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# “The Only Thing I Want is for People to Stop Seeing Me Naked”: Consent, Contracts, and Sexual Media

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## Abstract

In pornography, standard modeling contracts often require a performer to surrender rights over their public image and sexual media in perpetuity and across media. Under these contracts, performers are unable to determine who accesses, for what duration, and under what conditions, their sexual media. As a result, pornography has been described by some performers as a “life sentence”—a phrase which, if true, violates some strong intuitions we share about the importance of autonomy in sexual activity. Using the framework of “affirmative consent,” I argue that these contracts violate performers’ rights to sexual autonomy, and ought therefore to be considered objectionable. Overall, I argue that the legal regimes we create have a strong impact on people’s lives, and more important than legislating individual outcomes, the type of infrastructure we build around people’s decisions has the potential to radically empower—or disempower—those engaged in sex work.

The boundary between what we reveal and what we do not, and some control over that boundary, is among the most important attributes of our humanity.

(Thomas Nagel 2004)

After you have made pornography, it will be viewed as a part of you forever, and because it is viewed this way it will be a part of you forever.

(Lorelei Lee 2018)

I feel like people can see through my clothes. And it brings me deep shame.

(Mia Khalifa quoted in Sackur 2019)

Mia Khalifa is world-famous. At time of writing, her videos have garnered hundreds of millions of views and have caught the eyes of people from across the globe, resulting in attention that spans the gamut from mobbing by eager fans to death-threats from the terrorist organization ISIS. Her name has risen to be the second-most searched for

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on one of the leading sites featuring her content, putting her for the moment—one would think—at the very top of a multi-billion-dollar industry.

Yet Khalifa has earned only a paltry \$12,000 for her time, all of that in 2014–15, while her work continues to profit the corporation which owns it many years later. And to add insult to injury, her videos continue to result in her harassment, day-in, day-out. Even at Disneyland—where she is “hounded for photos”—she is reminded that she is an unwilling participant in the sex lives of many.

Khalifa worked in porn. Her stint was brief and unsatisfactory, and she left the industry almost immediately. Although she consented to the filming at the time, in the years since, she has developed a different perspective: “the only thing I want is for people to stop seeing me naked” (Horton 2019).

Khalifa's case appears unjust on many fronts. Most prominently, people have pointed to the issue of compensation, whereby Khalifa is denied a share of the profits that have been made from her image. Yet there is a deeper, and more troubling, injustice in the middle of Khalifa's case: Khalifa has withdrawn her consent, yet her sexual media—and, I shall argue, her sexual agency—remains under the control of others.

For many, this is the price one pays to participate in pornography. It is intrinsic to the act that one surrenders control, if not over one's physical body, at least over how one is to be perceived by the viewer. The permanent sexual objectification<sup>1</sup>—as long as freely consented to— is simply in the nature of the deed. As one performer states, “The first few people I met in the industry tried to tell me it was like a life sentence. And it does feel like that, I'm not going to lie” (Weisman 2016). The performer goes on to argue that this is not necessarily a bad thing, and for some people this may be true: their consent to feature in the sex lives of strangers remains constant throughout the course of their lives. But the association of “life sentence” and “sex” in this account ought to disturb us. In no other form of sexual activity do we believe that people ought to be bound by consent given in other times, under other circumstances.

The life-sentence nature of porn stems primarily from two factors. The first is the existence of standard modeling contracts, in which porn production companies tend to be granted “absolute worldwide and perpetual right and license.” Usually these licenses extend across media formats, “whether known now or hereafter invented.” Contracts which give production companies ownership over the sexual media of performers typically ensure perpetual license, so that the performer has no recourse for the removal of his or her image as conditions—including whether he or she consents to their consumption—change. The second factor in the lifetime duration and consumption of a performer's sexual media is the fact of the internet. Like the opening of Pandora's box, once something is placed online it is difficult to remove. For those who engage in commercial pornography, the second factor, however, is often moot. The practical matter of removing one's explicit media from the internet is a technical and legal puzzle which is currently being explored across a range of disciplines. But so long as a performer holds no license over their own image, it doesn't matter *how* one might remove access to it if one has no *right* to pursue such an option in the first place.

In this paper, I argue that contracts which permanently alienate one from one's sexual media violate a person's sexual autonomy. A person is alienated from their sexual media when they are unable to control the dissemination and consumption of that media. In particular, I'm going to focus on how standard contracts interfere with one's ability to revoke access as consent is withdrawn. I'll refer to standard pornography contracts, and other contracts that fail to provide the necessary clauses for revoking consent and controlling distribution, as *permanent contracts*.

Why focus on contracts in particular? There are two reasons for this. The first is that contracts by their very nature complicate our understanding of consent. Contracts make explicit the proposals to which one agrees, and the consequences of that agreement. However, as they make an *action* of “consent” more visible, they simultaneously obscure the *conditions* of that consent. The agreement itself is in the forefront; the circumstances of that agreement are no longer in view. Yet there are few theories of consent—perhaps, only the Hobbesian understanding<sup>2</sup>—in which conditions such as the option set play no role in our determining of consent’s legitimacy. Looking closely at the conditions of consent is therefore worthwhile. Second, I care about contract *regimes* because of the way they are interpolated with our society’s norms of consent and the conditions under which consent is given. The power structures behind the agents involved, the types of action to which consent applies, the norms behind them: all of these both undergird individual contracts and are shaped by the contract regime itself. In order to have a just society, we must focus not only on the fairness of any individual contract, but also ensure that our legal regimes—the laws and systems which distribute power—work towards equality.

