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Law's Gaze

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When looking at a sexualized image, the viewer is both subject and object of the artwork, because the gaze of the viewer is turned back on themselves. Thus, the Supreme Court's jurisprudence on obscene speech tells us more about the viewer of an image than it says about the image itself. The existence of this gaze is revealed in the Court's obscenity jurisprudence and its inability to settle on a definition of obscenity for most of the twentieth century. In all of these instances, the court looks upon pornographic materials as the object upon which the court gazes; but in reality, the nature of these materials flips the view, so the Court becomes the object on which pornography gazes. At the same time, the fixation on criminalizing obscenity has led to the silencing of the models who appear in sexual images. Drawing on social theories, this article argues that the failure of obscenity law was inevitable because at the heart of obscenity lies unending subjectivity. This subjectivity means that obscenity should be protected under the First Amendment. But this article also proposes changes to the law which will continue to protect children and give voice to models.

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Modern American obscenity law can be traced to the years after the Civil War when the Young Men's Christian Association (YMCA) and other advocates persuaded the New York legislature to pass a law outlawing the distribution of obscene material.[1] Anthony Comstock and his ilk were overtly concerned with the private morals of people, especially children, when they pushed for the criminalization of obscenity.[2] Over the intervening years, courts and commentators have attempted to move obscenity law from private morals to public wrong.[3] Obscenity law has become justified for preventing the sale of material which is harmful to the public, often with a continued focus on children.[4] Anti-pornography forces have also attempted over the last forty years to link pornography with more generalized sexual crimes and degradation of women.[5] Similarly, some feminists have linked pornography to assaults on women[6] and a general exploitation of women's bodies.[7] A broader group of feminists have sought to restrict pornography and obscenity in order to protect the models who appear in the work.[8] In

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[1] GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 157 (2017).

[2] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 131–32 (1993).

[3] *See, e.g.*, MODEL PENAL CODE § 251.4(2) (AM. L. INST. 1980).

[4] *Id.*

[5] FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY (1986) [hereinafter REPORT COMMISSION ON PORNOGRAPHY] (drawing a distinction between sexually violent material, nonviolent but degrading materials, nonviolent and non-degrading material, and simple nudity; noting that all of the committee would allow simple nudity but varied on the restrictions for the other categories).

[6] CATHARINE A. MACKINNON, ONLY WORDS 14–15 (1993).

[7] Andrea Dworkin, *Suffering and Speech*, *in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS, 25 (Catharine A. Mackinnon & Andrea Dworkin eds., 1997).

[8] *See, e. g.*, Ginia Bellafante, *We Need to Talk About Balthus*, N.Y. TIMES (Dec. 8, 2017), https://www.nytimes.com/2017/12/08/nyregion/we-need-to-talk-about-balthus.html [https://perma.cc/3E8S-8BFC] (describing the petition to have the Metropolitan Museum of Art in New York City remove a painting by artist Balthus, *Thérèse Dreaming*, which depicted a prepubescent model in a sexualized pose).

respect to all of these goals, American obscenity law has failed.

More than forty-five years after the Supreme Court announced the current obscenity standard in *Miller v. California*, the standard appeals to the prurient interest in a patently offensive way and lacks artistic or scientific value.[9] Obscenity law has failed on numerous fronts. The law largely fails to stop the dissemination of obscene materials, to protect the models who appear in those materials, and to formulate a consistent definition of obscenity. Instead, it has led to capricious prosecutions.[10] Pornography has continued to proliferate throughout the United States and reaches all segments of the population.[11] Indeed, many states have started to view the rapid spread of pornography as a healthcare crisis in order to disseminate information about what they perceive as the dangers of pornography.[12] In addition, the criminalization of obscenity has done virtually nothing to protect the mostly young and female models who appear in it.[13] In fact, obscenity law has often had the opposite effect as it stigmatizes pornographic models and actors and thus serves to weaken their protections.[14]

Nor are obscenity prosecutions a feature of the last century. In 2007, Paul Little was indicted and subsequently convicted for sending obscenity through the United States mail.[15] In 2011, Phillip Greaves reached a plea deal with Polk County prosecutors for the publication of a book, *The Pedophile's Guide to Love and Pleasure: A Child-lover's Code of Conduct*, which contained no pictures of child pornography.[16] And as late as the late-1990s, South Carolina showed the absurdity of some obscenity laws when the state began issuing

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[9] Miller v. California, 413 U.S. 15, 26 (1973).

[10] *See, e.g.*, United States v. Extreme Assoc. Inc., 431 F.3d 150,151 (3d Cir. 2005).

[11] Alexis Kleinman, *Porn Sites Get More Visitors Each Month than Netflix, Amazon and Twitter Combined*, HUFFPOST (May 4, 2013, 10:45 AM), https://www.huffpost.com/entry/internet-porn-stats_n_3187682 [https://perma.cc/ZEM6-4YTD] (describing analytics from Pornhub.com and other companies as surpassing the bandwidth of numerous companies).

[12] Penny Nance, Opinion, *Pornography Is a Public Health Crisis—Treat It Like One*, THE HILL (April 7, 2018, 11:00 AM), https://thehill.com/opinion/civil-rights/382067-pornography-is-a-public-health-crisis-treat-it-like-one [https://perma.cc/ZEM6-4YTD].

[13] John Felipe Acevedo, *The Model Speaks?: Obscenity Laws in the United States*, *in* GENDER JUSTICE AND THE LAW: THEORETICAL PRACTICES OF INTERSECTIONAL IDENTITY 257 (Elaine Wood ed., 2021) [hereinafter Acevedo, *Model Speaks?*].

[14] GAYLE S. RUBIN, *The Leather Menace: Comments on Politics and S/M*, *in* DEVIATIONS: A GAYLE RUBIN READER 109, 111–12 (2011) [hereinafter Rubin, *Leather Menace*].

[15] United States v. Little, 365 F. App'x 159, 169 (11th Cir. 2010).

[16] *Phillip Greaves Gets Probation for 'Paedophile Guide'*, BBC NEWS (Apr. 7, 2011), https://www.bbc.com/news/world-us-canada-12994248 [https://perma.cc/4JKY-ZGUC]. Greaves will not have to register as a sex offender and will be allowed to serve his two year probation sentence in his home state of Colorado. *Id.*

citations for obscene bumper stickers.[17]

This article proposes that the failure of obscenity law was inevitable because at the heart of obscenity lies unending subjectivity. This is not some mere "dim and uncertain line," but categorical confusion.[18] This subjectivity is revealed by applying postmodern theory to the issue and in particular the concept of the gaze from Jacques Lacan and Slavoj Žižek. In all of these instances, the court looks upon pornographic materials as the object upon which the court gazes; but in reality, the nature of these materials flips the view, so the Court becomes the object on which pornography gazes. In attempting to criminalize obscenity, courts merely make an obscenity of the law.

Part I sets forth the theory of this gaze, applying it for the first time in the area of legal analysis. Nudity in art as well as obscenity will be explored through the lens of postmodern theorists. These theories reveal the problem of the *object-gaze*, in which the subject-object perception is inverted in the area of sexual speech so that the viewer can never describe the object, but only their beliefs towards it. Part II of this essay provides a brief history of criminal obscenity law to reveal how the *object-gaze* has prevented the creation of a stable obscenity jurisprudence. Part III examines the area of child pornography to demonstrate that it contains similar subjectivity. Part IV examines the way current obscenity law and theories silence models. Part V looks beyond current criminal obscenity laws to provide some ways to give models a voice and protections. Finally, Part VI asserts that obscenity lies within the law itself and not the expressions it is applied to, and that the only remedy to law's obscenity is the acceptance of all sexualized speech as fully protected. It also explains why child pornography would still be prohibited and provides a clearer definition to achieve this.

I. NUDITY AND THE GAZE

A. The Hegemony of Nudity as Sin

The Supreme Court's jurisprudence reveals discomfort with the naked human body; indeed, several of the justices seem to have rarely, if ever, viewed pornography of any type before taking the bench.[19] Even those

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[17] Adam Bernstein, *Calvin's Unauthorized Leak*, WASH. POST (July 17, 1997), https://www.washingtonpost.com/archive/lifestyle/1997/07/17/calvins-unauthorized-leak/4b49c407-2f00-452f-b3db-74843769b66d/ [https://perma.cc/4PTC-AC6R] (describing the rise of bumper stickers depicting the fictional comic strip character Calvin urinating on unpopular NASCAR driver numbers and the citations issued by South Carolina police).

[18] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1963) (striking down an informal state censorship regime on Fourteenth Amendment grounds).

[19] STONE, *supra* note 1, at 272, 288, 290 (describing Chief Justice Warren's prudishness towards pornography; Justice, Burger's contempt for pornography, and the likelihood that Justice

justices who were not naïve or openly opposed to pornography could not define a line between obscenity and pornography.[20] Justices, indeed the law, have been unable to clearly classify depictions of obscenity from non-obscenity.[21] This is not a failing just of the Court or of law, but rather a problem of distinguishing among obscenity, pornography, erotica, and "simple nudity."[22] This has led some to the belief that "'[w]hat turns me on is erotica; what turns you on is pornographic.'"[23] Obscenity is supposed to be a definition of law rather than taste, whereas "pornographic was a term of judgement not of law."[24]

Legal obscenity is something more than pornography. It is patently offensive and appeals to the prurient interest while lacking serious artistic merit.[25] If this is obscenity, then pornography and artistic or simple nudity must lack one or more elements of obscenity. Pornography is defined as "the explicit description or exhibition of sexual subjects or activity in literature, painting, films, etc., in a manner intended to stimulate erotic rather than aesthetic feelings."[26]In art, nudity can be the ideal of beauty,[27] the erotic,[28] or even "the chaste clothing of nakedness."[29] As will be discussed, there is a problem in defining the line between the obscene and the non-obscene.

Hegemony was originally referred to as the "predominance of one nation

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Powell saw his first pornography as a justice). *But cf.* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 192–94 (1979) (describing Justice White's reserved, but non-loathing view of pornography in contrast to Justices Blackmun and Burger)

[20] STONE, *supra* note 1, at 277–88 (describing the Warren Court's inability to agree on a definition of obscenity).

[21] *Id.* at 283–84, 291 (noting the inability of the Warren Court to define obscenity and the narrow majority in *Miller*).

[22] GIORGIO AGAMBEN, NUDITIES 57 (David Kishik & Stefan Pedatella trans., 2011) (using the term "simple nudity," juxtaposed against the concepts of orgy and torture for a group of nude women in a performance art piece).

[23] ELLEN WILLIS, *Feminism, Moralism, and Pornography*, *in* BEGINNING TO SEE THE LIGHT: SEX, HOPE, AND ROCK-AND-ROLL 223 (Univ. Minn. Press, 2012) (1982).

[24] GAYLE S. RUBIN, *Misguided, Dangerous, and Wrong: An Analysis of Antipornography Politics*, *in* DEVIATIONS: A GAYLE RUBIN READER 254, 261 (2011) [hereinafter Rubin, *Misguided*].

[25] Miller v. California, 413 U.S. 15, 24 (1973).

[26] *Pornography*, OXFORD ENGLISH DICTIONARY (3d ed. 2006).

[27] FLAMINIO GUALDONI, THE HISTORY OF THE NUDE 12 (2012) (noting that from antiquity through the early nineteenth century nudity was equated with the "elevated model," or ideal, but, starting in the nineteenth century, other implications and views of nudity began to enter the art world).

[28] Rubin, *Misguided*, *supra* note 24, at 109–11 (describing the change in the perception of the nude in Victorian Culture to being not just an ideal, but also indecent with the widespread adoption of morality codes).

[29] GUALDONI, *supra* note 27, at 12.

over another."[30] Antonio Gramsci expanded on this conceptualization to describe cultural hegemony within a society as the "ideological terrain, determines a reform of consciousness and of methods of knowledge: it is a fact of knowledge, a philosophical fact."[31] Hegemony is therefore a persuasive method or tool which a class uses to lead and dominate the workers of society; as a Marxist, Gramsci preferred the proletariat to wield this power.[32] To be clear, cultural hegemony is a power of persuasion or coercion and not forceful domination of one class over another.[33] The dominant hegemony is perpetuated because subaltern classes must educate themselves in the dominant ideology in order to gain knowledge of "the art of government" and in doing so place themselves under the dominant hegemony.[34] Therefore, the dominant hegemony of a society only changes when a class or subclass builds sufficient alliances to dislodge the existing hegemonic order.[35] This also means that any class can use hegemony to dominate other classes within a society and that no one class is preordained to dominate.[36]

In Western culture, the hegemonic force defining sexual speech has been Christianity, which views chastity and nudity as opposing each other. This is because nakedness is linked, possibly inseparably, to theological discussions of man's fall as told in Genesis.[37] Some justices have been wary of decisions which are too overtly tied to religious notions, but they have not considered that the entire genera of obscenity is inseparable from religion.[38] Christian hegemony goes deeper than merely enforcing a moral code through the law.[39] Instead, the hegemony pervades both the law and the way that many, but not

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[30] ROGER SIMON, GRAMSCI'S POLITICAL THOUGHT 17 (3d ed. 2015).

[31] ANTONIO GRAMSCI, THE ANTONIO GRAMSCI READER: SELECTED WRITINGS 1916-1935, at 192 (David Forgacs ed., 2000) [hereinafter GRAMSCI, READER].

[32] *See* ANTONIO GRAMSCI, THE SOUTHERN QUESTION 19 (Pasquale Verdicchio trans., 2015) (1995) [hereinafter GRAMSCI, SOUTHERN QUESTION].

[33] *See* Perry Anderson, *The Antinomies of Antonio Gramsci*, 100 NEW LEFT REV. 5, 25–26 (1976) (discussing the nature of hegemonies).

[34] GRAMSCI, READER, *supra* note 31, at 197.

[35] SIMON, *supra* note 30, at 20–21.

[36] *See* Anderson, *supra* note 33, at 18.

[37] *See* AGAMBEN, *supra* note 22, at 57.

[38] *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents of Univ. of N.Y., 360 U.S. 684, 701 (1959) (Clark, J., concurring).

[39] *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (stating that sodomy laws are addressing a deeply moral issue); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850–51 (1992) (noting that many persons view the termination of a pregnancy as a moral issue, but noting that the Court does not "mandate [its] own moral code."); *see generally* United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 586–87 (W.D. Pa.), *rev'd*, 431 F.3d 150 (3d Cir. 2005) (holding that, after *Lawrence*, the enforcement of a moral code is not a legitimate state interest).

all, persons view the relationship between nudity and sex.

Saint Augustine theorized that before the Fall, people perceived their nakedness, but "their nakedness was not yet disgraceful."[40] Before the Fall it was a chaste nakedness, or the "garment of grace," a nakedness without obscenity, lust, or the taint of disobedience (so--called original sin).[41] "Conversely after the fall they were aware of their nakedness and sought to cover it as it symbolized their disobedience to God."[42]

The association of nudity with sin or wrongdoing is key to understanding the conflation between nudity, sex, and illegality because nudity was extended by Christian authors to include shame of sexual intercourse, whatever its nature.[43] Augustine notes that even the Cynics who claimed that it was a lawful act for a married couple to have sexual intercourse refrained from openly having sex, keeping a cloak over themselves to shield their acts from the gaze of others.[44] The relationship between nudity, sexuality, and sin is not unique to Augustine; indeed others were more extreme, viewing any nudity as leading to sin.[45]

One exception made by most early Christians was nudity during baptism, which was common in the first few centuries after Christianity's founding.[46] It is possible therefore to have nudity without obscenity, lust, or taint of sin; indeed it is the goal of art to present the graceful naked body as though it is clothed "with an invisible garment, hiding its flesh entirely, though it is completely present to the spectators' eyes."[47] The early church appears to have distinguished between innocent and sinful nudity, with children and souls ascending to heaven depicted as nude to symbolize innocence and

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[40] AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 615 (R.W. Dyson ed. & trans., Cambridge Univ. Press 1998) (426) (writing against the then popular belief that man before the fall did not have eyesight, but proposing instead that they perceived nudity, but attached no significance to it because they were clothed in god's grace).

[41] *Id.* at 615–16.

[42] *Id.* at 616.

[43] *Id.* at 617–20 (noting that even married couples would not engage in sexual activity in public).

[44] *Id.* at 619–20 (asserting his belief that Diogenes and other Cynics who claimed to have sex in public only simulated it or kept cloaks on).

[45] JAMES A. BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 109–10, 161 (1987) (describing the views of St. John Chrysostom, who viewed any depiction of nudity as likely leading to sinful thoughts or behavior, as well as the belief among some Christians that even married couples should not see each other naked); *see also* Janet S. Ericksen, *Penitential Nakedness and the Junius 11* Genesis, *in* NAKED BEFORE GOD: UNCOVERING THE BODY IN ANGLO-SAXON ENGLAND 257–258, 272 (Benjamin C. Withers & Jonathan Wilcox eds., 2003) (noting that in Anglo-Saxon belief, nakedness was equated with sin and clothing with penance and forgiveness).

