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Punishing Sexual Fantasy

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PUNISHING SEXUAL FANTASY

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ABSTRACT

The Internet has created unprecedented opportunities for adults and teenagers to explore their sexual identities, but it has also created new ways for the law to monitor and punish a diverse range of taboo sexual communication. A young mother loses custody of her two children due to sexually explicit Facebook conversations. A teenager is prosecuted for child pornography crimes after sending a naked selfie to her teenage boyfriend. An NYPD officer is convicted for conspiracy to kidnap several women based on conversations he had on a "dark fetish" fantasy website. In each of these cases, online sexual exploration and fantasy easily convert into damning evidence admissible in court.

This Article reveals a widespread and overlooked pattern of harshly punishing individuals for exploring their sexual fantasies on the Internet. It shows, for the first time, that judges and juries have repeatedly conflated sexual fantasy with harmful criminal conduct, have largely been dismissive of fantasy-based defenses, and have relaxed evidentiary standards to prejudice individuals whose desires provoke disapproval or disgust. Even as celebrated decisions by the United States Supreme Court provide broader constitutional protection to sexual minorities, this Article shows that actual venues for exploring sexuality remain on the social and legal margins. Drawing from recent criminal law, family law, and First Amendment cases,

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this Article shows that courts have struggled to adapt free speech, privacy, and due process principles to the uncomfortable realities of the digital environment.

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INTRODUCTION

The contemporary legal treatment of sexuality contains an overlooked paradox. By most accounts, over the past two decades the law has embraced a broader range of sexual identities and practices. In *Obergefell v. Hodges*, Justice Kennedy proclaimed that the Constitution protects the liberties of all persons "to define and express their identity."[1] At the same time, however, the law remains deeply uncomfortable with, and often outright hostile to, situations in which people actually explore and express their sexual identities and desires. A divorcing mother loses custody of her children for having sexual conversations with an ex-boyfriend.[2] A teenage lesbian couple is prosecuted for child pornography crimes after sharing nude photos.[3] A police officer is convicted for a kidnapping conspiracy based entirely on conversations via a "dark fetish" role-playing website.[4]

Sexual identity may indeed be protected in a fully blossomed, clearly articulated form—at the point where two people are ready to get married or otherwise pursue a "personal bond that is more enduring."[5] Nonetheless, the actual process of coming to terms with one's sexual identity often entails extensive fantasizing, experimentation, education, and social interaction.[6] And these processes are often far less romantic, much less "dignified," and far less "PG" than

1. 135 S. Ct. 2584, 2593 (2015); *see also, e.g.*, Smithkline Beecham Corp. v. Abbott Labs., 740 F.3d 471, 474 (9th Cir. 2014) (applying heightened scrutiny to classifications based on sexual orientation).

2. *See* Borden v. Borden, 167 So. 3d 238, 242-43 (Miss. 2014).

3. *See* Beth Slovic, *Sext Crimes: Oregon Has a Name for Teens who Take Dirty Photos with Their Cell Phones: Child Pornographer*, WILLAMETTE WEEK (Nov. 30, 2010), http://www.wweek.com/portland/article-16544-sext-crimes.html [https://perma.cc/UVH4-Q23L].

4. *See* United States v. Valle, 301 F.R.D. 53, 59 (S.D.N.Y. 2014), *aff'd in part and rev'd in part*, 807 F.3d 508 (2d Cir. 2015). *See generally* Thea Johnson & Andrew Gilden, *Common Sense and the Cannibal Cop*, 11 STAN. J. C.R. & C.L. 313 (2015); Andrew Gilden, *Second Circuit Sides with the "Cannibal Cop,"* PRAWFSBLAWG (Dec. 3, 2015), http://prawfsblawg.blogs.com/prawfsblawg/2015/12/second-circuit-sides-with-the-cannibal-cop.html [https://perma.cc/QZ3D-HC7P].

5. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

6. *See, e.g.*, Michael W. Ross, *Typing, Doing, and Being: Sexuality and the Internet*, 42 J. SEX RES. 342, 343-44 (2005); *see also infra* Part I.

envisioned by the evolving legal narratives of sexuality.[7] When confronted with day-to-day explorations of sexual fantasy—for example, sexually explicit stories and conversations, adult social media profiles, and pornographic images—judges, prosecutors, law enforcement, and policymakers frequently devalue or punish what are, for better or worse, formative components of sexual identity.[8]

This tension between protected sexual identity and marginalized sexual fantasy has become particularly acute in the digital context. The Internet and social media are frequently credited with bringing needed visibility to sexual inequalities[9] and helping LGBT people understand and come to terms with their identities.[10] At the same time, the dominant legal narrative surrounding the intersection of Internet and sexuality has focused not on these new opportunities for self-definition but instead on the dangers of the sexual Internet: predators, cyberbullies, sexting, and revenge porn.[11] In the wake of panics surrounding Internet pornography, online sexual predators, and cyberbullying, a large body of laws has emerged to stamp out nearly all avenues for Internet-mediated sexual harms and to

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7. *See, e.g.*, Emily S. Pingel et al., *"A Safe Way to Explore": Reframing Risk on the Internet Amidst Young Gay Men's Search for Identity*, 28 J. ADOLESCENT RES. 453 (2012); Jennifer Egan, *Lonely Gay Teen Seeking Same*, N.Y. TIMES (Dec. 10, 2000), http://www.nytimes.com/2000/12/10/magazine/lonely-gay-teen-seeking-same.html [https://perma.cc/8P54-6UT3].

8. *See infra* Part II.

9. *See, e.g.*, Luke O'Neil, *How Facebook Friended Gay Marriage*, ESQUIRE (June 26, 2013), http://www.esquire.com/news-politics/news/a23253/friending-gay-marriage/ [https://perma.cc/8CWK-2KNC]; Nancy Scola, *The Social-Network Effect That Is Helping Legalize Gay Marriage*, ATLANTIC (Nov. 30, 2012), http://www.theatlantic.com/politics/archive/2012/11/the-social-network-effect-that-is-helping-legalize-gay-marriage/265793/ [https://perma.cc/5VUC-ZTB7]; *How Social Media Created Marriage Equality*, SXSW PANELPICKER, http://panelpicker.sxsw.com/vote/21720 [https://perma.cc/Q8EN-96M7].

10. For instance, LGBT teenagers and young adults can connect with other LGBT people in relative anonymity, talk frankly and explicitly about their desires, and use those experiences to gauge and ultimately define their sexual identities—both online and off. *See, e.g.*, Bradley J. Bond et al., *Information-Seeking Practices During the Sexual Development of Lesbian, Gay, and Bisexual Individuals: The Influence and Effects of Coming Out in a Mediated Environment*, 13 SEXUALITY & CULTURE 32, 43-45 (2009); Samantha DeHaan et al., *The Interplay Between Online and Offline Explorations of Identity, Relationships, and Sex: A Mixed-Methods Study with LGBT Youth*, 50 J. SEX RES. 421, 430-33 (2013); Pingel et al., *supra* note 7, at 471-73; Ross, *supra* note 6, at 348-49.

11. Kristian Daneback et al., *The Internet as a Source of Information About Sexuality*, 12 SEX EDUC. 583, 584 (2012) ("[M]uch of the research available in the field so far has focused on the negative and problematic aspects of using the Internet for sexual purposes and less on sexual lust, sexual health, sexual joy, and sexual knowledge." (citation omitted)).

severely punish individuals who pursue taboo sexual fantasies.[12] Often missing from these debates, however, is any acknowledgement of the potential value of exploring sexual desires or the chilling effect of harshly policing and punishing sexual fantasies.[13]

This Article reveals a widespread and overlooked pattern of harshly punishing individuals for exploring their sexual fantasies on the Internet. It shows that judges and juries in several areas of the law repeatedly conflate sexual fantasy with sexual abuse, have largely been dismissive of both the merits and value of fantasy-based defenses, and have relaxed evidentiary standards in ways that particularly prejudice individuals whose desires likely provoke disapproval or disgust. Moreover, even though crime data consistently show that fears of Internet "stranger danger" are commonly overstated,[14] this Article shows that law enforcement frequently identify potential sex offenders by enacting Internet users' taboo fantasies through extensive, explicit conversations. These practices may be motivated by the worthy desire to protect women and children from sexual abuse, but they nevertheless fail to appreciate the potential impact on free speech, privacy, due process, and the ability to define and express one's constitutionally protected identity.

The Internet undeniably poses risks for vulnerable populations,[15] and, as a result, it may be difficult for the law to see anything but the harm in sexually explicit conversations and content. For instance, it may be extremely difficult for a judge or jury to read a defendant's extensive chat room conversations about bondage, sexual assault, sadomasochism, incest, or underage sex without concluding that he or she poses a real danger or actually intends to engage in violent, nonconsensual, or otherwise illegal sexual conduct.[16] The Internet provides unprecedented opportunities to indulge in nearly

12. *See generally* Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553 (2014).

13. *See infra* Part III.B.

14. *See infra* Part III.C.

15. *See, e.g.*, DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (2014) (detailing the legal precedents that should enable criminalization of cyber harassment); Mary Anne Franks, *Unwilling Avatars: Idealism and Discrimination in Cyberspace*, 20 COLUM. J. GENDER & L. 224, 245-47 (2011).

16. *See infra* Part II.

all forms of sexual fantasy, and its relative anonymity can disinhibit discussions about even the most taboo topics.[17] As a result, the transcript of a conversation on a fetish website might go into specific, painstaking detail about an elaborate kidnapping and cannibalism plot, and in the courtroom this transcript might look—without context—comparable to a wiretapped conversation about drug or weapons trafficking.[18] When confronted with such evidence, judges and juries often are highly skeptical and dismissive of arguments that these conversations are ultimately all fantasy.[19]

Nonetheless, there is an important distinction between sexual fantasy and harmful sexual conduct.[20] In many contexts, extensive discussions of taboo sexual topics are celebrated by popular culture and squarely protected by the First Amendment—for example, books like *Lolita*[21] or *Fifty Shades of Grey*,[22] television shows like *Game of Thrones*,[23] or video games like *Grand Theft Auto*.[24] Even though the underage sex, sadomasochism, incest, rape, and prostitution present in these works would absolutely be criminal if acted out in real life, there is widely understood to be social value—and constitutionally protected expression—in airing and openly discussing the dark side of the human psyche.[25] Reading, writing, and

17. *See, e.g.*, Katelyn Y.A. McKenna et al., *Demarginalizing the Sexual Self*, 38 J. SEX RES. 302, 302 (2001) ("Using anonymous screen names, individuals can explore and express their sexual interests with little fear that friends, coworkers, or even spouses will discover their activities."). *See generally* JAMIE BARTLETT, THE DARK NET: INSIDE THE DIGITAL UNDERWORLD (2015) (detailing activities that remain unknown to many Internet users).

18. *See* United States v. Valle, 301 F.R.D. 53, 60 (S.D.N.Y. 2014), *aff'd in part and rev'd in part*, 807 F.3d 508 (2d Cir. 2015).

19. *See infra* Part II.C.

20. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.").

21. VLADIMIR NABOKOV, LOLITA (1955).

22. E.L. JAMES, FIFTY SHADES OF GREY (2011).

23. *Game of Thrones* (HBO 2011-present).

24. *Grand Theft Auto* (BMG Interactive 1997).

25. *See Ashcroft*, 535 U.S. at 247-48 ("Both themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works.... Our society, like other cultures, has empathy and enduring fascination with the lives and destinies of the young. Art and literature express the vital interest we all have in the formative years we ourselves once knew, when wounds can be so grievous, disappointment so profound, and mistaken choices so tragic, but when moral acts and self-fulfillment are still in reach."); Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films

reflecting on sexuality—whether taboo or otherwise—allows individuals to understand their own desires and pursue a range of socially desirable ends; they might "come out," seek treatment, channel the fantasy into a consensual offline form, openly question the wisdom of the underlying taboo, or use the fictional account to cathartically let off steam and aggression.[26] In the Internet context, however, reading and writing about sexual fantasies are often conflated with acting out the fantasy in the precise manner in which it is discussed.[27] This has resulted in a surprisingly large body of case law in which individuals face decades in prison and lifetime sex offender registration without ever demonstrably endangering themselves or another person.[28]

As our social interactions become increasingly digitized and recorded, the law will be forced to grapple with an increasingly robust archive of sexual desire. For example, in August 2015, a group of hackers leaked account information of roughly 37 million subscribers of the extramarital hookup website AshleyMadison.com.[29] The leaked data revealed descriptions of many account holders' sexual fantasies—such as blindfolding, erotic tickling, sex toys, transvestism, and a "bubble bath for two."[30] During the same week, the Department of Homeland Security and the U.S. Attorney's Office for the Eastern District of New York seized the servers of Rentboy.com, a website providing advertising and messaging services to gay male escorts.[31] As a result of these two events, leaked Ashley Madison data have made their way into divorce proceedings,[32] and federal

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he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

26. See *infra* Part III.B.

27. *See infra* Part II.C.

28. *See infra* Part II.

29. *See* Martin Robinson & Steph Cockroft, *Stamina, Blindfolds, and Spanking: The Most Popular Sexual Fantasies that Would-Be Cheats Were Looking for on Ashley Madison Infidelity Website Are Revealed*, DAILY MAIL (Aug. 20, 2015), http://www.dailymail.co.uk/news/article-3204549/Stamina-blindfolds-spanking-popular-sexual-fantasies-cheats-looking-Ashley-Madison-infidelity-website-revealed.html [https://perma.cc/Q9JL-UZSS].

30. *Id.*

31. *See Homeland Security Raid of Rentboy.com Raises Ire*, CBS NEWS (Sept. 27, 2015, 2:11 PM), http://www.cbsnews.com/news/homeland-security-raid-rentboy-com-raises-ire/ [https://perma.cc/R9V3-F6CU].

32. *See* Martin Robinson, *Wife Starts First Ashley Madison Divorce Proceedings After Her Cheating Husband Was Outed as a Member of the Infidelity Website*, DAILY MAIL (Aug.

agencies now possess conversations regarding thousands of men's interests and desires towards other men.[33]

It is therefore becoming increasingly pressing for scholars, courts, law enforcement, and policymakers to come to terms both with the tremendously diverse ways that people explore their sexual fantasies online and with limits of using online fantasy as a meaningful proxy for sexual misdeeds.[34] Previous scholars have examined the law's general hostility to taboo sexual desires[35] or challenged its increasingly harsh treatment of online sex offenders.[36] This is the first article, however, to show that intersecting fears of sex and technology have begun to spread broadly across numerous legal contexts and seep into the minutiae of evidence and procedure. Moving forward, as huge droves of data become potential fodder for both criminal prosecutions and legal disputes regarding employment, education, divorce, and custody, it will be crucial to find ways of contextualizing and understanding the inferential limits of sexual fantasy. As this Article shows, however, the past two decades present a troubling track record.

21, 2015, 10:17 AM), http://www.dailymail.co.uk/news/article-3205657/Wife-starts-Ashley-Madison-divorce-proceedings-husband-outed-member-infidelity-website.html [https://perma.cc/7CK3-KBGM].

33. *See* Dale Cooper, *Rentboy: For What It's Worth*, HUFFINGTON POST (Aug. 27, 2015, 5:04 PM), http://www.huffingtonpost.com/dale-cooper/rentboy-for-what-its-wort_b_8046340.html [https://perma.cc/FZD6-NXZ2] ("The government has access, in the seized servers, to all of their personal information, not to mention that of their clients.").

34. For example, the Ashley Madison data may seem to disclose an epidemic of kinky extramarital sex enabled by an online platform, but it turns out that of the 5.5 million accounts seemingly held by women, "there's a good chance that about 12,000 of the profiles out of millions belonged to actual, real women who were active users of Ashley Madison." Annalee Newitz, *Almost None of the Women in the Ashley Madison Database Ever Used the Site [Updated]*, GIZMODO (Aug. 26, 2015, 8:05 PM), http://gizmodo.com/almost-none-of-the-women-in-the-ashley-madison-database-1725558944 [https://perma.cc/PZ6A-4Y74]. As one commentator observed, the vast majority of men were not having affairs; "[t]hey were paying for a fantasy." *Id.*

35. *See, e.g.*, JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 348-50 (2006); UMMNI KHAN, VICARIOUS KINKS: S/M IN THE SOCIO-LEGAL IMAGINARY 13-15 (2014); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 102, 115-16 (2014).

36. *See, e.g.*, Carrisa Byrne Hessick, *Disentangling Child Pornography from Child Sex Abuse*, 88 WASH. U. L. REV. 853, 860-63 (2011); Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 558 (2002); McLeod, *supra* note 12, at 1572-73.

Part I will briefly locate Internet fantasy within contemporary understandings of sexual identity. Part II compiles, for the first time, a diverse body of case law that has punished, burdened, or otherwise harshly treated sexual fantasy. This includes divorce and custody decisions, "sexting" prosecutions, attempt and conspiracy crimes premised on sexual fantasies, admission of sexual fantasies as character propensity evidence, failed entrapment defenses, and failed free speech defenses. Part III will critique this legal treatment of sexual fantasy from two perspectives. First, it will show that these decisions are at odds with the First Amendment framework for distinguishing fantasy from harmful conduct. Second, it will survey a growing body of social science research to show that there is a range of valuable reasons to allow people greater space to explore their fantasies online, regardless of how objectionable they may appear to many observers. The Conclusion will suggest ways to better respect the inevitably blurry line between fantasy and harmful conduct and avoid some of the chilling effects of punishing sexual fantasy.

I. SEXUAL IDENTITY: SITUATED, EVOLVING, AND PERFORMATIVE

Many forms of identity—for example, gender, race, and sexual orientation—are often framed and experienced as fixed and immutable at birth. From this perspective, identity development is a process of observing and uncovering the unfolding secrets of the psyche; as we move from childhood to adolescence to adulthood, our identities reveal themselves, and our challenge is to understand, manage, and come to terms with our essential human nature.[37] Adolescence, accordingly, becomes an inherently tumultuous and dangerous phase: life inexperience renders teenagers ill-equipped to control their hormonal drives and make good decisions without the oversights and constraints of parents, schools, and the state.[38]

37. *See* JUDITH HALBERSTAM, IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES 153 (2005) (observing the "conventional binary formulation of a life narrative," which "charts an obvious transition out of childish dependency through marriage and into adult responsibility through reproduction"); Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 404-05 (2013) (summarizing this conventional view of immutable identity and normal sexual identity development).

38. *See* AMY ADELE HASINOFF, SEXTING PANIC: RETHINKING CRIMINALIZATION, PRIVACY,

Under this view, so long as they are safely transported from puberty to the age of eighteen, the kids will be all right.

Contemporary identity scholars have largely rejected this "essentialist" view of identity, and particularly of sexual identity.[39] Identity is not fixed at birth; it does not spring into being like Venus from the sea. Instead, identity is produced through ongoing interactions with other people, institutions, and popular culture.[40] Through these interactions, we come to learn the identities and life narratives at our disposal and internalize the norms and values associated with these various paths.[41] Through our interaction with other people, we acquire both the building blocks for constructing a coherent set of identities and the toolkits for managing and presenting these identities in our everyday lives.[42] Doctors, parents, and religious institutions may assign us a range of presumptive identities and life courses, but these assignments too are part of the cultural processes by which minds and bodies are inscribed with social norms and values.[43] We work with and against these norms, values, and identities both in adolescence and throughout our lives, and this process often can be messy and highly improvisational.

Numerous scholars, accordingly, have recognized that exploration, or "play," is a central mechanism for all people to construct

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AND CONSENT 60-64 (2015); ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 42-45 (2011); KATHRYN BOND STOCKTON, THE QUEER CHILD, OR GROWING SIDEWAYS IN THE TWENTIETH CENTURY 4-5 (2009); Joseph J. Fischel, *Per Se or Power? Age and Sexual Consent*, 22 YALE J.L. & FEMINISM 279, 293 (2010).

39. *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 506 (1994).

40. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 84-86 (1990); 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 116-17 (Robert Hurley trans., Vintage Books 1990) (1978).

41. *See generally* THE STORY OF SEXUAL IDENTITY: NARRATIVE PERSPECTIVES ON THE GAY AND LESBIAN LIFE COURSE (Phillip L. Hammack & Bertram J. Cohler eds., 2009); Phillip L. Hammack & Bertram J. Cohler, *Narrative, Identity, and the Politics of Exclusion: Social Change and the Gay and Lesbian Life Course*, 8 SEXUALITY RES. & SOC. POL'Y 162, 178-79 (2011).

42. *See* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 1-2 (1959); David J. Phillips, *From Privacy to Visibility: Context, Identity, and Power in Ubiquitous Computing Environments*, 23 SOC. TEXT 83, 98 (2005).