I’ll make my argument in the following way. First, I will posit a right to sexual autonomy and argue for its importance across a range of sexual behaviors, including those concerning media. Then I’ll discuss how “affirmative consent” has risen as a mechanism for protecting sexual agency, an important part of sexual autonomy. I’ll discuss the role that consent’s *revocability* plays in ensuring an individual’s sexual agency and show how, when permanent contracts prevent a performer from revoking consent, this violates their sexual agency. Furthermore, I’ll point to how the existence of the contracts themselves create a regime which allows autonomy-harming practices on the part of major production companies to flourish. Finally, I’ll consider some objections and conclude.

### The right to sexual autonomy

There is no doubt that sexual mores have changed dramatically in the last hundred years, and that these changes have accelerated in the past few decades. Today, more than ever, we see sex as having an important role to play in one’s conception of the good life, and we believe that individual control over one’s sexual activity and sexuality is key to living a life of freedom and dignity. One way of expressing how we value individual liberty in the realm of sexuality is to posit a right to sexual autonomy (Anderson 2002).

Sexual autonomy is the

amalgamation of the internal states and attitudes towards sex and sexuality that a) enable us to fully realize the good of sex in human life and b) give full credence to our existence as free and rational agents. It consists of our ability to understand and face our sexual desires and romantic inclinations, including their social meaning and significance, place those in the context of our life objectives as a whole, and act on the ensuing considered sexual preferences. (Seaford 2020)

As a part of sexual autonomy so defined, we have an interest in what I term sexual agency, which is your ability to act on, and in particular communicate about, things pertaining to your sexuality. Communication is related to action in two ways.<sup>3</sup> First, some actions require communication in order to come into being. You can’t get someone else to do something without being able to describe or ask for what you want.

Second, communication is sometimes an action in its own right. In the context of sexuality, to tell someone that you are aroused by them is to act sexually, by making a sexual advance.

Some social practices systematically deprive individuals of sexual agency in this communicative sense. For instance, the mistaken belief that women practice “token resistance” (saying no when they really mean yes) damages women’s sexual agency by creating circumstances in which it is impossible to communicate accurately about one’s sexual desires or preferences (Muehlenhard and Hollabaugh 1988). Another example might be the practice of teenagers hijacking one another’s social media accounts to jokingly “come out.” When a significant proportion of a community engages in such a practice, they make it difficult for gay and lesbian teenagers to actually make important announcements about their sexuality.<sup>4</sup>

On the other hand, some practices constitute or enhance sexual agency, such as the expression of an enthusiastic “yes” during foreplay. As our practices change, so do the means and moments in which participants expect to exercise their sexual agency. For instance, sexting—or the sharing of sexually explicit images, videos, and messages—has emerged as an increasingly common cultural practice over the last 20 years, catalyzed by the rise of the smartphone (Mori et al. 2020). This has created a generational difference in sexual practices, in which adolescents and emerging adults (and the scholars who study them) are more and more likely to see the exchanging of digital sexual words and images “as a normal, even healthy aspect of sexual expression, and part of the repertoire of interpersonal sexual communication relationships” (Morelli et al. 2021). As the practice develops, ethical norms are arising which reflect how sexting impacts values such as privacy and autonomy (Burén et al. 2021; Hasinoff and Shepherd 2014). In other words, the sharing of sexually explicit media is coming to be understood as an act reflecting one’s sexual agency on the part of those who engage in it.

With this background understanding of sexual agency’s relationship to our perceived right to sexual autonomy in place, I will demonstrate that permanent pornography contracts violate the sexual agency of performers, thereby hindering their sexual autonomy. These contracts do so by preventing performers from being able to control *how* they communicate, and *with whom*, on the topic of their sexuality. To ensure performer sexual agency, the practices and institutions of commercial pornography ought to be held to the same regulative standards as other forms of sexual engagement.

### Regulating in favor of sexual agency

One helpful lens for thinking about how we implement our beliefs concerning the importance of sexual agency is to look at the concept of affirmative consent. The idea of affirmative consent has arisen in response to violations of the right to sexual autonomy, and it seeks to provide a framework through which we can endeavor to ensure that people can act in an agential capacity during sexual encounters.

Affirmative consent, as defined in one iteration, is the “affirmative, conscious, and voluntary agreement to engage in sexual activity.” In particular it “must be ongoing throughout a sexual activity and can be revoked at any time” (California Senate, 2014, Bill 967, §67386).

Affirmative consent thus has two parts. It is first the positive and open expression of consent, most often associated with “enthusiastic” consent in the language of sex-positivity. Second, it is revocable, and it is that revocability in particular which

distinguishes it from other models of consent, such as what I term “single-issue consent.” Single-issue (as in issued only once) consent requires only a single act of affirmation, and is common in commodity trading (once I agree to sell you my car, it is no longer mine) and many other forms of contracting (I cannot revoke my contractual consent without facing legal sanction). Affirmative consent, on the other hand, is not a single temporal act, but rather a state of agreement which can be exited at will.