[46] AGAMBEN, *supra* note 22, at 71–73.

[47] *Id.* at 74 (describing the invisible garment as grace itself, making the nude body the most graceful body).

purity.[48] However, by the Middle Ages nudity became associated with sexualized bodies, sin, and excess.[49]

There were also many Europeans who pushed well beyond nude baptism to depict nudity in a variety of settings.[50] Cast genitalia badges and depictions of genitals in the marginalia of medieval manuscripts point to a more relaxed view of nudity among clergy existing alongside official views.[51] Even the Bayeux Tapestry, depicting the Norman Conquest, contained depictions of nude men and women in the marginalia of the tapestry.[52] The intended message of the nudity, much like nude depictions today, depended in large part on the audience viewing the tapestry and the context in which they were viewing it.[53] The depiction of nudity was suppressed by the Church into the early Renaissance when it slowly, and unevenly, gave way to a wider depiction of nude figures.[54]

Obscenity of course can also occur in the written word as well under *Miller* and does appear in medieval and early modern literature.[55] In medieval literature, depictions of sex and rape appear in a wide range of literary types—secular and religious.[56] Most famously, Geoffrey Chaucer's *Canterbury Tales* contains descriptions of sexual activity in a prurient manner.[57] Although common, these prurient descriptions and depictions were not sanctioned by the Church or governments during the medieval period.[58] These examples

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[48] Karen Rose Mathews, *Nudity on the Margins: The Bayeux Tapestry and its Relationship to Marginal Architectural Sculpture*, *in* NAKED BEFORE GOD: UNCOVERING THE BODY IN ANGLO-SAXON ENGLAND 138, 139 (Benjamin C. Withers & Jonathan Wilcox eds., 2003).

[49] *Id.*

[50] RUTH MAZO KARRAS, SEXUALITY IN MEDIEVAL EUROPE: DOING UNTO OTHERS 110 (3d ed. 2017) (noting that the degree of nudity acceptable in society is difficult to know, but for depictions of nakedness in late medieval literature and art, the audience was not expected to find it offensive).

[51] Nicola McDonald, *Introduction* to MEDIEVAL OBSCENITIES 2–11 (Nicola McDonald ed., 2006).

[52] Mathews, *supra* note 48, at 142–43.

[53] *Id.* at 157–61 (noting that a similar issue exists with depictions of nude images in the marginalia of books, other tapestries, and buildings).

[54] GUALDONI, *supra* note 27, at 77–80 (describing how more artists began to paint nude figures, but how nude images were painted over in the Sistine Chapel, while contemporaneously they are more accepted in liberal cities such as Venice).

[55] Miller v. California, 413 U.S. 15, 24 (1973).

[56] *See generally* Danuta Shanzer, *Latin Literature, Christianity and Obscenity in the Later Roman West*, *in* MEDIEVAL OBSCENITIES 179 (Nicola McDonald ed., 2006) (describing a wide range of Latin texts that contained descriptions of sexual activity that appeared in the early medieval or late Roman eras).

[57] KARRAS, *supra* note 50, at 113–114, 134–135 (noting such depictions in the Shipman's, Wife of Bath's, and Miller's tales contained in the book).

[58] *See* BRUNDAGE, *supra* note 45, at 424–25.

demonstrate that for centuries a split existed between official association of nudity with sin alongside depictions of nudity. Indeed, as Gualdoni noted "nudity in art is the chaste clothing of nakedness."[59]

In contrast, obscenity is nudity which embraces lust and sin. In legal terms, obscenity is the prurient display of the human body in a manner which is patently offensive and lacks serious artistic merit.[60] American law links obscenity with the theological concept which equated nudity and sex with sin and obscenity.[61] But this is not the only way to think of obscenity. Augustine also equated obscenity with the lack of control of the genitalia, particularly the penis, that occurs with the presence of lust.[62] This is because he equates sexual lust with the lust for the forbidden fruit which Adam and Eve had prior to partaking of the fruit.[63] This view is still held today, as many art models will not take certain poses if they believe them to be too revealing and consider an erection a sign of unprofessionalism.[64] In the pre-Fall world, sexual organs would have been controlled just like appendages and used only to produce offspring—it was this control which was lost in the Fall.[65] Augustinian obscenity is thus the lack of control of the human body.

Jean-Paul Sartre also draws on the fall from grace and equates obscenity with the ungraceful, "but not everything which is ungraceful is obscene."[66] Obscenity is produced by acts which strip the body of its grace, because the naked body itself is not obscene.[67] Instead, the "certain involuntary waddlings of the rump are obscene," for they reveal the fact of the state of nudity, and even if clothed the obscenity continues.[68] In contrast, grace is the fluid

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[59] GUALDONI, *supra* note 27, at 12.

[60] *Miller*, 413 U.S. at 24.

[61] *See* WHITNEY STRUB, OBSCENITY RULES: *ROTH V. UNITED STATES* AND THE LONG STRUGGLE OVER SEXUAL EXPRESSION 208–12 (2013) (describing the influence of religious conservatives to the resistance in the spread of pornography in America and their pushing for more limits, which *Miller* was supposed to provide).

[62] *See* AUGUSTINE, *supra* note 40, at 618–29 (theorizing that humans' genitals would have been used for procreation had they remained innocent, but it would have been a procreation without lust).

[63] *Id.* at 615, 619.

[64] SARAH R. PHILLIPS, MODELING LIFE: ART MODELS SPEAK ABOUT NUDITY, SEXUALITY, AND THE CREATIVE PROCESS 59–61 (2006) (describing the view of many models, especially female, that they will not strike "Playboy" or overly sexual poses, as well as a view among all models that a male model who has an erection during a pose is being unprofessional because it would distract the artist).

[65] AUGUSTINE, *supra* note 40, at 629.

[66] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS: A PHENOMENOLOGICAL ESSAY ON ONTOLOGY 519 (Hazel E. Barnes trans., Washington Square Press 1956) (1943).

[67] *Id.* at 520.

[68] *Id.* at 520–21.

movement of the body, and "it reveals above all its transcendence as a transcendence-transcended . . . understood in terms of the situation and of the end pursued."[69] Thus even some acts of sadism cannot make the body obscene since the actions must be understood in the terms of the act of sadism.[70] Sartre has readily admitted that he did not account for the oppression of women in his writings, a topic which will be discussed in Part III.[71] For Sartre, grace clothes the flesh of the body and makes it not-obscene even though the viewer gazes upon the naked flesh.[72] The obscene then is the involuntary motion of the body which focuses the gaze on the flesh of the object—not the nudity itself.

Nudity is therefore both a literal lack of clothing and "something that is acknowledged, that one is conscious of. It is a state of mind and of the gaze."[73] Put differently, initially people "[are] not ashamed" of their nudity and it is only the gaze of others that makes their nudity an object.[74] Similarly, obscenity, whether Augustine's copulation and uncontrolled genitals or Sartre's waddlings, must be gazed upon for the obscenity to exist. This brings us to the underlying problem of obscenity law: the subjectivity of obscenity.

B. Obscenity's Gaze

An image exists independent of anyone seeing it—it is an object and "*objects* exist external to and independent of subjects."[75] Its appearance is dependent on the gaze of subject who views it.[76] Inversely, "the *subject* is that to which objects appear, have appeared, or may appear."[77] The appearance of the object is therefore a subjective perception of the viewer and is therefore subjective knowledge, "not a quality of . . . the object."[78]

An image is a fact-object existing independent of any conceptions about it, because "a 'fact' [is] something which is there, whether anybody thinks so

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[69] *Id.* at 519.

[70] *Id.* at 518–19.

[71] Jean-Paul Sartre & Simone de Beauvoir, *Answers to Queries from Simone de Beauvoir,* 97 NEW LEFT REV. 71, 71–72 (John Howe & Rosamund Mulvey trans., 1976).

[72] SARTRE, s*upra* note 66, at 520.

[73] GUALDONI, *supra* note 27, at 9.

[74] *Genesis* 2:25 (Oxford NRSV).

[75] Henrey E. Bliss, *The Subject-Object Relation*, 26 PHIL. REV. 395, 405 (1917) (italics in original excepting emphasis).

[76] *Id.*

[77] *Id.* at 406 (italics in original excepting emphasis).

[78] *Id.* (emphasis omitted).

or not."[79] In contrast, obscenity is a belief or conception rooted in the Christian relation of nudity with sin.[80] Whether or not the belief in obscenity is *true* depends on whether it is rooted in a fact.[81] This has also been formulated as the object-property distinction, or the particular-universal distinction, in which the objects or particulars "exist intime, and cannot occupy more than one place at one time in the space to which they belong."[82] In other words, the image is a fact-object which exists as a concrete object, but obscenity is a belief about or property of that fact-object that does not exist in time and has no relation to one place.[83] It is this relationship which I shall explain as the problem of the *object-gaze*.

The emergence of mechanical and digital reproduction diminished the uniqueness of all art by allowing for some form of mechanical reproduction, principally photography.[84] In terms of valuation and how we view art, reproduction removes art from being one unique piece bound in time and space subject to history.[85] Although Walter Benjamin is correct that reproduction alters the way we view an object by exposing details not easily visible and by placing the copy into situations which the original could not be placed, it does not alter the fact that the copies are themselves fact-objects.[86] Mechanical reproduction does not change this because each copy of a photograph can only occupy one physical space and each pixilation can exist on a computer screen at one time, thus rendering each unique, if fleeting.

For example, if I hold a copy of the book *Sugar and Spice* it does not matter that it is only one of thousands printed; it is still an identifiable real-

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[79] BERTRAND RUSSELL, HUMAN KNOWLEDGE: ITS SCOPE AND LIMITS 130 (Routledge 2009) (1948) [hereinafter RUSSELL, HUMAN KNOWLEDGE]; *see also* Bertrand Russell, *On the Relations of Universals and Particulars*, 12 PROC. ARISTOTELIAN SOC'Y 1, 3 (1911–12) [hereinafter Russell, *On Relations*] (referring to it as the object of perception versus the real object).

[80] RUSSELL, HUMAN KNOWLEDGE *supra* note 79, at 130–31, 135. Russell divides fact from belief and knowledge. *Id.* A fact is "everything that there is in the world . . ." while a belief is an assertion that may or may not be true. *Id.* Truth is a belief based in fact. *Id.*

[81] *Id.* at 135.

[82] Russell, *On Relations*, *supra* note 79, at 23–24 (using the terms "particulars" and "universals" to describe this relationship).

[83] *Id.*

[84] Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 217, 218–20 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1969) (1955) (describing the changing types of reproduction of art that have occurred since Ancient Greece).

[85] *Id.*

[86] *Id.* at 220–22 (noting that reproductions are lacking the uniqueness of time and space that is only found in original artwork).

object because it exists in one place and within time.[87] An image in that magazine can be described as a pubescent girl depicted naked in a bathtub.[88] Indeed more specificity can be given; it is an image of the then child actress Brooke Shields naked in a bathtub taken by the photographer Garry Gross.[89] But none of these descriptions of the fact-object have anything to say on the object of perception—in other words whether or not the object is obscene.[90]

The obscenity of an object is not a property of the real-object or image; instead, it is dependent on the gaze of the subject.[91] There is one more layer of complexity to add: an image is a fact-object itself, but in the case of photographs and film, it is also a representation of another fact-object.[92] Returning to the above example, the fact-object Brooke Shields is not in my office, but rather a fact-object image representing her is in my office.

The introduction of cameras (film and still) has created distance between the depicted fact-object and the viewer, so now the audience sees what the camera allows them to see—the camera is their viewpoint and any personal contact with the object is lost.[93] The problem thus becomes the gaze itself and what, if anything, the gaze of the viewer can tell us about either the fact-object which is viewed, or the fact-object depicted in that object. In one sense, the gaze of the audience is always present since the artist (photographer, painter, or other) has an audience in mind when they are creating the image.[94] In another sense, the gaze is created by the artist when they create the work, as creation is a sovereign act which excludes all other possibilities.[95] When an artist creates a work they claim to impose their gaze on the object, but "[t]here is always was a gaze behind . . ."[96]

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[87] SUGAR AND SPICE: SURPRISING AND SENSUOUS IMAGES OF WOMEN FROM THE PORTFOLIOS OF 14 OUTSTANDING CONTEMPORARY PHOTOGRAPHERS 40–41 (Francois Robert ed., 1976).

[88] *Id.*

[89] Christopher Turner, *Sugar and Spice and All Things Not So Nice*, THE GUARDIAN (Oct. 2, 2009, 7:05 PM), https://www.theguardian.com/theguardian/2009/oct/03/brooke-shields-nude-child-photograph [https://perma.cc/6KZU-N7SN].

[90] *See* RUSSELL, HUMAN KNOWLEDGE *supra* note 79, at 18–19.

[91] Bliss, *supra* note 75, at 403–04 (using the examples such as a bell is separate from its sound, and the physical color of a rose petal is separate from how the rose petal's color is perceived).

[92] JACQUES LACAN, THE SEMINAR OF JACQUES LACAN BOOK XI: THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS 105–06 (Jacques-Alain Miller ed., Alan Sheridan trans., W.W. Norton & Company 1998) (1973). Lacan uses the term "the subject of representation," which I have shortened to "representation" in an attempt to avoid confusion.

[93] Benjamin, *supra* note 84, at 228–29 (noting that the performance of a stage actor is presented directly to the audience by the actor, but the performance of a screen actor is presented to the audience indirectly by film).

[94] LACAN, *supra* note 92, at 113.

[95] *Id.* at 114.

[96] *Id.* at 113.

For Lacan, the gaze of the present audience is also not the true gaze, because the audience only sees "the gaze of those persons who, when the audience are not there, deliberate in hall"—that is the gaze of the patron, or the audience the artist created for.[97] The result is that the viewer, or subject, is not fully aware that they are looking through the eyes of another.[98]

Žižek expanded on this idea to assert that when viewing sexual images—arguably all images—the images only gain form when they are distorted by the viewer's desire.[99] When a viewer looks at a sexual image, "the gaze falls into ourselves," because the image is trying to hide nothing.[100] The purpose of the image is the emotional arousal of the viewer, not the feelings of the model or artist, and its success or failure depends on the viewer. This inverts the subject-object relationship because the object becomes the real subject trying to rouse us, while "the spectators[] are reduced to a paralyzed object-gaze."[101]

Similarly, Sartre notes that when an object returns a gaze to the subject, the gaze is reversed and turns the initial subject into an object.[102] Judith Butler rephrased this into the feminine gaze; when a woman returns the gaze of man she reverses the gaze and creates gender trouble by reminding the man that he is dependent on the woman for his masculinity.[103] This is in contrast to the male gaze which is determinative and "projects its phantasy on to the female form which is styled accordingly."[104] For Butler, gender is a performance which is repeated to conform to and recreate existing social ideas of genders.[105] Obscenity is included in the forms of fantasy, which can result in criminal sanctions if one does not conform to the fantasies or gender

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[97] *Id.*

[98] *Id.* at 115. Lacan uses the term "subject" instead of "viewer." I have used "viewer" in an attempt to maintain clarity of terms.

[99] Slavoj Žižek, *Looking Awry*, 50 OCT. 30, 34 (1989) [hereinafter Žižek, *Looking Awry*]. Žižek uses the terms "pornography" and "obscenity" interchangeably. I have used "sexual image" to capture the full range of images including obscenity, pornography, erotica, and even some simple nudity.

[100] *Id.* at 37.

[101] SLAVOJ ŽIŽEK, LOOKING AWRY: AN INTRODUCTION TO JACQUES LACAN THROUGH POPULAR CULTURE 110 (1992) [hereinafter ŽIŽEK, LOOKING AWRY]. Although the book and article versions of "Looking Awry" are similar, there are slight differences in Žižek's argument in each version.

[102] SARTRE, *supra* note 66, at 373–76.

[103] JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY xxx (1990) [hereinafter BUTLER, GENDER TROUBLE]. For Butler this dialectic was an unsatisfactory explanation for the cause of gender trouble given the systemic nature of gender differentiation combined with the growing fluidity of the category female. *Id.*

[104] Laura Mulvey, *Visual Pleasure and Narrative Cinema*, *in* FILM MANIFESTOS AND GLOBAL CINEMA CULTURE: A CRITICAL ANTHOLOGY 364 (Scott MacKenzie ed., 2014) (1975).