43. *See* JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 105-06 (1993); Dean Spade, Commentary, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 25 (2003).

their identities and situate themselves within their culture.[44] Through play—whether in a sandbox, board game, chat room, or bedroom—we simultaneously pursue pleasure, engage in creative problem solving, understand how to relate to other people's skills and experience, and move towards solidifying identity and social bonds.[45] Nonetheless, legal and social institutions often fail to appreciate these links between identity development and play, fantasy, and exploration.[46] For young people, play is fraught with risks and the potential to be injured physically, emotionally, or morally either by one's own ignorance or by the stranger lurking at the edge of playground.[47] Adolescence is widely understood to be a time of central importance regarding identity, but collective fears surrounding the vulnerability of minors results in substantial limits on their abilities to play and explore—for example, curfews, overscheduling, Internet monitoring, GPS tracking, and pervasive warnings to steer clear of unfamiliar adults.[48] By contrast, adults generally are allowed unfettered access to all manner of exploration and play—from social media to PlayStation to bars to gambling to pornography. Yet rarely do we connect adult "play" to identity development—by adulthood, identity is (or should be) resolved, and controversial activities made in play spaces can be dismissed as irrational or morally questionable.[49] For adults, play is often associated with procrastination, laziness, or something to do during

44. JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 133-35 (2012).

45. *Id.* at 225-29; Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1267-68 (2011).

46. *See* COHEN, *supra* note 44, at 53-54.

47. *See, e.g.*, Joan Almon, *The Fear of Play*, EXCHANGE, Mar.-Apr. 2009, at 42 ("People freely admit they are afraid of accidents in play and want to minimize risk.... There is also a widespread fear of 'stranger danger.' ... The current mindset in the U.S. leads [Americans] to create a life that is as safe and risk-free as possible.").

48. *See* DANAH BOYD, IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS 87 (2014); STOCKTON, *supra* note 38, at 40-41 ; Bernstein & Triger, *supra* note 45, at 1238-39, 1240 n.94; Joshua A.T. Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215, 1216-17 (2009). This Article uses danah boyd's preferred characterization of her name. *See* danah michele boyd, *What's in a Name?*, DANAH.ORG, http://www.danah.org/name/html [https://perma.cc/UP43-MQVH].

49. *See* COHEN, *supra* note 44, at 129-31; HALBERSTAM, *supra* note 37, at 152-53; HASINOFF, *supra* note 38, at 68-69.

time off—fun, but nonetheless frivolous pursuits like poker, *Candy Crush*, or *Tinder*.

The emergence of digital networks does not fundamentally change these processes of identity development or the collective discomfort with explorations of identity and desire. The Internet can provide new arenas in which to play and explore, to construct identity, and to situate ourselves within our cultural landscape.[50] The processes of identity development in the digital era remain messy and improvisational, but with the added twist that these processes have become far more transparent and easily policed.[51] When teenagers actively use the Internet to explore and understand sexual desire, adults, and the legal system in particular, have often reacted with panic—for example, by vigorously pursuing and punishing potential sexual predators that are both adults and children.[52] On the flip side, when adults use the Internet to explore their sexual fantasies, they are often dismissed as predators and harassers when they may have identity-based interests similar to those of adolescents.[53] The following sections will show this dynamic in action: the law punishes explorations of sexual fantasy by both teenagers and adults based on a supposedly commonsense understanding that teenagers are inevitably harmed by Internet-mediated sexuality and that adults who explore their sexual fantasies online should at the very least be viewed with suspicion.

In previous work, I showed that the law has frequently discounted the value of the Internet to LGBT teens for exploring their sexuality with relative autonomy and anonymity.[54] I argued that in order to understand and come to terms with their sexuality, LGBT teens needed to learn about, talk about, and to some degree experiment with their sexual desires, and that the Internet provided unprecedented opportunities to do all of these things in relative

50. *See, e.g.*, COHEN, *supra* note 44, at 34-35; Gary W. Harper et al., *The Role of the Internet in the Sexual Identity Development of Gay and Bisexual Male Adolescents*, *in* THE STORY OF SEXUAL IDENTITY, *supra* note 41, at 297, 302.

51. *See, e.g.*, NEIL RICHARDS, INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE 185 (2015).

52. *See, e.g.*, HASINOFF, *supra* note 38, at 35-36; LANCASTER, *supra* note 38, at 63-64; McLeod, *supra* note 12, at 1572-73.

53. *See, e.g.*, Lynch, *supra* note 36, at 546-47 (discussing congressional debates surrounding the Child Protection and Sexual Predator Punishment Act).

54. *See* Gilden, *supra* note 37, at 377-83.

physical and emotional safety.[55] I emphasize here that such interest in sexual identity is limited neither to LGBT people nor to adolescents. Sexual identity and desires do not simply boil down to sexual orientation, but encompass a tremendous range of physical acts, power dynamics, gender roles, and emotional attachments that both splinter and transcend the gay/straight matrix. Moreover, sexual identity is neither fixed at birth, cemented at the age of consent, nor a one-way trip out of whatever closet you have come out of. This is not to say that sexual identity is not deeply important or that it is akin to a hat that you can put on and take off at will. Nonetheless, sexual desires, communities, and identities can change and evolve throughout one's life, and the Internet provides opportunities for a broad range of people to explore their fantasies[56] and embrace the dynamic, ongoing process of self-definition.[57]

One of the primary threats posed by digital networks is that they effectively loosen the family and community's hold on the norms and values that shape identity development. Through the Internet and social media, adolescents—and everyone else for that matter—can envision themselves situated in broader circles of acculturation than would have been accessible in earlier generations, and access to these distant social circles allows individuals to explore and internalize a range of perspectives potentially at odds with norms in a local community.[58] Particularly in the realm of sexuality, where it can be deeply uncomfortable or potentially dangerous to discuss taboo desires, the Internet provides at least semi-anonymous forums to test out and engage with a seemingly endless array of fantasies and pleasures.[59] This is certainly not to say that the Internet is a social utopia; indeed, there are considerable, well-documented risks

55. *See id.*

56. *See, e.g.*, Kristian Daneback & Michael W. Ross, *The Complexity of Internet Sexuality*, *in* SEXUAL DYSFUNCTION: BEYOND THE BRAIN-BODY CONNECTION 121, 121 (Richard Balon ed., 2011); Darryl B. Hill, *Coming to Terms: Using Technology to Know Identity*, SEXUALITY & CULTURE, Summer 2005, at 24, 49-50 (2005); McKenna et al., *supra* note 17, at 302.

57. This dynamic is by no means limited to sexual identity—the Internet can be deeply helpful for exploring gender identity, racial identity, religious identity, ancestry, language, and pretty much any other axis of self-definition.

58. *See* Gilden, *supra* note 37, at 393.

59. *See infra* Part III.B; *see also* Edward Stein, *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, 38 HARV. C.R.-C.L. L. REV. 159 (2003) (describing how gay and lesbian individuals can explore their sexuality online with relative anonymity).

that online communities can normalize self-destructive behaviors or perpetuate sexism, racism, and other forms of prejudice.[60] It is to say, however, that our online lives are an extension and reflection of our offline lives: complex, evolving, and full of potential risks *and* rewards.[61]

Whether and how online explorations of sexuality manifest offline is impossible to predict with certainty, but, at the very least, a dialectic exists between virtual and real that continually produces and refines identity and desire.[62] Part III will more thoroughly examine the potential psychological and cultural value of online explorations of sexual fantasy. At this juncture, the important takeaway is that online sexual play and fantasy are neither merely frivolous time killers nor inevitable one-way gateways into adolescent ruin. As digital technologies become an increasingly integral part of our day-to-day lives, it becomes increasingly important to treat them with the mundane importance they deserve.[63]

II. CYBERLAW AND SEXUAL FANTASY

Even though the Internet and social media have become integral parts of identity development and contemporary social interactions, legal actors frequently react hostilely when confronted with individuals who have used Internet resources to explore their sexuality. This Part will canvass a broad range of legal issues from multiple jurisdictions in three sections: (1) family law, (2) teenage "sexting" prosecutions, and (3) law enforcement oversight of chat rooms, social media, and other iterations of the sexual Internet.

The scenarios canvassed herein are far from identical in terms of the actors being punished (spouses versus teenagers versus adult men) or in the amount of offline conduct involved. Nonetheless,

60. *See, e.g.*, Franks, *supra* note 15, at 226-27.

61. *See* BOYD, *supra* note 48, at 124 (collecting research showing that vulnerabilities online reflect similar risk factors—for example, familial conflict, depression, and substance abuse—to vulnerabilities offline).

62. *See, e.g.*, MARY L. GRAY, OUT IN THE COUNTRY: YOUTH, MEDIA, AND QUEER VISIBILITY IN RURAL AMERICA 15 (2009) (describing how rural LGBT youth "suture the queer social worlds they find in their hometowns, on television, and online").

63. *See, e.g.*, COHEN, *supra* note 44, at 129-30; GRAY, *supra* note 62, at 117-18 (urging scholars and policymakers to move beyond the negative effects of media consumption and engage with the role of new media in the everyday lives of LGBT youth).

there are important, troubling similarities in how the law responds to these diverse forms of sexual desire. In each area, networked technologies surface sexual fantasies and desires that are uncomfortable or unfamiliar for many people, and they do so often in vivid, sordid detail. As judges, juries, and law enforcement grapple with these vivid details of sexual desire, they are repeatedly unable to divorce their disapproval of the sexual desire at hand from an evenhanded assessment of the actual risks posed by the parties. Whether the case involves a divorcing parent's search for new sexual connections, a teenager's sexual explorations, or a criminal defendant's conversations about taboo fetishes, legal actors repeatedly conflate sexual desire with actual harm to third parties, and they rarely appreciate the potential dangers of doing so. Sometimes the law directly punishes sexual fantasy itself, akin to *Minority Report*[64]-style "thought crimes," and at other times it treats taboo fantasies as inevitable stepping-stones toward harmful conduct. In either iteration, legal actors troublingly use sexual fantasy as a crystal ball into the criminal or otherwise immoral workings of the human psyche.

A. Family Law

Family law decision-making often flies in the face of the First Amendment, subjecting parents and guardians to a wide spectrum of restraints on speech under the banner of "the best interests of the child."[65] As Professor Eugene Volokh has demonstrated, parents have had their rights limited or denied based on their adherence to or defense of a wide range of disfavored ideologies, including communism, pacifism, nonmonogamy, polygamy, homosexuality, and "non-mainstream religions."[66] Professor Volokh's research has further shown that family court judges have based custody decisions on parental speech that is otherwise squarely protected by the First Amendment, including swearing, unfiltered Internet use, watching R-rated movies, reading gun-themed magazines, looking at photos

64. MINORITY REPORT (Twentieth Century Fox 2002).

65. Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 86 N.Y.U. L. REV. 631, 637 (2006).

66. *Id.* at 635-37.

of drag queens, listening to vulgar music, and viewing pornography.[67] Consistent with this speech-restrictive trend, courts have also looked negatively upon parents that have used the Internet to explore their sexual fantasies in entirely lawful ways.

Under the best interests standard, courts have used a parent's exploration of sexual fantasies as a proxy for his or her poor moral fitness and mental health. For example, in *Borden v. Borden*, a woman in Mississippi was denied primary custody of her two children when "the chancellor found that her extramarital contact with the two men negatively affected her responsibility as a parent."[68] During the custody trial, her ex-husband introduced a seventy-five-page transcript of Facebook chats between her and an ex-boyfriend, "which contained numerous sexual references."[69] Even though the couple was experiencing marital difficulties at the time of the "inappropriate Facebook chats," and the children were not home during these chats, the court of appeals affirmed the chancellor's custody award.[70] Although the Mississippi Supreme Court reversed on two of the eight best interests of the child factors—"parenting skills" and "stable home environment"—it held that the chancellor "correctly found" that the wife's extramarital communications reflected poorly on her "moral fitness."[71]

In *In re Marriage of Grose*, an Illinois appellate court affirmed a trial court's finding that a father's "mental health" weighed against awarding him custody.[72] Central to this finding was evidence that the father viewed Internet pornography and posted ads looking for women interested in, among other things, "bondage & spanking."[73] After summarizing the bondage, domination, sadism, and

67. *Id.* at 638-39.

68. 130 So. 3d 1168, 1172 (Miss. Ct. App.), *rev'd*, 167 So. 3d 238 (Miss. 2014).

69. *Id.* at 1171.

70. *Id.*

71. *Borden*, 167 So. 3d at 242-43. Even when judges have granted custody notwithstanding some evidence of sexual Internet behavior, they have made a point of distancing themselves from the behavior. *See, e.g.*, Zepeda v. Zepeda, 632 N.W.2d 48, 55 (S.D. 2001) ("The court believed Renee's testimony that she had abstained from Internet usage and erotic discourse since the temporary custody hearing. Although the court labeled such conduct 'potentially harmful' and 'appalling,' it found no 'demonstrable effect on [Jorgito].'"); *see also Borden*, 130 So. 3d at 1176 (James, J., dissenting in part) ("Mary Jane's behavior was indisputably a poor reflection on her moral fitness, but not on her parenting skills.").

72. No. 4-12-005, 2012 WL 7050410, at *6 (Ill. App. Ct. May 24, 2012).

73. *Id.* at *2.

masochism (BDSM) interests included in the father's profile, as well as the role-playing scenes he fantasized about, the court concluded that the evidence could support an adverse finding on his mental health.[74] There was no evidence, however, that the child had ever been exposed to any sexual materials or that the father's fantasies involved minors.[75]

In *Bower v. Bower*, the chancellor also ruled that the mental health factor weighed against a mother's custody.[76] The mother argued that "in today's society, meeting people over the Internet is viewed as an option to meeting people at church, work, or through a dating service, and, although it is a new innovative tool in today's society, its use is not an indication of unstable behavior."[77] The chancellor disagreed, emphasizing that "she ha[d] spent enormous amounts of time on the Internet talking to strange men."[78]

Despite other evidence that a parent has a strong bond with his or her child and otherwise has not put the child in any immediate danger of harm, the potential unknown risks of online sexuality have made courts uneasy. For example, *In re Marriage of Chisholm* presented the Court of Appeals of Iowa with a situation in which both parents had explored their sexual fantasies online.[79] Although disclaiming moral judgment on "this type of 'entertainment,'" the parents' online behaviors nonetheless were "troubling to the court."[80] The court observed:

> The use of the internet opens new horizons to people around the world, including those in small-town Iowa. It can be a tremendous resource of both information and linking people together, yet it is fraught with unknown risks to unsuspecting users.... Both Jason and Tasha were attracted to adult chat rooms and pornography. While Tasha engaged in sexually explicit online conversation, Jason exchanged photos with a woman he met in a chat room and briefly subscribed to a pornographic site.[81]

74. *Id.* at *6.
75. *See id.* at *3.
76. 758 So. 2d 405, 411-12 (Miss. 2000).
77. *Id.*
78. *Id.*
79. No. 00-77, 2000 WL 1027237, at *1, *3 (Iowa Ct. App. July 26, 2000).
80. *Id.* at *2.
81. *Id.*

Because Tasha had actually invited two men into the family home, however, Jason was awarded primary custody.[82] Even though neither of the children was at home at the time, "[t]hese invitations put the children at great risk of harm, as strangers were given the family's address and brought into the home."[83] Although this might seem to cross an important line, this behavior trumped evidence that Tasha otherwise "was undisputedly the parent that was intricately involved in every aspect of the children's care.... Tasha's role as primary caregiver does not guarantee her physical care in a contested matter."[84]

Courts will sometimes take fairly extreme measures to ensure that a parent's sexual behavior online has no negative spillover. For example, in *Micnhimer v. Micnhimer*, the mother had been given primary custody.[85] The father was allowed unsupervised visitation on the conditions that (1) he not have any access to the Internet in his home, and (2) his wife could inspect any computer in his home to ensure he had no Internet access.[86] These conditions were put in place because the father had at some point viewed pornography while the children were *in the same house* with him.[87] Although the Arizona court's opinion did not detail the nature of this pornography, it did mention that the father objected to the "homophobic bias" of the initial order, and that he now had a "partner/roommate."[88] Five years later, the father managed to alter the visitation conditions: he could now access the Internet, so long as the computer was in a locked room, secured with a protected password.[89]

Beyond the relatively limited body of published custody opinions, family law practitioners have relayed a broader practice of family court judges removing children or restricting custody when a parent had demonstrated an interest in BDSM activities, such as through blog postings or participation in an e-mail listserv.[90] One

82. *Id.* at *3.
83. *Id.*
84. *Id.* at *4.
85. No. 1 CA-CV 08-0508, 2009 WL 3526575, at *1 (Ariz. Ct. App. Oct. 29, 2009).
86. *Id.*
87. *Id.*
88. *Id.* at *2.
89. *Id.* at *1.
90. Susan Wright, *Depathologizing Consensual Sexual Sadism, Sexual Masochism, Transvestic Fetishism, and Fetishism*, 39 ARCHIVES SEXUAL BEHAV. 1229, 1229 (2010).

organization, the National Coalition for Sexual Freedom, frequently steps into custody disputes to protect the legal interests of BDSM-practitioners, and it often needs to educate judges that a demonstrated interest in bondage or sadomasochism does not equate to mental illness or poor parenting.[91] For example, in one case, a woman's ex-husband found her profile on the website FetLife and used her posts, pictures, and writings about consensual BDSM activities to claim that she was a danger to their children.[92] Similarly, in another case, a man's ex-wife found his girlfriend's FetLife profile and sought to deny him access to their children, even though the images the ex-wife discovered were solely of equipment, clothing, and attendance at BDSM community events.[93]

Judges' skepticism and hostility toward evidence of online sexual fantasy raise several issues. First, none of the above cases included any evidence of actual harm toward or neglect of the children who are supposed to be the real focus of the best interests of the child standard; instead, it is the perceived morality or wisdom of the parent that determines whether he or she deserves custody over an ex-spouse.

Second, in all of the above cases, the negative consequences of exploring online sexuality fall on women, gay men, and people with nonnormative sexual interests, such as BDSM. By contrast, in a number of published decisions, courts have separated out a husband's *heterosexual* pornography and sexually explicit conversations with women from the child's best interests and dismissed the potential spillover harms as speculative.[94]

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91. *See id.* (describing the National Coalition for Sexual Freedom).

92. Interview with Susan Wright, Media Relations Dir., Nat'l Coal. for Sexual Freedom (May 28, 2015) (on file with author).

93. *Id.*

94. *See, e.g.*, Givens v. Givens, 53 So. 3d 720, 729 (La. Ct. App. 2010) ("[T]he majority of the evidence at trial pertained to Kenneth Givens' activity on pornographic internet websites, the sexually explicit communications, through the internet, between him and Barbara Givens, and their subsequent use of the internet to exchange lewd photographs of parts of their bodies. All of this activity occurred when Kenneth Givens was still living in the family home with Frances Givens and Olivia, and both Frances Givens and Olivia were unaware of Kenneth Givens' activity in this regard."); Delly v. Delly, No. 2011-L-018, 2011 WL 5829699, at *5 (Ohio Ct. App. Nov. 21, 2011) ("While the evidence indicates that Daniel has viewed pornography and seen a therapist regarding this issue in the past, the evidence presented at the trial established that Daniel's use of the internet did not negatively impact A.D."); Petty v. Petty, No. E2004-01421-COA-R3-CV, 2005 WL 1183149, at *5 (Tenn. Ct. App. May 19,

Third, judicial hostility toward marginalized sexuality may discourage individuals from openly discussing their sexual desires with their spouse, when it may be in the best interests of everyone involved for a couple to be open and honest about evolving desires. If one spouse has brewing sexual curiosities that may be at odds with the other spouse's desires, it seems important to surface, rather than deter and suppress, any significant incompatibilities. Instead, if individuals introduce their spouses to their online fantasy world, fail to sufficiently scrub their browser history, happen to be the target of adultery surveillance software,[95] or are included in a data leak—and a spouse reacts negatively—their very private, and potentially embarrassing, fantasy world can be used to deny those individuals access to their children.[96]

Fourth, these consequences attach at a particularly vulnerable moment in the parties' lives—the dissolution of a relationship—when the Internet may be most useful as an outlet and a resource. Sexual fantasies of course give no license to cause physical or emotional harm to one's spouse or child or to impose those sexual fantasies upon others. Yet, this line between fantasy and coercion has repeatedly collapsed in the custody context.