Single-issue consent has been increasingly replaced by affirmative consent in the public regulation of sexual activity. For instance, laws concerning the punishment of marital rape undermine the once common understanding that marriage was a form of “permanent consent” to sex with one’s spouse; that is, that spouses could not be raped because consent given through the marriage contract was always in effect. In the regulation of sexual assault and sexual harassment, affirmative consent has been implemented in legislation in various states, including the Californian Senate Bill 967 quoted above, which amended the state education code to require schools whose students received financial aid to uphold an affirmative consent standard in disciplinary hearings.

Currently, pornography contracts operate on a single-issue model of consent. When the actors or actresses sign an adult modeling form, they release their rights over the media of their sexual activity. In most such “modeling” contracts, the company is granted “absolute worldwide and perpetual right and license.” Such consent is irrevocable. There is no process for performers to recall their images, prevent their further distribution, or indicate to the viewer that the consumption of the performer’s image no longer carries the performer’s consent.<sup>5</sup>

I want to briefly make the case that the concept of affirmative consent ought to apply to sexual media. With the understanding that affirmative consent is itself a contested concept, I argue that *if* one accepts affirmative consent as a standard for regulating sexual conduct, one ought to ensure that all sexual media is subject to continuous consent: that is, similarly to the way a sex act must end once consent is revoked, so must the dissemination of sexual media.

### Applying affirmative consent to pornography

Does commercial pornography count as the kind of sexual media which reflect one’s sexual agency? That is, does it communicate to others on behalf of a performer in a manner that impacts the performer’s sexual autonomy? I argue yes, and I demonstrate that this is the case by first arguing that sexual media are relevantly a type of behavior to which we think affirmative consent applies; and second, by detailing how performers experience the inability to control the consumption of their pornography as a harm to their sexual autonomy.

As I have just discussed, young people and those who research them are increasingly coming to believe that sexual media are an important part of sexual expression. While a great deal of the conversation around the exchange of sexual media, in particular the phenomenon known as “sexting,” concerns risks and harm-reduction, a substantial portion acknowledges that the distribution of such media—when consensual, relying on an “ethics based upon rights to one’s body and freedom from harm” (Setty 2019)—is a valuable expression of one’s sexual identity. Some have gone so far as to argue these behaviors are important enough, or widespread enough, that they ought to be considered “protected conduct under human rights instruments” (Gillespie 2013).

Yet the worry of harm is not overblown, for the rise of non-consensual pornography—the sharing of another's sexual media without their agreement—has made clear that this form of sexual expression can result in injury to those who engage in it. The harm has been registered as great enough to spark campaigns for legislation against the abuse of sexual media, asking for laws that create punishment and enforcement above and beyond that applied to other forms of non-consensual image sharing.<sup>6</sup> The worry over the illicit dissemination of these common forms of sexual self-expression illuminates the way that images of a sexual nature have an important social valence. The nude photograph seems more intimately connected with who we are as people, probably because it encroaches on a sphere of life—sexual behavior—in which privacy is highly valued. As Thomas Nagel writes, “The boundary between what we reveal and what we do not, and some control over that boundary, is among the most important attributes of our humanity” (Nagel 2004, 4). Privacy is in part important for the way in which it allows us to be sexually agential—that is, make key decisions about with whom and in what ways we are intimate—which is a key part of a good human life. If our sexual media are disseminated without our consent, our sexual agency is undermined, and the resulting loss of sexual autonomy will be experienced as a profound violation.

That this belief is widely accepted, and perhaps even increasing in influence, can be seen in two ways. First, we see this belief influencing legislatures in various states and countries. For instance, 46 US states and the District of Columbia now have laws prohibiting the posting of “non-consensual pornography,” making it a crime distinct from standard copyright violations. Second, this intuition seems to be spreading within American culture, and perhaps even within the culture of pornography itself. As one performer described via Twitter, there has been what she terms a “cultural shift” during her “8 years in sex work” (Aella 2020). Whereas before, content that was “leaked” (posted without a performer's consent) was considered fair game for consumption—to the point that consumers would be angry if they were thereafter charged for viewing the same image—now there is an emphasis on ensuring that the performer's consent is valid first. As the performer put it, “the leaked content of sex workers is [considered] ‘non-consensually viewed’” (Aella 2020). Similar themes have arisen in advice columns.<sup>7</sup> In at least some segments of the pornography market, the belief that consent is necessary before viewing sexual images is spreading.

Additionally, the phenomenology provided by performers also provides evidence for the usefulness of the affirmative consent model. Looking at case studies, we can see that many performers have experienced the lack of continuous consent manifest in permanent pornography contracts as a violation of their sexual agency. As described in the introduction, Mía Khalifa finds the continued consumption and dissemination of her sexually explicit media to be intrinsically violating.