[105] BUTLER, GENDER TROUBLE, *supra* note 103, at 191–92.

performances of society.[106]

Combining these theories of the gaze, the concept can be pushed further into what I call the problem of the *object-gaze*. It is the gaze of others which makes nudity obscene, not anything about nudity itself. For in art, nudity remains "the chaste clothing of nakedness."[107] The gaze also clarifies the paradox of definition among art nude, erotic, pornographic, and obscene.[108] If the viewer becomes the object of the image, then the model becomes the subject. Thus, they invert roles. More accurately, both the sexual image and the viewer are simultaneously both subject and object. In other words, what is seen and what may have been intended to be seen can never be separated—the vision of the artist can never be separated from the subjectivity of the viewer. This is not a mere castration fantasy as in Freud's *Medusa's Head*, in which the male is rendered castrated by the sight of woman's genitalia, in this instance represented by Medusa's head, as a reminder of the first time he saw his unclothed mother and felt castrated.[109] Instead the viewer, of any gender, becomes the object in the presence of the subject-image.

The problem of the *object-gaze* then is defined by the inability of any viewer of sexual speech to describe the object in a way that does not show their subjective judgement of the object. This is because the subject-object relationship collapses when sexual speech is viewed, rendering the subject-viewer incapable of describing the object independent of their own beliefs. In the United States, among other parts of the world, this *object-gaze* contains within it some degree of linking nudity and sex and sin, thus inevitably conflating prurient-ness and nudity in an inseparable dialectic. Culturally, this means that the model appearing in the image is not degraded, but the viewer degrades themselves as the object of the image.[110]

Legally, this means that the line between obscenity and pornography, or unprotected and protected speech, is always contained within the gaze of the viewer as both the subject and object of the image.[111] The Court's unwillingness to accept obscenity law's failure stems from the belief of members of the Court that they have a workable, objective definition of

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[106] JUDITH BUTLER, UNDOING GENDER 214 (2004) [hereinafter BUTLER, UNDOING GENDER].

[107] GUALDONI, *supra* note 27, at 12; *see also* SARTRE, *supra* note 66, at 519–20.

[108] *See* WILLIS, *supra* note 23, at 223.

[109] Sigmund Freud, *Medusa's Head*, *in* THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD, VOLUME EIGHTEEN 273, 273–74 (James Strachey ed., Hogarth Press 1953) (1922). *But see* Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 YALE J.L. & HUMAN. 227, 228, 242–44 (2009) (asserting that the different treatment of nude dancing from other conduct by the Court can be explained by the Medusa's head and the Court's fear of castration because, unlike all other forms of sexual speech, the nude dancer performs live and is unmediated by any medium).

[110] ŽIŽEK, LOOKING AWRY, *supra* note 101, at 110.

[111] Acevedo, *Model Speaks?*, *supra* note 13 at 260–61.

obscene. This is despite the Court's lurching from definition to definition during the late twentieth century and the acknowledgment by several justices that they cannot define obscenity.[112] Most importantly, the definition's reliance on a viewer's perception will always devolve into the *object-gaze* problem.

Each prong of the *Miller* test is pervaded by the problem of the *object-gaze*. Part (a) asks the viewer to determine if the work appeals to the prurient interest; part (b) asks if it is does so in a patently offensive way, and part (c) asks if the work has value.[113] The Court has contended that "[t]he legal definition of obscenity does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him."[114] It has also held laws that attempt to regulate merely indecent speech as overbroad, thereby drawing a distinction between an objective obscenity test and overbroad statutes targeting indecent speech.[115] In a literal sense the Court is correct, the definition provided by *Miller* and its progeny is static, but within that definition the *object-gaze* ensures that subjectivity dominates—the definition is sufficiently subjective that the defendant has no notice of what is obscene.

This means that despite the Court's delusion, obscenity laws will always be both overbroad and overly vague.[116] The Court rests its belief on the *Miller* test; but because what a viewer—including a juror—deems to appeal to the prurient interest is patently offensive or has value which depends on the *object-gaze* of the viewer, it is in fact never predictable. Since obscenity laws are criminal statutes, the lack of a reliably enforced definition of obscenity means there can never be notice of what acts are illegal.[117] Just as the Court has declared loitering prohibitions to be vague because the definition provided

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[112] *See, e.g.*, Redrup v. New York, 386 U.S. 767, 770–71 (1967) (describing the various views of obscenity by the members of the Court); *see also*, *e.g.*, Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I know it when I see it."); *id.* at 200 (Warren, C.J., dissenting) (noting that most decisions since *Roth* were given without opinion and did not furnish guidance on what is obscene).

[113] Miller v. California, 413 U.S. 15, 24 (1973) ("(a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value") (citation omitted).

[114] Hamling v. United States, 418 U.S. 87, 118 (1974) (citing Roth v. United States, 345 U.S. 476, 491–92 (1957)).

[115] Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 874–76 (1997) (distinguishing laws that target obscenity versus indecent speech).

[116] *But see* Hamling, 418 U.S. at 118 (holding federal obscenity law to not be overbroad because only obscenity is not protected); Ward v. Illinois, 431 U.S. 767, 771 (1977) (holding state law to not be vague because it provides a definition of obscenity).

[117] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 65–66 (2d ed. 2012) (providing a brief discussion of the vagueness doctrine).

would not put the average person on notice, despite there being a common meaning of the term, so too does the *Miller* test fail to put the average person on notice despite the fact that we might know obscenity when we see it.[118]

The presence of the *object-gaze* renders the *Miller* test unconstitutionally vague and overbroad—by extension it means that the Court will never be able to distinguish between low value and high value speech, nor between the obscene and merely pornographic.[119] The Court must always fail to define obscenity because obscenity is never contained within the object of the law, the image, but instead must be contained within the *object-gaze* of the viewer. To prevent over-broadness and unconstitutional vagueness, obscenity must be granted First Amendment protection. But protecting obscenity under the First Amendment is only the first step, as will be discussed below, there are times when individual liberty interests must yield to the state's interest.[120]

II. OBSCENITY LAW

The history of obscenity law reveals that from the earliest caselaw, the problem of the *object-gaze* was present in both British and American law. The problem of the *object-gaze* is present whether obscenity is a matter of law for the trial court or matter of fact for the jury. A review of the Court's jurisprudence reveals that the *object-gaze* foiled their attempts to create an objective definition of obscenity. Indeed, the Court has merely lurched from definition to definition without resolving the core subjectivity, and in the process, this revealed the Court's own shortcomings.

A. Statutory Development of Obscenity Law

The common law of England contained no direct law against obscenity until the Long Parliament of the seventeenth century. Previously, its prosecution was left to ecclesiastical courts in instances when obscenity was

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[118] *See generally* City of Chicago v. Morales, 527 U.S. 41 (1999) (holding that the statutory definition of loitering as "to remain in any one place with no apparent purpose" did not overcome vagueness because a person could not know if they appeared to have a purpose); *see also*, Paul Gewirtz, *On "I Know It When I See It"*, 105 YALE L.J. 1023, 1025 (1996) (discussing how the phrase provides a window into understanding non-rational elements in judicial decision making).

[119] Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 319–24 (1995) (discussing various arguments in favor of including pornography as a class of low-value speech).

[120] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 586–89 (6th ed. 2019) [hereinafter CHEMERINKSKY, CONSTITUTIONAL LAW] (providing a brief description of the levels of scrutiny including their definitions); *see also* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (providing the Court's initial description of levels of deference to legislatures and instances when heightened scrutiny should be applied).

directed at the church or occurred on church property,[121] and otherwise handled by the Court of Star Chamber if against a member of the nobility.[122] Since at least 1530, printed materials were subject to licensing laws, but the degree to which they were enforced varied greatly.[123] Although there would later be obscene libel, it does not appear in the list of scandalous libels compiled by Edward Coke during the reign of James I.[124] The Ordinance for the Regulating of Printing did not specifically mention obscenity, but instead targeted printed material which was "false, forged, scandalous, seditious, libellous, and unlicensed . . . to the great defamation of Religion and Government."[125] Despite the lack of mention of obscenity, the ordinance was used to suppress books which were considered lewd or obscene.[126]

Although the act was passed by an anti-royalist parliament which contained many puritans, and with the promotion of religion in mind, they were not united in their beliefs.[127] A major opponent of the ordinance was the poet John Milton who penned a pamphlet, *Areopagitica*, urging parliament not to adopt the ordinance.[128] He advocated against the act because tracts against the King and his supporters had been suppressed before the start of the revolution, and he feared that it would lead to "suppresse the suppressors themselves."[129] Milton was no supporter of obscenity and opposed poets, mostly of the king's court, who included any in their works—but he was a

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[121] NORMAN ST. JOHN-STEVAS, OBSCENITY AND THE LAW 12–14 (1956).

[122] WILLIAM HUDSON, A TREATISE OF THE COURT OF STAR CHAMBER 100–04 (Francs Hargrave ed., Legal Classics Library 1986) (1792) (noting that although it was not a separate category— was included in libeling and scandalous words against nobles—lumping together scorn, defamatory letters and "scurvy love letter[s]," all punished alike).

[123] ADRIAN JOHNS, THE NATURE OF THE BOOK: PRINT AND KNOWLEDGE IN THE MAKING 230–35 (1998) (providing a brief history of the licensing laws from adoption through the seventeenth century).

[124] Edward Coke, *The Case de Libellis Famosis, or of Scandalous Libels*, *in* 3 COKE'S REPORTS, Part V, 254, 254–56 (Law Book Exchange 2002) (1826).

[125] *June 1643: An Ordinance for the Regulating of Printing*, *in* ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660, at 184–86 (C.H. Firth & R.S. Rait eds., 1911), http://www.british-history.ac.uk/no-series/acts-ordinances- interregnum/pp184-186 [https://perma.cc/AUY6-QKXE].

[126] ST. JOHN-STEVAS, *supra* note 121, at 14.

[127] BARRY COWARD, THE STUART AGE: ENGLAND 1603-1714, at 178–82 (4th ed. 2012) (describing the disagreements among members of the Long Parliament especially in regard to church reform).

[128] JOHN MILTON, AREOPAGITICA: AND OTHER WRITINGS OF JOHN MILTON xi–xii (1999).

[129] *Id.* at 49–50. Milton feared that the new censorship law would lead to the suppression of freedom which he associated with the Catholic Church in Spain or the Court of Star Chamber in England. *Id.* As there was no standardized spelling or grammar in the seventeenth or eighteenth centuries, the spelling and grammar in all quotations will be left as in the original without the use of "sic." Sic erat scriptum. *Id.*

supporter of free expression.[130]

The primary suppression of obscenity law was through obscene libel, but that required the obscenity to target either an identifiable person or institution.[131] This is why upon publication in 1750, Fanny Hill met no obscenity charges in Great Britain or its colonies, although there were a few isolated prosecutions for obscenity.[132] Between the English Civil War and the American Revolution, a more liberal attitude toward obscenity prevailed in both England and the colonies.[133] Echoing Milton, Justice Black observed that obscenity falls within the protection of the First Amendment: "censorship is the deadly enemy of freedom and progress."[134]

The nineteenth century featured a few isolated obscenity prosecutions.[135] In *Commonwealth v. Sharpless,* the Pennsylvania court upheld the conviction of Sharpless for displaying an obscene painting for profit.[136] The court reasoned that the opinion of the jury was sufficient to determine if it was an obscene picture being displayed for profit: "[w]hether the picture was really indecent, the jury might judge from the *evidence*, or, if necessary, from *inspection.*"[137] Therefore, from the earliest prosecution, the problem of the *object-gaze* was present—it was up to each juror to determine for themselves what was obscene.

Modern obscenity law arose during Reconstruction as part of a wider push by Christian reformers to foist their morals onto American society.[138] This push for criminal sanctions on obscene material was part of a larger movement to criminalize vice and sexual impropriety, and this movement was advocated by Protestant reformers with funding from elite society.[139] The rise of criminal obscenity statutes was part of a larger growth of federal

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[130] CHRISTOPHER HILL, MILTON AND THE ENGLISH REVOLUTION 64 (2d ed. 1979).

[131] FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 5–6 (1976)

[132] *Id.* at 3–6 (describing the few obscenity prosecutions that took place and noting that John Cleland's work was not among them).

[133] STONE, note 1, at 83 (noting that there were no prosecutions for obscenity during the entire colonial era).

[134] Smith v. California, 361 U.S. 147, 160, 158–60 (1959) (Black, J., concurring) (discussing that although obscenity was noxious, it was a way for censors to encroach into free speech); *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867–68 (1960) (discussing the need to protect freedom of speech, including obscenity law, before discussing the "ancient evils" of England that forced many to flee to the American colonies).

[135] SCHAUER, *supra* note 131, at 12.

[136] Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 103 (1815).

[137] *Id.* at 103.

[138] MARK DOUGLAS MCGARVIE, LAW AND RELIGION IN AMERICAN HISTORY: PUBLIC VALUES AND PRIVATE CONSCIENCE 104–06 (2016).

[139] FRIEDMAN, *supra* note 2, at 134–35.

law enforcement power, specifically the rise of postal inspectors, to investigate crimes related to the mail, including obscenity.[140] The origins of criminal obscenity laws are thus closely tied to the expansion of criminalization of immoral behavior and federal law enforcement.[141]

A dry goods salesman, Anthony Comstock, created the Committee for the Suppression of Vice to advocate for nationwide laws to prohibit the sale of obscene art and literature.[142] In addition to being a dry goods salesman, he was also a lay minister active in the Young Men's Christian Association (YMCA) prior to starting his morality crusade.[143] In 1873, Comstock succeeded in convincing Congress to make it illegal to send any obscene material, contraceptives, or aid for abortions through the mail.[144] The linking of contraception, abortion, and obscenity further highlights the role of hegemonic Christian belief embedded in obscenity law, and this was part of the wider effort to codify Christian morality and beliefs in the United States.[145]

B. Early Supreme Court Obscenity Jurisprudence

In *Ex parte Jackson*, the Court upheld the Comstock laws based on Congress' power to regulate the post office and post roads, which necessarily included the power to determine what it would and would not permit to be mailed.[146] The Court indirectly held that obscenity fell outside the area of protected speech by focusing on the liberty interest of the press under which morally corrupting material did not fall.[147] Interestingly, Justice Field foreshadowed *Stanley v. Georgia*[148] by insisting that letters and sealed packages were as fully protected from warrantless searches "as if they were retained by

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[140] Elizabeth Dale, *Criminal Justice in the United States, 1790-1920: A Government of Laws or Men?*, *in* THE CAMBRIDGE HISTORY OF LAW IN AMERICA, VOLUME I: THE LONG NINETEENTH CENTURY (1789-1920) 133, 136–38 (Michael Grossberg & Christopher Tomlins eds., 2008).

[141] MCGARVIE, *supra* note 138, at 125 (tying the rise of sin laws—drinking, obscenity, and sabbath breaking—to a broader movement of imposing Christian social values on society through the law); Dale, *supra* note 140, at 138.

[142] Erwin Chemerinsky, *Outlawing Pornography: What We Gain, What We Lose*, 12 HUM. RTS. 24, 24 (1984).

[143] HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 366–68 (2002).

[144] FRIEDMAN, *supra* note 2, at 135.

[145] *See* MCGARVIE, *supra* note 138, at 125 (linking obscenity to Sabbath breaking laws and alcohol regulation); *see also* AMY WERBEL, LUST ON TRIAL: CENSORSHIP AND THE RISE OF AMERICAN OBSCENITY IN THE AGE OF ANTHONY COMSTOCK 66–67 (2018) (linking Comstock's push to prohibit obscenity to the wider movement to have Christianity codified into the Constitution and federal laws).

[146] *Ex parte* Jackson, 96 U.S. 727, 736–37 (1877).

[147] *Id.* at 736.

[148] *See* Stanley v. Georgia, 394 U.S. 557, 558 (1969).

the parties forwarding them in their own domiciles."[149]

The Court ratified the practice of most states that obscenity was a matter of fact for the jury to determine.[150] Obscenity occurs if a work "tends to deprave the morals in one way only, namely, by exciting sensual desires and lascivious thoughts."[151] The Court seemed to think that this was an objective standard despite the trial court providing a clearly subjective standard, instructing the jury that, "'[n]ow, what [are] obscene, lascivious, lewd, or indecent publications is largely a question of your own conscience and your own opinion' . . ."[152]

By the middle of the twentieth century, criminal obscenity expanded to include speech which was merely filthy, even if not obscene.[153] It also reached literary works such as *Ulysses*, *Lady Chatterley's Lover*, and *Fanny May*.[154] In an attempt to correct the over-inclusivity of criminal obscenity, the Court began its decades long attempt to define obscenity in a way that would not capture serious literary works.[155] In *Roth v. United States*, the Court held that obscenity was not expression protected by the First Amendment.[156] The majority stated that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."[157] They began to feel their way toward a standard under which a work is obscene if "the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[158] But this definition was contested with four of the justices who wanted to either limit the holding to the facts presented or articulate a clearer definition.[159]

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[149] *Jackson*, 96 U.S. at 733.

[150] Dunlop v. United States, 165 U.S. 486, 500–501 (1897).

[151] *Id.* at 501.