B. Sexting and Child Pornography

The previous section showed that a parent's sexual fantasies have been used as a proxy for harm to a child's best interests. This section shows that minors' sexual fantasies sometimes are used as a proxy for harm to their *own* best interests. In a disturbing number

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2005) ("While clearly Father's time could have been better spent in activities other than those described, no proof has been presented in this case that any of the activities ascribed to Father has affected his relationship with his children or that his children have been, or will be, exposed to any material which has been designated 'pornographic.'"); B.M.M. v. P.R.M., No. M2002-02242-COA-R3-CV, 2004 WL 1853418, at *19 (Tenn. Ct. App. Aug. 18, 2004) ("Viewed as a whole, the evidence simply does not support Mother's conclusion that Father's viewing of pornography as their marriage disintegrated and the isolated incidents that occurred when he was a teenager mean that Father has engaged in sexually inappropriate behavior with their daughter or that he is likely to engage in such behavior.").

95. *See* Melissa Gregg, *Adultery Technologies*, *in* IDENTITY TECHNOLOGIES: CONSTRUCTING THE SELF ONLINE 99, 99-100 (Anna Poletti & Julie Rak eds., 2014).

96. The marital confidences privilege typically does not apply in child custody disputes. *See* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:40 (4th ed. 2015); *see also, e.g.*, T.C.H. v. K.M.H., 693 S.W.2d 802, 804-05 (Mo. 1985).

of cases, teenagers have been threatened or charged with child pornography violations after an authority figure discovered that they had produced and consensually shared sexually charged imagery.[97] The ubiquity of "sexting" among teenagers and the resulting "sexting panic" have received extensive attention in the popular and academic press,[98] and this Article's treatment is not designed to be exhaustive. The sexting phenomenon nonetheless is an important part of the cultural conversation around sexuality mediated by the Internet and digital communications. The anxieties around sexting again reveal a tendency to collapse fantasy and coercion in the digital context and to downplay the importance of sexual agency and autonomy, regardless of how uncomfortable it often makes us.

A few examples illustrate the legal treatment of sexting. In *Miller v. Skumanick*, middle school teachers in Wyoming County, Pennsylvania, discovered sexually provocative images on a few students' phones, and school district officials confiscated *all* of the middle-schoolers' phones.[99] After finding sexted images on seventeen student phones, the school district relinquished those phones to the District Attorney, who in turn threatened to charge those seventeen students with production, possession, or dissemination of child pornography unless they completed a six- to nine-month reeducation program.[100] Parents of three teenagers successfully sued the District Attorney for First and Fourteenth Amendment violations.[101] The District Court and the Third Circuit both held that compelling the teenagers to participate in the reeducation program would violate their *parents'* rights both to control their children's upbringing and to free speech.[102]

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97. *See infra* notes 99-116 and accompanying text.

98. *See, e.g.*, HASINOFF, *supra* note 38; Marsha Levick & Kristina Moon, *Prosecuting Sexting as Child Pornography: A Critique*, 44 VAL. U. L. REV. 1035, 1035-36 (2010); Hanna Rosin, *Why Kids Sext: An Inquiry into One Recent Scandal Reveals How Kids Think About Sexting—And What Parents and Police Should Do About It*, ATLANTIC (Nov. 2014), http://www.theatlantic.com/magazine/archive/2014/11/why-kids-sext/380798/ [https://perma.cc/XGH2-8RW5].

99. 605 F. Supp. 2d 634, 645 (M.D. Pa. 2009), *aff'd sub nom*. Miller v. Mitchell, 598 F.3d 139 (3d Cir. 2010).

100. *Id.* at 638.

101. *Id.* at 647.

102. *See id.*

Although the *Miller* plaintiffs were faced only with the threat of criminal charges, other sexters have faced far more serious consequences. In Alabama, authorities arrested four middle-school students for exchanging nude photos of themselves.[103] An eighteen-year-old Iowa boy was forced to register as a sex offender after sending a naked photo of himself to a fifteen-year-old girl.[104] Three high-school girls from Westmoreland County, Pennsylvania, were charged with producing and disseminating child pornography after sending nude or seminude photos of themselves to three male classmates, ages sixteen and seventeen.[105] The boys were also charged with possession of child pornography for having the images on their phones.[106]

In *United States v. Nash*, a sixteen-year-old girl consensually sent sexually explicit images of herself to her twenty-two-year-old boyfriend.[107] Even though their sexual relationship was entirely lawful in Alabama (where the age of consent is sixteen), Nash was charged with possession of child pornography.[108] Although the court departed from the Sentencing Guidelines's recommended twenty-four-to-thirty month range, Nash nonetheless was given five years of probation and subjected to lifetime sex offender registration.[109]

In another case, two young women, sixteen- and nineteen-years old, exchanged sexually explicit photos, and the nineteen-year-old was charged with producing child pornography after the younger woman's mother turned over her cellphone to local police.[110] Although the nineteen-year-old was able to avoid the child pornography charges and sex offender registration by pleading guilty to

103. Gigi Stone, *'Sexting' Teens Can Go Too Far*, ABC NEWS (Mar. 13, 2009), http://abcnews.go.com/Technology/WorldNews/sexting-teens/story?id=6456834 [https://perma.cc/3FT5-4WNN].

104. Vicki Mabrey & David Perozzi, *'Sexting': Should Child Pornography Laws Apply?*, ABC NEWS (Apr. 1, 2010), http://abcnews.go.com/Nightline/phillip-alpert-sexting-teen-child-porn/story?id=10252790 [https://perma.cc/N83A-QFMZ].

105. *See* Robert D. Richards & Clay Calvert, *When Sex and Cell Phones Collide: Inside the Prosecution of a Teen Sexting Case*, 32 HASTINGS COMM. & ENT. L.J. 1, 4 (2009).

106. *Id.*

107. 1 F. Supp. 3d 1240, 1241 (N.D. Ala. 2014).

108. *Id.* at 1241-42, 1244.

109. *Id.* at 1248.

110. *See* HASINOFF, *supra* note 38, at 8.

"luring a minor," she nonetheless spent over a month in jail and lost her job at a call center due to her felony conviction.[111]

In *A.H. v. State*, a sixteen-year-old and her seventeen-year-old boyfriend were adjudicated delinquent on child pornography charges for taking photos of themselves in consensual sexual behavior.[112] Neither shared the images with third parties, and the photos were found on a computer in the girlfriend's home.[113] The girlfriend argued that application of Florida's child pornography laws in this context violated her reasonable expectation of privacy, and the court rejected this argument.[114] According to the court:

> Minors who are involved in a sexual relationship, unlike adults who may be involved in a mature committed relationship, have no reasonable expectation that their relationship will continue and that the photographs will not be shared with others intentionally or unintentionally....
>
> ...A reasonably prudent person would believe that if you put this type of material in a teenager's hands that, at some point either for profit or bragging rights, the material will be disseminated to other members of the public.[115]

Furthermore, "[t]he fact that these photographs may have or may not have been shown in no way affects the minor's reasonable expectation that there was a distinct and real possibility that the other teenager involved would at some point make these photos public."[116] According to the court, "Appellant was simply too young to make an intelligent decision about engaging in sexual conduct and memorializing it. Mere production of these videos or pictures may also result in psychological trauma to the teenagers involved."[117]

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111. *See id.*
112. 949 So. 2d 234, 235 (Fla. Dist. Ct. App. 2007).
113. *Id.*
114. *Id.* at 235, 239.
115. *Id.* at 237.
116. *Id.* at 238.
117. *Id.* at 238-39; *see also* Robby Soave, *Teen Boy Will Be Charged as Adult for Having Naked Pics of a Minor: Himself*, REASON: HIT & RUN BLOG (Sept. 2, 2015, 4:31 PM), http://reason.com/blog/2015/09/02/teen-boy-will-be-charged-as-adult-for-ha [https://perma.cc/L9QH-XHSE].

Several features of the sexting cases are consistent with the treatment of adult sexual fantasies documented above. First, there was noticeable speculation about the potential harms from consensual sexting and an equation of teenagers' sexual expression with their sexual abuse. There certainly have been well-documented incidents in which sexually explicit photos, often of young women, have been disseminated broadly without their consent and used as a basis for bullying and harassment.[118] The recent attention to the very real, and entirely unjustifiable, practice of "revenge porn" highlights the potential negative consequences of producing or disseminating sexual imagery: loss of employment, sexual harassment, increased risks of stalking and domestic violence, and serious anxiety disorders.[119] But, as revenge porn opponents have emphasized, consent is a key component in regulating the production and dissemination of sexual imagery.[120] The harms from sexting largely emerge from some act of coercion, breach of trust, or distribution of an image beyond its intended audience; by contrast, images that are shared consensually and produced without coercion[121] do not cross that important line.[122] Nonetheless, the sexting cases largely ignore that line and presume harm merely because a sexual image has been produced. Even while it is entirely legal for the parties to actually have sex with each other, they can be branded as lifelong sex offenders if they instead remain in their separate bedrooms and set up cameras.

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118. *See, e.g.*, Mike Celizic, *Her Teen Committed Suicide Over 'Sexting,'* TODAY (Mar. 6, 2009, 9:26 AM), http://www.today.com/parents/her-teen-committed-suicide-over-sexting-2D80555048 [https://perma.cc/TS5F-UFTG] (discussing Jessica Logan's suicide after her ex-boyfriend sent naked pictures of her to other teenage girls, who repeatedly harassed and bullied her).

119. *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 350-54 (2014).

120. *See id.* at 348; Amy Adele Hasinoff, *How to Have Great Sext: Consent Advice in Online Sexting Tips*, 13 COMM. & CRITICAL/CULTURAL STUD. 58, 58-59 (2015).

121. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 239 (2002).

122. *See* HASINOFF, *supra* note 38, at 110 ("[E]rasing girls' agency can have the problematic effect of conflating consensual and harmful uses of sexual images."); *id.* at 129 (arguing that "explicit consent should be required for the circulation of private media and information"); Michal Buchhandler-Raphael, *Overcriminalizing Speech*, 36 CARDOZO L. REV. 1667, 1706 (2015) ("Criminal charges brought against adolescents for sexting each other, however, are often unjustified because their behaviors fall short of risking actual abuse of children.").

Second, little value is placed on the teenagers' interests in understanding and exploring their fantasies and desires. As children's rights advocates Marsha Levick and Kristina Moon have observed, "'[A] vital part of adolescence is thinking and experimenting with areas of sexuality'.... Sexting is the result of a convergence between the well-recognized adolescent need for sexual exploration and new technology that allows teens to explore their sexual relationships via private photographs shared in real-time."[123]

Nonetheless, as demonstrated by the court's reasoning in *A.H. v. State*,[124] sexting prosecutions reflect a deep skepticism about the possibility that teenagers might have an interest in sexual autonomy or that they might be able to make informed decisions about the use of their likenesses. Even when courts have stepped in to halt aggressive efforts to police teen sexting, they have not done so out of respect for teenagers' sexual autonomy, privacy, or authority over their image or likeness.[125] Instead, the *Miller* court stayed the District Attorney's hand out of respect for parental authority over teenagers' upbringing and sexual morality.[126] The ACLU framed the case in a way that avoided raising the teenagers' own free speech and privacy interests surrounding sexual exploration and fantasy. As Professor Amy Hasinoff has observed, the briefing in the case repeatedly emphasized the "fun" and nonsexual nature of the photos at issue—the girls were showing off "training bras," and horsing around at a "sleepover," "[r]emoving sexual agency from sexting."[127]

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123. Levick & Moon, *supra* note 98, at 1038-39 (alteration in original) (quoting Lynn E. Ponton & Samuel Judice, *Typical Adolescent Sexual Development*, 13 CHILD ADOLESCENT PSYCHIATRIC CLINICS N. AM. 497, 508 (2004)).

124. 949 So. 2d 234 (Fla. Dist. Ct. App. 2007).

125. Both Derek Bambauer and Amy Hasinoff have advocated an authorship approach to sexting, which analogizes an individual's right to control distribution of sexual imagery to a copyright owner's right to control distribution of original creative works. *See* Derek E. Bambauer, *Exposed*, 98 MINN. L. REV. 2025, 2032 (2014); Amy Adele Hasinoff, *Sexting as Media Production: Rethinking Social Media and Sexuality*, 15 NEW MEDIA & SOC'Y 449, 449-50 (2013). Under this approach, the harm from sexting is not the mere creation of the image, but instead its unauthorized reproduction, display, and distribution.

126. *See supra* notes 101-02 and accompanying text.

127. HASINOFF, *supra* note 38, at 28. Hasinoff has also observed that sexting commentaries have discounted the potential significance of sexting by casting it as a result of raging hormones, as a playful adolescent phase, or as merely frivolous and misguided. *Id.* at 67. In this frame, sexting is an aspect of a fleeting, temporary sexuality that is distinct from the discovery and development of adult sexual identity. *Id.*

Third, as in the family law context, the risk of sexting prosecutions falls particularly heavily on marginalized sexualities. In the above cases, the criminal charges were not the result of an aggrieved victim who went to the police; instead, they stemmed from either a parent or a teacher discovering an image that was not intended for their viewing. Accordingly, whether a sexter faces legal sanctions lies largely within the discretion of parents and other authority figures who may or may not approve of the relationship in question. Several sexting prosecutions have involved gay and lesbian teens,[128] and at least one study has found that respondents were significantly more likely to recommend sex offender registration for sexting when the youths were gay or lesbian than if they were heterosexual.[129] Where explorations of sexual fantasy are framed solely in terms of whether the government or parent has a stronger right to control a teenager's sexual development, the opinions and preferences of those entities will predictably sideline the teenager's less mainstream—yet often entirely healthy and legitimate—sexual desires.[130]

C. Criminal Law, Internet Stings, and Social Media Surveillance

The following conversation was read into evidence in a Manhattan courtroom in the of winter of 2013:

> Meatmarketman: OK. Are you married? How big is your oven? Is it fan assisted?

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128. *See supra* notes 110-11 and accompanying text; Hasinoff, *supra* note 38, at 38-39 (summarizing a case in which a seventeen-year-old was put on probation for sending a sexually explicit video of himself to his sixteen-year-old boyfriend; the younger boy's parents found the video and called the police).

129. Erin Comartin et al., *"Sexting" and Sex Offender Registration: Do Age, Gender, and Sexual Orientation Matter?*, 34 DEVIANT BEHAV. 38, 45 (2013).

130. For a discussion of systemic bias against queer people within the criminal justice system, see DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW 20 (2011); and JOEY E. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES, at xii (Michael Bronski ed., 2012); *see also* Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1412 (2014) ("The insufficient protection that the three cases above offer children *de facto* signals to LGBT youth that their sexual identity and relationships are inferior and illegitimate and are, quite literally, harmful to themselves and their parents.").

> [Mhal52]: I am single, and it's a big gas oven but I am also open to other ideas like an outdoor spit roast. No one around for three-quarters of a mile.
> Meatmarketman: How big? I've seldom seen an oven big enough to take a whole adult, even a small one.
> [Mhal52]: It's hard to say, but it's big enough, as long as the girl is trussed up I can fit her in, definitely Kimberly.
> Meatmarketman: How big is she?
> [Mhal52]: Five foot two.
> Meatmarketman: Weight?
> [Mhal52]: 110-115 pounds.
> Meatmarketman: Very good. Would you want me to decapitate and gut her first?
> [Mhal52]: Well, here's my ideal situation, you let me know if it will work. I really want her to suffer, so I am hoping to cook her alive, but just until she dies. Once she is dead, I will take her out and properly butcher her body and cook the meat right away. And that could be out on a rotisserie too.
> ....
> Meatmarketman: You need to be very secluded.
> [Mhal52]: I am, believe me.... I have a place up in the mountains. No one around for three-quarters of a mile.
> ....
> Meatmarketman: Have you ever eaten anyone before?
> [Mhal52]: No, I haven't.
> Meatmarketman: I have. The meat isn't quite like pork, but very meaty anyway. Ever considered a black or Asian girl?
> [Mhal52]: No, not really. White girls seem the most appetizing to me. So I'm thinking a Labor Day cookout. First Monday of September with Kimberly as the main course.[131]

This was one of forty conversations that served as the basis for the conviction of Gilberto Valle (Mhal52), an officer with the New York City Police Department.[132] Valle was convicted of conspiring with three other individuals to kidnap, kill, and eat five women, including his wife.[133]

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131. Transcript of Record at 456-60, United States v. Valle, 301 F.R.D. 53 (S.D.N.Y. 2014) (No. 12-CR-0847), ECF No. 135.

132. *See* United States v. Valle, 301 F.R.D. 53, 59-60 (S.D.N.Y. 2014), *aff'd in part and rev'd in part*, 807 F.3d 508 (2d Cir. 2015).

133. *See id.*

This may seem like damning evidence of a criminal conspiracy; however, a number of complexities about this case caution against using these disturbing conversations as conclusive evidence of criminal intent.[134] Valle met "Meatmarketman" and his other alleged coconspirators on the website Dark Fetish Net, which is dedicated to a wide range of BDSM fantasies, including cannibalism.[135] On that site, Valle maintained a profile on which he put a clear disclaimer that everything he discussed on the site was, indeed, fantasy.[136] He never met or spoke on the phone with any of his alleged coconspirators.[137] Indeed, his three alleged coconspirators lived in New Jersey, England, and Pakistan.[138] Quite significantly, there was no oven, no house in the woods, no rotisserie, and he was not single.[139]

Throughout his allegedly "real" chats, Valle provided conflicting, false details about his own life: in certain conversations, he was an experienced kidnapper soliciting new clients; in others, he was a neophyte looking for guidance from more seasoned experts.[140] He never revealed, however, that he was a police officer with access to a firearm and handcuffs.[141] Importantly, although he was friendly with a woman named Kimberly, he never used the alleged victims' last names and repeatedly obfuscated or lied about their identifying details.[142] Moreover, the date of the "Labor Day cookout" and all other discussed kidnappings came and went without a passing mention from any member of the conspiracy.[143] Nonetheless, a jury convicted Valle for both conspiring to kidnap and accessing an NYPD database beyond his authorization.[144]

There are signs that the verdict did not arise from the strength of the evidence, but instead from disapproval of his dark fantasies. At various points in the trial, prosecutors emphasized to jurors that

134. Thea Johnson and I have written more extensively about the *Valle* case elsewhere. *See* Johnson & Gilden, *supra* note 4, at 313-14.

135. *Valle*, 301 F.R.D. at 59.

136. *Id.*

137. *See id.* at 59-60.

138. *See id.*

139. *See id.* at 60-61, 98-99.

140. *See id.*

141. *See id.* at 61-62.

142. *See id.* at 61.

143. *Id.* at 60; Johnson & Gilden, *supra* note 4, at 320.

144. Johnson & Gilden, *supra* note 4, at 320.

Valle's fantasies were "not ... OK" and "not normal" and implored them to use their "common sense" when assessing the evidence.[145] When later interviewed about the verdict, one juror explained, "We were convinced he wanted to do it."[146]

Fortunately for Valle, a year after his conviction, the district judge overturned the jury's verdict on the conspiracy charge, recognizing that all of these conversations were pure fantasy and never entered the realm of actual criminal conspiracy.[147] On December 3, 2015, the Second Circuit affirmed Judge Gardephe's judgment of acquittal on the kidnapping charge, largely adopting the reasoning of his "thorough and thoughtful 118-page opinion."[148] The majority was "loath to give the government the power to punish us for our thoughts and not our actions. That includes the power to criminalize an individual's expression of sexual fantasies, no matter how perverse or disturbing."[149] Nonetheless, by the time Valle was acquitted, he had been denied bail and had spent twenty-one months in jail, including seven in solitary confinement.[150] Moreover, he lost his job, his pension, and his child.[151] And he has been publicly ridiculed as the "Cannibal Cop" ever since.[152]

Valle's case may seem like an extreme example of the criminal justice system struggling to interpret evidence of online sexual fantasy; however, this is far from the only case in which a criminal

145. *Valle*, 301 F.R.D. at 107-08.

146. *Thought Crimes*: *The Case of the Cannibal Cop* (HBO Documentary Films 2015).

147. *Valle*, 301 F.R.D. at 62. The *Valle* ruling is reminiscent of the earlier "Jake Baker" case, in which a University of Michigan student was charged with communicating a threat to kidnap or injure a young man, based upon a series of fictional stories on the Usenet group "alt.sex.stories" and sexually explicit e-mails with an online buddy in Canada. *See* United States v. Alkhabaz, 104 F.3d 1492, 1496 (6th Cir. 1997). In that case, the district court threw out the indictment, and the Sixth Circuit affirmed, observing that "Baker and Gonda apparently sent e-mail messages to each other in an attempt to foster a friendship based on shared sexual fantasies." *Id.* Although Baker was never convicted (or actually tried) on the threat charges, he was suspended from Michigan, was initially denied bail, and spent several months in jail as a result of the charges. Adam S. Miller, *The Jake Baker Scandal: A Perversion of Logic*, TRINCOLL J. (Apr. 6, 1995), http://www.trincoll.edu/zines/tj/tj4.6.95/articles/baker/html [https://perma.cc/6EM2-HYPP].