When she was 21, Khalifa consented to the terms of her original contract. But that contract now holds for sexual communication to which she no longer consents. At age 26, Khalifa desperately wants people to stop viewing her videos. When asked whether fair compensation would reconcile her to their continued dissemination, she responded that, “No amount of money would make it worth it” (Horton 2019). If she could, she is quoted as saying, she would burn her videos. She does not feel as though she has control over who can access her body: “I feel like people can see through my clothes. And it brings me deep shame” (Horton 2019). The feeling of distress that comes from her experience of sexual miscommunication is accompanied by a physiological response; in one post, she laments the presence of “hourly dissociative attack[s] from

remembering hundreds of millions of people's only impression of you is solely based on the lowest, most toxic, most uncharacteristic 3 months of your life when you were 21" (Cole 2020).

Khalifa is not alone in being harmed by the kind of sexual communication enabled by these contracts. Nor, indeed, is it only the performers who view the dissemination of this media as a form of communication on the part of those featured within such media. In 1988, the actress Vanessa Williams broke new ground when she was crowned the first Black Miss America at the age of 21. It was an important accomplishment, but one that would soon be taken from her. Only a few months later, explicit pictures she had taken at age 19 were published in *Penthouse* magazine. She had been told that the photos would be used only for silhouettes, that she would be unidentifiable, and that the pictures would never leave the studio. The photographer was paid the highest sum of money *Penthouse* had ever spent on a single photoshoot, and Williams was dethroned (Latson 2015). There are many injustices in Williams' case, but one which particularly stands out is how Williams was deprived of her sexual agency. Commenting on the release of her images, Hugh Hefner, the founder of *Playboy* and the mogul behind a multimillion-dollar pornography empire, was quoted as saying that "The single victim in all of this was the young woman herself, whose right to make this decision was taken away from her. If she wanted to make this kind of statement, that would be her business, but the statement wasn't made by her" (Latson 2015). Even viewed from the perspective of a producer, Williams's inability to control the dissemination of her images was a form of involuntary sexual communication, and thus a source of damage to her sexual agency.

In sum, our intuitions regarding non-consensual pornography as well as the evidence for the importance of consent in media-based sex work indicate that not only is there something special about the realm of sex—a property which makes single-issue consent invalid—but also that sexual images share this same property. And given the relationship between sexual media and sexual agency evidenced in this belief, we have a pro tanto reason to believe that the affirmative consent model, a framework designed to facilitate sexual agency, is applicable.

### The harms of permanent contracts

So far I have argued that performers experience the dissemination and consumption of their sexual media as a violation of their sexual agency. But one might be asking: how harmful in fact *is* such a violation? If I am to make the case that these contracts are objectionable—and perhaps even therefore ought to be legislated against—I must demonstrate that they are sufficiently harmful to sexual autonomy as to necessitate their removal.

There are two distinct harms that emerge from an individual's inability to control her or his sexual communication. The first is the direct harm that comes from the undesired communication regarding, or miscommunication about, one's sexuality. Each image or video makes a statement about the person performing. Unlike in traditional acting, where the social context makes clear that these actions do not reflect the desires or preferences—or even the true actions (for instance, hitting is fake, and sex scenes are mimed)—of the actors, in pornography the producer's goal is that the actions and the desire are as real, or at least perceived as being as real, as possible. Individuals who actually believe an actor in a traditional film to be her character are understood to be deluded; in the pornography industry, there is no such general understanding. There

is rather the search for authenticity. As one performer said, “I would have so many fans come up to me at autograph signings or whatever and tell me I was their favorite porn star, because all the other girls were faking it, and I was the one they knew, man, that I was for real” (Wagoner 2012). This was not the case, but the illusion sold well: “That’s why I make the big bucks” (Wagoner 2012). Even given the general understanding that there is “faking it” in porn, viewers are searching for reflections of “reality,” evidenced by who rises to the top of the industry (an article about a famous performer in *The Cut*, a piece of ostensible journalism—not advertising copy, emphasizes “the elation she expresses when having sex” that comes as her “partners are starting to really turn her on,” a “primal giggle of pure pleasure”: Goodman 2016) and in the increasing popularity of amateur pornography. Even the heterosexual porn industry’s aversion to condom use can be attributed to the desire of the consumer that their video be “real.” The directors are clear: “Viewers, buyers, renters—they want to see raw, something raw” (Schieber 2019). Too much polishing, the use of condoms, or any indication that this is not real life is scorned by the consumer.

The impact of having repeated false statements made on one’s behalf, with all the forces of a multibillion-dollar industry pushing consumers to believe them to be true, is profoundly damaging. Khalifa describes the experience as “post-traumatic stress” (Sackur 2019). And then there comes the solicitation and the sexual advances. As Lorelei Lee describes it, “You are a performer, but the public sees no line between when you are performing and when you are not” (Lee 2018). A consumer who assumes that the performer stands by these statements, indeed even believes that the performer is still active in the industry, may wish to approach them to discuss favorite scenes or actions. In the best case this is in the spirit of appreciation and intending to compliment. However, the performer who no longer consents to the dissemination of this media will find such an approach to be unwanted sexualization—the condition of being forced to engage in a sexual context—and a violation of his or her sexual agency.