[152] *Id.* at 500 (emphasis added) (quoting the trial court decision).

[153] *See generally* United States v. Limehouse, 285 U.S. 424 (1932) (holding that a letter which contained filthy language and accusations of sexual impropriety, but no obscenity, could be prosecuted under the statute).

[154] WOODWARD & ARMSTRONG, *supra* note 19, at 234–35.

[155] STONE, *supra* note 1, at 176–77.

[156] Roth v. United States, 354 U.S. 476, 492 (1957).

[157] *Id.* at 487.

[158] *Id.* at 489 (rejecting the standard set forth in Regina v. Hicklin, (1868) 3 QB 360 (Eng.), which judges particular material in isolation from the rest of the work and upon a particularly susceptible person).

[159] *Id.* at 494 (Warren, C.J., concurring); *see also id.* at 499–500 (Harlan, J., concurring in part and dissenting in part) (stating that the majority completely ignored the fact that the two cases arose under different statutes with different definitions of obscenity); *see also id.* at 514 (Douglas, J., dissenting) (asserting that obscenity should be protected, and people can choose to not read it).

Two years later, in 1959, the Court avoided the issue of obscenity and held that New York's motion picture licensing law was unconstitutional for having viewpoint bias, since it targeted only adultery which was shown as appropriate.[160] By 1962, the Court applied the *Roth* test, focusing on the "patently offensive" prong, or whether the magazines at issue offended contemporary community standards.[161] The Court concluded that the *Roth* test articulated two prongs: "(1) patent offensiveness; and (2) 'prurient interest' appeal," both of which have to be met for a work to be obscene.[162] To apply the test, the Court viewed the magazines themselves, declaring, "the most that can be said of them is that they are dismally unpleasant, uncouth, and tawdry," but not obscene.[163] In constructing the test in this manner, the Court hoped to remove legitimate scientific and literary works from the purview of obscenity.[164]

The failure to define obscenity does not rest completely with the Court. The drafters of the Model Penal Code completed their work in May 1962, advocating for keeping obscenity laws despite their progressive recommendation that sodomy laws be abolished.[165] The explanatory note stated, "[i]t is worth noting, however, that Section 251.4 is consistent with the general policy against legislating private morality in that it does not proscribe simple possession of obscene materials. Possession is criminal only if maintained for the purpose of sale or other commercial dissemination."[166] Despite claims of commercial focus, the end section criminalized not only the sale of obscene materials, but also displays, exhibits, or actions which "otherwise [make] available any obscene material . . . " thus capturing more than was promised in the note.[167] The Model Penal Code's definition of obscenity was similar to the Court's, "if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters."[168] The Model Penal Code was a bit less restrictive than the Court since it allowed evidence to show the "artistic, literary, scientific, educational or other merits of the material[s]."[169] Nonetheless, the debate on the bounds

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[160] Kingsley Int'l Pictures Corp. v. Regents of Univ. of New York, 360 U.S. 684, 688–90 (1959).

[161] Manual Enters. Inc. v. Day, 370 U.S. 478, 482 (1962).

[162] *Id.* at 486.

[163] *Id.* at 489–90.

[164] *Id.* at 487.

[165] MODEL PENAL CODE § 251.4 (AM. L. INST. 1980).

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

of obscenity continued.

In 1964, the Court turned yet again to the issue of obscenity, this time regarding the showing of the film *Les Amants* in Ohio.[170] The Court acknowledged that, in the seven years since *Roth,* there had been confusion applying its test, but the Court vowed to remain with it because "we think any substitute would raise equally difficult problems . . ."[171] Yet the Court was unable to reach a consensus on how to deal with obscenity cases, despite six justices agreeing that the conviction should be overturned.[172] Chief Justice Warren acknowledged both the need for a definition and the Court's failure to provide one.[173] Of course the most honest description of obscenity was provided by Justice Stewart:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.[174]

Obscenity's reliance on an individual's gaze is acknowledged as no definition is readily available, but we do know it when we see it, even if no one else agrees.

Two years later, the Court attempted again to define obscenity in a trilogy of cases. The Court, once again, dealt with the issue of literature being swept up in the definition of obscenity, in this instance the two hundred year old book, *Memoirs of a Woman of Pleasure* by John Cleland.[175] A three judge majority claimed to apply the *Roth* test, but they changed the phrasing to what presented as a mere truism: that the First Amendment protected "all ideas having even the slightest redeeming social importance."[176] The *Memoirs* test emerged as requiring "(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."[177] The Court held that, although the book appealed to the prurient interest and was offensive, it had some

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[170] Jacobellis v. Ohio, 378 U.S. 184, 186 (1964).

[171] *Id.* at 191.

[172] STONE, *supra* note 1, at 278.

[173] *Jacobellis*, 378 U.S. at 200 (Warren, C.J., concurring).

[174] *Id.* at 197 (Stewart, J., concurring) (emphasis added).

[175] A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts (*Memoirs v. Massachusetts*), 383 U.S. 413, 415 (1966).

[176] *Compare* Roth v. United States, 354 U.S. 476, 484 (1957), with *Memoirs*, 383 U.S. at 418.

[177] *Memoirs*, 383 U.S. at 418.

redeeming social importance.[178]

In two companion cases, the Court claimed to apply the reminted obscenity test but instead immediately altered its application. The Court modified the test, holding that, although the materials in question, *The Housewife's Handbook on Selective Promiscuity* and the magazine *Eros*, were not obscene, the conviction for obscenity was still proper because the material was marketed to appeal to the prurient interest.[179] The Court thus added a new path to prurience, adding that:

> when an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitation through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.[180]

Although deciding the case on other grounds, the Court in *Mishkin v. State* further expanded the paths to prurient interest and obscenity by holding that an appeal could be limited to a fetish subgroup if the material was designed to appeal to that subgroup's fetish.[181] Despite the continued confusion over what obscenity meant, the new definition was in place.

Over the next two years, the Court would further erode the basis of criminal obscenity prosecutions.[182] In *Redrup v. New York*, the Court embraced its inability to reach a definition of obscenity, noting that no test held more than three justice's votes; instead, they simply noted that whatever the definition of obscenity, the material in the case was not it.[183] In per curiam decisions, the Court would overturn obscenity convictions in more than thirty cases over the next six years.[184] More importantly, the Court protected the private possession of obscene material if it was held in the home.[185] It appeared that the Court went as far as it could to protect sexual speech without removing all restrictions, and "the coming decade should see a re-affirmation and re-interpretation of these principles so that they may be practically implemented. Beyond that, the Supreme Court—creator and

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[178] *Id.* at 420–21.

[179] Ginzburg v. United States, 383 U.S. 463, 469–70, 475–76 (1966).

[180] *Id.* at 475–76.

[181] *See* Mishkin v. New York, 383 U.S. 502, 508 (1966) (rejecting the petitioner's argument that books involving flagellation, fetishism, and lesbianism do not appeal to the average person).

[182] *See* REPORT COMMISSION ON PORNOGRAPHY, *supra* note 5, at 13–14.

[183] *See* Redrup v. New York, 386 U.S. 767, 770–71 (1967).

[184] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 120, at 1112.

[185] Stanley v. Georgia, 394 U.S. 557, 568 (1969).

perceiver both of the winds of change—will probably wait for society to catch up to it."[186]

The authors of this view were wrong; in fact, the very book in which they articulated this belief would be at issue in the case in which the Court attempted to redefine and further restrict obscenity.[187] The Court's continued inability to formulate a coherent doctrine, or even a definition, of obscenity led to its continued criminalization.[188] President Nixon's appointees took advantage of this blasé view and the inability of the Warren Court to develop a consistent approach to obscenity.[189] Chief Justice Burger believed that the Court could rid American society of not only obscenity, but also pornography, by expanding the definition of obscenity and including local standards in a new test.[190]

C. Miller and its Progeny

In *Miller v. California*, Chief Justice Burger got his chance to create a new definition of obscenity, and for the first time, five justices agreed to it.[191] The Court now said the test was:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work taken as a whole, lacks serious literary, artistic, political or scientific value.[192]

The court abandoned the *Memoirs* requirement that the work be "utterly without redeeming social value."[193] In a companion case, the Court also recognized a legitimate state interest in limiting the commerce of obscene material in places of public accommodation, even those which exclude

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[186] ABE RICHARDS & ROBERT IRVINE, AN ILLUSTRATED HISTORY OF PORNOGRAPHY 288 (1968).

[187] *See generally* Miller v. California, 413 U.S. 15, 18 (1973) (the Illustrated History of Pornography was one of the books mentioned by the majority decision as being advertised in the advertisements deemed obscene in the case).

[188] FRIEDMAN, *supra* note 2, at 234.

[189] STRUB, *supra* note 61, at 213.

[190] STONE, *supra* note 1, at 291–93, 296.

[191] *See generally Miller*, 413 U.S. at 15 (creating a new definition of obscenity). Justices Douglass dissented asserting that it was unfair to imprison someone using a new standard, on which the Court itself does not agree. *Id.* Justices Brennan, Stewart and Marshall would reverse because the state law was over broad and thus facially invalid. *Id.*

[192] *Id.* at 24 (citations omitted).

[193] *Id.* at 24–25 (quoting Memoirs v. Massachusetts, 383 U.S. 413, 418 (1996)).

minors.[194] Justice Burger hoped the change in broadening the definition of obscenity and recognizing public interest in limiting its commerce would stem the increase of obscenity and pornography, but he was wrong.[195]

The following year, the Court began to adjust the definition set forth in *Miller*. The Court first clarified that the community standard was a local standard where the case was tried, not a national standard.[196] This leads to the problem that "the guilt or innocence of distributors of identical materials mailed from the same locale can now turn on the chancy course of transit or place of delivery of the materials."[197] On the same day, the Court also held that, while the list of actions given in *Miller* was not an exhaustive list of obscenity, nudity alone is not sufficient.[198] Although the court held that "nudity alone is not enough to make material legally obscene under the Miller Standards," it did not articulate what was enough, noting "[t]here is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes."[199]

The Court reaffirmed its differentiation between nudity and obscenity as it struck down a statute prohibiting the screening of any movie including nudity at a drive-in theater which could be visible from the street.[200] However, the second prong was eviscerated when the Court held that state statutes do not need to provide an exhaustive list of obscene conduct.[201] The Court also reaffirmed the local nature of community standards for determining if a work "appeals to the prurient interest."[202] The Court did strengthen First Amendment protections by balancing the local nature of prurient-ness with a national standard for determining if a reasonable person would find "serious literary, artistic, political, or scientific value in allegedly obscene material."[203] It also held that the prurient interest does not apply to "normal sexual appetites."[204] By the mid-1980s, a work was defined as obscene if (a) an "average person, applying contemporary *community* standards

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[194] Paris Adult Theater I v. Slaton, 413 U.S. 49, 69 (1973).

[195] STONE, *supra* note 1, at 298 (noting that Chief Justice Burger hoped that the broader definition of obscenity would "stem the tide of sexually-explicit materials in the United States . . . this was not to be.").

[196] Hamling v. United States, 418 U.S. 87, 105–06 (1974).

[197] *Id.* at 144 (Brennan, J., dissenting).

[198] Jenkins v. Georgia, 418 U.S. 153, 160–61 (1974) (noting that the actors' genitals were not exhibited in the challenged film).

[199] *Id.* at 161.

[200] Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975).

[201] Ward v. Illinois, 431 U.S. 767, 776 (1977).

[202] Smith v. United States, 431 U.S. 291, 301 (1977).

[203] Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

[204] Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 496 (1985).

would find that the work, taken as a whole, appeals to the prurient interest" (b) "whether the work depicts or describes, in a patently offensive way, sexual conduct defined by the applicable state law" or through past decisions of the state; and (c) whether a reasonable person applying a national standard would find that, "the work, taken as a whole, lacks serious literary, artistic, political or scientific value."[205]

Just as the Court was winding down its definition of obscenity, two new issues emerged: the role of pornography in violence against women and the production and sale of child pornography.[206] The state's interest in protecting children in regard to sexual speech first came up in *Ginsberg v. New York*, in which a conviction for selling pornography magazines to a minor was upheld even though the magazines were "not obscene for adults."[207] The prosecution of child pornography was approved of by the Court, which held that, like obscenity, child pornography is unprotected by the First Amendment.[208] To be child pornography, the images must contain actual pictures of children and not artificially generated images.[209] A conviction for attempting to procure child pornography is valid, even if the material is not pornographic in nature, and therefore protected speech.[210] The issue of child pornography has been treated as largely separate from obscenity by the Court and will therefore be dealt separately from obscenity.

The wobbling definitions of obscenity provided by the Court started to become moot as the internet proliferates easy to access pornography and the government's focus shifts toward prosecuting child pornography cases.[211] Despite the Court's protestations that obscenity law has nothing to do with nudity, the religious right's obsession with obscenity can only be explained through nudity.

III. CHILD PORNOGRAPHY

That children should be protected is uncontroversial, but as with all pornography, defining what is pornographic is to trap the law within the gaze of the object. Moving sexual speech from unprotected to protected speech under the First Amendment will not harm the ability of the state to protect children, because their protection has previously been held to be a compelling

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[205] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 120, at 1112–14 (quoting the test set forth by the Court in *Miller v. California* and providing commentary on the elements of the test).

[206] Id. at 1114–16.

[207] Ginsberg v. New York, 390 U.S. 629, 633–34 (1968).

[208] New York v. Ferber, 458 U.S. 747, 764 (1982).

[209] Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002).

[210] United States v. Williams, 553 U.S. 285, 299, 303 (2009).

[211] STONE, *supra* note 1, at 301–03.

governmental purpose.[212] Unfortunately, the protection of children has also been used to target the LGBTQ community, especially gay men, portraying them as "drooling old sickies corrupting or harming sweet innocent children," to create public hysteria against them.[213] This, combined with the general hysteria which usually accompanies any harm to children (which can lead to crime panics), is reason to remove ambiguity from child pornography laws.[214]

At the federal level, the shipment of child pornography in interstate or foreign commerce is prohibited,[215]as is the production of child pornography or the transport of children across state lines for the purposes of its production.[216] The statute defines child pornography, or sexually explicit conduct as, "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex."[217] It also includes, "(ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person."[218] By focusing on specifically described activities such as intercourse, bestiality, masturbation, or abuse, the statute almost avoided the problem of the *object-gaze*.[219]

However, the final clause, which includes "lascivious exhibition," once again opens the statute to the problem of the *object-gaze*; since lasciviousness, like obscenity, is in the eye of the viewer. For example, one of the counts charged in *City of Cincinnati v. Contemporary Arts Center* was that the gallery possessed "a photograph of a minor male child, under age 18, with a lewd exhibition or graphic focus on the genitals . . . "[220] The photo is of pre-

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[212] *Ferber*, 458 U.S. at 761 (upholding state law that prohibited non-obscene depictions of children engaged in sexual activity); *see also* Osborn v. Ohio, 495 U.S. 103, 110–11 (1990) (citing to the state's interest in protecting children when upholding state law that prohibited the possession of child pornography in a private residence); *see also Ashcroft*, 535 U.S. at 255–56 (striking down portions of the Child Pornography Prevention Act of 1966 for encompassing sex speech not created with actual children).

[213] Rubin, *Leather Menace*, *supra* note 14, at 112.

[214] John Felipe Acevedo, *Crime Fantasies*, 46 AM. CRIM. L. 193, 222–25 (2020) [hereinafter Acevedo, *Crime Fantasies*] (discussing the link between sex panics and the Satanic Panic of the 1980s and 1990s); *see also* ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 27 (2011) (noting that panics around the safety of children are a regular feature of American politics).

[215] 18 U.S.C. § 2252 (2018).

[216] *Id.* § 2251.

[217] *Id.* § 2256 (2)(A)(i); *see also id.* § 2252 (defining child pornography as visual depiction of sexually explicit conduct).

[218] *Id.* § 2256 (2)(A)(ii)–(v).

[219] Žižek, *Looking Awry*, *supra* note 99, at 37.

[220] City of Cincinnati v. Contemp. Arts Ctr.., 556 N.E.2d 207, 209 (1990) (describing the first count of the indictment against the defendants).

pubescent children, brother and sister, squatting next to each other—their genitals are visible but it is hardly lewd or graphic.[221] The jury agreed, acquitting the defendants of all charges in less than two hours.[222] That the charging district attorney saw lasciviousness tells us more about the district attorney than it does about the photograph. As with obscenity, the inversion of the gaze makes it impossible for the artist or model to know when they might be creating something which some prosecutor believes is lascivious.