148. United States v. Valle, 807 F.3d 508, 513 (2d Cir. 2015).

149. *Id.* at 511 (citation omitted).

150. Daniel Engber, *An Exclusive Interview with the "Cannibal Cop,"* SLATE (Dec. 10, 2015), http://www.slate.com/articles/news_and_politics/crime/2015/12/cannibal_cop_an_exclusive_interview_with_gilberto_valle.html [https://perma.cc/DWV3-62CS].

151. *See id.*

152. *See, e.g.*, *id.*

defendant has been punished or otherwise disadvantaged by discomfort, disgust, and confusion toward his online fantasy life.[153] This Section will show various ways in which the criminal law has blurred the lines between fantasy and reality in the face of dark or disturbing evidence of online sexual fantasy. In the wake of *To Catch a Predator*[154]-style panics surrounding online predators and pedophiles, jurors, judges, and law enforcement have doubted, punished, and arguably preyed upon sexual fantasy.

One group of cases involved situations similar to Valle's: disturbing, sexually explicit conversations were used to show attempt or conspiracy.[155] In *United States v. Hite*, the fifty-eight-year-old defendant entered a chat room on the website Gay.com and initiated a conversation with someone named "DCped," who described himself as a "[n]o limit perv."[156] DCped was, in reality, an undercover D.C. police officer.[157] The two men began a series of conversations discussing, in graphic detail, the sexual activities they wanted to engage in with two minors with whom DCped (falsely) claimed to be sexually active.[158] The two men scheduled a time to meet in person, but the defendant told DCped that "[a]ny of the conversation that we have I'm sure on my end, and on your end also, has been totally fantasy, and it's just the two of us meeting Friday night to explore, and you know, discuss various things, correct?"[159] A few days later, DCped offered to have sex with his nephew on webcam, which sounded "fabulous" to the defendant.[160] That night, the defendant was arrested at a gas station near his home, and he was charged with and convicted of attempted coercion and enticement of a minor.[161] The jury rejected his argument that "he was engaged in

153. For an eerily prescient discussion of the criminalization of fantasy in the early days of the Internet, see LAURA KIPNIS, BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA (1996) (discussing thirty-year conviction of two men for discussing violent sexual fantasies with FBI agents they met through an online bulletin board).

154. *To Catch a Predator* (MSNBC 2004-2007).

155. For discussions about other areas of law, such as national security law, in which attempt and conspiracy charges have been in tension with free speech principles, see generally Buchhandler-Raphael, *supra* note 122.

156. 769 F.3d 1154, 1158 (D.C. Cir. 2014) (alteration in original).

157. *Id.*

158. *Id.*

159. *Id.* at 1159 (alteration in original).

160. *Id.*

161. *Id.*

fantasy and role-play and had no intention of engaging in sexual activities with a real child."[162]

In *People v. Weston*, the California Court of Appeals upheld a conviction for attempting to commit a lewd and lascivious act with a minor under fourteen years old.[163] The defendant initiated a conversation in an Internet Relay Chat room, "Little Girls Sex Chat," with an individual who claimed to be thirteen years old (again, a police officer), engaged "her" in sexually explicit conversations for several weeks, and flew from Colorado to Moreno Valley, California, to meet her.[164] Although this may seem like pretty solid evidence of his intent to sexually engage with the minor, the defendant cited the following information to support his belief that he was talking to an adult who fantasized about being a teenager: (1) he looked up all of the information she had given him about her address, name, and parents' occupations, and determined they were false and entirely inconsistent; (2) she (an adult decoy) had a much older-sounding voice on the phone, and the phone number she used was registered to a Korean woman in another city; and (3) the girl accessed the Internet from a range of different telephone numbers and ISP addresses, while claiming always to be at home.[165]

Although the appellate court acknowledged that "there was evidence to support defendant's 'fantasy' defense," it held that the jury could have reasonably concluded that it was not a fantasy, based largely upon the frequent discussions of sexual activities online and defendant's travel to California.[166] According to the court, "regardless of whether evidence exists to support defendant's argument that he had good reason to believe Sheila13 was an adult, the record supports the jury's conclusion that defendant thought Sheila13 was under 14 years of age."[167] As in the *Valle* case, jurors were given the task of separating fantasy from reality, but here, the California court refused to disturb the verdict, notwithstanding evidence that placed their conclusion in doubt. Several other reported

162. *Id.*
163. No. E033065, 2003 WL 22251409, at *1, *8 (Cal. Ct. App. Oct. 2, 2003).
164. *Id.* at *1-3.
165. *Id.* at *3.
166. *Id.* at *5.
167. *Id.*

decisions similarly acknowledged the potential viability of a fantasy defense but refused to disturb the jury's weighing of the evidence.[168]

A second group of cases involve questionable application of character propensity rules to allow juries to infer a defendant's intent or motive from evidence of sexual fantasy. Federal Rule of Evidence 404 and state law analogs prohibit the introduction of evidence of a person's character trait in order to show that they acted in conformity with that trait.[169] Nonetheless, in *United States v. Curtin*, the Ninth Circuit allowed the government to introduce a series of sexually explicit incest stories found on defendant's PDA in order to show that he intended to meet someone (a police officer) he believed to be a thirteen-year-old girl.[170] According to the government, the stories allegedly disproved defendant's argument that, as in *Weston*, he believed he had been talking with an adult woman pretending to be a minor; they showed "[w]hat his fantasies are and this shows his

168. United States v. Howard, 766 F.3d 414, 427-28 (5th Cir. 2014) ("There is no single action by the defendant in this case that clearly signifies that the defendant would follow through on his sexual talk.... Were we the triers of fact, we might reach a conclusion different from the district court."); United States v. Laureys, 653 F.3d 27, 33 (D.C. Cir. 2011) ("[Detective] Palchak admitted there was no implication in the chat that the girl would be present at the initial meeting with Jim. Even so, the jury reasonably found Laureys's trip to meet Jim was for the purpose of engaging in illicit sexual conduct with a minor." (citation omitted)); United States v. Dwinells, 508 F.3d 63, 74 (1st Cir. 2007) ("The appellant's chief defense—that he was merely role-playing and thought that the communications were mutually entertained fantasies, comfortably remote from any prospect of consummation—is plausible. Moreover, that defense was buttressed by the appellant's persistent dodging of suggestions that he and his correspondents meet. But the government's theory of the case—that the appellant was engaged in earnest predation with persons he thought to be minors—also was plausible.... In the end, everything depended upon which set of inferences the jury chose to draw."); Maloney v. State, 294 S.W.3d 613, 622 (Tex. App. 2009) ("[A]ppellant contends that Brandy 'displayed a maturity about sex and relationships uncharacteristic of most thirteen-year-old girls.' Appellant also...contends that Officer's Yates's [sic] voice was 'unmistakably that of an adult woman.' ... [W]e conclude that the evidence supporting the conviction is not so weak that the verdict seems clearly wrong and manifestly unjust.").

169. *See* FED. R. EVID. 404(a)(1).

170. 489 F.3d 935, 958-59 (9th Cir. 2007) (en banc) (but remanding to the district court with instructions to read the proffered stories in order to assess under FED. R. EVID. 403 whether their probative value outweighed their prejudicial effect); *see also* United States v. Brand, 467 F.3d 179, 197 (2d Cir. 2006) ("As the government points out, '[t]hese images provided a glimpse into Brand's sexual interest in children and, as such, were highly probative of whether he wanted to have sex with "Julie" or simply to give her voice lessons, as Brand essentially contended at trial.'" (alteration in original)).

intent."[171] The majority of the en banc court agreed.[172]

Judge Kleinfeld, however, concurring, pointed out the dangerous slipperiness of allowing the government to point to a defendant's general fantasies as evidence of intent.[173] Under the government's chain of reasoning, the stories revealed a sexual fantasy; the sexual fantasy meant he was *the type of person who would intend to act upon them when given the chance*, and therefore he intended to act upon them when he met the police decoy.[174] Under Rule 404 of the Federal Rules of Evidence, this reasoning inappropriately conflated repugnant sexual fantasies with specifically intending to commit the crime at issue.[175] According to Judge Kleinfeld, the majority failed to appreciate the crucial distinction between having, reading, and writing about "disgusting" sexual fantasies and actually acting upon those fantasies in an unlawful manner.[176] Nonetheless, several cases have followed the *Curtin* majority and held it proper to use sexually explicit material as evidence of motive or intent.[177]

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171. *Curtin*, 489 F.3d at 939-40 (alteration in original); *see Weston*, 2003 WL 22251409, at 84; *see also Brand*, 467 F.3d at 198 ("The child pornography found on Brand's computer certainly suggests just such an abnormal sexual attraction by Brand. Brand's abnormal sexual attraction encompassed not only possession of child pornography but the desire to meet a young girl for a sexual encounter; the same urge that Brand satisfied by obtaining child erotica also inclined Brand to commit sexual crimes against children."). FED. R. EVID. 404(b)(2) allows introduction of "other acts" for a series of noncharacter propensity reasons, for example to show "motive" or "intent."

172. *Curtin*, 489 F.3d at 958-59.

173. *Id.* at 961-62 (Kleinfeld, J., concurring).

174. *Id.* at 963 ("Perverse sexual desire is a trait of character. Using a person's perverse sexual fantasies to prove action in conformity therewith is exactly what subsection (a) of Rule 404 prohibits.").

175. *Cf.* FED. R. EVID. 404(a)(1) (prohibiting the use of character trait to prove that defendant acted in accordance with that character trait on a specific occasion).

176. *Curtin*, 489 F.3d at 960 (Kleinfeld, J., concurring) ("Curtin had a First Amendment right to possess and read the disgusting stories he downloaded from the internet and to fantasize about the criminal sexual conduct they describe. He emphatically did not have a right to attempt to persuade a person under 18 to have sex with him or to travel from California to Nevada 'for the purpose' of having sex with a person under 18." (footnotes omitted) (quoting 18 U.S.C. § 2423(b) (2012))).

177. *See* United States v. Knope, 655 F.3d 647, 659 (7th Cir. 2011) (allowing introduction of previous online conversations with seven individuals claiming to be minors, including police officers, to show that the defendant intended to have sex with the minor in the case at hand); State v. Brown, 710 S.E.2d 265, 269-70 (N.C. Ct. App. 2011) (allowing introduction of a series of erotic stories involving incest—"an uncommon and specific type of pornography"—to show defendant's motive and intent to molest his young daughter), *aff'd*, 722 S.E.2d 508 (N.C. 2012) (mem.); *see also* Johnston v. State, 431 S.W.3d 895, 899 (Ark. 2014) (allowing the admission

The last group of cases involves defendants' allegations that they were entrapped by chat room sting operations. Entrapment is an affirmative defense that allows a defendant to show, by a preponderance of the evidence, that the government induced him or her to commit a crime.[178] Even if the government induced the crime, however, it can still defeat an entrapment defense by showing beyond a reasonable doubt that the defendant was predisposed to commit the crime before the government approached him or her.[179] Although many "chat room sting" decisions acknowledge that the government induced the charged crime, the government is sometimes able to use a defendant's fantasies and desires to show predisposition.

In *United States v. Brand* the defendant was charged with traveling across state lines for the purposes of illicit sexual conduct with a minor, as well as enticement of a minor, based upon a series of sexually explicit conversations he had with "Sara" and "Julie."[180] Sara and Julie were fictitious minors created jointly by an FBI Agent and a "private citizen."[181] The Second Circuit held that there was sufficient evidence that Brand was predisposed to commit the charged crimes because he had logged into an "I Love Older Men" chat room—"a chat room with a very suggestive name"—and previously had sexually explicit conversations with other police officers

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of incest-related website names and images when the defendant was the victim's father); People v. Dean, No. B192974, 2008 WL 376226, at *8 (Cal. Ct. App. Feb. 13, 2008) (admitting seven pornographic photos of "relatively young women" found on appellant's computer); State v. Putman, 848 N.W.2d 1, 13, 16 (Iowa 2014) (admitting two videos depicting the sexual abuse of very young children); Commonwealth v. Carey, 974 N.E.2d 624, 633 (Mass. 2012) (permitting introduction of photos that mirrored the method by which the defendant allegedly assaulted the victim); State v. Gaines, 667 S.E.2d 728, 732 (S.C. 2008) (admitting defendant's sexually explicit online chat conversation with a young female).

178. *See* Sherman v. United States, 356 U.S. 369, 372-73 (1958); Sorrells v. United States, 287 U.S. 435, 442 (1932).

179. *See* Jacobson v. United States, 503 U.S. 540, 554 (1992). This is the "subjective" test for entrapment adopted by the federal government and most states. Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1394, 1400 (2004). Other states, like California, have adopted a more "objective" test under which the defendant's predisposition is much less relevant. *See* People v. Barraza, 591 P.2d 947, 955 (Cal. 1979) (asking whether "the conduct of the law enforcement agent [was] likely to induce a normally law-abiding person to commit the offense").

180. 467 F.3d 179, 194 (2d Cir. 2006).

181. *Id.* at 183. The private citizen, Stephanie Good, was a "55-year-old woman who spen[t] 20 to 50 hours a week surfing the Internet for those she believe[d] to be sexual predators and reporting her finds to the FBI." United States v. Joseph, 542 F.3d 13, 14 (2d Cir. 2008), *abrogated by* United States v. Ferguson, 676 F.3d 260 (2d Cir. 2011).

posing as young girls, viewed child pornography online, and promptly responded when law enforcement brought up the topic of sex for the first time.[182]

In *United States v. Joseph*, the Second Circuit allowed the government to show predisposition to entice a minor (the same fictitious "Julie" as in *Brand*)[183] to engage in sexual activity by introducing "devastating evidence" that the defendant was a member of a website called "Muscleteens."[184] This website featured girls and young women, both over and under eighteen years of age, with well-developed muscles.[185]

In *People v. Grizzle*, the Colorado Court of Appeals held that the defendant was not entitled to a jury instruction as to an entrapment defense, even though there was little evidence that he was predisposed to attempt the sexual assault of a child.[186] The defendant believed that he was chatting online with an adult female pretending to be thirteen, and at one point "she" sent him a photo of, in the words of the court, "a youthful-looking but obviously adult female deputy sheriff."[187] Moreover, the court observed that "[i]t is, perhaps, inevitable that such an [Internet sting] operation will ensnare an otherwise law-abiding citizen with sexual fantasies—involving conduct which is illegal, immoral, taboo, or all three—upon which he or she would not otherwise act were the opportunity not presented to them."[188]

Nonetheless, the defendant was not entitled to an entrapment defense because he "did not admit the culpable mental state" necessary to convict on the attempt charges.[189] In other words, he could not claim the affirmative defense of entrapment because he did not admit to *intending* to have sex with or entice an actual minor; he merely admitted to intending to have sex with someone

182. *Brand*, 467 F.3d at 194-95.

183. 542 F.3d at 14-15 (identifying the same FBI agent and private citizen as in *Brand*).

184. *Id.* at 20-21 ("Although admission of the Muscleteens photos was not erroneous, if they become relevant at a retrial, the defendant must be accorded an opportunity to present evidence that he did not view them.").

185. *Id.* at 20.

186. 140 P.3d 224, 227 (Colo. App. 2006).

187. *Id.* at 225.

188. *Id.* at 227.

189. *Id.*

fantasizing that she was a minor.[190] He was convicted of attempted sexual assault because the jury did not believe his argument that he only fantasized about illegal, immoral, or taboo fantasies, and he could not challenge the police conduct that exposed those fantasies to prosecution because he would not admit to actually intending to turn those fantasies into reality.[191]

Although courts have been willing to reject entrapment arguments or predisposition when confronted with taboo sexual fantasies, they have been more receptive to fantasy defenses when the court could in some way relate or sympathize with the defendant's desires and actions. In *People v. Aguirre*, for example, a California Court of Appeal overturned the defendant's convictions when the trial court had not *sua sponte* instructed the jury on entrapment:

> The police lured defendant into an electronic conversation with Jess without providing any indication at the outset that she was underage. Indeed, the police conducted their sting on a Craigslist forum that is supposed to be limited to users age 18 and over. The police quickly disclosed Jess was 13 years old once defendant contacted her, but in response to defendant's request for a picture of Jess, the police selected a photograph of an attractive and mature female body.[192]

The court, apparently, could imagine this scenario appealing to a "normally law-abiding person":

> The forum and photograph selected by the police, along with the flirtatious and prurient "personality" displayed by Jess, contributed to an ambiguous and titillating scenario in which a normally law-abiding person who was seeking consensual sex with a woman on an internet forum might be enticed to pursue a fictional underage girl.[193]

Another set of cases in which courts have been more receptive to entrapment defenses involve "sexual mentor" stings, in which law

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190. *Id.* at 226.

191. *Id.*

192. No. G045009, 2012 WL 1132777, at *6 (Cal. Ct. App. Apr. 5, 2012), *modified on denial of reh'g* (Apr. 27, 2012).

193. *Id.*

enforcement pretend to be a parent looking for another adult to have sex with her minor daughter or son.[194] Courts' concern in these cases appears to be that the defendants are really interested in a relationship with the adult, and that law enforcement is using that desire as leverage to push him toward the minor.[195]

According to one court, "[t]he 'sexual mentor' version of internet sting operations directed at pedophiles can be problematic because some targets of the operation may feel pressured to agree to 'teach' a child about sex in the hope of obtaining a sexual relationship with the child's older relative."[196] It may make sense that an adult woman would have greater coercive force on an adult man than a teenage girl, but it is easy to forget that trained police officers are behind many of these fictional paramours. The law enforcement officers in these cases are trying to locate individuals with taboo sexual fantasies and see if they can get them to cross the line into potentially harmful conduct. Whether that line has been crossed, and the propriety of law enforcement activity, should not depend on how sympathetic the defendant's fantasy happens to be.

One court has suggested "the government should not be in the business of testing the will of law-abiding citizens with elaborate (if improbable) fantasies of sensuous teenagers desperate to engage in sexual acts with random middle-aged men."[197] Nonetheless, this is often the very business in which it is engaged. In *United States v. Larson*, the court captured the logic behind the investigation and prosecution of sexually charged Internet forums:

> Identifying individuals who offer children for sex or who seek to procure children for sex without the use of the Internet is difficult, as those crimes typically occur in secret. Sexual assault of children arranged by adults is made easier by the Internet. The anonymity of the Internet adds a new layer of secrecy to a crime

194. *See* United States v. Poehlman, 217 F.3d 692, 697, 705 (9th Cir. 2000) (reversing defendant's conviction on entrapment grounds); Mizner v. State, 154 So. 3d 391, 394 (Fla. Dist. Ct. App. 2014) (describing how law enforcement posed online as a mother seeking a sexual mentor for her ten-year-old daughter), *appeal denied*, No. SC14-2380, 2016 WL 1669708 (Fla. Apr. 27, 2016). *But see* United States v. Larson, No. 12-CR-00886-BLF-1, 2015 WL 729738, at *10 (N.D. Cal. Feb. 19, 2015) (denying motion to dismiss for outrageous government conduct).

195. *See Poehlman*, 217 F.3d at 698-700.

196. *Mizner*, 154 So. 3d at 393 n.1.

197. *Aguirre*, 2012 WL 1132777, at *7.

> committed in the shadows of society. Therefore, as the defense expert acknowledges, the government frequently uses on-line undercover investigations as a means of identifying persons involved in the exploitation of children.[198]

As reflected in this passage, the cases surveyed above view Internet fantasy as a useful and accurate proxy for actual sexual coercion and exploitation.

The problem with this logic is that it collapses two distinct questions—whether the defendant was sexually aroused by the illegal actions he discussed, and whether he was predisposed to *actually commit* the actions themselves absent government involvement.[199] Whether framed as attempt, motive, conspiracy, or predisposition, these opinions repeatedly conflate sexual desire with some form of criminal intent. In many of these cases, the evidence might reasonably show, as in the "Cannibal Cop" case, that the defendant "wanted to do it."[200] However, there is often no evidence that the defendant had ever done so before or was in a position to actually do so before the government created a fake persona designed to

198. 2015 WL 729738, at *9.

