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Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America

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EYES WIDE OPEN, MINDS WIDE SHUT: ART, OBSCENITY, AND THE FIRST AMENDMENT IN CONTEMPORARY AMERICA

INTRODUCTION

Fifteen years after a coalition of conservative politicians and organizations declared war on controversial Contemporary art, the battle rages on. Detroit's Museum of New Art (MONA) opened its fourth "dirty show" this past Valentine's Day.[1] Including works by well-known Contemporary artists Glenn Barr, Tom Thewes, and Niagara, the exhibition was immediately condemned by Jef Bourgeau, MONA's founder and former director, as "pornography pure and simple."[2] Emphasizing that his opposition was about principles, not censorship, Bourgeau charged "dirty art" was an example of the vanishing line between art and entertainment, and that viewers were paying money to see "seedy bookstore" porn masquerading as fine art.[3] Bourgeau's own brush with administrative censorship makes his opposition to this exhibition even more interesting; just over two years ago, an exhibition of his own works was cancelled by the Detroit Institute of Arts.[4]

The controversy surrounding Detroit's dirty exhibition highlights one dilemma facing controversial artists in contemporary America. Immersed in a political, philosophical, art historical, and legal debate, works like those struggling for recognition in MONA's exhibition are in good company. Fifteen years ago, photographer Robert Mapplethorpe's striking and shocking homoerotic photographs touched off a nationwide controversy.[5] Today, he is fondly remembered for his superb technique and remarkable "aesthetization of [a] supposedly

1. Joy Hakanson Colby, *Is It Porn or Is It Art? You Judge "Dirty Show,"* DETROIT NEWS, Feb.14, 2003, at 1C.

2. *Id.*

3. *Id.* The exhibition's organizers were, in fact, flattered by Bourgeau's charge and believed his disapproval would attract a larger crowd curious to see the source of this brouhaha. *Id.* Asked to define what made the exhibition's works "dirty," the show's creator referenced Dean St. Souver's 2002 exhibition entry. *Id.* Souver's submission that year was a painting the artist purchased at a garage sale, which depicted a young boy fishing with a man looking down on him from a bridge. *Id.* Souver added the caption "Dirty is in the mind of the beholder." Colby, *supra* note 1.

4. *Id.*

5. *See infra* notes 53, 57-60 and accompanying text.

forbidden subject matter"[6] at the "outer reaches of sexual experience."[7] Karen Finley, whose failed challenge to the National Endowment for the Arts' "decency and respect" grant review criteria[8] sent shockwaves through the artistic community, continues to draw audiences eager to see her performance works.[9]

In spite of the growing critical and public acceptance of these works, the nature and extent of First Amendment protection remains ill defined and out of date, governed by an obscenity test and First Amendment philosophy unable to separate valuable art from obscenity. This Comment will describe the state of Contemporary art and illustrate the failure of the United States Supreme Court's First Amendment case law and theory to give today's controversial artists the protection they deserve. To further this understanding, Part II will provide a brief overview of art history through the Postmodern and Contemporary movements.[10] Part II will then offer a survey of American obscenity cases, highlighting the inability of the Supreme Court's current protection scheme to distinguish Postmodern art with sexual content from obscenity.[11] Part III will then analyze the theoretical foundations of the current obscenity test and suggest the problems with its attempts to define art and artistic value.[12] Part III will also explore the reasons why artists, art insiders, judges, and "reasonable" men and women are each unsuited to determine aesthetic merit in a challenged work.[13] Finally, Part IV will illustrate some potential consequences of a continued failure to afford Postmodern and Contemporary art sufficient protection, namely arbitrary law enforcement, self-censorship, and regulation based on secondary effects.[14]

II. BACKGROUND

This section will lay the legal and artistic foundations necessary to understand the failure of the Supreme Court's obscenity jurisprudence to satisfactorily address Postmodern art with sexually explicit content. It begins with a brief survey of art history since the mid-

6. EDWARD LUCIE-SMITH, VISUAL ARTS IN THE TWENTIETH CENTURY 329 (1997).

7. Edward de Grazia, *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius*, 11 CARDOZO ARTS & ENT. L.J. 777, 782 (1993).

8. Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

9. Finley performed her *Make Love* work—an attempt to understand post-September 11th life—in September 2003 at Boulder's Museum of Contemporary Art. John Moore, *Zoning Violations Push LIDA Off 'Balcony,'* DENVER POST, Sept. 7, 2003, at F-16.

10. *See infra* notes 18-65 and accompanying text.

11. *See infra* notes 66-142 and accompanying text.

12. *See infra* notes 143-216 and accompanying text.

13. *See infra* notes 217-232 and accompanying text.

14. *See infra* notes 233-275 and accompanying text.

nineteenth century, and traces the roots of Postmodern and Contemporary art back to the Modern era.[15] Next, this section discusses the origins of the Court's obscenity doctrine by first providing an overview of historical interpretations of obscenity and indecency statutes by British and lower U.S. courts.[16] Finally, this section traces the evolution of the United States Supreme Court's own obscenity jurisprudence.[17]

A. Understanding Art Today

To understand the problems faced by Postmodern and Contemporary art, one must first understand the position these works occupy in the history of art. For centuries, the success of an artwork was based primarily upon the artist's ability to capture reality in a realistic way.[18] Changes in patronage and the French Academy system in the nineteenth century profoundly affected society and artists, causing a "gradual metamorphosis . . . in attitudes toward artistic means and issues."[19] The product of this evolution was the "Modernist" movement.[20] Exemplified by innovative artists like Gustave Courbet[21] and

15. *See infra* notes 18-51 and accompanying text.

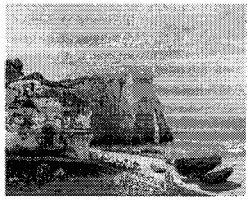
16. *See infra* notes 66-92 and accompanying text.

17. *See infra* notes 93-142 and accompanying text.

18. Pamela Weinstock, *The National Endowment for the Arts Funding Controversy and the* Miller *Test: A Plea for the Reunification of Art and Society*, 72 B.U. L. REV. 803, 804 (1992).

19. H.H. ARNASON & MARLA F. PRATHER, THE HISTORY OF MODERN ART 17 (4th ed. 1998). Governmental patronage of the arts waned in the mid-nineteenth century, and a newly-wealthy middle class increasingly replaced state patrons. *Id.* at 29. These new collectors favored materialistic ideas and ideology over the romantic, fantastical, and historical paintings prized by their predecessors. *Id.* Furthering this break in tradition was a trend toward small-scale landscape and genre paintings, a shift away from the "large, cumbersome scenes from antiquity" coveted by the aristocracy. *Id.*

20. *Id.* For a good critical study of the rise and fall of Modernism, see ROBERT HUGHES, THE SHOCK OF THE NEW (2d ed. 1991).

21. 

Gustave Courbet, *The Cliffs of Etretat After a Storm, available at* http://www.art.com/asp/display_artist-asp/_/ui3B72F718E2F44702B7597B912CDB6154/CRID—4604/isSearch—Y/searchString—courbet/posters.htm (last visited Sept. 12, 2003).

Edouard Manet,[22] Modern art became self-conscious, emphasizing color, composition, and spatial arrangement.[23] Instead of striving to precisely capture life on canvas or in marble, Modern artists sought to capture an emotion, a feeling, or a fleeting impression.[24]

In 1939, art critic Clement Greenberg surveyed the contemporary American cultural landscape in an attempt to reconcile how one society could simultaneously produce high and low culture: poetry by T.S. Eliot and Tin Pan Alley songs, Braque artworks and Norman Rockwell prints.[25] Greenberg explored the relationship between an aesthetic experience and the social-historical context of that experience, ultimately concluding that advanced art—the avant-garde—had split from and leapt ahead of popular artwork.[26] Leading the charge that kept culture alive in the face of capitalism, Greenberg's avant-garde blazed the trail that kitsch followed.[27] On this foundation,

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22. 

Edouard Manet, *Olympia, available at* http://www.art.com/asp/display_artist-asp/_/ui—3B72F718E2F44702B7597B912CDB6154/CRID—48/isSearch—Y/searchString—manet/posters.htm (last visited Sept. 12, 2003).

23. *See* ARNASON & PRATHER, *supra* note 19, at 17.