This problem is exacerbated by the fact that child pornography does not even have to meet the vague standards of the *Miller* test.[223] The only real limit placed on the lascivious element is that the image "depicts real children engaged in actual sexual conduct."[224] But of course if no actual children are depicted, prosecutors can then claim the image is obscene, effectively creating a loop between the two standards and smearing the accused with the tag of child pornographer.[225] For example, in *United States v. Eychaner,* the defendant was charged with attempting to possess child pornography and obscenity, but in its discussion of obscenity, the court continually referred to the character in the image as being of a child, thus conflating real children with cartoons.[226] A cartoon should never count as a lascivious display of the genitals since no actual genitals are being displayed. In doing so, the District Court undermined the Supreme Court's decision in *Ashcroft v. Free Speech Coalition*, which required that child pornography actually depict children engaged in sexual activity.[227]

Starting with the Clinton administration, there was an increased focus on child pornography, which enabled the administration to avoid debates about obscenity by targeting the more stigmatized conduct of intergenerational sexual contact.[228] The problem of the *object-gaze* explains the slew of false accusations during the 1990s by photoshop workers of parents developing photos of their nude children.[229] It also helps to explain the failed federal

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[221] JANET KARDON, ROBERT MAPPLETHORPE: THE PERFECT MOMENT 47–49 (2d ed. 1989). This edition printed for the Hartford, Connecticut exhibition had some of the allegedly obscene photographs redacted, but the nude photos of the children are still included.

[222] *Justice in Cincinnati*, N.Y. TIMES, 22, Oct. 6, 1990.

[223] New York v. Ferber, 458 U.S. 747, 761 (1982) (noting the state's compelling interest to protect children enables it to reach speech that would not fall within the *Miller* obscenity test).

[224] STONE, *supra* note 1, at 302.

[225] *See e.g.*, United States v. Eychaner, 326 F. Supp. 3d 76 (2018).

[226] *Id.* at 7–8.

[227] Ashcroft v. Free Speech Coal., 535 U.S. 234, 234. (2002).

[228] *Id.* at 302–03; *see also* Rubin, *Leather Menace*, *supra* note 14, at 111–12.

[229] Doreen Carvajal, *The Nation; Pornography Meets Paranoia*, N.Y. TIMES, 4, Feb. 19, 1995, https://www.nytimes.com/1995/02/19/weekinreview/the-nation-pornography-meets-

investigations of legitimate photographers.[230] It also explains state indictments of booksellers such as Barnes & Noble for selling books by well-known photographers because they contain pictures of nude children in Alabama and Tennessee.[231] Where one person sees lasciviousness, another sees the chaste clothing of nakedness, and this variation should not be the basis for damaging criminal investigations.

The stated goal of child pornography statutes is to protect children, but they do little to stop American society's sexualization and exploitation of children. Advertisements and the fashion industry trade on the eroticization of child models and the infantilization of adult models to sell their products.[232] In addition, female athletes of all ages are sexualized by being placed in revealing uniforms, which results in many athletes feeling that men only attend their events to watch them in their uniforms and not for their athletic ability.[233] Finally, the law does not protect those children who voluntarily appear nude in films.[234] Given the rampant and legal sexualization of minors, it rings hollow that the law is there to protect children.

The deficiency of the law protecting children can be illustrated with an example. In 1976, a series of photographs were taken of a naked and oiled pre-pubescent girl with her make-up applied as if she was an adult and her hair styled as if she was much older. To increase the erotic feeling, the model was posed in a marble bathtub complete with telephone, pink rose, and nude female statues for decor. The series of pictures, which showed the model's buttocks and genitalia, was shot for Playboy Publishing.[235] In case there was doubt about the goal of the photographer or the publisher, the editor

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paranoia.html [https://perma.cc/MNG7-Y729] (providing descriptions of several incidents where parents were suspected or even charged with child pornography for innocuous pictures of nude children).

[230] Associated Press, *Panel Rejects Pornography Case*, N.Y. TIMES, 1:29, Sept. 15, 1991, https://www.nytimes.com/1991/09/15/us/panel-rejects-pornography-case.html [https://perma.cc/27DC-8AR9] (describing the rejection of child pornography charges against the San Francisco based photographer Jock Sturges).

[231] Associated Press, *Alabama Grand Jury Indicts Barnes & Noble*, N.Y. TIMES (Feb. 19, 1998), https://www.nytimes.com/1998/02/19/us/alabama-grand-jury-indicts-barnes-noble.html [https://perma.cc/92XK-KNN6] (describing the indictment in Alabama of the bookseller for selling copies of books by David Hamilton and Jock Sturges that contained images of naked children and noting the indictment in Tennessee).

[232] JAMES R. KINCAID, EROTIC INNOCENCE: THE CULTURE OF CHILD MOLESTING 13–14, 104–06 (1998).

[233] Vikki Krane et al., *Living the Paradox: Female Athletes Negotiate Femininity and Muscularity*, 50 SEX ROLES 315, 327 (2004).

[234] KINCAID, *supra* note 231, at 124–27 (describing both actual nudity of child actors as well as the general sexualization of children depicted in some films).

[235] Garry Gross, *Untitled*, *in* SUGAR AND SPICE: SURPRISING AND SENSUOUS IMAGES OF WOMEN FROM THE PORTFOLIOS OF 14 OUTSTANDING CONTEMPORARY PHOTOGRAPHERS 36 (Francois Robert ed., 1976).

described the series as

> Garry's premise in creating them was simply to demonstrate his feeling that a little girl often projects an identifiable sensuality, into which she grows as she becomes a woman. Obviously, a child's and a woman's expressions of that sensuality will differ, but Garry is intrigued by the fact that it so clearly exists in both: inside that little girl there's a sexy woman hiding.[236]

Despite the unabashedly erotic tones of the photographs, they have not been held to be either child pornography or obscene in the United States.[237]

In 1983, the model sued him seeking to prevent him from selling the photographs to other magazines for republication.[238] By then the model, Brooke Shields, was a well-known actress and model and felt that their republication was harming her career and being used beyond their original intended use.[239] The parties stipulated that the photographs were neither obscene nor pornographic, which reduced the issue to one of contract validity and revocation.[240] The court held that the contract was validly entered into by Shields's mother on her behalf and that state law prohibited her from revoking it.[241]

The Shields case reveals the limitations of child pornography laws to address the economic exploitation of underage models. The repurposing of photographs through republication in different venues than originally indicated is a problem faced by numerous models.[242] This often represents a windfall to the photographer when an unknown model becomes famous after signing away their rights to the photos.[243] This is particularly troubling

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[236] *Id.*

[237] *But see* Turner, *supra* note 89 (noting that the images from the photo series were withdrawn from a display of Gross's work at the Tate Modern Gallery in London after police suggested that they violated United Kingdom obscenity law).

[238] Shields v. Gross, 448 N.E.2d 108, 109 (1983).

[239] *Id.*

[240] *Id.*

[241] *Id.* at 112.

[242] *See, e.g., The Minneapolis Hearings, in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 39, 224–25 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter *Minneapolis Hearings*] (providing a transcript of a letter from Jaime Lyn Bauer describing how nude test photographs that she took were later resold to pornography magazines without her consent and with no additional payment to her).

[243] *See, e.g.*, Peter Kerr, *Penthouse Says Nude Photos are Those of Miss America*, N.Y. TIMES, July 20, 1984, at A18 https://www.nytimes.com/1984/07/20/nyregion/penthouse-says-nude-photos-are-those-of-miss-america.html [https://perma.cc/TJ48-PQTD] (describing how a photographer had taken the photos of Vanessa Williams when she was trying to break into

because many women who appear in sexual images do so partly out of economic need, which is not considered coercion.[244] This is exacerbated when, as in Shields's case, the model is a minor trying to start in the modeling or acting industry with their parent acting on their behalf.

The *Shields* case also demonstrates that additional protections are needed for child models who often create images without thinking through the ramifications. As will be discussed in Section V, those protections should be civil and not criminal in nature. Criminal child pornography should be limited to depictions of actual children engaged in actual sexual acts.

This can be easily achieved by simply removing section v. of section 18 U.S.C. 2256(2)(A)(v), which contains the catchall term "lascivious exhibition."[245] Doing so would continue to protect children from appearing in pornography, while solving the *object-gaze* problem. The deficient protection of children by current laws, as illustrated by the *Shields* case, reveals the need to take account of the people who are most affected by sexual speech: the models who appear in images.

IV. CAN THE MODEL SPEAK?

The discussion of obscenity law almost always leaves out the one most important group, the models and actors who appear in the works. This creates a paradox of silence, since the model is not heard in statutory law and makes virtually no appearance in case law, yet they are baring all in sexualized speech.[246] This silencing has previously been attributed to the structure of obscenity law, the adversarial system, and the middle class (masculine, Christian, and heteronormative) hegemony which keeps the existing law in place.[247] Although these are the root causes of the silencing, they are compounded by the alienation of the model from their work and the underlying censorship of sexual speech.

American courts tend to be conservative and have not been particularly adept at bringing about social change, instead ratifying extra-legal societal changes.[248] Although the Burger majority sought to settle the obscenity issue and stem the increase in pornography, it could not stop the social changes of American society, which became more tolerant of sexual images.[249] If the law

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the modeling business and sold them to Penthouse Magazine without her consent, which was not needed because of a waiver she signed).

[244] REPORT COMMISSION ON PORNOGRAPHY, *supra* note 5, at 231–32.

[245] 18 U.S.C. § 2256(2)(A)(v).

[246] Acevedo, *Model Speaks?*, *supra* note 13, at 257.

[247] *Id.* at 257-58.

[248] GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 420–22 (2d ed. 2008).

[249] STONE, *supra* note 1, at 288–91, 296.

follows society, then the cultural wars of the last half-century are where changes in the hegemonic view of sexual images will be wrought.[250] For the United States and Western Europe, the hegemonic construction of gender is middle class, Christian, gender binary, and heteronormative.[251] This current American hegemony impedes us from hearing models in obscene or pornographic works because it views them as engaged in sinful or distasteful practices, and in doing so, perpetuates the dominant hegemony.[252]

The silence of the model perpetuates the existing system of gender norms by denying a voice to marginal groups and strengthening the normative.[253] The silencing of the model is particularly problematic in sexual images because, as Butler asserts, gender identity is constructed through the performance of gender roles.[254] When a person does not perform gender properly or subverts gender identity, they threaten society's gender norms.[255] For example, drag both brings together and separates the issues of "anatomical sex, gender identity, and gender performance."[256] As Benjamin asserted, art is now based on the practice of politics.[257] The models who posed for Robert Mapplethorpe's *X Portfolio* were performing their gender, pushing the notions of male gender identity, and displaying their anatomical sex—by prosecuting the images as obscene, their motives were lost in the

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[250] *See, e.g.*, Mike Wallace, *Culture War, History Front, in* HISTORY WARS: THE ENOLA GAY AND OTHER BATTLES FOR THE AMERICAN PAST 171, 174–79 (Edward T. Linenthal & Tom Engelhardt eds., 1996) (describing the early 1990s as an instance where conservatives began to voice the dangers of liberal thought in academic and other institutions).

[251] *See* Acevedo, *Model Speaks?*, *supra* note 13 (asserting that American society is middle-class, Christian, and heteronormative); *see also* PAUL KIVEL, LIVING IN THE SHADOW OF THE CROSS: UNDERSTANDING AND RESISTING THE POWER AND PRIVILEGE OF CHRISTIAN HEGEMONY 11–36 (2013); *see* STEVE SEIDMAN, THE SOCIAL CONSTRUCTION OF SEXUALITY 36 (2d ed., 2010) (asserting that the dominant gender roles are heterosexual with a goal of marriage and a nuclear family); Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* DEVIATIONS: A GAYLE RUBIN READER 137, 148–51 (2011) [hereinafter Rubin, *Thinking Sex*] (describing views on sexuality among Christians in the United States); SIMON, *supra* note 30, at 30–32 (providing a gloss on Antonio Gramsci's description of the rise of middle class hegemony in Italy).

[252] AGAMBEN, *supra* note 22, at 80–82 (arguing that the fall into sin is more one of the mind than one of the flesh).

[253] Rubin, *Misguided*, *supra* note 24, at 273 (discussing how anti-porn politics leads to police harassment of people with unfashionable desires); *see also* Rubin, *Thinking Sex*, *supra* note 250, at 163–64 (discussing how the targeting of pornography leads to the targeting of the s/m subculture).

[254] SEIDMAN, *supra* note 250, at 35–37.

[255] BUTLER, GENDER TROUBLE, *supra* note 103, at 186–89.

[256] *Id.* at 187.

[257] Benjamin, *supra* note 84, at 223–24 (concluding that the ritual of art which is bounded to a certain time gives way to the use of mechanically reproduced art as politics).

court record.[258] Of course, the average model is not looking to fight a cultural war, but to simply earn a living with dignity.[259]

The silencing of models fixes them as an *other* to the viewer, who uses the model as a barometer of their prurient-ness just as men use women to define themselves.[260] The reversal of the subject-object gaze does not remedy the situation, because it is the reversal of the gaze of the object image, not of the individual represented in the image. In other words, we only have the final work product of the model, the image, and not their beliefs about why they engaged in the production of the image.

A. Theoretical Silencing of the Model

The plight of models has been noted by anti-porn feminists as a justification for expanding unprotected speech to include pornography as well as obscenity.[261] There have also been discussions of how the image of a model can immortalize her, while virtually nothing is known by the general public about her.[262] The inappropriate depiction of models in works of art has also been the subject of some recent controversy.[263]

Starting in the 1980s, anti-porn feminists began to link societal violence toward women with pornography and sought to stop it via city ordinances.[264] Catherine MacKinnon and Andrea Dworkin proposed an ordinance which sought to introduce a new form of action to prohibit pornography based on the civil rights of women and create causes of actions for violence used in the making of pornography or which could be traced back to the perpetrator viewing pornography.[265]

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[258] KARDON, *supra* note 220, at 47–49 (providing some of the photos that were claimed to be obscene); *see also* City of Cincinnati v. Contemp. Arts Ctr., 566 N.E.2d 207, 211 (1990) (denying the defense motion to dismiss counts of their indictment for obscenity).

[259] PHILLIPS, *supra* note 64, at 40–44 (discussing how models do not see themselves as sex workers since their goal is not to arouse the viewer but rather that they do it for enjoyment since it pays very little); *see also* SHIRA TARRANT, THE PORNOGRAPHY INDUSTRY: WHAT EVERYONE NEEDS TO KNOW 53–58 (2016) (describing the pay for various types of pornography actors plus some of the negatives of the work).

[260] SIMONE DE BEAUVOIR, THE SECOND SEX 264–65 (Constance Borde & Sheila Malovany-Chevallier trans., Vintage Books 2011) (1949) (describing how male writers use women to reflect their own ideals, ethics, and beliefs about themselves).

[261] MACKINNON, *supra* note 6, at 3–6.

[262] CAMILLE LAURENS, LITTLE DANCER AGED FOURTEEN: THE TRUE STORY BEHIND DEGAS'S MASTERPIECE 1–3,5–6 (2017) (describing both how little is known about the model for the sculpture either today or even at the time of the first exhibit in Paris).

[263] Bellafante, *supra* note 8 (detailing the online petition to remove a Balthus depiction of a young girl in a suggestive pose).

[264] SEIDMAN, *supra* note 250, at 171.

[265] *See* MACKINNON, *supra* note 6, at 22–24, 90–92 (providing a brief description the hole in

For purposes of un-silencing models, the hearings held to support the ordinance were more important than the ordinance itself. They represent the first time women were able to speak in public about the harms done to them by pornography.[266] The most sensational issue facing women in sexual speech was coercion into making the speech as described by Linda Marchiano.[267] Marchiano appeared under the name Linda Lovelace in several movies, most notably *Deep Throat* during which she reports being physically abused and coerced into appearing.[268] The more common complaint voiced in the hearings was the reusing of non-pornographic photos in pornographic contexts or faking nude images of models.[269] The hearings were successful in revealing these abuses within the pornography industry plus highlighting violence against women. But the flaw of the hearings, and of the ordinance, was that it was one-sided in highlighting the harms against women—forcing women to engage in sexual activity—most of which were already illegal, and in doing so, it showed the signs of a crime panic.[270]

The ordinance's major innovation was to shift the focus onto women by changing the definition of pornography to focus on the objectification, violence, or demeaning of women.[271] The effect the ordinance might have had will remain unknown, since it was struck down by the Seventh Circuit for violating the First Amendment because it did not conform to the standards set forth in *Miller* to define obscenity.[272] It is unlikely the ordinance would have unsilenced models, because it only gave voice to those who believed pornography was harmful and silenced others.[273]

Both the hearings and the ordinance failed to fully take account of feminists, such as Butler and Rubin, who have a positive view of sexual

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American law that the ordinance was attempting to fill); *Minneapolis Hearings*, *supra* note 242, at 60–63 (providing the language of the ordinances adopted by the City of Minneapolis in 1983 and 1984).

[266] CATHARINE A. MACKINNON, *The Roar on the Other Side of Silence*, *in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 3, 3–24 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

[267] Catharine A. MacKinnon & Andrea Dworkin, *Minneapolis: Memo on Proposed Ordinance on Pornography*, *in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARING, 253–57, 254 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997).