199. *See* United States v. Valle, 807 F.3d 508, 519-20 (2d Cir. 2015) ("As with his chats and emails, Valle's Internet searches show that he was *interested* in committing acts of sexualized violence against women. Interest may be relevant evidence of intent, but it does not by itself prove intent."); United States v. Broussard, 669 F.3d 537, 545 (5th Cir. 2012) ("[W]hether this was a fantasy or carry-out, you know, history is full of individuals who start off with fantasies and end up with the reality of carrying out those fantasies." (quoting the district court's sentencing discussion)); United States v. Curtin, 489 F.3d 935, 948 (9th Cir. 2007) (en banc) ("Curtin's possession in his PDA of this material at the time of his intended encounter with Christy clearly illuminated his thoughts and his subjective intent to carry out his daddy/daughter sexual initiation escapades with a juvenile, not an adult."). In *United States v. Gladish*, Judge Posner emphasized the distinction between desire and attempt where the defendant was convicted for online enticement without taking a "substantial step" toward actually engaging the minor in person. 536 F.3d 646, 650 (7th Cir. 2008) ("The requirement of proving a substantial step serves to distinguish people who pose real threats from those who are all hot air; in the case of Gladish, hot air is all the record shows."); *accord* United States v. Farley, No. 3:14CR21, 2014 WL 4809453, at *1 (E.D. Va. Sept. 26, 2014) ("The evidence does not show beyond a reasonable doubt that Farley actually planned to meet Bosnich or to engage in sexual conduct with her. Although Farley talks a good game, he lives in a fantasy world. Farley liked to talk to girls in sexual terms, but it was nothing more than role playing.").

200. *See supra* note 146 and accompanying text.

push the defendant toward taking one step too far for the very first time.[201]

Making a distinction between desire and intent is by no means an effort to defend or normalize pedophilia, incest, or sexual violence. Nonetheless, there is an important distinction between what turns a person on and whether they are foreseeably likely to engage in harmful and illegal sexual activity.[202] There is certainly a risk that desire and fantasy can spill over into coercive, harmful acts against an actual victim; but, again, the harms prevented in these cases are often speculative, as opposed to imminent or reasonably foreseeable, particularly given that the "victim" at issue

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201. *See, e.g.*, United States v. Gagliardi, 506 F.3d 140, 150 (2d Cir. 2007) ("[E]ven if Gagliardi could establish government inducement, and even if he had never before exhibited pedophilic tendencies, there was sufficient evidence for a reasonable juror to conclude that he stood ready and willing to violate § 2422(b)."); *see also* Gerald Dworkin & David Blumenfeld, *Punishment for Intentions*, 75 MIND 396, 396 (1966) ("[N]o person should be punished unless he is guilty of having committed some wrong act. We punish a man for attempted murder but not for wanting to murder."). One court has appreciated this distinction between fantasy, or desire more generally, and intent. *See* People v. Walter, 810 N.E.2d 626, 631 (Ill. App. Ct. 2004) ("Hope and fantasy do not equal intent, even if they lead to actions that could make the fantasy come true. Every man going on a blind date with a condom in his wallet might hope to have sex, but that does not mean he intends to have sex."). In that case, however, two of the three judges seemed particularly comfortable overturning a conviction where the conversations between the defendant and the (actual) minor were never explicitly sexual until the police became involved. *Id.* at 630.

202. *See Curtin*, 489 F.3d at 961 (Kleinfeld, J., concurring) ("*Shymanovitz* [overruled by the majority] explained that the possession of male homosexual pornography tended to prove that the defendant 'had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys.' It did not prove 'that he actually engaged in, or even had a propensity to engage in, any sexual conduct of any kind.'" (quoting *Guam v. Shymanovitz*, 157 F.3d 1154, 1159 (9th Cir. 1998))); RICHARD G. WRIGHT, SEX OFFENDER LAWS: FAILED POLICES, NEW DIRECTIONS 150 (2009) ("Law enforcement agents, prosecutors, and supporters of Internet sex stings assume that Internet sexual curiosity about adult-child sex will in a definitive causal chain lead to child sexual abuse."); Margo Kaplan, *Taking Pedophilia Seriously*, 72 WASH. & LEE L. REV. 75, 78, 84 (2015) (distinguishing between individuals who have a sexual interest in children and those who take the further step of acting out that interest); McLeod, *supra* note 12, at 1594 (arguing that the link between arousal and activity is "tenuous at best"). As Gerald Dworkin and David Blumenfeld observed, "To have an intention to do X, as opposed, say, to having a fantasy of doing X, IS to be prepared to take steps to do X given the chance." Dworkin & Blumenfeld, *supra* note 201, at 400; *see also* Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141, 1240 (2008) ("[I]t is not obviously true that dreams or fantasies in which someone enjoys engaging in torture or committing another deeply immoral act are generally indicative ... of either a desire to do the real thing or a capacity to take pleasure in doing the real thing.").

is often fictional.[203] In many of these cases, law enforcement is not simply harshly treating evidence of dark sexual fantasy as they find it. Instead, it is enacting, rooting out, and then punishing the very fantasies that people are not supposed to have.[204]

In order to justify this conflation of desire and intent, the judges and prosecutors in the cases canvassed above consistently spell out the lurid details of what were seemingly private online conversations. The opinions in these cases are deeply uncomfortable to read, and I have opted not to include many of the sexual positions, coercive acts, and bodily fluids painstakingly described in published judicial opinions. The logic seems to be that by showing that this person talked and read about doing horrific things with and to women and children, we can reasonably use our common sense and conclude that they intended to do those things.[205] As Judge Kleinfeld observed in *Curtin*, however, "Good prosecution proves that the defendant committed the crime. Bad prosecution proves that the defendant is so repulsive he ought to be convicted whether he committed it or not."[206]

The Internet may provide a window into some of the darkest corners of sexual desire, and it is very difficult not to pass some sort of judgment on the people whose conversations come to the attention of the court. But it is precisely at these moments when legal commitments to objectivity are at their most important; judges and prosecutors may never be able to just call balls and strikes, but the same principles that supposedly apply to drugs, theft, violence, and

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203. *See* Buchhandler-Raphael, *supra* note 122, at 1694 ("[G]rounding criminal liability based on some unquantifiable risk that the speech *may* lead to sexual abuse is an unjustified expansion of the criminal law.").

204. *See* STOCKTON, *supra* note 38, at 38 ("This child voice that police send out to 'pedophiles' in order to 'catch' them is the voice of childhood that the law denies.").

205. The following colloquy illustrates this logic:

> Now, [defense counsel] again took a lot of time talking about there's nothing wrong with chatting, this was all a fantasy. But again remember I asked you to keep [in] your mind the kind of character and person that could envision in their mind being with a 13-year-old sexually. This man by his own admission is fantasizing involved in a role play involving a girl in considering the concept that when he's f—king her, she's going to start to bleed. That's who this man is. In his mind, according to him, he can envision these scenarios and play them out and he's envisioning her bleeding through this.

State v. Nandy, No. A-1659-08T4, 2010 WL 3932793, at *16 (N.J. Super. Ct. App. Div. Oct. 8, 2010) (alteration in original).

206. *Curtin*, 489 F.3d at 963 (Kleinfeld, J., concurring).

fraud[207] should be extended to the policing and punishment of sexuality.[208] Given the identity, speech, and associational interests triggered by sexual fantasy, if anything, the lines between thoughts and crime deserve particularly careful treatment in this domain. When confronted with uncensored, disturbing sexual turn-ons, it may be tempting for juries and judges to respond by locking up the person and consequently the perceived problem with him. However, this approach both runs afoul of free speech and due process commitments and futilely minoritizes the nonnormative desires exposed in the microscopically small slice of sexual fantasies that end up in court.

III. TROUBLES WITH PUNISHING SEXUAL FANTASY

In the cases above, legal actors appear able to see only the potential harms in interactive explorations of sexual fantasy: harms to children from their mother's sexual desires, harms to children themselves from presenting themselves in a sexual manner, and harms to third parties from dark fetishes. Although the potential for harm is certainly present in each scenario, there is often no demonstration of actual or likely harm to a third party.

This Section challenges the tendency and willingness to conflate sexual fantasy with evidence of harm. First, this dynamic undermines free speech values—the First Amendment does not permit state actors to decide what types of consensual conversations people can have, no matter how gruesome and valueless they may appear. Second, this dynamic sidelines the potential benefits of the Internet

207. Criminal law scholars have observed, however, that issues of bias both pervade the criminal justice system generally, and can infect specific issues surrounding the burdens of proof, standards of review, and evidentiary rules discussed herein. *See generally* Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQUALITY 1 (2007); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); Casey Reynolds, Student Article, *Implicit Bias and the Problem of Certainty in the Criminal Standard of Proof*, 37 LAW & PSYCHOL. REV. 229 (2013).

208. *See, e.g.*, State v. Brown, 710 S.E.2d 265, 271 (N.C. Ct. App. 2011) ("Pornography, especially such singularly specific pornography like Family Letters, provides an obvious inference about the sexual motivations of the possessor in a way that other reading material cannot."), *aff'd*, 722 S.E.2d 508 (N.C. 2012) (mem.); *id.* at 279 (Hunter, J., dissenting) ("The Family Letters publication cannot be relevant to Brown's propensity to commit a sex offense without inferring he has a depraved sexual interest in incest.").

for exploring sexual fantasies, particularly regarding nonnormative sexual desires. Third, efforts to police and punish sexual fantasy are misaligned with empirically supported data about the actual risks of sexual harm and the Internet.

A. Free Speech and First Amendment Protections for Fantasy

The scenarios outlined above are at odds with the First Amendment framework for distinguishing fantasy from reality, as set forth by the U.S. Supreme Court.[209] In *Jacobson v. United States*, the Court overturned a child pornography conviction where the government failed to proffer sufficient evidence of predisposition to commit the charged conduct:

> Petitioner's responses to the many communications prior to the ultimate criminal act were at most indicative of certain personal inclinations, including a predisposition to view photographs of preteen sex and a willingness to promote a given agenda by supporting lobbying organizations. Even so, petitioner's responses hardly support an inference that he would commit the crime of receiving child pornography through the mails. Furthermore, a person's inclinations and "fantasies ... are his own and beyond the reach of government."[210]

The Court recognized that a sexual attraction to unlawful activities and related fantasies are distinct from intent to actually break the law by engaging in those activities.[211] Even though a person's fantasies may show a predisposition to reading and writing about unlawful, harmful, or coercive sex, free speech commitments mandate that such expressive or imaginative activities—no matter how objectionable—be decoupled from conduct that is likely to

209. This is *not* to say, of course, that the Court has been perfectly consistent in its free speech jurisprudence. Nonetheless, there are a number of important principles that arise repeatedly in First Amendment case law and have not been fully appreciated by lower courts addressing Internet-mediated sexuality.

210. 503 U.S. 540, 551-52 (1992) (alteration in original) (footnote omitted) (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973)).

211. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) ("[T]he Court's First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.").

negatively impact other people.[212] Speech is by no means inherently harmless,[213] and the speech/conduct distinction is hardly crystal clear,[214] but fantasy, expression, and imagination at the very least require clear-headed, particularized, and empirically supported justifications for legal regulation and punishment.[215]

The First Amendment protects pure fantasy—reading and writing about activities that could absolutely be punished if they occurred in the physical world. Fourth Circuit Judge Gregory, dissenting from an opinion finding a set of pedophilic stories to be obscene, observed that some of the most highly regarded books and movies, including *Lolita*[216] and *American Beauty*,[217] delve extensively into unlawful sexual fantasies.[218] From his perspective, "the iconic books and movies above render unsustainable the claim that writings describing sexual acts between children and adults, generated by fantasy, have no demonstrated socially redeeming artistic value."[219] He noted that even though "Whorley's e-mail fantasies, if carried to fruition, would undoubtedly subject him to criminal liability ... [his] actions can easily be separated from the *potentially* illegal acts about which he fantasized."[220]

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212. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("[A] bedrock principle underlying the First Amendment ... is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

213. *See, e.g.*, CATHARINE A. MACKINNON, ONLY WORDS (1993); MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993).

214. *See, e.g.*, Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 855-58 (2012); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 777 (2001); John Hart Ely, Comment, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1496 (1975).

215. *See* Kahan et al., *supra* note 214, at 857 ("[I]f the selectivity with which the government prohibits such assaultive behavior reflects a 'special hostility towards the particular biases thus singled out,' punishment of such conduct reflects exactly the sort of disapproval of ideas that the First Amendment is meant to proscribe." (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992))).

216. NABAKOV, *supra* note 21.

217. AMERICAN BEAUTY (DreamWorks Pictures 1999).

218. United States v. Whorley, 550 F.3d 326, 349 (4th Cir. 2008) (Gregory, J., concurring in part and dissenting in part); *see also Ex parte* Lo, 424 S.W.3d 10, 20 (Tex. Crim. App. 2013) (listing materials such as *Lolita*, *Fifty Shades of Grey*, *The Tudors*, *Basic Instinct*, Janet Jackson's "Wardrobe Malfunction," and Miley Cyrus' "twerking").

219. *Whorley*, 550 F.3d at 349 (Gregory, J., concurring in part and dissenting in part).

220. *Id.* at 349-50; *see also* United States v. Curtin, 489 F.3d 935, 960 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring) ("[Defendant] had a First Amendment right to possess and read the disgusting stories he downloaded from the internet and to fantasize about the

Moreover, recent Supreme Court decisions have hammered home that, outside the very specific confines of obscenity law, disgust is an impermissible basis for regulating speech that does not pose a reasonably imminent threat of harm to another person. In *Brown v. Entertainment Merchants Ass'n*, the Supreme Court struck down a California statute prohibiting the sale of violent video games to minors.[221] The statute expressly targeted some of the most gruesome types of games—those in which the options involve the player "killing, maiming, dismembering, or sexually assaulting an image of a human being."[222] Nonetheless, the Court emphasized, again, that the First Amendment consistently protects objectionable, offensive expression: "esthetic and moral judgments about art and literature ... are for the individual to make, not for the Government to decree."[223] In the context of video games, it was insufficient for the government to point either to the desire to protect minors or to the inherently interactive nature of the content. The Court noted that "the *books* we give children to read [such as *Grimm's Fairy Tales*, *Lord of the Flies*, and Dante's *Inferno*] ... contain no shortage of gore."[224]

The majority opinion in *Brown* took particular issue with Justice Alito's dissent, which included "considerable independent research" to identify particularly gruesome video games, in which victims were, for example, dismembered, decapitated, and disemboweled.[225] The majority noted that "Justice Alito recounts all these disgusting video games in order to disgust us—but disgust is not a valid basis for restricting expression."[226] The Court suggested that Justice Alito's goal was to "arouse the reader's ire, and the reader's desire

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criminal sexual conduct they describe."); *Ex parte Lo*, 424 S.W.3d at 26 ("A man's thoughts are his own; he may sit in his armchair and think salacious thoughts, murderous thoughts, discriminatory thoughts, whatever thoughts he chooses, free from the 'thought police.' It is only when the man gets out of his armchair and acts upon his thoughts that the law may intervene." (footnotes omitted)); Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3, 7 (1998) ("Everyone is entitled to commit murder in the imagination once in a while.").

221. 564 U.S. 786, 805 (2011).

222. *Id.* at 789.

223. *Id.* at 790 (quoting United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 818 (2000)).

224. *Id.* at 795-96.

225. *Id.* at 798.

226. *Id.*

to put an end to this horrible message."[227] And this mode of argument cut to the core of the free speech dangers presented in the case, namely, that "the *ideas* expressed by speech—whether it be violence, or gore, or racism—and not its objective effects, may be the real reason for governmental proscription."[228]

In many of the cases surveyed in the previous sections, judges, juries, prosecutors, and law enforcement officers were extremely uncomfortable with, if not outright disgusted by, the sexual desires laid bare before them: teenagers experimenting with their sexuality, adults discussing their violent or pedophilic fantasies, parents simultaneously raising kids while daring to have a sex life. And in these circumstances, it is the ire and disgust—and not the "objective effects"—that veer legal decision-making away from free speech and due process commitments. Judicial opinions and prosecutors' arguments detail parties' criminal, cringeworthy, and taboo sexual desires as a way to justify carving out sexuality and the Internet from other realms of potentially harmful human activities within law's purview.[229]

A core message from First Amendment jurisprudence is that the development and expression of ideas, no matter how uncomfortable they might make us, are entitled to protection, notwithstanding the evolution of communicative technologies.[230] It is true that, unlike

227. *Id.* at 799.

228. *Id.*

229. This assumes that the speech at issue here would not fall within the relatively high bar for establishing obscenity. I acknowledge, though, that obscenity law can and has been manipulated to target minority sexual desires. *See* Elizabeth M. Glazer, Essay, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1380, 1385 (2008) (arguing generally that obscenity laws have discriminated against homosexuals).

This is not the only area of contentious speech in which courts have deviated from the free speech principles outlined in this section. *See, e.g.*, Buchhandler-Raphael, *supra* note 122, at 1669-70 (surveying decisions, such as *United States v. Mehanna*, 735 F.3d 32 (1st Cir. 2013), that criminalize online discussions of jihadist literature); Charis E. Kubrin & Erik Nielson, *Rap on Trial*, 4 RACE & JUST. 185, 187 (2014) (documenting the use of rap lyrics to show defendants' guilt); Eugene Volokh, *Gruesome Speech*, 100 CORNELL L. REV. 901, 946 (2015) (describing cases upholding bans on images of aborted fetuses because they "'caused or could cause psychological harm' to children" (quoting Saint Johns Church in the Wilderness v. Scott, 296 P.3d 273, 284 (Col. App. 2012))).

230. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 885 (1997); Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2054 (2004) ("The rise and adoption of a technology—like motion picture technology—changes our ideas about what art is, what communication is, what identity is, what appearing 'in public' means, and so on.").

readers and authors of books, the individuals in the cases surveyed above are using Internet-enabled devices to explore fantasies in real time with another person. From a First Amendment standpoint, however, this marked increase in interactivity is not dispositive. For example, although the video games at issue in *Brown* "enable[d] participation in the violent action," the Court observed that "all literature is interactive.... 'Literature when it is successful draws the reader into the story, makes him identify with the characters ... [and] experience their joys and sufferings as the reader's own.'"[231] The interactive nature of video games did not require that they be treated as qualitatively different, let alone removed from the reach of strict scrutiny.[232] In the virtual reality context, Professor Marc Blitz has similarly observed that "[a] virtual world we construct from our imagination should be no less protected than a drawing or animation we create to give more vivid form to a dream sequence, or a journal entry we use to reflect upon and revise our thoughts."[233]

It may be difficult to appreciate the continuities between Internet communications and more traditional media, not just due to the increased interactivity of fantasy, but also due to fantasy's increased externalization. Even though a sexually charged book like *Lolita*[234] or *Fifty Shades of Grey*[235] might provoke and indulge a reader's fantasies, those fantasies often play out in the reader's mind, beyond the reach of third-party surveillance. In the Internet context, by contrast, fantasy often takes the form of written text, captured on the user's hard drive and stored on third-party servers.[236] Several First Amendment and privacy scholars have observed, however,

231. *Brown*, 564 U.S. at 798 (quoting Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)).

232. *See* Balkin, *supra* note 230, at 2056 ("[G]ames, particularly massively multiplayer games and virtual worlds, have creative and interactive features that, in some ways, make them even more like speech than motion pictures.").

233. Blitz, *supra* note 202, at 1149 (arguing that certain acts, including "virtual joyrides and sexual encounters ... should often count as First Amendment activity in virtual reality even if they are not First Amendment 'speech' in the real world"); *see also id.* at 1208 ("Such interactivity, considered by itself, provides no reason to eliminate or weaken the protection that virtual encounters receive.").

234. NABOKOV, *supra* note 21.

235. JAMES, *supra* note 22.

236. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 389 (2008) (explaining that through computers and electronic technologies, "[w]e are creating ... a record of our intellectual activities—a close proxy for our thoughts—in unprecedented ways").

that monitoring, recording, or restricting externalized manifestations of thought and imagination can severely chill cognitive processes at the core of free speech.[237] Neil Richards, for example, has persuasively linked free speech with the value of "intellectual privacy."[238] As Richards notes, there is a "fundamental need for privacy surrounding an individual's intellectual explorations," even if those explorations take place on social media platforms or are recorded on a third-party server.[239]

Nonetheless, courts have repeatedly lumped together interactive texts with conduct that might imperil the well-being of young children, sexually exploit teenagers, or pose real dangers to women's health and safety.[240] As the law is increasingly presented with digitized evidence of individuals' intimate lives, the law has struggled to view the data trails of fantasy as precisely that—external recordings of mental processes and not damning proof of the scenarios described. With respect to the Ninth Circuit's decision in *Curtin*, discussed above,[241] Professor Richards drives home this point powerfully:

> Reading even disturbing incest stories does not necessarily make a person a child molester any more than owning a copy of *Natural Born Killers* makes one a serial killer. While there may certainly be a correlation between the reading or watching of such materials and criminal intent, such a link is tenuous at best.[242]

For sure, the risks and consequences of communication vary across mediums,[243] and the broad reach and relative permanency of

237. *See, e.g.*, Blitz, *supra* note 202, at 1189; Richards, *supra* note 236, at 389 ("Surveillance or interference can warp the integrity of our freedom of thought and can skew the way we think, with clear repercussions for the content of our subsequent speech and writing."); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 123 (2007) ("The ability to keep personal papers and records of associational ties private is a central First Amendment value.").