24. *Id.*

25. Clement Greenberg, *Avant-Garde and Kitsch*, *in* ART IN THEORY 1900-1990: AN ANTHOLOGY OF CHANGING IDEAS 529-41 (Charles Harrison & Paul Wood eds., 1993). For further analysis of Greenberg's hi/low art distinction, see IRVING SANDLER, ART OF THE POSTMODERN ERA: FROM THE LATE 1960S TO THE EARLY 1990S 1-5 (1996).

26. *See generally id.*

27. *See generally* Greenberg, *supra* note 25. Greenberg states:

> [W]ith the introduction of universal literacy, the ability to read and write became almost a minor skill like driving a car, and it no longer served to distinguish an individual's cultural inclinations, since it was no longer the exclusive concomitant of refined tastes. The peasants who settled in the cities as proletariat and petty bourgeois learned to read and write for the sake of efficiency, but they did not win the leisure and comfort necessary for the enjoyment of the city's traditional culture. Losing, nevertheless, their taste for the folk culture . . . the new urban masses set up a pressure on society to provide them with a kind of culture fit for their own consumption. To fill the demand of the new market, a new commodity was devised: *ersatz culture*, kitsch, destined for those who, insensible to the values of genuine culture, are hungry nevertheless for the diversion that only culture of some sort can provide.
>
> Kitsch, using as raw material the debased and academicized simulacra of genuine culture, welcomes and cultivates this insensibility. It is the source of its profits. Kitsch is mechanical; and operates by formulas. Kitsch is vicarious experience and faked sensations. Kitsch changes according to style, but remains always the same. Kitsch is the epitome of all that is spurious in the life of our times. Kitsch pretends to demand nothing of its customers except their money – not even their time. . . . [Kitsch] borrows from it devices, tricks, stratagems, rules of thumb, themes, converts them into a system and discards the rest.

Greenberg argued in 1961 that Modernist painting was the paradigm of artistic expression,[28] and that abstraction and the stained-color-field painting of current painters Louis, Noland, and Olitski were the logical conclusion of a century's technical artistic evolution.[29] To him, the simplified, authentic, pure, nonrepresentational, and serious nature of these works made them the product of an unquestionable linear development of artistic means and abilities.[30] In 1980, Greenberg summed up, "Modernist with a capital M [is] the simple aspiration to quality, to aesthetic value and excellence for its own sake, as an end in itself. Art for art's sake . . . . nothing else."[31]

By the late 1970s, art became infused with a different ideology as critics and artists grew dissatisfied with the "narrow confines" Modernism placed on art.[32] Like many movements before it, Postmodernism "retains as its hallmark the desire to break with the visual past and strike out into new aesthetic territory" and strains against what Modernism taught artists, critics, and society to value.[33] For this reason, Postmodern and Contemporary artworks often surprise viewers accustomed to the Modernist paradigm.[34] Unlike Greenberg's serious Modernism, Postmodernism is often unserious, impure, irreverent, and derivative.[35]

As they broke with the Modernist dogma, these artists explored the flip side of its paradigmatic autonomy and quality: relevance.[36] Confronting social issues rather than simplification, abstraction, reduction and novelty, Postmodern artists set their sights on topical subjects. Rejecting Modernsim's teachings about the supreme importance of

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Id. at 534.

28. Clement Greenberg, *Modernist Painting*, *in* ART IN THEORY 1900-1990: AN ANTHOLOGY OF CHANGING IDEAS, *supra* note 25, at 754-60. *See also* Amy M. Adler, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359, 1363 (1990).

29. SANDLER, *supra* note 25, at 2.

30. *See generally* Greenberg, *supra* note 28. Greenberg states:

> I cannot insist enough that Modernism has never meant anything like a break with the past. It may mean devolution, an unraveling of anterior tradition, but it also means its continuation. Modernist art develops out of the past without gap or break, and wherever it ends up it will never stop being intelligible in terms of the continuity of art.

Id. at 759.

31. SANDLER, *supra* note 25, at 2 (citing Clement Greenberg, *Modern and Post-Modern*, ARTS MAG., Feb. 1980, at 65) (internal quotation marks omitted).