This is further exacerbated by the relationship between pornography and escorting, which is the act of selling sexual services in person. The changes in the economics of pornography since the rise of the internet have made it difficult for all but a very few top performers to survive on the income from performing in pornography alone. As a result, many have turned to escorting, advertising their services on the internet. Performers who escort can charge customers a premium for “sex with a porn star,” using their pornography as a form of promotional labor which supports a more lucrative second career. The practice, although still stigmatized, is sufficiently widespread that has impacted perceptions of performers generally. As one industry publicist states, “Now, all talent is looked at as if they are escorts, and those who aren’t have to come out and say so” (Bernstein 2019). As a result, performers expect regular solicitations for sex. While this may be beneficial to those who seek to make a living from escorting, for those who wish to leave the industry, such solicitation can be a disturbing experience. Solicitation for sex places performers in an unanticipated and undesired sexual conversation. It may also be frightening to be approached in a non-sexual context by someone who exhibits some sense of entitlement over one’s body, believing that they should have—given their ability to pay—the option to have sex with you.

The second harm of permanent pornography contracts is not only how they violate sexual agency over that particular piece of communication, but also how they decrease one’s ability to be sexually autonomous in the future. As another performer describes it, once she perceived that she was—in her words—“owned” by her production company, she spiraled. She “lost control of herself and her identity, eventually signing agreements

without fully understanding them” (Popescu 2016). When one feels that one has already lost control over one’s sexual agency, one’s ability to communicate about who they are and what they want sexually, it diminishes one’s capacity for agential action in the future: why bother fighting to maintain one’s agency when it already seems gone? These contracts can contribute to a feeling on the part of the performer that sexual autonomy, once surrendered, is forever gone.

### How the permanent contract regime influences industry

Thus far, I have discussed how the permanence of the contract relates to sexual autonomy generally. It is enough to argue that within the sphere of sexuality, given the importance that we place on sexual agency, the “permanence” of permanent pornography contracts violate an important right, and therefore ought to be considered objectionable. But life is not lived in the abstract, and although the theoretical perspective may suffice for my argument, the feminist tradition of looking at the world as embodied in space and time necessitates that we further explore how permanent pornography contracts interact with—and indeed, shape—the contemporary pornography industry. The permanent contract has given rise to a number of industry practices which exacerbate the harms to sexual agency experienced by performers.

For instance, sexual agency is further harmed by the way that pornography producers leverage permanent pornography contracts to communicate to consumers on “behalf” of the performers. One common practice is the creation of “star” websites controlled by production companies, and facilitated by permanent license rights, which exist to make consumers believe that the performer is still modeling. Bang Bros, the company behind Khalifa’s videos, owns a webpage that uses Khalifa’s name as its URL address and writes updates in her first-person voice. Crissy Moran, a performer who left the industry in 2006, described her experience with her webpage as such:

I don’t even know when the contract ended or when it ends. The only thing I remember is the wording on the contract; if I were to die, what would happen to the site. From what I recall, it said that they would still continue to run the website. I remember when I read it I thought, “Wow, they’re going to own me. They’re going to keep the site up forever, as long as it keeps bringing them money—and it doesn’t cost them anything to keep it up.” (Popescu 2016)

In 2016, over a decade after she initially sought to have the videos removed and the content taken down, the website was still running, charging fees and posting updates that claimed to be from “the real Crissy.” In this instance, Moran had signed a contract which enabled her to receive royalties from the website, but she refused to accept payment, ripping up the checks as they arrived. There was no amount of money that could compensate her for the harm to her sexual agency, and the resulting feeling that she no longer owned herself.

Tube sites further exacerbate this harm. There are over 3,800 videos on Pornhub tagged with Khalifa’s name, most replications of her original 12 videos. Industry veterans cited in the *Washington Post* claim these videos exist in order to dupe consumers into thinking that Khalifa is still performing (Horton 2019). Despite a publicity campaign in which Khalifa emphasized the withdrawal of her consent, she remains a top-searched name. Indeed, the more she protests and the more she engages with the public sphere in an effort to prevent viewing, the higher her view count grows (a fact which her

former production company duplicitously leverages, arguing that she only protests in order to earn more money from increased recognition: Cole 2020). Under such circumstances, neither Khalifa nor Moran can truly communicate to consumers of these videos that they are no longer performing, nor can these women take effective actions to positively communicate what their new sexual desires and preferences are (in particular, if those new desires are to not “be naked on the internet” at all). The videos are out there in the ether, communicating for them, supplemented by the nefarious acts of the greedy production companies. Because her sexual media continue to be hosted on numerous pornography tube sites, Khalifa says, “It feels like being stuck in quicksand ... There are still millions of people who think I’ve done nothing but porn for the past five years” (Horton 2019).

### Objections

In this final section, I will raise and address two important objections to the argument from sexual autonomy, one practical, concerning what is legislable, and one theoretical, regarding how my proposal might impact our understanding of freedom of contract. I will also address a potential worry, concerning how my view might interact with performer activism.