238. Richards, *supra* note 236, at 417.

239. *Id.*

240. *See supra* Part II.

241. *See supra* notes 170-76 and accompanying text.

242. Richards, *supra* note 236, at 442 (footnote omitted).

243. Nevertheless, I am skeptical that it merits the diverging legal consequences in the online and offline realms. For example, the federal crime of using the Internet to entice a minor to engage in illegal sexual activity carries a ten-year statutory minimum sentence, even

Internet communications are certainly relevant considerations when designing legal regulations.[244] But again, it is these harms that must drive legal intervention and not "common sense," moral intuitions about the underlying ideas and desires.[245]

On the issue of harms, *Brown* and the more recent decision in *United States v. Alvarez* emphasize that the government really must link prohibitions on expression to some real-world demonstration of harm to others—the objective effects must be real.[246] In *Brown*, California argued that it did not need to show a "direct causal link" between violent video games and harms to minors, and that it could instead make a "predictive judgment that such a link exists, based on competing psychological studies."[247] The Court rejected this argument on the grounds that "ambiguous proof" would not suffice.[248] The studies cited by California showed "at best some correlation between exposure to violent entertainment and miniscule real-world effects" on children's aggressive behavior, and they did not sufficiently distinguish video games from other violent

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if the attempt is unsuccessful and involves no coercion. *See* 18 U.S.C. § 2422(b) (2012). If the defendant were actually to succeed in having consensual sex with a minor, the resulting statutory rape crimes would typically yield a much lighter sentence. *See* CHARLES PATRICK EWING, JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 200-01 (2011).

244. Marc Blitz, pulling from work by Frederick Schauer, draws a useful distinction between the First Amendment's "coverage" of virtual spaces—whether it applies at all—and its level of "protection"—the range of government interventions that it will permit. *See* Blitz, *supra* note 202, at 1191 (quoting FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 89 (1982)). The government may have powerful reasons for regulating certain types of speech—for example, defamation or threats—but this is a different question from whether the expression at issue is protected "speech" at all.

245. *See id.* at 1175 (arguing that virtual experiences should not be denied "First Amendment protection unless there is powerful evidence that its effects on us are significantly different (and more potentially harmful) than other creative activity"); *id.* at 1226 ("[P]rivate visits to fantastic virtual landscapes will—in rare cases—be fair game for government regulators not because of their alleged worthlessness, but because they do damage or have substantial social consequence."); Volokh, *supra* note 229, at 932 ("[I]t's human nature to think the worst of behavior we dislike, and predict various harmful effects that we wouldn't have predicted as to behavior we like.").

246. United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 800 (2011); *see* Volokh, *supra* note 229, at 930 ("But even under the secondary effects approach, the government must indeed provide sufficient evidence that speech with this particular content actually causes the asserted harms, and does so to an unusual degree.").

247. *Brown*, 564 U.S. at 799.

248. *Id.* at 800.

media.[249] The law at issue accordingly punished the sale of a broad category of speech that was both wildly overinclusive, when compared to the demonstrated risk of harm, and wildly underinclusive when compared to the range of other media that also explored gruesome violence.[250]

In *Alvarez*, the Court similarly emphasized that speech could not be proscribed solely due to its widely perceived moral failings.[251] The Court struck down a statute prohibiting lying about receiving a Congressional Medal of Honor.[252] The fact that such lies might often lack perceived social value was not enough to justify the statute without some additional showing of deception, coercion, reliance, or related material harm.[253]

Although it might be argued that the Court's laxer protections for sexual as opposed to violent speech might justify punishing sexual fantasy,[254] even the highly punitive area of child pornography law draws distinctions between the virtual and the real—the First Amendment protects the former and categorically excludes the latter.[255] In *Ashcroft v. Free Speech Coalition*, the Court struck down the Child Pornography Prevention Act of 1996, which banned the possession and distribution of child pornography that did not contain *actual* minors, but instead used adults who looked like minors or realistic computer-generated images of children.[256] While reaffirming Congress's power to prohibit pornography containing

249. *Id.*

250. *Id.* at 802-05.

251. *Alvarez*, 132 S. Ct. at 2546.

252. *Id.* at 2542-43.

253. *Id.* at 2545, 2547-48 ("Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."); *see also id.* at 2555 (Breyer, J., concurring) ("[I]n virtually all these instances [in which lies can be prohibited,] limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.").

254. *See generally* Kaplan, *supra* note 35, at 99-115 (summarizing and rejecting arguments for treating sexual speech categorically differently than violent speech).

255. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 239-40, 258 (2002) (striking down a ban on "virtual" child pornography).

256. *Id.*

actual minors, the Court also reaffirmed a number of useful principles for shielding such "virtual child pornography" under the First Amendment.[257]

First, even highly objectionable content can trigger considerable free speech interests.[258] According to the Court, "[b]oth themes—teenage sexual activity and the sexual abuse of children—have inspired countless literary works,"[259] including *Romeo and Juliet*[260] and the movies *Traffic*[261] and *American Beauty*.[262] Second, no children were even arguably harmed in the production of this content,[263] and it was insufficient for the government to argue that it might "whet[ ] the [sexual] appetites of pedophiles."[264] The Court further noted that "Congress may pass valid laws to protect children from abuse .... The prospect of crime, however, by itself does not justify laws suppressing protected speech."[265] Instead, the First Amendment demanded some reasonably proximate harm to flow from the speech—"contingent and indirect" harms are insufficient.[266] Third, the Court rejected the argument that, because it was difficult to distinguish between real and virtual child pornography, the government needed to be empowered to prosecute both.[267] In other words, even though it may be difficult to separate out the virtual from the real, and possession of the virtual may provide a potential proxy for possession of the real, the First Amendment required the government to tease apart expression that did and did not pose some direct harm to third parties.[268]

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257. *Id.* at 245-46.

258. *Id.* at 245 ("It is also well established that speech may not be prohibited because it concerns subjects offending our sensibilities.").

259. *Id.* at 246-47.

260. WILLIAM SHAKESPEARE, ROMEO AND JULIET.

261. TRAFFIC (Universal Pictures 2000).

262. AMERICAN BEAUTY (DreamWorks Pictures 1999).

263. *Ashcroft*, 535 U.S. at 249-50 ("*Ferber* upheld a prohibition on the distribution and sale of child pornography, as well as its production, because these acts were 'intrinsically related' to the sexual abuse of children." (quoting New York v. Ferber, 458 U.S. 747, 759 (1982))).

264. *Id.* at 253.

265. *Id.* at 245; *see also id.* at 253 ("The government may not prohibit speech because it increases the chance an unlawful act will be committed 'at some indefinite future time.'" (quoting Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam))).

266. *Id.* at 250 ("The harm does not necessarily follow from the speech, but depends upon some unquantified potential for subsequent criminal acts.").

267. *Id.* at 254-55 ("This analysis turns the First Amendment upside down.").

268. *See id.*

The practice of punishing online fantasy runs afoul of these principles.[269] Although the actions surveyed above do not expressly prohibit speech in the way that the statutes did in *Brown*, *Alvarez*, and *Ashcroft*, the same concerns are raised by state actors' failure to meaningfully scrutinize parties' actions for evidence of the feared harm. Although there are certainly concerns and risks about Internet behavior's disinhibiting effect and actual spillover into criminal behavior, this, as in *Brown*, is often highly speculative and sometimes—for example in the child custody context—in tension with other evidence before the court. Courts, juries, and law enforcement repeatedly conflate fantasy with harm, with little acknowledgment of the potential for punishment to deter valuable—even if also uncomfortable or objectionable—expressive activity. As introduced in Part I and discussed further below, there is potential social and psychological value in providing safe space to explore taboo sexual fantasies, and the false conflation of desire and harm produces government action that is wildly overinclusive with respect to protecting minors from harm, and wildly underinclusive with respect to social contexts in which individuals explore taboo desires and fantasy.[270]

Legal actors frequently lose sight of the fact that often no one actually has been harmed by the defendant/aggrieved party's conduct; for example, a substantial number of the chat room sex offender cases involve solely virtual—not actual—minors.[271] Law enforcement justifies its use of virtual minors/adult decoys by emphasizing the difficulty of investigating sexual abuse and the importance of ensuring that virtual pedophiles do not become actual sex offenders.[272] This is, however, precisely the type of fantasy-as-proxy justification that the Court rejected in *Ashcroft*.[273] Even in the face of difficult, blurry line drawing, the government cannot simply

269. In the wake of *Ashcroft*, some courts arguably have still punished virtual child pornography through generally applicable obscenity laws. *See* Bryan Kim-Butler, *Fiction, Culture and Pedophilia: Fantasy and the First Amendment After* United States v. Whorley, 34 COLUM. J.L. & ARTS 545, 548-49 (2011).

270. *See supra* Part I.

271. *See supra* Part II.C.

272. *See supra* notes 169-72 and accompanying text.

273. *See* Hessick, *supra* note 36, at 884 ("Even if some—or many—of those who possess child pornography also abuse children, we ought not punish all possessors for such abuse without actually proving that they have committed a contact offense.").

throw up its hands and speculate about some future fantasy spillover.[274] As observed by one court in the relatively early days of Internet law, "[w]hile new technology such as the Internet may complicate analysis and may sometimes require new or modified laws, it does not in this instance qualitatively change the analysis under the statute or under the First Amendment."[275]

Nonetheless, courts facing a prosecution of purported sexual fantasy have repeatedly sidelined First Amendment concerns. For example, in *Maloney v. State*, the Texas Court of Criminal Appeals upheld a statute providing that "an accused cannot defend against an online solicitation of a minor charge by asserting that he was engaged in a fantasy."[276] It rejected defendant's argument that the statute prohibited constitutionally protected fantasy and restricted freedom of expression and thought:

> [T]his case presents circumstances in which the legitimate goal of the statute far exceeds any potential unlawful applications. The prevention of sexual exploitation and abuse of children addressed by the Texas online solicitation of a minor statute constitutes a government objective of surpassing importance.... *[T]he incidence of the State seeking to prosecute two consenting adults engaging in online role playing or "fantasy" would likely be exceedingly low*.... [W]e have been given no basis to believe that prosecutions of consenting adults engaging in role-playing would amount to any more than a "tiny fraction" of all prosecutions under the statute.[277]

This reasoning, and its casual dismissal of online "fantasy," is highly troubling. First, its core assumption—that the government would

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274. *See Ex parte* Lo, 424 S.W.3d 10, 19 (Tex. Crim. App. 2013) ("[A] ban upon constitutionally protected speech may not be upheld on the theory that 'law enforcement is hard,' and the State may not punish speech simply because that speech increases the chance that 'a pervert' might commit an illegal act 'at some indefinite future time.'" (footnote omitted) (first quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 254 (2002), then quoting Hess v. Indiana, 414 U.S. 105, 108 (1973) (per curiam))).

275. United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995) (footnote omitted), *aff'd sub nom*. United States v. Alkhabaz, 104 F.3d 1492 (6th Cir. 1997).

276. 294 S.W.3d 613, 626 (Tex. Ct. App. 2009).

277. *Id.* at 628 (emphasis added) (citations omitted); *see also* United States v. Dwinells, 508 F.3d 63, 70-71 (1st Cir. 2007) ("But there is no realistic danger that section 2422(b), as we have interpreted it, criminalizes protected speech.").

rarely, if ever, go after adults engaging in fantasy—is flatly incorrect. As Part II demonstrated, many people have been punished harshly for engaging in sexual fantasies when no minor was ever involved, let alone harmed.[278] Second, it is not enough to simply point to a concern for protecting minors to justify criminalizing sexual role-playing. As *Ashcroft* and *Brown* emphasize, the government has a duty to tailor its efforts to protect minors to actions that are demonstrably linked to real-world harms, even if the speech at issue is taboo, offensive, or disgusting to many observers.[279] The *Maloney* court had faith that the government would not intrude on legitimate expression.[280] But there is no reason to believe anyone in the decision-making chain—law enforcement, prosecutor, judge, or jury—will do the difficult, but crucial, work of (1) identifying the actual harms posed by the conduct at issue, (2) recognizing the potential value of speech they dislike, and (3) disentangling questions of speech and harm from panicked, misleading discourses of online sexual predators.

B. Social Science and Sexual Fantasy

Aside from free speech commitments, there are strong psychological and cultural reasons not to conflate interactive fantasy with conduct that harms actual people.[281] A substantial body of social psychology literature shows a more sympathetic, and at least more complicated, story about explorations of fantasy and desire online.

It is important to clarify the purpose of looking to social science here, particularly in light of the long history of the legal system using social science to criminalize and harshly punish sexual

278. *See supra* notes 155-98 and accompanying text.

279. *See* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 804-05 (2011); *Ashcroft*, 535 U.S. at 250-51. Indeed, in *Ashcroft*, the district court upheld the Child Pornography Prevention Act on the ground that it was highly unlikely that any adaptation of sexual works like *Romeo and Juliet* would be prosecuted. 535 U.S. at 242-43.

280. *See Maloney*, 294 S.W.3d at 628.

281. *See, e.g.*, WRIGHT, *supra* note 202, at 149 ("Sexuality and sexual fantasies are replete with instances of curiosity, desire, testing of boundaries, fears, guilt, excitement, and moral calculations. Whether it involves marriage partners of 40 years or a young adult with many sexual partners, there are many cases in which an individual *does not* always act on their sexual feelings.").

practices—such as homosexuality—that are now routinely understood as healthy.[282] This questionable use of social science continues even in the contemporary decisions canvassed above; recall that family law judges have denied parents custody based upon outdated psychiatric classification of BDSM desires.[283] Accordingly, I am wary of using social science in order to make any bold "truth" claims about the nature of sexuality or sexual fantasy to conclude whether Internet-mediated fantasy is fundamentally healthy.

The studies surveyed below, however, can serve a more modest purpose of complicating or pushing back against "common sense" about the Internet and sexuality, which sees only the potential for harm. The existing literature cannot show—nor does it purport to show—that exploring sexual fantasy online is an unmitigated "good" or sideline the potential for addiction, disinhibition, and social isolation that can indeed coincide with extensive Internet use.[284] But it can push back against the intuition that those engaging in taboo sexual fantasy are inherently "bad" or "dangerous" people and that the legal system should not care about the chilling effects of policing Internet sexuality. Even though the Internet has been shown to facilitate a range of antisocial behaviors,[285] it has also been shown to provide a range of benefits to individuals developing or coming to grip with their sexualities.[286] Just as the First Amendment does not protect speech because it is inherently "good," but instead because "bad" (that is, hateful, violent, indecent) speech is often a part of

282. *See supra* Part II.

283. *See supra* note 74 and accompanying text.

284. *See, e.g.*, SHERRY TURKLE, ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER 11-13 (2011); Adam N. Joinson, *Disinhibition and the Internet*, *in* PSYCHOLOGY AND THE INTERNET: INTRAPERSONAL, INTERPERSONAL, AND TRANSPERSONAL IMPLICATIONS 75, 75-76 (Jayne Gackenbach ed., 2d ed. 2007); Daria J. Kuss et al., *Internet Addiction in Students: Prevalence and Risk Factors*, 29 COMPUTERS HUM. BEHAV. 959, 959-60 (2013).

285. *See, e.g.*, TURKLE, *supra* note 284, at 154-57; Saul Levmore & Martha C. Nussbaum, *Introduction* to THE OFFENSIVE INTERNET: SPEECH, PRIVACY, AND REPUTATION 1, 2-5 (Saul Levmore & Martha C. Nussbaum eds., 2010) (introducing a series of essays discussing how speech on the internet "harasses, bullies, threatens, defames, invades privacy, and inflicts reputational damage as well as emotional distress").

286. *See* TURKLE, *supra* note 284, at 151-53.

social practices we value,[287] there is a risk that demonizing abhorrent sexual fantasies will disrupt valuable identity practices.

A number of studies have shown that the Internet can help individuals explore and clarify their desires in ways not otherwise available in their physical community.[288] Much of this literature has focused on LGBT youth and young adults, who have used the Internet as a central component of their "coming out" process.[289] Through exploring chat rooms, blogs, discussion forums, and pornographic websites, LGBT youth are able to gain exposure to sexual practices usually unavailable outside of urban cores,[290] learn the "sexual scripts" employed by LGBT adults,[291] and ultimately make decisions about whether to take their desires offline.[292]

Although LGBT people particularly may benefit from such self-discovery, this interest potentially extends to a broader range of sexual desires.[293] For example, often missing from discussions of sexting is the potential for such activities to serve as a relatively empowering venue for teenagers to experiment sexually. Amy Hasinoff's work has shown that teenage girls, in particular, can exert agency and autonomy in digital spaces that they often lack in physical ones.[294] Again, this is not to deny the considerable risks of

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287. *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 4 (2016) ("[T]he Supreme Court has recognized some First Amendment protection for the *speech process*, and not merely the expressive end product.").

288. *See, e.g.*, Daneback & Ross, *supra* note 56, at 126-27; Ross, *supra* note 6, at 344-45.

289. *See, e.g.*, Lynne Hillier & Lyn Harrison, *Building Realities Less Limited than Their Own: Young People Practising Same-Sex Attraction on the Internet*, 10 SEXUALITIES 82, 84-86 (2007).

290. *See* Chris Brickell, *Sexuality, Power and the Sociology of the Internet*, 60 CURRENT SOC. 28, 31-32 (2012); McKenna et al., *supra* note 17, at 302; Nuno Nodin et al., *Sexual Use of the Internet: Perceived Impact on MSM's Views of Self and Others*, 16 NEW MEDIA & SOC'Y 719, 720-21 (2014).

291. *See* Pingel et al., *supra* note 7, at 459-60, 471-72 (concluding that Internet scripts "offer[ ] [youth] an opportunity to explore their sexuality"); Ross, *supra* note 6, at 344; Allen B. Thomas et al., *Coming Out Online: Interpretation of Young Men's Stories*, SEXUALITY RES. & SOC. POL'Y, June 2007, at 5, 11.

292. Brickell, *supra* note 290, at 31-32; DeHaan et al., *supra* note 10, at 431; R.J. Maratea & Philip R. Kavanaugh, *Deviant Identity in Online Contexts: New Directives in the Study of a Classic Concept*, 6 SOC. COMPASS 102, 106-07 (2012) ("[T]he Internet becomes a vehicle to realize 'authentic' identities, which can be particularly important for people who do not participate in subcultures, scenes, or groups in a face-to-face manner." (citations omitted)).

293. *See generally* OGI OGAS & SAI GADDAM, A BILLION WICKED THOUGHTS: WHAT THE INTERNET TELLS US ABOUT SEXUAL RELATIONSHIPS (2012).

294. *See* HASINOFF, *supra* note 38, at 157-59; *see also* Trevor Scott Milford, *Revisiting*

coercion and exploitation online or off, but there is a potentially overlooked set of benefits.

Two scholars have observed that the Internet has brought about a "sexual revolution, particularly for disenfranchised groups."[295] People can educate themselves about interests they would not feel comfortable discussing in their physical communities,[296] indulge those interests within (seemingly) low risk online environments,[297] and, again, decide whether to pursue them further. And this *decision* is one key takeaway from this scholarship—many people who engage in Internet-mediated fantasies do not pursue their interests further,[298] either because they realized it was ultimately not for them or because the self-contained Internet fantasy is fulfilling or satisfying in and of itself.[299] The Internet can certainly be a stepping-stone toward a full embrace of a particular sexual identity, but it can also be a stepping-stone away from an identity or set of practices that ultimately are not a match.

Relatedly, the Internet is not only a stepping-stone toward or away from a particular marginalized sexual identity; it can also provide a safety valve for sexual practices that individuals have

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Cyberfeminism: Theory as a Tool for Understanding Young Women's Experiences, *in* eGIRLS, eCITIZENS 65 (Jane Bailey & Valerie Steeves eds., 2015) ("Despite the plethora of constraints and risks articulated in mainstream discourses on gender and virtual expression, girls can also experience agency and liberation through online self-disclosure."); Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex-Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51, 92 (2014) ("Other teenage girls, however, may be embracing electronic media as [a] place to display their bodies—in various shapes and sizes—as a form of teen sex-positivity.").