[268] *See generally,* LINDA LOVELACE WITH MIKE GRUNDY, ORDEAL (1980) (describing Lovelace's ordeal as an actress during *Deep Throat*); *see also Minneapolis Hearings*, *supra* note 242, at 62–63.

[269] *See Minneapolis Hearings*, *supra* note 242, at 140–42 (describing the creation of faked nude images of the actress Valerie Harper for printing on a t-shirt).

[270] *See* Acevedo, *Crime Fantasies, supra* note 214, at 195 (defining crime panics).

[271] *Minneapolis Ordinance, in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 426, 435 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter *Minneapolis Ordinance*].

[272] Am. Booksellers Ass'n v. Hudnut, 771 F. 2d 323, 323 (7th Cir. 1985).

[273] Acevedo, *Model Speaks?, supra* note 13, at 265.

imagery—or at least fear state censorship more than masculine hegemony.[274] Anti-porn feminists lumped pornography with obscenity—indeed most sexual speech—as oppressing women.[275] But his view "treats the women in the industry as if they were incapable of asserting their own personhood."[276] In the end, both pro- and anti-porn feminists inscribed their beliefs on the bodies of the models they sought to help. As with everyone else, their gaze fell into themselves and only revealed their beliefs, and it did not unsilence the models.

The Subaltern Studies movement has sought, "to produce historical analyses in which the subaltern groups were viewed as the subjects of history."[277] The term subaltern refers to those people who are not part of "the dominant indigenous and foreign elite."[278] The approach of these scholars provides a counterbalance to the generally Marxist analysis of workers because they seek to separate power from capital and examine "the relationship between power and knowledge."[279]

The rise of mechanical reproduction has changed the relationship between models and viewers and contributed to the alienation of the model from the work in which they appear.[280] The emphasis on exhibiting all art, and nude bodies in particular, has shifted from the ritual and civic displays of most artwork until the nineteenth century to the exhibition value of the art, which is a primary concern in contemporary society.[281] The pornographic model, like all models and actors, now creates not for art, but for public consumption; because images can be reproduced, the aura of the individual is lost and replaced by the mere commodification of the result.[282]

This is not to say that before mechanical reproduction, models were

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[274] JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE xiii (1997) [hereinafter BUTLER, EXCITABLE SPEECH]; *see also* Rubin, *Misguided*, *supra* note 24, at 260–62.

[275] MACKINNON, *supra* note 6, at 22–25.

[276] DRUCILLA CORNELL, THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARASSMENT 96 (1995).

[277] Dipesh Chakrabarty, *Subaltern Studies and Historiography*, 1 NEPANTLA: VIEWS FROM SOUTH 9, 15 (2000).

[278] *Id.*

[279] *Id.* Subaltern Studies also seeks to critique the formation of nations, but that is not relevant to the present discussion.

[280] Benjamin, *supra* note 84, at 228–30 (noting that the performance on film pulls apart the actor into many small performances, which causes them to no longer identify with the character they are playing); KARL MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844, at 72–73 (Martin Milligan trans., Prometheus Books, 1988) (1844) (noting that regardless of the type of labor, the more the worker puts into the object of their work the more estranged from their work product they become).

[281] Benjamin, *supra* note 84, at 224–25.

[282] *Id.* at 230–31.

treated well.[283] However, the disjuncture between model and the work has been emphasized in photography and film, because the camera serves to refocus reality into only what the filmmaker wants you to see while excluding the context of the model. Unlike stage productions, where there is no point where the illusion is directly revealed, errors of models can be reshot, retouched or edited out. In this way, machinery has interposed itself to a greater degree than previous art forms.[284] At the same time, the model is captured directly by film, but the narrative is that of the director's speech—it is the model's body disjointed from the model's motives.[285]

The model is themself a commodity, and like all workers, becomes alienated from what she produces.[286] "The worker puts his life into the object; but now his life no longer belongs to him but to the object."[287] Their work product, and their voice, becomes the property of the artist or corporation and the model is separated from her image and therefore her body and speech.[288] The alienation also has a direct economic impact on models, because the work product belongs to the capitalist-photographer who can continue to profit and reuse the image without additional compensation or permission from the model.[289] The alienation of the model from their own image therefore poses an enhanced problem in the area of free speech law because it perpetuates the power inequality inherent in the transaction.

Benjamin notes that our urge to get closer to things is pushed by contemporary desires, which reproduction enables—we can now own a photograph or reproduction of the artwork.[290] For nude images, mechanical reproduction enables anyone who wants to possess the nude image—possess the model—to do so; whereas before, at most, someone could see a bronze, lithograph, or painting of the model, see her live, or read a description of her. This is only illusory, as mechanical reproduction only enables us to possess

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[283] *See, e.g.*, LAURENS, *supra* note 261, at 24–27 (describing the poor conditions of the model, Marie Geneviève van Goethem, who was depicted by Edgar Degas in the sculpture *Little Dancer Aged Fourteen*).

[284] Benjamin, *supra* note 84, at 232–34 (describing the editing of film as illusionary in nature but allowing the viewer to feel as if they are seeing reality because the equipment is hidden from their viewpoint).

[285] *Id.* at 235–37 (describing how film can be manipulated to change the viewers perspective).

[286] MARX, *supra* note 279, at 71.

[287] *Id.* at 72.

[288] *Id.* at 71–75 (providing an overview of the theory of alienation of labor).

[289] *See generally* REPORT COMMISSION ON PORNOGRAPHY, *supra* note 5, at 231–32 (noting that many women who started modeling in sexual speech did so to earn money); *see, e.g.*, *Minneapolis Hearings*, *supra* note 242, at 224–25 (providing a letter from Jaime Lyn Bauer describing how photos that she was either not paid for or received minimal compensation for were resold by photographers without her permission and without compensation to her).

[290] Benjamin, *supra* note 84, at 224–26 (discussing the transition from cult value to exhibition value of art works).

her work product, the reproduction. For this reason, any solution which seeks to aid the model must be located in property, contract, or tort law and not in criminal law because the later will not restore what is lost to the model and only punish the seller. The reversal of the gaze cannot fully restore a voice to the model. She was alienated from her image the moment the photographer captured it.[291] But alienation should not be overstated. The model's voice does come through, albeit muted, via the work she chooses to appear in and the poses she chooses to assume. She is a co-producer of art.[292] Marxist theorists can explain why the model is seen but not heard, but they do not provide them with voice.

Various groups of historians have sought to give voice to marginalized, or subaltern, people by expanding their analysis beyond elites. Social History began to describe everyday people in the 1920s.[293] "Social historians focus either on the factors and forces that shape society as a whole or on the lives of ordinary people who are excluded from established centers of power."[294] Marxist historians, almost by default, examine workers for signs of class struggle, regime change, and the divergence between labor and capital.[295] Despite these theoretical movements to tell stories from the bottom up, none of them have been able to give voice to non-elites because they are bound by the gaze and voice of elites.[296]

Critical Race Theory has come the closest in allowing the model to speak but is limited by the same problem of elites giving voice to non-elites and by its own goals. By using storytelling and narrative analysis, Critical Race Theory scholars have pushed to give voice to marginalized racial communities in legal discourse.[297] These methods have been successful in making law students, legal scholars, and judges take account of minority

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[291] MARX, *supra* note 279, at 71–72; *see also* Benjamin, *supra* note 84, at 230–31 (noting that a film actor, unlike a stage actor, means that the market takes not just his labor, but his whole self).

[292] PHILLIPS, *supra* note 64, at 15–17.

[293] Alice Kessler-Harris, *Social History*, *in* THE NEW AMERICAN HISTORY: REVISED AND EXPANDED EDITION 231, 232–33 (Eric Foner ed., 1997) (providing an overview of the origins of social history).

[294] Gary J. Kornblith & Carol Lasser, *More Than Great White Men: A Century of Scholarship on American Social* History, *in* A CENTURY OF AMERICAN HISTORIOGRAPHY 11 (James M. Banner, Jr. ed., 2010).

[295] S.H. Rigby, *Marxist Historiography*, *in* COMPANION TO HISTORIOGRAPHY 889, 900–02 (Michael Bentley ed., 1997) (discussing Marxist historians who focus on the early modern and modern eras).

[296] Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* COLONIAL DISCOURSE AND POST-COLONIAL THEORY, A READER 66, 90–93 (Patrick Williams & Laura Chrisman eds., 1994).

[297] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 3–39 (2001).

voices in discussion of case law.[298] Although Critical Race Theory has started to unsilence entire communities in legal discourse, it cannot fully unsilence models who appear in sex speech.[299] This is because at its core, it is an advocacy model and as such is compelled to defend the marginalized, which almost necessitates that sex speech is seen as a form of assaultive speech.[300] Similarly, Critical Race Theory's response to hate speech has been to focus on expanding the fighting words doctrine to include racially derogatory speech as unprotected speech.[301] Thus, Critical Race Theory has proven itself a powerful tool for unsilencing many marginal groups, but has difficulty giving voice to the sex image model if they are not oppressed by their work. Critical Theory also suffers from the paradox of elites voicing non-elites found in other social theories.

In the end, changing theories alone will not allow either the model or the subaltern to speak.[302] The problem is illustrated by the difficulties faced by the liberal state and feminist commentators as they grapple with depicting sati, the immolant widow, and often are unable to do so.[303] For colonial apologists, the sati was a woman to be saved from the oppressive system which coerced her onto her husband's funeral pyre—ignoring any agency of hers.[304] For Indian scholars, the story of the goddess—her death and dismemberment into sacred places—shows there was original feminist ideology in Hinduism which was contaminated over time, but "there is no space from which the sexed subaltern subject can speak."[305] The liberal state has gone a step further by un-labeling immolations as sati; however, this was done not to ignore sati, but out of an inability to comprehend and include sati within the liberal state.[306]

> The inability of scholars to adequately capture subalterns is further complicated on the issue of models because they are

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[298] *Id.* at 39–43.

[299] *Id.* at 43–44 (asserting that Critical Race Theory has started to give voice to minority communities).

[300] MARI J. MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7 (1993); *see also* BUTLER, EXCITABLE SPEECH, *supra* note 273, at 64 (describing division among critical race theorists about how to restrict hate speech while preserving the First Amendment right to free speech).

[301] BUTLER, EXCITABLE SPEECH, *supra* note 273, at 4–5, 64, 94.

[302] Spivak, *supra* note 295, at 105.

[303] *See id.* at 101–04; *see also* Deepa Das Acevedo, *Changing the Subject of Sati*, 43 POLAR: POL. & LEGAL ANTHROPOLOGY REV. 37, 39, 45–46 (2020) [hereinafter Das Acevedo, *Changing the Subject*] (arguing that satis are often unlabeled as such because the liberal state and feminists cannot reconcile the two models of personhood contained within the individual).

[304] Spivak, *supra* note 295, at 101.

[305] *Id.* at 103.

[306] Das Acevedo, *Changing the Subject*, *supra* note 302, at 37–38, 45–48.

> not heterogeneous; some look back on their work with pride and others with embarrassment; some viewed their work as a voluntary profession and others were coerced through circumstance or directly; some consider themselves empowered and others victims.[307]

Whatever the reason, the result is the same: the model, like the sati and subaltern before them, cannot fully speak.[308] But, theories have allowed us to catch enigmatic glimpses of their intent in the images they appear in.

B. Legal Silencing of the Model

Current jurisprudence rarely allows models to speak. In legal discourse, this occurs for three interrelated reasons. First, the law creates a binary between licit and illicit sexual speech from the perspective of the viewer. Second, the law focuses on the sale and distribution of illicit sexual speech and not its creation. Third, standing limitations remove models from the possible parties to most legal actions. But the law also provides glimpses of pathways which allow models to speak.

Obscenity law makes no distinction among pornography and erotica, but registers a simple binary of obscene or not-obscene, low-value or high-value speech, illicit or licit.[309] The law does not care what the goal of the artist or model was, only if the end result is obscene.[310] Indeed, the law does not care about the intent of the distributor, other than they intended to distribute.[311] Even in the area of child pornography the model plays no role in the prosecution beyond establishing that they are a minor; once established, they are no longer needed and the case continues between the state and the accused.

This binary elides the motivation behind the sexual speech and lumps all models together in silence, irrelevant to the legal discussion. This creates a problem for the model who cannot know if they are making art, erotica, pornography, or obscenity—it is for the viewer, not the model nor photographer, to decide. The binary thus focuses the legal discussion onto the viewer's gaze by asking whether "the average person, applying contemporary community standards' would find that the work, taken as a

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[307] Acevedo, *Model Speaks?*, *supra* note 13, at 274.

[308] Spivak, *supra* note 295, at 104.

[309] Roth v. United States, 354 U.S. 476, 485 (1957) (declaring obscenity to be unprotected speech under the First Amendment).

[310] STONE, *supra* note 1, at 278–79.

[311] *See* 18 U.S.C. § 1465 (2018) (setting forth the elements of production with the intent to transport, distribute, or transmit in interstate commerce); *see, e.g.*, City of Cincinnati v. Contemp. Arts Ctr., 566 N.E.2d 207, 211 (1990) (noting that, although this was the first prosecution of a museum for obscenity distribution, it is uncontested that the entity displayed the photographs and charged admission).

whole, appeals to the prurient interest."[312] As discussed above, this simply collapses the analysis into the individual viewer and tells us nothing about the nature of the image, but instead the nature of the viewer.

There is a separate binary at issue: the adversarial dialectic of the criminal legal system, which excludes those persons not charged with a crime or prosecuting the crime.[313] This is not a feature unique to obscenity prosecutions but a feature of the modern common law adversarial system which was solidified when defense counsel transformed the judge from an active participant to a referee between warring counsel.[314] Fighting to obtain a voice in the criminal legal system was an early goal of the victim's rights movement in America.[315] But models who appear in obscenity are usually not considered victims of the obscenity, so they would not be included as victims.

The binary nature of obscenity law is compounded by the requirement that federal laws need to be based on a grant of power enumerated in the Constitution.[316] The federal government's lack of general police power has forced it to justify criminal sanctions on other powers, most often the power to regulate interstate and foreign commerce.[317] The Comstock Laws were initially justified under the power to regulate the post and thus placed their focus on persons who ship obscene material via the post.[318]

When Congress expanded the scope of the Comstock Laws in the early twentieth century to include all common carriers, Congress relied instead on

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[312] Miller v. California, 413 U.S. 15, 24–25 (1973).

[313] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND 1660–1800, at 361–62, 374–76 (1986) (discussing the introduction of defense counsel and their effectiveness in challenging the prosecution's case). *But see* JOHN H. LANGBEIN, THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL 332 (2003) (asserting that the introduction of counsel into criminal trials served to further obscure the search for truth rather than enhance it because it left the search for truth in the hands of partisans who seek to win).

[314] *See generally* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978) (providing a description of the criminal trial before the introduction of defense counsel and a brief history of the introduction of defense counsel).

[315] *See* Alice Koskela, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 167 (1997) (describing the assertion of a right to be heard by supporters of victim's rights).

[316] McCulloch v. Maryland, 17 U.S. 316, 353 (1819) (holding that Congress has broad discretionary authority to implement the powers enumerated in the Constitution under the Necessary and Proper Clause).

[317] United States v. Lopez, 514 U.S. 549, 564–65 (1995) (striking down the Act for failing to have a sufficient nexus to interstate commerce).

[318] *See* United States v. Bott, 24 F. Cas. 1204, 1204–05 (C.C.S.D.N.Y. 1873) (No. 14,626) (holding that Congress's postal power only extends to items shipped within the post office system and not the end or desired results of those shipments); *see also Ex parte* Jackson, 96 U.S. 727, 735–37 (1877) (holding that Congress can prohibit transportation of certain items via the post as part of its postal power).

its Commerce power.[319] Although, some pornography producers still routinely ship their merchandise through alternative carriers from the Postal Service.[320] At the time, the Commerce power was limited to acts which directly touched transportation through interstate commerce.[321] This narrow reading of the Commerce power continued to focus attention on the distributors and suppliers of obscene material rather than the production of the material. The Court eventually overturned this view and declared that Congress could reach production and activities which substantially affect interstate commerce, but the target of obscenity laws did not change.[322]

The Court has also removed the individual possessor of obscene material from the obscenity law so long as they keep the obscene item within the privacy of their own home.[323] The result of this peculiar history of obscenity law's justification is that the model rarely enters the legal arena as part of an obscenity prosecution.

Exceptions do exist, such as the prosecution of the pornographic actor Max Hardcore, but he was also the producer of pornography and distributed it over his website.[324] As the homemade pornography sector of the industry grows—through webcams and on-demand pornography—the exceptions will expand, but it remains the distributor or seller of obscenity who are most often prosecuted.[325]

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[319] SCHAUER, *supra* note 131, at 21.