On the practical side, one might counter that it is very difficult to define sexual media—at the very least, that it is more difficult to define than sexual contact. However, for all the notoriety that Justice Stewart’s statement, “I know it when I see it,” brought to pornography, regulations of sexually explicit media have never required philosophically rigorous definitions to become applicable. Our laws make distinctions continuously, across a range of subjects. We have standards for what needs an 18+ rating and we can sanction people for showing lewd and lascivious images to children or in the public square. H. L. A. Hart pointed out that legal terms often have what he terms a “penumbra” of debatable cases, resulting from the “fuzzy boundaries” of any particular concept (Hart 1958). In his famous example, consider a law which bans vehicles from a local park. It is obvious that such a rule prohibits cars. But what about bikes? Electric scooters? Planes? Parade carts? There is a natural indeterminacy which requires legal interpretation and precedent. Pornography has a similar indeterminacy, and like every other legal concept will also have a penumbra of cases which will require legal precedent and interpretation.

One working definition of pornography is that of Michael S. Rea (2001). His definition has two parts, one stating what it is for something to be *treated* as pornography and the other part stating what it is for something to *be* pornography.

Part 1: *x* is *used (or treated) as pornography* by a person *S* =<sub>DF</sub> (i) *x* is a token of some sort of communicative material (picture, paragraph, phone call, performance, etc.), (ii) *S* desires to be sexually aroused or gratified by the communicative content of *x*, (iii) if *S* believes that the communicative content of *x* is intended to foster intimacy between *S* and the subject(s) of *x*, that belief is not among *S*’s reasons for attending to *x*’s content, and (iv) if *S*’s desire to be sexually aroused or gratified by the communicative content of *x* were no longer among *S*’s reasons for attending to that content, *S* would have at most a weak desire to attend to *x*’s content.

Part 2: *x* is pornography =<sub>DF</sub> it is reasonable to believe that *x* will be used (or treated) as pornography by most of the audience for which it was produced. (Rea 2001)

Rea's definition was constructed nearly 20 years ago, and what might strike the contemporary reader is that Rea is careful to exclude from his definition of pornography any sexual media that are intended to foster intimacy. Today, with the internet a much more prevalent force and the emergence of non-consensual pornography, it is unlikely that we would make such an exception. However, what is clear from such a definition is that there are a number of works which we would exclude from counting as pornography (or in my preferred term, sexual media). These include films and pieces of artwork which—although they may be sexually explicit—are neither intended nor received as being for the purpose of arousal. Of course, as just described, there will be a penumbra of hard cases which will require adjudication; however, paradigmatic forms of pornography can be identified and their associated modeling contracts regulated.

One of the most difficult areas to negotiate will be determining the relationship between nudity and sexual communication. Nudity in films is at least one important place where there is no social understanding that the actor is “acting”: this is his or her real body. As our society has come to value consent more, this is something with which producers of films are slowly coming to terms. For instance, Michaela Coel—in her ground-breaking television series, *I May Destroy You*—hired an intimacy coordinator to assist the actors with navigating scenes containing nudity and simulated sex. As part of that practice, Coel hired a body double for actress Weruche Opia, who was uncomfortable with nudity (Castillo 2020). The identity of the body double has been, as best as I can tell, protected, which serves to ensure that the scenes remain attributed to the character instead of Opia or the body double performer.

Determining when the visual display of a naked body constitutes sexual communication on the part of the performer will be difficult. Practically, it may require iterations of various cases, as culture, the courts, and philosophers puzzle through the various types of nudity, media, and contracts. But there is a case to be made that in making initial laws, we ought to lean in favor of the most important rights. Generally, we prioritize one's right to sexual autonomy and dignity over one's right to artistic liberty. For instance, you cannot sexually assault someone for the purposes of making art. It seems fitting that this priority be reflected in law; when in doubt, the power over the communication ought to revert to the performer.

So those are the practical concerns. But in addition, one might have concerns regarding the theoretical implications of banning permanent pornography contracts. One could argue that, in attempting to secure one's right to sexual autonomy, my proposition infringes on other rights we consider fundamental, particularly that of freedom of contract. But freedom of contract is only one right among many—one whose application has long been contentious—and must be balanced with other rights. For instance, we do not allow one to contract oneself into bondage,<sup>8</sup> prioritizing the right of self-ownership above the right to freedom of contract.

Debra Satz argues that we prohibit contracts of bondage, such as indentured servitude and outright slavery, for two reasons. First, she claims, we have an interest in basic agency, which requires that people have a certain capacity and arena in which to make choices and decisions. Moreover, when such agency is denied, it is not only that the subject cannot make decisions, but that this decisional power is given to another person, creating a relationship of domination. Second, she worries that bondage even of a short duration or in a limited sphere decreases one's capacity for autonomy in the future:

I draw on some empirical evidence to suggest that the capacity for autonomy is, as John Stuart Mill put it, “in most natures a very tender plant, easily killed, not only

by hostile influences, but by mere want of sustenance; and in the majority of young persons it speedily dies away if the occupations to which their position in life has devoted them, and the society into which it has thrown them, are not favorable to keeping that higher capacity in exercise". (Satz 2010)

In a democratic society, these two particular interests—the exercise of agency and a future capacity for autonomy—are enough to require limits on the freedom to contract.