295. Daneback & Ross, *supra* note 56, at 121, 128.

296. Brian Simpson, *Identity Manipulation in Cyberspace as a Leisure Option: Play and the Exploration of Self*, 14 INFO. & COMM. TECH. L. 115, 119 (2005).

297. *See* Daneback & Ross, *supra* note 56, at 131 (noting, for example, that people can discuss their desires online without having to actually speak); Richard L. Gilbert et al., *Sexuality in the 3D Internet and Its Relationship to Real-Life Sexuality*, 2 PSYCHOL. & SEXUALITY 107, 108 (2011) ("Individuals have the ability to explore their sexuality without the risk of sexually transmitted disease, pregnancy, physical harm or societal judgment.").

298. *See* Brickell, *supra* note 290, at 32; Hillier & Harrison, *supra* note 289, at 92; Nodin et al., *supra* note 290, at 724-25, 730.

299. Brandon Andrew Robinson & David A. Moskowitz, *The Eroticism of Internet Cruising as a Self-Contained Behaviour: A Multivariate Analysis of Men Seeking Men Demographics and Getting Off Online*, 15 CULTURE HEALTH & SEXUALITY 555, 562, 565-66 (2013) (finding that many men found posting ads and subsequent online exchanges to be erotic in and of itself).

no intention of ever acting out offline.[300] Particularly, where the sexual fantasy is criminal, violent, or might unduly disrupt a person's day-to-day life, several researchers have observed that the Internet can serve as an outlet or coping mechanism.[301] For example, self-identified heterosexual men have reported satisfaction from being able to explore same-sex desires solely within the confines of an online environment.[302] A substantial number of men and women not only report that they have explored bondage, submission, and rape fantasies online, but also that they have little desire to pursue those fantasies in their physical sex lives.[303] Individuals with a sexual interest in teenagers or even younger children report using the Internet as a way to cope with these desires.[304] Accessing sexually explicit content is often tightly associated with sexual violence and the social subordination of women.[305] Some studies have instead shown an inverse relationship between sexual content and sexual violence—for example, sexual assault rates have declined over the past thirty years notwithstanding an explosion in available pornography.[306] Some scholars have

300. *See* Daneback & Ross, *supra* note 56, at 126, 130-31 (explaining that Internet sex can be an outlet for stress and curiosity about sexual activities people would not pursue offline); Gilbert et al., *supra* note 297, at 118 (finding that the results of a study about sexual explorations in Second Life "indicated that participants viewed their sexuality in the two realms as largely independent."); McKenna et al., *supra* note 17, at 309.

301. *See, e.g.*, Declaration of Park Dietz at 6-7, United States v. Valle, 301 F.R.D. 53 (S.D.N.Y. 2014) (No. 12-CR-00847), ECF No. 181; *see also* Daneback & Ross, *supra* note 56, at 127-28 (concluding that the vast majority of sexual Internet use is unproblematic); Ross, *supra* note 6, at 343 (observing that the Internet allows people to experiment with perversion without being perverse).

302. Robinson & Moskowitz, *supra* note 299, at 563-64.

303. *See* OGAS & GADDAM, *supra* note 293, at 114, 207-11; Christian C. Joyal et al., *What Exactly Is an Unusual Sexual Fantasy?*, 12 J. SEXUAL MED. 328, 338-39 (2015).

304. *See* David L. Riegel, Letter to the Editor, *Effects on Boy-Attracted Pedosexual Males of Viewing Boy Erotica*, 33 ARCHIVES SEXUAL BEHAV. 321, 322 (2004) ("Respondents who wrote comments almost invariably stated that such viewing actually sublimated and redirected their sexual energies away from attempted or actual sexual contact with boys and, as a result, they felt less rather than more inclined to seek out boys for sexual gratification."). This should not be read as an endorsement for pornography involving *real* children, given the high risk of sexual exploitation associated with its production.

305. *See* MACKINNON, *supra* note 213, at 20-23; Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 9-17 (1985).

306. *See* William A. Fisher et al., *Pornography, Sex Crime, and Paraphilia*, 15 CURRENT PSYCHIATRY REP., no. 362, 2013, at 3. ("[I]n the context of very widespread and unfettered access to essentially all types of sexually explicit materials, rates of sex crime, indexed in a variety of ways, have not increased and may have decreased."); Hessick, *supra* note 36, at 877

credited this counterintuitive trend to a "catharsis" effect of experiencing sexual violence virtually.[307]

Lastly, the Internet can provide access to a *community* of other people sharing similar sexual desires.[308] Possessing and working through nonnormative sexual desires can be extremely isolating, and the Internet can provide opportunities to connect with other people and obtain some emotional support for desires with which friends, family, or coworkers may be unlikely to sympathize.[309] In the words of one scholar, "for some people, internet communication may be not a luxury, but a lifeline."[310] Much of the literature on this notion of online sexual communities has focused on LGBT persons, and particularly LGBT teens seeking support both from other teens struggling with similar sexuality issues and from LGBT adults who have experience working through those issues.[311] But online sexual communities are not limited to LGBT interests, and exist for a tremendous range of desires. For example, BDSM websites like

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& nn.93-96 (collecting studies).

307. Fisher, *supra* note 306, at 6 (reviewing studies).

308. GRAY, *supra* note 62, at 121-40; Harper et al., *supra* note 50, at 302-04; Hill, *supra* note 56, at 28-32.

309. *See* JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX 148 (2002) ("On the Web, the lonely can get fast companionship; the clueless, compassionate, nonmoralistic support and crucial practical help."); Hill, *supra* note 56, at 24, 28, 39-42 ("I realized, yes, this was a whole group of transvestites and transexuals talking to each other."(quoting Interview with Miggi, study participant)); Hillier & Harrison, *supra* note 289, at 90 ("I have not been exposed to gay people through my family and seeing there are gays all over the world really takes the loneliness away. I'm not the only one, there are others like me and they are living a great life." (quoting Interview with Amber, 21, study participant)); Pingel et al., *supra* note 7, at 462 ("It made me feel a little less alone." (quoting Interview with Peter, 24, white, single, study participant)); Ross, *supra* note 6, at 349 ("For those with the greatest sexual isolation, cybersex may constitute a community of support and identification, support in the sense that it provides them with a sense that they are not alone."); Thomas et al., *supra* note 291, at 8 ("[T]hat's the first time I think I felt that it wasn't a defect. That there's a lot of people out there who feel the same way that I do."(quoting Interview with Eric, study participant)).

310. Ross, *supra* note 6, at 349.

311. *See* Hillier & Harrison, *supra* note 289, at 94 ("[M]any young people turn to the internet to look for role models and information about gay culture and to try out their same-sex attractions among similar others in an internet-based community."); Simpson, *supra* note 296, at 122 (noting that "virtual peers" online are not necessarily the same age); Thomas et al., *supra* note 291, at 9 ("Online friends served as a source of strength and support, particularly for those whose living situations (with parents or in rural communities or both) limited their opportunity to meet gay men offline.").

FetLife.com, mentioned in the custody law context,[312] emphasize the importance of community and acceptance of members as they are.[313] Professor Margo Kaplan has also written about websites dedicated to adults with pedophilic desires seeking to help each other cope with pedophilia and avoid actual sexual contact with children.[314]

Particularly when the sexual desire is deeply stigmatized, feelings of social isolation can make it more likely that an individual will act upon those desires, and the Internet can provide some needed intervention for individuals lacking or fearing other potential social outlets.[315] This is not to deny the potential for online communities to reinforce unhealthy behavioral patterns; online communities formed around sexual taboos also can provide, at the very least in the short-term, a network of emotional support not otherwise available.[316] Online communities are wildly varied in form, and, like all forms of communities, hold the potential to both foster and inhibit the emotional and physical well-being of their members.[317]

The practice of harshly punishing sexual fantasy online deters people from using the Internet to figure out their desires and connect with potential communities of support. Most directly, it sends a strong signal to adults both to steer clear of any sexual conversations with minors and to be highly skeptical that anyone claiming to be a minor actually is one. This wedge between teenagers and adults online[318] may be particularly troubling for LGBT youth, who

312. *See supra* notes 92-93 and accompanying text.

313. *See* FETLIFE, http://Fetlife.com [https://perma.cc/Y832-53N9] (quoting user "shy_ but_sassy" as saying "Great website. I have been checking out facebook but I have to keep it somewhat neutral as vanilla family and friends are there. Its [sic] great to have somewhere to go where you don't have to hide anything"); *see also* Maratea & Kavanaugh, *supra* note 292, at 104 (describing the "emergence of collegial online communities" akin to "deviant subcultures" through which participants can "dispense advice, provide empathy, and network" regarding similar taboo sexual interests, such as zoophilia).

314. *See* Kaplan, *supra* note 202, at 77-78.

315. *See id.* at 95 ("Experts and individuals living with pedophilia agree that isolation and lack of support is a serious obstacle for the prevention of sexual abuse.").

316. *See* Maratea & Kavanaugh, *supra* note 292, at 104-05 (collecting studies observing behavioral reinforcement patterns in pro-anorexia and self-harm websites).

317. *See, e.g.*, Keith Durkin et al., *Pathological Internet Communities: A New Direction for Sexual Deviance Research in a Post Modern Era*, 26 SOC. SPECTRUM 595, 603 (2006) (emphasizing the need for more research about the catharsis/support versus reinforcement effects of online sexual communities).

318. *See generally* Fairfield, *supra* note 48 (describing efforts to segregate adults and minors online).

have repeatedly reported valuable mentoring relationships online,[319] and who are significantly more likely to have had sexually themed conversations with adults.[320]

This wedge, however, is unlikely to actually keep teenagers and adults apart; teenagers often do not turn away in the face of age restrictions—they simply lie, vitiating any certainty that eighteen and older forums are safe spaces for *adults* to have sexually charged conversations.[321] Moreover, given the potential for anyone's online sex life to be used as evidence of negative moral fitness or as predisposition for a range of criminal activity, the legal system dissuades candor in otherwise potentially supportive online forums. The result of all these effects is to strip sexual encounters in the digital realm of one key component of both intimacy and community: trust.[322] Adults should be wary of communicating with minors, minors should be wary of adults expressing an interest in their lives, and everyone should be wary about their online sex life making its way into the courtroom.

C. Distorting the Data

It might be argued that, even if there is some potential upside to allowing individuals space to explore their sexual desires online, this benefit is heavily outweighed by the pronounced risk of sexual harm and predation. Although law enforcement certainly should take allegations and suspicions of sexual violence seriously—and

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319. *See supra* notes 310-11 and accompanying text.

320. *See generally* Michele L. Ybarra & Kimberly J. Mitchell, *A National Study of Lesbian, Gay, Bisexual (LGB), and Non-LGB Youth Sexual Behavior Online and In-Person*, 45 ARCHIVES SEXUAL BEHAV. 1352, 1361 (2016).

321. *See* Pingel et al., *supra* note 7, at 461 ("Rather than age acting as a barrier, young men reveled in the freedom that accompanied lying about one's age."); *id.* at 474 ("The lack of appropriate spaces meant that some YGM [young gay men] entered sites nominally reserved for those over eighteen."). Misrepresenting age in order to access a computer network potentially raises additional legal concerns under the Computer Fraud and Abuse Act. *See* United States v. Nosal, 676 F.3d 854, 856, 858, 862-64 (9th Cir. 2012) (en banc).

322. *See* HASINOFF, *supra* note 38, at 79 ("[PSA ads] cast[ ]men as skilled predators and position[ ] girls as innocent dupes who need to educate and empower themselves to change their online interactions. In other words, they need to learn to distrust online relationships."); Simpson, *supra* note 296, at 123 (noting that trust is an important aspect of using the Internet for identity management); Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 590, 613, 616, 621 (2015).

there are well-documented examples of police and school administrators failing to do so—several scholars have emphasized that the "vexing problem of Internet predation"[323] is statistically a much smaller threat to minors' health and safety than suggested by legal, political, and cultural discourse.[324] The goal here is not to deny that Internet-mediated sexual assault is a real problem; the goal is to show that legal responses have poorly mapped onto the real-world dynamics of the problem.

For example, Professor Allegra McLeod has criticized the distorted statistical risks around online sexual predators; for instance, only 3 percent of reported sexual abuse conforms to the "stranger danger" narrative dominating legal discussions of child sexual abuse.[325] This distortion has channeled resources away from the vast majority of sex crimes, which are perpetrated by family and community members.[326] Indeed, she emphasized that there was no meaningful correlation between the target of Internet sting operations and actual child abuse.[327]

Similarly, Professor Margo Kaplan has noted that the dominant narrative of sexual predators falsely equates sexual assault with sexual desires. For example, she noted that most sexual assaults against children have *not* been perpetrated by persons with pedophilia.[328] Furthermore, when Internet sex-related arrests involved an actual child (as opposed to an undercover officer), most involved consensual, statutory rape scenarios, and not the abduction and coerced sex scenarios commonly envisioned in law and popular culture.[329] Teenagers' age and experience certainly create an important

323. United States v. Dwinells, 508 F.3d 63, 65 (1st Cir. 2007).

324. Janis Wolak et al., *Online Predators: Myth Versus Reality*, 25 NEW ENG. J. PUB. POL'Y, no. 6, 2013, at 1, 2 ("Overall, our research about Internet-initiated sex crimes indicates that the stereotype of the Internet 'predator' is largely inaccurate."); Ybarra & Mitchell, *supra* note 320, at 1368 ("Health professionals should be encouraged that the Internet is not fostering exploitative relationships for the vast majority of youth.").

325. McLeod, *supra* note 12, at 1568-71; *accord* Hessick, *supra* note 36, at 887 ("One of the most pervasive misperceptions about child sex abuse is that it is a crime perpetrated by strangers.").

326. McLeod, *supra* note 12, at 1573.

327. *Id.*

328. Kaplan, *supra* note 202, at 87 ("Indeed, the majority of child sex offenders do not have a strong or dominant sexual interest in children.").

329. EWING, *supra* note 243, at 200 (explaining that data on Internet-mediated sex abuse suggest that it is primarily in the form of statutory rape); Wolak et al., *supra* note 324, at 1-2.

set of vulnerabilities, but they are rarely coerced or duped into traumatic sexual encounters as presumed by the stranger danger myth.[330]

Scholars danah boyd[331] and Amy Hasinoff both have similarly pushed back against the false narrative surrounding social media and sexuality, particularly in relation to teenagers.[332] boyd's work has involved extensive interviews with teenagers about how and why they spend so much time on social media,[333] and Hasinoff's work looks specifically at the rise of teen sexting and the accompanying moral panic.[334] Rather than framing teenagers' Internet and social media use solely in terms of sexual innocence and potential victimization, each has shown the complexity of the relationship between youth and emerging technology. Teenagers use networked technologies in order to make connections with both old and new friends and to explore identities and desires (whether related to sexuality or the newest One Direction single) in ways they are often unable to in the midst of increasingly structured, overscheduled physical lives.[335] In sustaining connections with offline friends, exploring new or existing intimate relationships, and complying with the demands of families and schools, teenagers do indeed struggle to maintain boundaries between their various online social spheres.[336] But research shows that the collapse of these spheres—for example, through bullying or dissemination of sexted images—is not a result of the Internet's inherent danger but instead a byproduct of teenagers' attempted assertions of social and sexual agency.[337]

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330. *See* BOYD, *supra* note 48, at 113 ("Even in cases in which the perpetrator was not someone that the victim initially knew, the perpetrator rarely deceived the teen.... Surprisingly, many teens were more deceptive about their age, intentionally portraying themselves as older.").

331. *See supra* note 48 (explaining capitalization).

332. *See generally* BOYD, *supra* note 48; HASINOFF, *supra* note 38.

333. *See* BOYD, *supra* note 48, at 84-93.

334. *See* HASINOFF, *supra* note 38, at 1-3.

335. *See* BOYD, *supra* note 48, at 84-93 ("When teens engage with networked media, they're trying to take control of their lives and their relationship to society."); *see also* HASINOFF, *supra* note 38, at 118 (suggesting that teenagers use sexting as a way "to maintain an intimate sexual copresence that reaffirms attraction and affection while the two partners are physically apart").

336. *See* BOYD, *supra* note 48, at 49-53, 59-61; HASINOFF, *supra* note 38, at 135 ("[Y]oung people often view privacy in terms of maintaining control over who (friends, parents, or teachers, for example) has access to their information.").

337. *See, e.g.*, BOYD, *supra* note 48, at 98 ("Most youth aren't turning to social media

Teenagers are certainly at risk for sexual exploitation online, but these online risks often track the profile of teenagers at risk offline, such as LGBT teens or teens struggling with drugs and alcohol.[338] Accordingly, approaching teen sexuality online solely through the lenses of criminalization and victimization misconceives and harshly punishes teenagers' imperfect attempts at boundary management and sexual agency, while distracting from teenagers' most pressing actual vulnerabilities.[339]

Many published legal opinions may indeed document instances of adult men seeking to sexually engage with "minors," but again these arrests and convictions are fueled by chat room sting operations in all fifty states[340] and a large corps of volunteer citizen decoys.[341] For example, sixteen published decisions mention sting operations in an AOL chat room labeled "I Love Older Men."[342] In exactly zero of

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because they can't resist the lure of technology. They're responding to a social world in which adults watch and curtail their practices and activities, justifying their protectionism as being necessary for safety."); *see also* HASINOFF, *supra* note 38, at 12 ("The problem with assuming that all girls who sext are passive victims is that it becomes difficult to recognize or understand girls' choices.... [T]he dominant discourse about girls tend to entirely erase their capacity for agency in sexual decisions."); Simpson, *supra* note 296, at 120-21 (observing that children use the Internet to actively explore their identities and transgress expected norms of gender, sexual preference, and childhood more generally).

338. *See* BOYD, *supra* note 48, at 113 ("[T]eens who are struggling in everyday life also engage in problematic encounters online."); *see also* JANIS WOLAK ET AL., CRIMES AGAINST CHILDREN RES. CTR., TRENDS IN LAW ENFORCEMENT RESPONSES TO TECHNOLOGY-FACILITATED CHILD SEXUAL EXPLOITATION CRIMES: THE THIRD NATIONAL JUVENILE ONLINE VICTIMIZATION STUDY 4 (2012), http://www.unh.edu/ccrc/pdf/CV268_Trends%20in%20LE%20Response%20Bulletin_4-13-12.pdf [https://perma.cc/2MBH-S4GH]; Wolak et al., *supra* note 324, at 5-7.

339. *See* BOYD, *supra* note 48, at 114 ("What's needed to combat grooming, deception, and abduction rape is very different than what's needed to address the underlying issues that motivate a young person to engage in risky sexual encounters."); HASINOFF, *supra* note 38, at 12 ("Pushing past the attractively simple explanations that sexualization in media, or raging hormones, or low self-esteem causes sexting opens up spaces for thinking about the complexity of girls' agency."); *id.* at 105 ("At the very least, the existing data suggest that the vast majority of teenage sexts are shared consensually among peers.... Nonetheless, many online safety campaigns and advertisements dramatize the relatively unlikely scenario of a middle-aged online predator viewing a girl's private sexual image.").

340. Press Release, Dep't of Justice, Department of Justice Announces Internet Crimes Against Children Task Forces in All 50 States (Oct. 15, 2007), https://www.justice.gov/archive/opa/pr/2007/October/07_ojp_061.html [https://perma.cc/V2Q9-RTHU].

341. *See, e.g.*, United States v. Joseph, 542 F.3d 13, 14 (2d Cir. 2008), *abrogated by* United States v. Ferguson, 676 F.3d 260 (2d Cir. 2011); PERVERTED JUSTICE, http://www.perverted-justice.com [https://perma.cc/P8G3-X85K] (website of volunteer decoys for child-sex stings).

342. *See Joseph*, 542 F.3d at 14; United States v. Gagliardi, 506 F.3d 140, 143 (2d Cir. 2007); United States v. Dwinells, 508 F.3d 63, 65, 66 & n.1 (1st Cir. 2007) ("[D]efendant-

these cases did the prosecution begin with an adult speaking with an actual minor—every one involved a police officer or adult volunteer pretending to be a teenage girl. This is not to say that these chat rooms never contain adults who have previously molested children;[343] it is to say, again, that it is rare for adults to meet a victim for the first time in these forums.[344] And, again, it is even rarer for minors to be unwittingly duped or deceived into having unwanted sexual experiences with adult strangers.[345] It is, however, common for adults to meet other adults pretending to be children, devoting many hours of their lives to extended, extremely graphic conversations about illegal sexual acts.