32. ARNASON & PRATHER, *supra* note 19, at 699.

33. Anne Salzman, *On the Offensive: Protecting Visual Art with Sexual Content Under the First Amendment and the "Less Valuable Speech" Label*, 55 U. PITT. L. REV. 1215, 1224 (1994).

34. *Id.*

35. "[A]rt that denies the value of art has become the most valuable art around." Adler, *supra* note 28, at 1367 (citing Elizabeth Frank, *Art's Off-the-Wall Critic*, N.Y. TIMES, Nov. 19, 1989, § 6 (Magazine), at 78).

36. SANDLER, *supra* note 25, at 4.

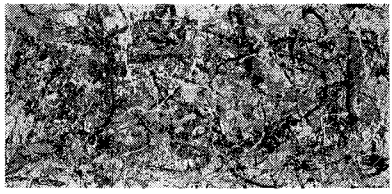
form, the Postmodernists began to emphasize the subject matter.[37] Addressing issues of race, gender, nationality, and the impossibility of true originality in the Postmodern age,[38] the plethora of styles under the Postmodern umbrella are alike in both their celebration of diversity and their frequent attempts to deconstruct the underlying assumptions of the Modern era.[39] Rejecting the authenticity prized by the Abstract Expressionists,[40] the commercialism celebrated by Pop Art,[41]

37. *Id.* at 4-5.

38. By the 1970s, more and more members of the artistic community came to believe that art had reached the limits of the Modernist paradigm. *Id.* at 7-8. In 1969, critic Irving Sandler explained this phenomenon: "A limit in art is reached when an artist's work comes as close as possible to being non-art." *Id.* at 7. What once was shocking artistic newness had become established and institutionalized and artists, frustrated with Modernist restrictions, began to look beyond the teachings of Greenberg and other Modernist critics. *Id.* at 8. A similar sense of frustration is expressed in the personal journals of Nirvana singer/songwriter/guitarist Kurt Cobain: "I feel there is a universal sense amongst our generation that everything has been said and done." KURT COBAIN, JOURNALS 18 (2002).

39. By understanding political and linguistic institutions as conventions rather than "natural facts," these artists look at the assumptions underlying social and political discourse that governs contemporary life. ARNASON & PRATHER, *supra* note 19, at 699. As Professor Adler explains, deconstruction is a multidisciplinary "critical practice that explores the failures and contradictions of language and of the systems of thought derived from it." Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1518 (1996). Deconstruction is founded on the premise that words have a Janus-like quality and possess a "double, contradictory, undecidable value." *Id.* (quoting JACQUES DERRIDA, DISSEMINATION 221 (Barbara Johnson trans., Univ. Press 1981) (1972) (internal quotation marks omitted)). This practice is relevant to a discussion of Postmodern Art because of the tendency of these artists to work from within the discourse they seek to undermine, using language or images of a system to ridicule it. *Id.* at 1519. Superficially similar because they share a common symbolic language, these critical works are vulnerable to the activism of would-be censors who seek to purge society of "harmful," "offensive" words and images. *Id.* For further reading on the role of deconstruction in Postmodern art, see SANDLER, *supra* note 25, at 375-424.

40. The works of Abstract Expressionist painter Jackson Pollock exemplify the authenticity prized by Modernism. Abandoning brushes and an upright easel, Pollock began working directly on the floor of his studio, dripping paint on the canvas either from the can or with objects like trowels and sticks. FROM EXPRESSIONISM TO POST-MODERNISM: STYLES AND MOVEMENTS IN 20TH-CENTURY WESTERN ART 20-22 (Jane Turner ed., 2000). Pollock's paintings record his sweeping gestures in a style Pollock described as "energy and motion made visible"; reminiscent of the Surrealist technique of Automatism, Pollock's action paintings are a permanent record of the actual physical movement of the artist. *Id.* at 21.