[320] Brief for Defendants-Appellants at 38, United States v. Little, 365 Fed. App'x. 159 No. 08-15964-D (M.D. Fla. Feb. 2, 2010).

[321] *See generally* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (striking down part of the Sherman Antitrust Act and holding that manufacturing is not part of interstate commerce); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 303 (1936) (holding that Congress could not regulate manufacturing of a good that would end up in interstate commerce before it enters interstate commerce). *But see* Champion v. Ames, 188 U.S. 321, 363–64 (1903) (upholding Congress's ability to regulate the sale of lottery tickets across state lines);*see also* Hous. E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914) (upholding congressional regulation of interstate railroad rates as necessary for the regulation of interstate commerce).

[322] *See generally* Nat'l Lab. Rel. Bd. v. Jones & Laughlin Steel Co., 301 U.S. 1, 5 (1937) (upholding the Wagner Act and federal regulation of workers' unions as a valid exercise of the Commerce Clause); *see also* Wickard v. Filburn, 317 U.S. 111, 114 (1942) (upholding the Agricultural Adjustment Act's quotas of agricultural production as a valid exercise of the Commerce Clause because the aggregate effect of all wheat was to impact interstate commerce even if the particular farmer's wheat did not enter interstate commerce).

[323] Stanley v. Georgia, 394 U.S. 557, 568 (1969) (invalidating a state obscenity statute that criminalized the possession of obscene material in a private home). *But see* Osborne v. Ohio, 495 U.S. 103, 103–05 (1990) (upholding state child pornography statute, which criminalized the possession of child pornography).

[324] *Little*, 365 Fed. App'x. at 161 (upholding the conviction of the defendant for distributing obscene material but remanding for re-sentencing).

[325] *See, e.g.*, Niels van Doorn, *Keeping it Real: User-Generated Pornography, Gender Reification, and Visual Pleasure*, 16 INT'L J. RSCH. INTO NEW MEDIA TECH 411, 415–17 (2010) (providing an

That the law punishes the person who disseminates the obscene material rather than the person who appears in it is not completely negative.[326] Throughout the twentieth century obscenity and pornography were linked to the LGTBQ community as a way to discredit both.[327] This is particularly important, given the continued police harassment of minority groups, including the LGTBQ community.[328] Thus the silencing of the model removed them not only from the case law, but removed them from the reach of police and prosecutors as well.[329]

Finally, standing requirements limit models from entering into obscenity cases. Standing requires that the party must allege they have suffered an injury, or imminently will suffer one; that the injury is traceable to the opposing party's conduct, and that a favorable court decision will redress the harm they have suffered.[330] As noted above, the model is rarely a party to the criminal prosecution and therefore has no way of entering the case, except perhaps as a witness. In a criminal obscenity case, the model has been paid and created the image they want. Indeed, that image has been displayed to another person so there is not even an issue of prior restraint.[331] They have

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overview of the literature linking the rise of participatory, or amateur, pornography to the rise of reality television).

[326] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 120, at 1112–14 (providing an overview of obscenity law).

[327] RICHARD MEYER, OUTLAW REPRESENTATION: CENSORSHIP AND HOMOSEXUALITY IN TWENTIETH-CENTURY AMERICAN ART 198–201, 209–13 (2018) (describing commercial censorship of Robert Mapplethorpe; the targeting of his work by religious organizations; linking him to child pornography; and the Helms Amendment to limit funding); *see also* Rubin, *Thinking Sex*, *supra* note 250, at 141–43 (describing the use of appeals to protect children to target both erotic speech and the gay community); *see also* Gayle S. Rubin, *Afterword to "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality", in* DEVIATIONS: A GAYLE RUBIN READER 182, 183–85 (2011) [hereinafter Rubin, *Afterword*] (noting the increased frequency of panics regarding pornography, children, homosexuality, AIDS and other disfavored popular culture and the increased linking of obscenity with children).

[328] John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 HOW. L.J. 621, 636–37 (2016) [hereinafter Acevedo, *Restoring Dignity*] (discussing the New Orleans Police Department's targeting of racial minorities and the LGTBQ community, which culminated in a consent decree with the Department of Justice in 2013).

[329] Norma Jean Almodovar, *Porn Stars, Radical Feminists, Cops and Outlaw Whores: The Battle Between Feminist Theory and Reality, Free Speech, and Free Spirits*, *in* PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY 149, 149–53 (Jessica Spector ed., 2006) (discussing how essentially the same paid sexual encounter can be criminal depending on who is doing the paying—if the sexual partner, then illegal prostitution, but if a director, then legal pornography).

[330] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 120, at 63–64 (providing an overview of federal standing requirements).

[331] New York Times Co. v. United States, 403 U.S. 713, 719–20 (1971) (noting the importance of the First Amendment in a free society and why prior restraints should not be generally allowed); *see also* Alexander v. United States, 509 U.S. 544, 549–56 (1993) (rejecting the assertion that the forfeiture of assets following a conviction will chill speech such that it will enact a prior restraint).

suffered no economic harm since they have already been paid for the work.

The only way models might have standing would be on behalf of the distributors or consumers of pornography. The Third Circuit has recognized that the distributors of obscenity and pornography do have derivative standing to challenge the constitutionality of federal obscenity laws on behalf of their customers.[332] In this holding, the Third Circuit simply continued the derivative standing of sellers to their customers which has been recognized in other contexts, such as the ability of beer sellers to challenge a state statute on behalf of customers.[333] The courts have looked to the interrelatedness of the constitutionally protected transaction between the party asserting the rights and the persons whose rights are being asserted, as well as the ability of that person to assert their own rights.[334] But it is unlikely that models would be able to assert the rights of consumers, because they are not sufficiently close in relationship as the distributor stands between them. To enable models to assert the rights of their employer-producers or distributors of obscenity, courts would have to find that those employers, like medical patients, were incapable of asserting their own rights—which is highly unlikely.[335] This leaves two options to relax the standing requirements or create causes of action which models can use to enter court.

India has led the way in opening the courtrooms to third party litigants through the creation of Public Interest Litigation (PIL), which removes traditional standing requirements for issues which are of general public concern.[336] But the relaxation of standing requirements has led to meddlesome interlopers filing PILs to advocate for their own views of society.[337] Indeed, this is exactly what happened in the litigation of sodomy laws, which pitted religious advocates against social reformers, neither of whom were members of the LGTBQ community.[338] Similarly, if PILs were adopted in the United States, it would not be hard to imagine the porn wars of pro-porn and anti-porn feminists being fought out on the bodies of models.[339] PILs continue to silence the very minority groups they sought to help and simply opened the door to unwanted third parties.

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[332] United States v. Extreme Assocs., Inc., 431 F.3d 150, 155 (2005).

[333] Craig v. Boren, 429 U.S. 190, 194–97 (1976).

[334] Singleton v. Wulff, 428 U.S. 106, 114–16 (1976) (setting forth the considerations to determine if a third party can assert the rights of another person).

[335] *Id.* at 115–18.

[336] Deepa Das Acevedo, *Sovereignty and Social Change in the Wake of India's Recent Sodomy Cases*, 40 B.C. INT'L & COMPAR. L. REV. 1, 5 (2017).

[337] *Id.* at 1–26.

[338] *Id.*

[339] SEIDMAN, *supra* note 250, at 169–75 (describing the porn wars of the 1980s, which pitted anti-porn feminists against pro-porn feminists).

On rare occasions, models do appear as parties to court cases. In 1981 Brooke Shields sought to enjoin photographer Garry Gross from further use of nude photos he took of her when she was a minor.[340] The courts ultimately ruled in favor of Gross, finding that the contract was valid and that he possessed the images for commercial use, including advertisement and reprinting in magazines.[341] The holding is problematic because it ratifies the ability of a parent to contract away the rights of their child's nude image.[342] Nevertheless, Shields was heard in court and her objection to the photographs was registered if not acted upon. More importantly, Shields's case shows the way forward: the creation of causes of action which models can use to enter court.

MacKinnon and Dworkin proposed a new civil rights action based on discrimination against women, children and transsexual individuals in the showing of pornography or coercion into performance in a pornographic image.[343] This law warrants serious consideration for two reasons. First, it sought to give models and women voice within the courtroom since they would bring the suits against the manufacturers, producers, or distributors of pornography.[344] Second, it is a civil and not a criminal expansion of the law, which would serve to hold pornographers liable while not exposing vulnerable groups to the criminal legal system. However, the law has its drawbacks; it did not protect any men and it targeted action—coercion was captured in other areas.[345] The law was struck down by the court for burdening protected speech, since it targeted pornography in addition to obscenity.[346] But even if it had been upheld it would not have helped all models because it was based on the premise that pornography is violent and therefore did not capture models who willingly appeared in pornography but wanted more protections.[347]

MacKinnon and Dworkin were on the right track moving obscenity from the criminal to civil realm. The relaxing of standing is not a solution because it is likely to create more problems allowing in meddlesome interlopers to speak on behalf of the models. The criminalization of obscenity law creates the othering of models—by casting the pornographer, purveyor, or displayer of obscenity as the target of regulation, it says that models are to be seen, but

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[340] Shields v. Gross, 58 N.Y.2d 338, 342 (1983).

[341] *Id.* at 257–58.

[342] *Id.*

[343] *Minneapolis Ordinance*, *supra* note 270, at 428–29.

[344] *Id.*

[345] *Id.*

[346] Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332–34 (7th Cir. 1985).

[347] Acevedo, *Model Speaks?*, *supra* note 13, at 265 and 274.

not legally heard.[348] Therefore, the model cannot be unsilenced until obscenity law is decriminalized and replaced by civil law remedies designed to protect the models who appear in sexual images.

V. MOVING BEYOND OBSCENITY AND UN-SILENCING THE MODEL

As the preceding sections have demonstrated, the problem of the *object-gaze* means that criminal obscenity law must be struck down as unconstitutional and obscenity, along with all sexual speech, should be granted First Amendment protection. But granting obscene speech First Amendment protection is only the beginning of the analysis. Protected speech is subject to content neutral restrictions[349] and, as for content based restrictions, the state can still overcome a liberty interest if it meets strict scrutiny.[350] That is, the restriction "is justified by a compelling government interest and is narrowly drawn to serve that interest. The State must specifically identify an 'actual problem' in need of solving, and the curtailment of free speech must be actually necessary to the solution."[351] Therefore, granting obscenity First Amendment protection does not mean that states cannot regulate it or that they cannot protect groups harmed by it.

In the area of sexualized speech, the two groups which need protection are unwanted viewers and the models who appear in the speech. The issue of community effects applies more to zoning issues surrounding live entertainment venues, which has been placed in the domain of property law and not criminal law.[352] Although property and criminal laws have long been the twin pillars of legal oppression, the issue of over zoning displays of or performances of sexual speech is more appropriate for another discussion.[353] Similarly, the protections which have been established to protect unwanted

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[348] BUTLER, UNDOING GENDER, *supra* note 106, at 55–56.

[349] *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47–52 (1987) (providing a comparison between content based and content neutral restrictions and giving examples of the later).

[350] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 120, at 1021–22 (describing the analysis for content-based restrictions).

[351] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (citation omitted).

[352] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 560–61 (1991) (applying the test for symbolic speech to nude dancing to uphold state ban); *see also* City of Erie v. Pap's A.M., 529 U.S. 277, 279–80 (2000) (upholding a city ordinance that targeted a specific club on the theory that the law was targeting undesirable secondary effects).

[353] *See* STEVE HINDLE, THE STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND, 1550–1640, at 127–28 (2002) (positing that the enforcement of laws against property crimes and crime in general correlated to economic downturns in seventeenth century England as the state sought to increase control); *see also* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 41 (1986) (upholding city zoning scheme that prohibited adult theaters from being within 1,000 feet of any residential zone, church, school, or park); *see also* Young v. Am. Mini Theaters, Inc., 427 U.S. 50, 50–51 (1975) (upholding zoning ordinance that limited the proximity of adult theaters to each other).

viewers would not be affected by the underlying change in obscenity law, since it already extends to non-obscene speech.[354] If broadcasts of George Carlin's *Filthy Words* cross public airwaves can be regulated, then so too can Evil Angel Productions' *Milk Nymphos*.[355] This would also mean that the written word would be subject to virtually no regulation unless obscene descriptions of sex were sent unsolicited into homes.[356]

This leaves models as the remaining group requiring protection of the law, ideally while giving them voice and agency. Models are not a heterogeneous group,[357] but they can be roughly divided into three groups: children, involuntary models, and voluntary models. Models could have been grouped in many different ways, but the ability to consent to sexual conduct is a hallmark of the common law.[358] In addition, the existence or lack of a contractual relationship affects the relationship between the model, the artist, and the distributor. In determining possible solutions, two key factors were taken into account. The first and most important factor is giving voice to models who have mostly been excluded from First Amendment jurisprudence despite being the people who are speaking most—often literally baring all. Second, solutions which are based on existing legal doctrines have been emphasized over the passage of new laws—or simplicity has been emphasized over complexity.[359]

The easiest group to protect are children because it has been long recognized that the state has a compelling interest in the protection of children.[360] Therefore, even if all sexual speech is given full First Amendment

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[354] *See* Fed. Commc'n Comm'n v. Pacifica Found., 438 U.S. 726, 738 (1978) (upholding the FCC's prohibition on indecent language over broadcast media because it is uniquely pervasive and is able to penetrate, unwanted, into the home).

[355] *Id.*; *see also* United States v. Stagliano, 729 F. Supp. 2d 215, 217–20 (D.D.C. 2010) (denying defendants motion to play the jury the entirety of all films accused of being obscene).

[356] *See* Miller v. California, 413 U.S. 15, 36–37 (1973) (holding Miller's conviction for obscenity would be overturned, but a law prohibiting the unsolicited distribution of obscene materials could be sustained).

[357] *See* PHILLIPS, *supra* note 64, at 9 (describing the wide range of commitment to modeling, gender, and age ranges of models interviewed for the study).

[358] MODEL PENAL CODE § 213.1–6 (AM. L. INST. 1980) (describing the grades of rape and other sexual crimes); *see also* EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 60 (18th ed. Lawbook Exchange 2015) (1658) (reproduction of the 1823 edition) (describing the common law felony of rape as being against the will of a woman or a child under ten).

[359] In these proposals, I am not asserting a revolution of how models are protected in the modern sense of a radical change, but rather in the original meaning; a returning to something that came before.

[360] *See e.g.*, Prince v. Massachusetts, 321 U.S. 158, 167–71 (1944) (upholding state law prohibiting children from selling magazines from a challenge that it infringed on free exercise of religion); *see also e.g.*, New York v. Ferber, 458 U.S. 747, 761 (1982) (noting the state's interest in protecting children by prosecuting those who promote the sexual exploitation of children).

protection, child pornography could still be prohibited at either the national or state level.[361] This is with the caveat that such statutes would be limited to clearly listed sexual acts which depict actual children. Nudity alone cannot be sufficient because the line between the chaste clothing of nakedness, erotica, and pornography cannot be drawn without introducing the *object-gaze*. The use of words such as "lascivious" does nothing to prevent the *object-gaze* and only perpetuates its existence.[362]

The elimination of the *object-gaze* in the regulation of sexual speech will require the censor to explicitly "state what it does not want stated."[363] This paradox of the censor is particularly acute when the censor is attempting to target a particular term or idea because it must articulate that which is to be not-articulated and bring into the public sphere that which they want to suppress.[364] As 18 U.S.C. Section 2256 demonstrates, this is not difficult; child pornography includes "(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; (v) lascivious exhibition of the anus, genitals, or pubic area of any person."[365] The descriptions need not be prurient, simply sufficient to define the conduct clearly. In the current definition, "sadistic or masochistic"[366] would need further definition, but this would not be difficult. The paradox of the censor can be overcome and the Court's willingness to allow states to criminalize speech without defining it reveals the willingness to target all sexual speech, licit or illicit.[367]

However, the criminalization of child pornography alone will not protect child actors because it will not aid those children who appear in non-pornographic sexual speech. As the Brooke Shields case illustrates, there are instances when a child engages in sexual speech which they want limited once they become adults.[368] One proposed solution is to prohibit children from engaging in modeling in most circumstances, but this goes too far and is

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[361] *See Ferber*, 458 U.S. at 758–62.

[362] 18 U.S.C. § 2256(2)(A)(v) (2018) (prohibiting the "lascivious exhibition of the anus, genitals, or pubic area of any person").

[363] BUTLER, EXCITABLE SPEECH, *supra* note 273, at 130.

[364] *Id.* at 130–32.

[365] 18 U.S.C. § 2256(2)(A)(i)–(iv) (2018); *see also* 18 U.S.C. § 2251(b)–(c) (2018) (describing the punishment of persons who assist in the creation, sale, transmission, or possession of images of children engaged in sexually explicit conduct).