As I have demonstrated above, permanent pornography contracts violate both of these interests, in sexual agency and in future capacity for autonomy. When these interests are violated, performers experience harm to their sexual autonomy. Affirmative consent, a concept which has evolved as a response to violations of sexual agency, can provide a useful framework for thinking about how contracts ought to be structured so as to avoid or mitigate these harms. Not only must consent to dissemination of sexual media be explicit, as contracts serve to ensure, but it also must be revocable. This entails ensuring that performers retain some degree of licensing rights over their images, and that licensing of varying durations contains the appropriate escape clauses.

Finally, one might wonder where this argument finds itself in relation to contemporary activism concerning sex work. One could worry that this argument, which treats sex as a special realm of activity to which certain norms and regulations apply, is in opposition to the activist stance that "sex work is work" just like any other work.<sup>9</sup> However, I believe this concern does not apply, for two reasons.

First, conceptually speaking, if "sex work is work" just like any other work, then the idea that it might have specific rules relevant to its domain should be considered *prima facie* reasonable. This is because it would align sex work with all other forms of employment, all of which are subject to domain-specific rules. These rules may be government mandated, that is, externally imposed, or they may be the result of industry self-regulation, meaning that they are adopted by businesses but not codified in law.<sup>10</sup> Jobs that are difficult or dangerous may have even more in the way of regulations to protect workers, consumers, and the environment, such as weight-lifting requirements for firefighters or, as mandated in some European countries, a course of personal therapy for therapists. Whether mandated by the state or voluntarily adopted by the industry, what is crucial to all of these regulations is that they are particular to the position in question. It is appropriate to the nature of the work, and indeed entails respect for the worker, to ensure that the applicable standards befit the object of the endeavor.

Second, and more importantly, pornography modeling is already treated *as* work. When writing about sex work, it is important to disaggregate the various forms. The production of pornography, unlike prostitution or escorting, is a legal industry in many countries, including much of Europe and North America. It is subject to a number of regulations, most obviously concerning age limits on performers and, in certain countries, laws regarding allowable sex acts or mandating condom use.<sup>11</sup> Not all of these regulations are externally imposed; some production companies agree to adopt industry best practices, including required testing for sexually transmitted diseases. The regulations tend to concern performer safety, but neglect what this article has argued is an equally important right: performer autonomy.

Given that pornography is already understood to be work, and that it is already regulated, unless those arguing for the "sex work is work" position are actually advocating for fewer legal protections for these workers—a stance which I have not seen—my proposal that sexual autonomy plays an important role in determining appropriate modeling contracts fits well within the remit of contemporary activism. Indeed, it

provides a specific goal for activists concerned for the well-being of those engaged in this form of sex work. Advocates for pornography performers ought to argue for changes to the legal regime which prioritize the interests of these performers. Given that the current regime not only deprives performers of ownership over their own sexual media, but also facilitates exploitative industry practices, the banning of these harmful contracts may be an important step in improving working conditions for performers.<sup>12</sup>

## Conclusion

In the above I have argued that permanent pornography contracts are objectionable because of the way they hinder the performers' right to sexual autonomy. This occurs in two ways: first, the individual contract creates harm insofar as it fails to apply the concept of affirmative consent to an act of sexual communication on behalf of the performer. Second, the contract regime creates fundamental power imbalances between the performer and the production company. Objections to the argument from sexual autonomy—that it is difficult to circumscribe the boundaries of the concept “sexual media” and that people have a right to freedom of contract—do not undermine the overarching claim: *ceteris paribus*, we should ensure that power remains in the hands of the performers.

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## Notes

- 1 Objectification, like any concept in feminist discourse, is controversial. There are three ways to think about the relationship between objectification and sexual media. The first wave of anti-pornography campaigners considered pornography to be the paradigmatic example of objectification, seeing it as the reduction of women to their body parts, making them a tool to serve men's purposes—a practice which, these scholars argued, reifies the objectification of women as a class and their instrumentalization in other areas of life. This point of view is best exemplified by Robin Morgan's statement that “Pornography is the theory, and rape the practice” (Morgan 1978). Some in the “sex positivity” movement responded by contesting the claim that pornography constitutes objectification. These theorists argued that for some women pornography could be empowering or even liberating (Chancer 2000). A third perspective, articulated by Martha Nussbaum, agrees with the anti-pornography feminists regarding porn's objectifying nature, but disputes the understanding that all objectification is bad (Nussbaum 1995). In this paper, I understand sexually explicit media to be a form of objectification—as they involve the creation of an external object which is importantly connected to one's sexuality (more on this below)—but along Nussbaumian lines, reserve judgment over whether objectification is intrinsically wrong. For my purposes, it only matters that it makes sense for some performers to experience porn as objectification, and find that objectification distressing.
- 2 Hobbes (in)famously argues that there is no distinction between “apparent” consent and “meaningful” consent. Consent given even in the face of death was true consent. For a further exploration of these ideas, see “Hobbes' Legacy in Choice Feminism” in Hirschmann and Wright (2012)
- 3 I highlight communication as it has long been a central concept in scholarly discussion of pornography. Anti-pornography feminists have argued both that pornography (1) “lies” about women's sexuality, communicating particular untruths, and (2) that the nature of its communication, in particular its illocutionary effects, silences women's voices (Langton 1993; Longino 2009; MacKinnon 1985). Pro-pornography activists have defended pornography on communicative grounds, arguing that it is speech protected in the

United States by the first amendment (Cole 1994). In both strands of the debate, pornography fails to be disaggregated into the voices of its various contributors. By looking at pornography as a single piece, both anti-pornography feminists and pro-pornography activists considered predominantly the speech of the producers. What were the filmmakers trying to communicate? What rights do they have over that communication? What is unique about my paper's contribution to the discussion is that I focus exclusively on the performers, rather than the producers. The producers and the performers may be communicating, or wish to be communicating, different messages in the same film.