The practice of punishing sexual fantasy ultimately creates a dangerous feedback loop. The more that individuals are sent to jail or registered as sex offenders or restricted access to their families, the more it appears that the Internet is a "hotbed of illegal activity"[346] in which huge numbers of men lure, pursue, and sexually assault women and children they would never otherwise meet.[347]

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appellant Matthew Dwinells engaged in extensive Internet contact with *three different correspondents thought to be teenage girls*. In fact, the 'girls' were histrionic law enforcement officers." (emphasis added)); United States v. Brand, 467 F.3d 179, 183 (2d Cir. 2006); United States v. Morton, 364 F.3d 1300, 1303 (11th Cir. 2004) (defendant contacted four different police officers in AOL chat room), *vacated*, 543 U.S. 1136 (2005), *reinstated*, 144 Fed. App'x 804 (2005); United States v. Johnson, 376 F.3d 689, 690 (7th Cir. 2004); United States v. Raney, 342 F.3d 551, 553 (7th Cir. 2003); United States v. Mitchell, 353 F.3d 552, 554 (7th Cir. 2003); United States v. Root, 296 F.3d 1222, 1224 (11th Cir. 2002); Liedke v. United States, No. 08 CR 653, 2015 WL 4111561, at *1 (S.D.N.Y. June 1, 2015); United States v. DeWoody, 226 F. Supp. 2d 956, 956 (N.D. Ill. 2002); People v. Crabtree, 88 Cal. Rptr. 3d 41, 50 (Ct. App. 2009); People v. Dean, No. B192974, 2008 WL 376226, at *2 (Cal. Ct. App. Feb. 13, 2008); Sirota v. State, 95 So. 3d 313, 315 (Fla. Dist. Ct. App. 2012); State v. Bower, No. 2005CA00015, 2005 WL 1983966, at *1 (Ohio Ct. App. Aug. 15, 2005); State v. Lawhun, No. 15-03-02, 2003 WL 21904798, at *2 (Ohio Ct. App. Aug. 11, 2003); *cf.* United States v. D'Amelio, 565 Fed. App'x 61, 62 (2d Cir. 2014) ("The Government's evidence showed that he initiated contact with 'Mary,' who told him that she was a 12-year-old girl, in a chatroom entitled 'I Love Much Older Men.'"); United States v. Chriswell, 401 F.3d 459, 460 (6th Cir. 2005) (involving Yahoo! chat room "I Love Older Men").

343. *See, e.g.*, *Crabtree*, 88 Cal. Rptr. 3d at 48-53 (discussing defendant's various charges, including offenses against both minors he knew previously and adult decoys he contacted in chat rooms).

344. *See, e.g.*, Richard Tewksbury & Jill Levenson, *When Evidence Is Ignored: Residential Restrictions for Sex Offenders*, CORRECTIONS TODAY, Dec. 2007, at 55-56.

345. Wolak et al., *supra* note 324, at 2.

346. *Brand*, 467 F.3d at 202.

347. For example, in a study conducted by danah boyd and her colleagues, 93 percent of parents were concerned about their children being harmed by strangers they met, even

And this misperception about online predators fuels a range of investigatory strategies designed to root out any exploration of online fantasy that plays into the dominant, stranger danger narrative. For example, between 2000 and 2006, arrests of offenders who solicited undercover investigators posing as youths increased 381 percent, while the number of arrests involving actual youths remained largely unchanged; indeed, in 2006, 87 percent of solicitation arrests involved undercover investigators.[348] Moreover, 89 percent of arrestees in these undercover arrests ended up registered as sex offenders.[349] The problem with chat room stings is not that the legal system should be unconcerned about the spillover from fantasy into the real world; the problem is that the government is actively trying to push fantasy into the real world based upon a mistaken belief that this spillover is inevitable. And this mistaken belief about the risks of online predation has itself spilled over into a legal system profoundly suspicious of and often outright hostile to uncomfortable manifestations of Internet-mediated sexuality. Families are split up, children are arrested, and many lives are effectively destroyed by a widely held, and deeply mistaken, conflation of sexual desire and harm.[350]

Which raises the question: What end does the practice of punishing sexual fantasy serve? Allegra McLeod suggests that the legal system's harsh treatment of sex offenders serves a scapegoating function for our anxieties about sexual desire and harm.[351] By

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though only 1 percent reported that this had actually happened to their children. *See* BOYD, *supra* note 48, at 109; *see also* WRIGHT, *supra* note 202, at 139 (describing Internet sex stings as "crime-control theater" which "generate[s] the appearance but not the fact of crime control" (quoting Timothy Griffin & Monica K. Miller, *Child Abduction, AMBER Alert, and Crime Control Theater*, 33 CRIM. JUST. REV. 159, 167 (2008))).

348. Wolak et al., *supra* note 324, at 4. After 2006, law enforcement activity shifted somewhat away from chat room stings and towards less time-intensive child pornography crimes. *See* WOLAK ET AL., *supra* note 338, at 2.

349. Kimberly J. Mitchell et al., *Investigators Using the Internet to Apprehend Sex Offenders: Findings from the Second National Juvenile Online Victimization Study*, 13 POLICE PRAC. & RES. 267, 275 (2015). Moreover, only 4 percent of these arrestees had any previous history of sex offending against a minor. *Id.* at 274 tbl.2.

350. *See supra* notes 2-4 and accompanying text.

351. McLeod, *supra* note 12, at 1562-63; *see also* EMILY HOROWITZ, PROTECTING OUR KIDS? HOW SEX OFFENDER LAWS ARE FAILING US, at xi (2015) ("We punish sex offenders so harshly, I believe, because it makes us feel as if we are helping children and protecting them, allowing us to avoid considering the ugly and depressing facts of widespread (and growing) problems of child poverty, child homelessness, and child hunger.").

focusing time, money, and labor on eradicating online stranger danger and rounding up a sizeable, yet manageable, population of sexual predators, we can claim to meaningfully address sexual harm and the eroticization of sexual violence.[352] These efforts, however, falsely hold out the promise of an easy fix—they target a tiny portion of actual instances of sexual abuse and single out only a tiny sliver of individuals who fantasize about sexual violence[353] or sex with minors.[354]

The cases surveyed in Part II highlight the unraveling, unsustainable nature of scapegoating taboo sexual desire. As more and more of our culture's sexual desires are recorded online and in digital media, it becomes increasingly difficult to claim that only a small minority of criminals are turned on by "immoral" sexual acts, or to equate that desire with a meaningful risk of harmful sexual activity. Sexual fantasy is becoming increasingly transparent across several areas of our legal system and making its way into the capillaries of procedure and evidence. It is deeply important for lawyers, lawmakers, law enforcement, scholars, and jurists to engage more directly and honestly with the uncomfortable realities of sexual fantasy and its ambiguous connection to real-world violence and coercion.

Punishing sexual fantasy no more than marginally protects children from the pursuits of online strangers, while at the same time it both diverts attention away from common sources of sexual abuse and limits opportunities for young people to explore and

352. *See* McLeod, *supra* note 12, at 1620-21.

353. *See, e.g.*, Joyal et al., *supra* note 303, at 338 ("Among women, it was found that [sexual fantasy] of being dominated, being spanked or whipped, being tied up, and being forced to have sex were reported by 30%-60%, confirming several studies conducted largely with college students."); *id.* at 334 tbl.2.

354. For example, the drafters of the AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013), rejected proposals to add "hebephilia" as a new psychiatric condition to describe adult sexual attraction to adolescents. *See* Allen J. Frances, *DSM 5 Rejects 'Hebephilia' Except for the Fine Print*, PSYCHOL. TODAY (May 3, 2012), http://www.psychologytoday.com/blog/dsm5-in-distress/201205/dsm-5-rejects-hebephilia-except-the-fine-print [https://perma.cc/4ZUH-4R2G]. Numerous psychiatric studies have shown that adult male attraction to postpubescent teenagers (in other words, those often involved in chat room stings) is extremely common and has long been understood as psychologically normal, even if actual sex with minors is justifiably criminal. *See* OGAS & GADDAM, *supra* note 293, at 16-17 (observing that the most frequent sex-related search terms involve an interest in "youth"); Karen Franklin, *Hebephilia: Quintessence of Diagnostic Pretextuality*, 28 BEHAV. SCI. & LAW 751, 754-61 (2010); Kaplan, *supra* note 202, at 88.

define their own identities.[355] Moreover, many of the vulnerable individuals ostensibly protected by the practices of punishing sexual fantasy—teenagers, women, and sexual minorities—are frequently the very individuals whose sexual desires offend the common sense of judges, juries, and law enforcement. The end result is therefore not "protection" of innocent children in any meaningful sense but instead a channeling of vulnerable youth away from the seemingly corrupting influences of both alternative perspectives on sexuality and their own nascent sexual agency.[356] By punishing sexual fantasy, the legal system goes to great lengths to prevent adults from communicating with other people's children, disfavors parents who might challenge conventional sexual morality, and sanctions youth for exploring their own sexuality while still under the authority of parents, schools, and the state.

CONCLUDING THOUGHTS AND THE PATH FORWARD

There is no silver bullet solution that will solve the problems outlined above. The problems surrounding punishing sexual fantasy involve multiple actors, in multiple settings, touching on multiple bodies of law. Indeed, the survey above cannot possibly encompass all potential areas of law that may be forced to confront recorded evidence of sexual fantasy and desire—employment, public benefits, and probation immediately come to mind as additional areas of potential friction. What is needed instead—and what this Article has primarily aimed to provide—is an awareness of the common misperceptions that link together these diverse practices: conflation of desire with intent; undue faith in "common sense"; and regulating sex and technology based upon fear and not empirical data.

What to do with this awareness will ultimately be contextual and may or may not be strictly "legal" in form. My hope is that when confronted with evidence of sexual fantasy, legal actors will reorient

355. *See supra* Part III.B.

356. *See* Brian Simpson, *From Family First to the FBI: Children, Ideology, and Cyberspace*, 15 INFO. & COMM. TECH. L. 239, 241 (2006) ("[T]he issue of children's capacity in Cyberspace becomes intertwined with many 'adult' agendas connected to what is considered to be the 'proper' family, the role of women and children in society and notions of 'appropriate' morality."); *see also id.* at 254 ("[T]he Internet is constructed as a place which is a threat to family life.").

themselves away from a knee-jerk embrace of common sense and towards evidentiary and procedural strategies that respect the complexities of sexual identity and desire. Neil Richards has similarly observed that in order to adequately protect intellectual privacy, it is not just a matter of adjusting First Amendment doctrine; instead, it is a matter of recognizing free speech values that make their way through various capillaries of legal process—evidentiary rules, discovery limits, privileges, standards of reviews, and expert testimony.[357] Accordingly, I conclude by suggesting an assemblage of potential reforms, aimed at rooting out and addressing some of the cultural and institutional structures that further the practices of punishing sexual fantasy.

The cases surveyed above show a few relatively straightforward ways to disrupt the reinforcing logic of "common sense." First, when cases involving sexual fantasy make it to trial, expert testimony might provide an effective, if imperfect,[358] counterbalance to the "common sense" surrounding the dangers of the Internet and sex.[359] In the "Cannibal Cop" case, for example, the trial judge denied a motion to exclude expert testimony about violent sexual fantasy and online sexual subcultures.[360] Nonetheless, the defense opted against putting these experts on the stand, the prosecution repeatedly asked jurors to invoke common sense, and they obliged with a guilty verdict.[361] In Valle's posttrial briefing, however, he included a letter from forensic psychiatrist, Park Dietz, emphasizing the crucial distinctions between sexual fantasy and sexual action and the common

357. *See* Richards, *supra* note 236, at 428 ("First Amendment values are broader than doctrine; they are the goals and policies which animate it, and represent our aspirations for the kind of free society we want to live in. The answer to the problem lies in building First Amendment values ... into other legal and social structures.").

358. *See, e.g.*, Libby Adler, *Just the Facts: The Perils of Expert Testimony and Findings of Fact in Gay Rights Litigation*, 7 UNBOUND: HARV. J. LEGAL LEFT 1 (2011).

359. *See, e.g.*, United States v. Hite, 769 F.3d 1154, 1167-70 (D.C. Cir. 2014) (discussing inclusion of psychiatrist expert testimony in a "fantasy-only" defense); United States v. Gladish, 536 F.3d 646, 650-51 (7th Cir. 2008) (finding that the district court had no ground to bar a psychologist from testifying about his opinions about defendant's "character pathology" and Internet gratification); United States v. Dwinells, 508 F.3d 63, 72-74 (1st Cir. 2007) (discussing sufficiency of evidence for jury to determine whether defendant actually intended to entice minor).

360. *See* United States v. Valle, No. 12-CR-0847, 2013 WL 440687, at *8, *10 (S.D.N.Y Feb. 2, 2013).

361. *See* Johnson & Gilden, *supra* note 4, at 319-20.

use of the Internet to explore sexual fantasies.[362] Although it is impossible to know just how much this view influenced Judge Gardephe's decision to overturn the verdict, other cases involving online sexual fantasy show that defendants have benefited greatly from the introduction of expert testimony or have been imperiled by its exclusion.[363]

A related approach is to impose greater oversight of jury decision-making. Jurors appear particularly susceptible to the dangers of "common sense"—indeed they often are relied upon in fact-finding precisely *because* they are seen as a proxy for common sense.[364] But, in the realm of Internet-mediated sexuality, there is a profound disconnect between the commonsense stranger danger narratives and the realities of both sexual abuse and online sexual explorations.[365] Heavy deference to juries in this realm insulates commonsense fear and misinformation, even in the face of substantial evidence placing intent, conspiracy, or predisposition in doubt. Indeed, many of the cases outlined in Part II acknowledge the viability of a failed fantasy defense.

By contrast, the Second Circuit's recent decision in the "Cannibal Cop" case emphasizes that jurors do not have free reign to draw specious inferences from evidence of Internet fantasy, nor are they free to convict based on "some evidence" of criminal intent.[366] Although it may seem problematic for judges to reweigh evidence considered by the jury, judges appear to be more sensitive to "the line between fantasy and criminal intent" and the increasing challenge of identifying it "in the Internet age."[367] Jurors sitting in a single trial, by contrast, appear less likely to be sensitive to this increasingly important challenge and are more likely to be swayed by a sense of disgust or revulsion.[368] Greater scrutiny posttrial and on appeal may help address the dangers of overly deferring to juror common sense, as would clearer and more specific jury instructions about the need to distinguish fantasy from intent.

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362. *Id.* at 325-26.

363. *See, e.g.*, *Hite*, 769 F.3d at 1167-70; United States v. Joseph, 542 F.3d 13, 21-22 (2d Cir. 2008), *abrogated by* United States v. Ferguson, 676 F.3d 260 (2d Cir. 2011).

364. Johnson & Gilden, *supra* note 4, at 322-23.

365. *See supra* notes 42-48 and accompanying text.

366. *Valle*, 807 F.3d at 522-23.

367. *Id.* at 511.

368. *See supra* notes 144-45 and accompanying text.

In addition, certain evidentiary and discovery limits could help better contextualize sexually explicit online conversations. As statements of the party-opponent, these conversations are easily admissible at trial, but they take on a very different, and potentially quite prejudicial, meaning when transferred from the chat room to the courtroom. Most straightforwardly, it is crucial for courts to more evenly apply character propensity rules in the context of sexual fantasy—it should be far more difficult for prosecutors to make the highly questionable leap from what turns a person on to what they actually intended to do.[369] The admissibility of sexual fantasy evidence runs afoul of traditional Rule 404 justifications (that is, you should be held liable for what you actually *did* during relevant time period) with the additional concern that admitting such evidence may dissuade or chill individuals from pursuing the potentially therapeutic benefits of online fantasy.[370] As a corollary to the limited relevance and heavy prejudice of sexual fantasy evidence, discovery of an individual's online fantasy life should be tightly constrained to avoid sexual matters disconnected from the alleged misdeed at hand.[371]

Lastly, there may be some role for more explicit First Amendment protections in recognition of the concerns highlighted above. For example, Michal Buchhandler-Raphael, in her work on overcriminalizing speech, suggests allowing opportunities to challenge generally applicable law as content-based *as applied*: "When a statute punishes speech because the harms are caused by the persuasive, informative, or offensive elements of the opinions expressed, that statute should be treated as a content-based restriction on speech and therefore subject to full-fledged First Amendment scrutiny."[372] Other ways of incorporating more explicit free speech values might

369. *See* Richards, *supra* note 236, at 443 ("But evidence of fantasies should be inadmissible, as should the use of reading habits to establish motive or intent, for all of the unreliability and First Amendment reasons discussed earlier.").

370. *Cf. id.* at 442 ("The introduction of our reading habits into evidence not only makes public these private cognitive processes, but also threatens to chill others in the future from engaging in the unfettered act of reading.").

371. I acknowledge, though, that in cases like the "Cannibal Cop," the online discussions among the alleged coconspirators will need to be discoverable to show the existence of the conspiracy itself. But other images, stories, and transcripts concerning "dark fetishes" are likely to bear far less heavily on the central question of guilt/liability.

372. Buchhandler-Raphael, *supra* note 122, at 1711.

include reading a subjective intent requirement into a statute when it imposes liability for fantasy-related activities,[373] or requiring the prosecution or plaintiff to demonstrate a foreseeable likelihood of harm from these activities.[374]

Judicial intervention, however, is only a partial solution to counteracting the trend of punishing sexual fantasy. Much of the punishment occurs outside the courtroom—for example, threats of prosecution, pretrial detention, or reputational damage from negative publicity.[375] Accordingly, it is crucial to better educate law enforcement, prosecutors, and policymakers about the potential social benefits of the activities they are monitoring before disturbing the lives of people who pose little risk to others.[376] One potentially fruitful entry point for reform is the Department of Justice's Internet Crimes Against Children Task Force Program (ICAC),[377] which provides substantial funding and extensive training to a nationwide network of federal, state, and local law enforcement.[378] It is crucial that ICAC's training on investigating Internet-facilitated crimes against children incorporate some acknowledgment

373. *See, e.g.*, Elonis v. United States, 135 S. Ct. 2001, 2011-12 (2015) (imposing a subjective intent requirement on prosecutions for transmitting a threat in interstate commerce, in order to separate out innocent, accidental Internet posting from purposeful, wrongful threats).

374. *See* Buchhandler-Raphael, *supra* note 122, at 1723-28 (proposing a "substantial probability of harm" test for endangerment speech crimes). In the copyright law context, I similarly have proposed refocusing fair use defenses on both the defendant's subjective intent and the foreseeable harm from his actions, in order to better align copyright with the First Amendment. *See* Andrew Gilden, *Raw Materials and the Creative Process*, 104 GEO. L.J. 355, 399-400 (2016).

375. *See generally* Derek E. Bambauer, *Against Jawboning*, 100 MINN. L. REV. 51 (2015) (discussing formal and informal governmental pressures placed on Internet platforms and their varied dimensions of authority and compulsion).

376. I suspect that law enforcement training will in many ways respond to developments in the case law with respect to Internet-mediated sexuality. For example, after the Second Circuit's decision in *Valle*, law enforcement will need to adjust its investigatory techniques to better ensure that a defendant did in fact take steps to carry out the sexual scenarios he or she discussed online.

377. *See Program Summary*, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, http://www.ojjdp.gov/programs/progsummary.asp?pi=3 [https://perma.cc/YS94-BD7K].

378. Most of the training programs available through ICAC and its affiliates are restricted access for law enforcement only, making it difficult to assess the extent to which, if at all, any of the concerns expressed in this Article about online sexual fantasy are being conveyed to law enforcement trainees. This is a fruitful area for future research.

and respect for the speech and privacy interests of the adults and minors under investigation.

Ultimately, as digital networks become an increasingly central backbone of contemporary society, the legal system will need to reckon with the complexities of our intimate lives and the uncomfortable curiosities of the human mind. The Internet has enabled countless numbers of people to explore their horizons, inhabit ways-of-being that otherwise appeared off-limits, and make connections outside the physical, emotional, and moral constraints of their local communities. And when these online explorations have empowered individuals to proudly and openly move forward with their lives in respectable, dignified ways, the legal system has come to recognize their rights to "define and express their identity."[379] But, in respecting the public manifestations of sexual identity—regardless of sexual orientation—it is crucial to remember that a lot is going on behind the scenes. The Internet brings to the surface the inherent messiness of identity and our continued anxieties about giving each other some extra space to play.

379. Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).