[366] 18 U.S.C. § 2256(2)(A)(iv) (2018).

[367] *See, e.g.*, Ward v. Illinois, 431 U.S. 767, 771–73 (1977) (upholding a state statute that did not provide a list of sexual conduct whose depiction was prohibited).

[368] Shields v. Gross, 448 N.E.2d 108, 109-10 (1983) (providing facts of the case and a description of plaintiff's claim).

unnecessary.[369]

A simpler solution is the restoration of the common law ability of children to disaffirm contracts made during infancy.[370] A form of infant disaffirmation was well established by the seventeenth century, although it was primarily focused the sale and transfer of land.[371] In general, the only contracts an infant could not void were those created for his sustenance: necessary food, drink, clothing, medical care, or education.[372] The use of disaffirmation would therefore not be a radical departure from existing law. Indeed, the dissent in Shields's case argued that child models engaged in sexual speech should be allowed to disaffirm contracts entered into by parents on their behalf.[373] Not only would this comport to the common law rule, but it would also promote state interest in the protection of minors.[374] The majority relied on New York state law, which abrogated this common law right in order to uphold agreements made between infants and their parents with entertainment and sports companies.[375] If the state wishes to protect corporations as well as children, then the Shields case also points to a solution. Shields only sought to enjoin the defendant photographer from using her images for uses beyond the original agreement—appearing in a Playboy publication book—and not for the original use.[376] The common law right could be amended in the case of actors and models to allow disavowing for any use beyond the originally contracted use, thus allowing the photographer to gain reasonable use while protecting child models and actors from the recycling of their images.

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[369] Kelli Ortega, *Striking a Pose: Protecting the Welfare of Child Models*, 35 CARDOZO L. REV. 2535, 2568–69 (2014) (suggesting that models under eighteen be prohibited from all fashion runway shows, editorials, photo shots, and advertisement unless the clothing is intended to be worn by children).

[370] Annotation, *Parent's Approval or Sanction of Infants Contract as Affecting Latter's Liability on, or Right to Disaffirm, it*, 9 AM. L. REPS. ANN. 1030 (1920) (providing a summary of the ability of infants to disaffirm a contract when they reach majority).

[371] *See* COKE, *supra* note 357, at § 57 n. 4 (discussing the differences between the automatic disaffirming of transfers during coverture versus the possibility to disaffirm if transfer was made during infancy); *see also id.* at § 259 (describing that any contract made for dead, obligation, release, grant, or by other writing to a person under the age of twenty-one may be avoided or disaffirmed by the infant).

[372] A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 540–44 (1975) (describing that these items were called necessities, but what was a necessity was debated over the centuries and resulted in the given list).

[373] *Shields*, 448 N.E.2d at 112 (Jasen, J., dissenting).

[374] *Id.* at 258–60.

[375] *Id.* at 257 (majority opinion noting that the legislature intended to make these contracts enforceable against the minor).

[376] *Id.* at 255–56 (describing Shields's objection to the photographs being licensed to other publications by the photographer after she became famous and without her consent).

The next most easily protected group are involuntary models, or those which have their image either captured or repurposed without their consent. This group can be divided into those who voluntarily pose for sexual imagery with the understanding that it is not for distribution (victims of revenge porn)[377] and those who are photographed without their consent or knowledge (victims of voyeurism).[378] The distinction is that the first group voluntarily distributed or posed for the photo, but like the child model, did not consent to its subsequent uses. The second group was likely (but not necessarily) the victim of a separate non-speech crime.[379]

The simplest solution is that being pursued by Without My Consent, a non-profit organization which is seeking to build a network of lawyers to engage in civil actions against the creators and distributors of these images.[380] Unfortunately, there is also a drive to criminalize speech as a means to deter the distribution of these photos.[381] The underlying action of taking images without consent would of course remain subject to state and local regulation, as would any coercion into sexual activity; thus, the call to criminalize that which is already criminal smacks of a crime fantasy.[382]

Instead, deterrence can be achieved through tort liability if the cost can be calculated properly, or set higher than needed, and there is a certainty of remedy.[383] Tort liability offers two benefits: first, it could be applied retroactively to images taken before its passage and to many distributions, because a civil law is not bound by the prohibition against ex post facto laws.[384] Second, the lawsuit can be pursued privately by the models involved

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[377] *See* Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 345–46 (2014) (describing the experience by a victim of revenge porn).

[378] Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1904–23 (2019) (providing descriptions of various types of sexual privacy invasions including voyeurism, up-skirt, sextortion, deep-fake sex videos, and nonconsensual photography).

[379] *See, e.g.*, Kimberly Lawson, *In Many States, It's Still Legal for Creeps to Photograph Up Your Skirt*, VICE (July 20, 2016, 1:33 PM), https://www.vice.com/en_us/article/gvzzem/in-many-states-its-still-legal-for- creeps-to-photograph-up-your-skirt [https://perma.cc/YC3H-HKYV].

[380] *50 State Project*, WITHOUT MY CONSENT, https://withoutmyconsent.org/50state/ [https://perma.cc/8KVW-QF69].H4TP-DRZF].

[381] *See, e.g.*, Citron & Franks, *supra* note 376, at 361–65 (arguing for the criminalization of revenge porn); *see also* Intimate Privacy Protection Act of 2016, H.R. 5896, 114th Cong. (proposing changes to federal law that would criminalize the online publication of photos taken without the consent of the person and placing the burden on the distributor to ensure consent was obtained).

[382] Acevedo, *Crime Fantasies*, *supra* note 214, at 195–97 (describing the overarching category of crime fantasy and the two subcategories of witch-hunts and crime panics).

[383] RICHARD POSNER, THE ECONOMICS OF JUSTICE 208–10 (1981).

[384] *See* Calder v. Bull, 3 U.S. 386, 390–91 (1798) (providing a list of laws that would be considered ex post facto laws; criminalizing action that was innocent when done; aggravating a crime retroactively; increases punishment retroactively; or alters the rules of testimonial evidence to a crime after it is committed).

without having to lobby district attorneys to pursue what might be a minor criminal matter.[385] As a general matter, using tort rather than criminal law will put the burden on plaintiffs, thus serving a break on attacks on legitimate speech and hopefully mitigating crime fantasies based on stereotypes while ensuring more legitimate actions.[386] Again, this is not an argument for the decriminalization of the underlying actions of invasion of privacy, just of the decriminalization of resulting sexual speech.

Voluntary models are the hardest to protect because many of the coercive forces which make women appear in sexual speech when they might prefer not to are systemic and apply to employment in general.[387] The model and actor simply represent the most literal alienation from their work product because it contains images of their bodies which they no longer control.[388] Without a major reform in the power dynamic between workers and employers, any solutions will only mitigate the problems, but not fully solve them.

Although their pornography ordinance and hearings were flawed, MacKinnon and Dworkin were on the right track in other senses. They looked beyond criminal law to provide remedies for models harmed by sexual speech.[389] They also sought to give voice to the grievances of models against publishers and producers of pornography.[390] One of the major problems which came out during the hearings and in subsequent incidents is the

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[385] *See, e.g.*, Valeriya Safronova & Rebecca Halleck, *These Rape Victims Had to Sue to Get the Police to Investigate*, N.Y. TIMES (May 23, 2019), https://www.nytimes.com/2019/05/23/us/rape-victims-kits-police-departments.html [https://perma.cc/F7W2-2P4A] (describing lawsuits from across the country against police and prosecutors in an attempt to push them to investigate rapes; noting that sex-based crimes are followed up on less than non-sex crimes).

[386] *See* Rubin, *Misguided*, *supra* note 24, at 273–74 (theorizing that focusing on pornography regulations detracts from more pressing oppressions of women such as unequal pay, job discrimination, sexual assaults, and others); *see also* Martenzie Johnson, *Commentary: Being Black in a World Where White Lies Matter*, THEUNDEFEATED (Jan. 30, 2017), https://theundefeated.com/features/being-black-in-a-world-where-white-lies-matter/ [https://perma.cc/539L-5LY2] (discussing the long history in the United States of white women making false accusations against black men); *see also* Acevedo, *Crime Fantasies*, *supra* note 214, at 222–25 (describing the Satanic Panic during the 1980s and 90s, which led to numerous false convictions because there was a rush to judgement and insufficient defendant safeguards).

[387] ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 148–56, 212–14 (2020) (linking a lack of education to fewer workplace options for American workers in the early 21st century); *see also* REPORT COMMISSION ON PORNOGRAPHY, *supra* note 5, at 231–32 (noting that many of the models involved in sexual speech reported having financial needs that pushed them into that type of appearance).

[388] MARX, *supra* note 279, at 71–74 (describing his theory of alienation of workers from their work product).

[389] *See, e.g.*, *Minneapolis Ordinance*, *supra* note 270, at 426–32.

[390] *See, e.g.*, *Minneapolis Hearings*, *supra* note 242, at 60–68 (providing the testimony of Linda Marchiano).

repurposing of images by photographers without the model's consent and without any payment to them.[391]

As with child models, the core issue is the use of images beyond the original intent of the contract, although the contract contained language giving rights of the photograph to the photographer.[392] Some judges have considered the resale of photographs to be contracts for goods, rather than the service of modeling, so they are applied to the Uniform Commercial Code to hold the contracts unconscionable.[393] U.C.C. Section 2-302 allows the court to "limit the application of any unconscionable clause as to avoid any unconscionable result."[394] The argument for non-substantive unconscionability is stronger because models are often young and unsophisticated in contract negotiations and because of the information asymmetry between an experienced photographer and a novice model.[395] Substantive unconscionability happens "when a contract yields a result that affects a contracting party too harshly," and this could also be applied.[396] Shields, Clausen, and Bauer all assert their careers were harmed by the republication of pictures in pornographic magazines, and they received no compensation for the pictures after receiving minimal compensation for the original photoshoot.[397] The application of unconscionability to the resale of sexual photographs beyond the initial use would protect models while still allowing photographers to gain the benefits of the original contract.

Providing First Amendment protection to obscene speech does not mean that currently recognized protections for unwanted viewers or listeners will be reduced. It also does not remove the criminalization of child

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[391] *See, e.g.*, *id.* at 224–25 (providing a letter from Jaime Lyn Bauer describing how test pictures taken by a photographer were later sold by that photographer ten years after they were taken, after she became famous, to Playboy Magazine without her consent); *see also,* Ellie Krupnick, *Hailey Clauson Urban Outfitters Lawsuit Headed to Court*, HUFFPOST (Mar. 12, 2012, 1:22 PM), https://www.huffpost.com/entry/hailey-clauson-urban-outfitters_n_1339285 [https://perma.cc/48ZJ-E7UG] (providing a brief overview of a lawsuit by Clauson against the company and photographer for repurposing a discarded image from a previous photoshoot for retail sale on clothing).

[392] *See, e.g.*, Shields v. Gross, 448 N.E.2d 108, 109 (1983) (describing the contractual arrangement between Shields and Gross as well as giving the example that to use the photos in a book Shields, herself, had to obtain permission from Gross).

[393] Shields v. Gross, 451 N.Y.S.2d 419, 421–22 (App. Div. 1982) (Asch, J., concurring).

[394] UNIF. COM. CODE § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 1977).

[395] Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1054 (1977) (describing the difference between substantive and non-substantive unconscionability and the subtypes of non-substantive unconscionability).

[396] *Id.* at 1054.

[397] *Shields*, 448 N.E.2d at 109 (1983) (providing a summary of Shields's complaint against Gross for the reselling of photographs to magazines); Krupnick, *supra* note 3890 (providing overview of Clausen's case against Urban Outfitters); *Minneapolis Hearings*, *supra* note 242, at 224–25 (providing Bauer's complaint about the reuse of her photographs by pornography magazines).

pornography. To solve the *object-gaze* problem, the statute would have to be amended to remove vague language which leaves judgment to the viewer. However, ending criminal obscenity will shift the focus of the debate from what is or is not obscene onto ways to protect models who appear in sexual speech of any kind. All of the proposed protections have sought to be practical in execution and exercisable by the models themselves. The goal has been to give voice to models in the legal arena—perhaps the law could be what allows models to speak.

VI. LAW'S OBSCENITY

The history of obscenity law reveals the Court's trouble in developing a workable definition. Finally, in developing the *Miller* test, the Court appeared to have created an objective test. As an analysis of obscenity through the lens of social theory and post-modern studies demonstrates, the *object-gaze* makes it impossible for obscenity to be objective. Because when a person looks at a sexual image, the subject-object gaze falls into the viewer, making them always the object of their own gaze.[398] What we learn about an image being obscene or not-obscene must always be about the viewer, never the image. The image is neither obscene nor non-obscene, it merely exists.[399] At most, the image serves as a Rorschach test to tell us about the viewer's sexual proclivities and their squeamishness about sexual imagery.[400]

The continued insistence on implementing obscenity law stems from the Christian hegemony which dominates American law and seeks to enforce aspects of its moral code upon everyone.[401] Although morality as the basis for law has been challenged in the area of sodomy[402] and birth control,[403] it remains unchecked in the area of obscenity law.[404] At the same time, obscenity law has not prevented the proliferation of sexual speech and has contributed to the silencing of the models who appear in it.[405] Indeed, although the models are the individuals who speak the most in sexual speech,

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[398] Žižek, *Looking Awry*, *supra* note 99, at 34.

[399] Russell, *On Relations*, *supra* note 79, at 18–19.

[400] Dr. Mike Drayton, *What's Behind the Rorschach Inkblot Test?*, BBC MAG. (July 25, 2012), https://www.bbc.com/news/magazine-18952667 [https://perma.cc/P7QJ-H477] (describing the origin and use of the Rorschach test as well as major criticisms of it).

[401] *See* WERBEL, *supra* note 145, at 66–67.

[402] Lawrence v. Texas, 539 U.S. 558, 571 (2003) (holding state prohibitions of homosexual sodomy to be in violation of the Due Process Clause of the Fourteenth Amendment).

[403] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 850 (1992) (holding that a woman's decision to terminate a pregnancy is a liberty protected by Due Process Clause of the Fourteenth Amendment).

[404] *See, e.g.*, United States v. Little, 365 Fed. App'x. 159, 162 (2010).

[405] STONE, *supra* note 1, at 301–03 (describing the proliferation of online pornography post *Miller*).

often baring all, they are almost completely absent from the legal discourse. As Spivak noted about subalterns in general, the model cannot speak.[406] Therefore, by granting First Amendment protection to all sexual speech and shifting the focus to protecting models through civil law remedies, they can finally be given a voice.

From a constitutional law perspective, the problem of the *object-gaze* is a strong argument that obscenity laws are unconstitutionally vague and that the area should receive First Amendment protection.[407] If an area of speech is protected, then the *object-gaze* of the viewer becomes less relevant because the law is not concerned with the emotional feelings aroused in the viewer, nor is their subjective belief relevant for its protection. Granting First Amendment protection to obscenity will not erode the ability of the state to impose content neutral restrictions, nor will it impede content based restrictions if they have a compelling purpose, such as protecting children.[408] The impossibility of determining what is and is not obscene contravenes the basic principles of criminal law: that a defendant should know their action is illegal when they commit the crime.[409]

From *Dunlop*[410] to *Roth*[411] to *Memoirs*[412] to *Jacobellis*[413] to *Miller*[414], the Court undulated from test to test in an attempt to define obscenity. With the *Miller* test, the Court declared it had achieved objectivity, but the problem of the *object-gaze* reveals that this was only an illusion.[415] The facticity of obscenity's subjectivity is laid bare by the Court's obscenity jurisprudence; the Court's involuntary intellectual waddling cannot be clothed in objectivity and is thus revealed to be obscene.[416] As the Court gazed at the subject of obscenity, its gaze fell into itself and revealed its jurisprudence to be obscene.[417] This is the obscenity of the law.

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[406] Spivak, *supra* note 295, at 104.

[407] *But see* Hamling v. United States, 418 U.S. 87, 105–06 (1974) (asserting that the *Miller* standard creates a workable test to determine something is obscene).

[408] New York v. Ferber, 458 U.S. 747, 752 (1982).

[409] ROBINSON ET AL., *supra* note 117, at 65–66.

[410] Dunlop v. United States, 165 U.S. 486, 500–01 (1897).

[411] Roth v. United States, 345 U.S. 476, 486 (1957).

[412] Memoirs v. Massachusetts, 383 U.S. 413, 415 (1966).

[413] Jacobellis v. Ohio, 378 U.S. 184, 191–92 (1964).

[414] Miller v. California, 413 U.S. 15, 21–33 (1973).

[415] Hamling v. United States, 418 U.S. 87, 105–06 (1974).

[416] SARTRE *supra* note 66, at 520–21 (describing obscenity as "certain involuntary waddlings of the rump," because they reveal a lack of gracefulness).

[417] Žižek, *Looking Awry*, *supra* note 99, at 34.