4 Thank you to David Klempner for this example.

5 It is worth noting that standard model release contracts are often similar, with templates for non-sexual commercial photography contracts also demanding "the irrevocable and unrestricted right to use and publish" the content produced, "for editorial, trade, advertising, and any other purpose and in any manner and medium; and to alter and composite the same without restriction and without model's inspection or approval." There may be questions to be explored here as well regarding the relationship between personal autonomy and the unrestricted use of one's image; however, my paper is limited to making the case that sexual autonomy is particularly impacted by permanent contracts in a manner which we have reason to find concerning. Thank you to the anonymous reviewer who pushed for this clarification.

6 Currently, such legislation has exceptions intended to exclude sexual media produced for commercial purposes. For instance, California requires that images "were intended to remain private" while in Arizona the legislation only applies "when the person has an expectation of privacy" (Arizona Criminal Code 2014, §13-1425; California Assembly 2020, Bill 2065). In the UK, the exceptions for commercial pornography are still more explicit. Article 5 of the Criminal Justice and Courts Act notes that "It is a defence for a person charged with an offence under this section to show that (a) he or she reasonably believed that the photograph or film had previously been disclosed for reward" (Criminal Justice and Courts Act 2015, provision 33). When sexual media produced for commercial purposes are further disseminated without the permission of the performers, the most common legal remedy right now seems to be for the production company to sue for copyright infringement. For an example of this tactic in action, see Bultman 2020. If the argument of this paper succeeds, we may have reason to believe that media produced for commercial purposes illegitimately disseminated are not only a violation of the producer's copyright, but of the performer's right to sexual autonomy as well. Thank you to the anonymous reviewer who pushed me to clarify this point.

7 For instance, in Slate's "How to Do It" column, a consumer writes asking for advice on how to consume online content ethically. The columnist responds: "There really isn't a way to easily tell how comfortable a person on set might have been, and especially how they might feel as they navigate full adulthood and may have more perspective about the conditions they made those choices under. I think the easiest solution is to focus on content made with pornographic intention, and focus on what performers are pleased to have worked on" (Stoya 2020).

8 Contracts of bondage refer here to those which create "tenure or service of a villein, a serf, or an enslaved person" (Merriam-Webster Online 2022). For an exploration of legally non-binding "contracts of bondage" featured in sexual practice, see Harvard Law Review 2014.

9 Thank you to the anonymous reviewer who raised this concern.

10 Practices of industry self-regulation may range from "establishing industry standards, to developing and applying codes of professional ethics, to ensuring consumer confidence," among others (Castro 2011). Enforcement of industry self-regulation includes publicizing bad behavior, removing violators from industry trade groups or lobbies, or in some cases, having an impact on civil decisions concerning company liability. Examples of self-regulation include the American Bar Association or the global non-profit Marine Stewardship Council.

11 See, for instance, legislation in New Zealand which bans material or the production of material "if it promotes or supports, or tends to promote or support" acts such as bestiality, necrophilia, extreme violence, or the use of urine or excrement (Wilson 2002) and legislation in Los Angeles County which requires performers to wear condoms during penetrative sex (Martinez 2012).

12 Of course, the devil is in the details. The practical import of such a ban requires further research that is both legal and empirical. On the legal side, the question of what contracts taking into account sexual autonomy would actually look like requires further study. One option might be a royalties-based contract, where instead of payment being upfront for producer ownership of the media, the performer licenses the media to the producer in exchange for regular payments. When consent is revoked, the media are taken down, and payments stop. Another option is limited-time contracts, which require performers to renew authorization every six months or year. Although this does not provide the instantly revocable consent that affirmative

consent ideally mandates, it does shift the paradigm closer to the ideal, while remaining perhaps more practically feasible.

If a legal ban is not realistic, there may be other actions that could be taken to shift the power dynamics within the contract regime. An option that performers might use to pursue their right to sexual autonomy would be to invoke legislative precedent or laws which seek to limit exploitation. Limitations on exploitative contracts have taken various forms, including the American unconscionability doctrine—which voids contracts which a court could not in “good conscience” enforce—and its equivalents in states like Australia, Germany, and France (Browne and Biksacky 2013). This option is further discussed in (O’Byran n.d.).

On the empirical side, before any action is taken, it is important that there are studies demonstrating that the outcome is indeed better for performers. If such legislation drives production underground or into the black market, it may be overall more detrimental than helpful.

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