Jackson Pollock, *No. 8*, 1949, © Neuberger Museum of Art

41. In the late 1960s and 1970s, a number of artists grew alarmed with what they perceived to be the commodification of art. SANDLER, *supra* note 25, at 12. Disgusted with the thirst of the market for objects that could be bought and sold, a number of artists reacted by creating art that

and the novelty prized by Greenberg, the Postmodernists began to challenge the distinction between avant-garde and kitsch. They mixed media, recycled old styles and symbols, combined kitsch and high culture, embraced stylistic diversity and strove to engage the social context.[42] Art critic Edit DeAk remarked in 1984 that Postmodern art produced "the shock of recognition instead of the shock of the new."[43]

Conceptual art embodies this break from Modernist values. Though identifiable in the early twentieth century,[44] Conceptual art truly emerged in the 1960s. Assuming a variety of forms, Conceptual art exists only in the viewer's perception and individual interpretation

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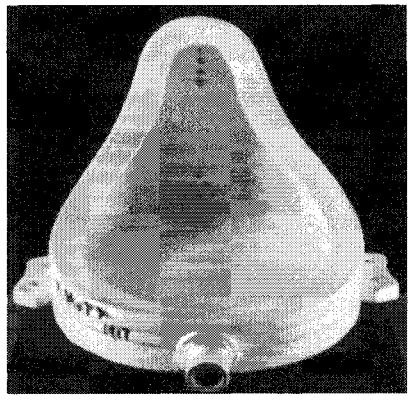
could not be commodified in order to "[erode] the very foundation of the art market," according to critic Barbara Rose. *Id.* (quoting Barbara Rose, *Problems of Criticism, VI: The Politics of Art, Part III,* ARTFORUM, May 1969, at 46-48). Conceptual and Performance art are two products of the desire to produce artistic expression while denying the capitalist market economy any object to sell. *Id.* at 11.

Andy Warhol, *Tomato Soup* (from *Campbell's Soup I* portfolio), 1968, © Museum of Modern Art

42. SANDLER, *supra* note 25, at 1-18.

43. *Id.* at 4 (citing Edit DeAk, *The Critic Sees Through the Cabbage Patch*, ARTFORUM, Apr. 1984, at 56). For further reading on Postmodern theory, see DAVID HOPKINS, AFTER MODERN ART: 1945-2000 (2000).

44. The "readymade" sculptures of Marcel Duchamp are notorious of these early Conceptual works. SANDLER, *supra* note 25, at 6. In 1917, Duchamp signed a porcelain urinal "R Mutt," titled it *Fountain*, and submitted it as sculpture in the exhibition of the Society of Independent Artists in New York City. *Id.* at 6. The exhibition's jury, which ironically included Duchamp himself, refused to display the work, condemning it as "immoral," "vulgar," and nothing more than a mere utilitarian object. *Id* at 28-30.



Marcel Duchamp, *Fountain*, 1964 (replica of 1917 original), © Philadelphia Museum of Art

of a work.[45] Refusing to limit art to a concrete object or interpretation, Conceptual art inspires a "continuing reflective encounter" by presenting viewers with a question to consider or a challenge upon which to reflect.[46] Demanding "mutual responsibility of artist and spectator," the connection that a Conceptual work of art forges with its audience is of critical importance.[47] For, rather than presenting a simple and unambiguous message, Conceptual art forces the viewer to engage in a continuing debate.[48]

In the late 1980s, Contemporary art took a political turn as artists focused their attention on race, gender, sexual orientation, and the AIDS crisis.[49] As Professor Amy Adler notes, this shift was decidedly Postmodern in character.[50] Art and artists defied the Marxist model of "political art as propaganda,"[51] and came to rely increasingly on the principles of deconstruction.

It is in this context that any analysis of Postmodern "shock" art must be situated. Often misunderstood, these works are splashed across newspaper pages,[52] torn off museum walls,[53] condemned by

45. *Id.* at 4.

46. MICHAEL ARCHER, ART SINCE 1960 215 (1997).

47. *Id.* at 112.

48. *Id.*

49. Adler, *supra* note 39 at 1517-18.

50. *Id.*

51. *Id.* at 1518 n.74 (citing James Meyer, *AIDS and Postmodernism*, ARTS MAG., Apr. 1992, at 63).

52. In 1999, Mayor Rudolph Giuliani led a spirited attack on the Brooklyn Museum's *Sensation* exhibition. *See* Brooklyn Inst. of Arts v. City of New York, 64 F. Supp. 2d 184 (E.D.N.Y. 1999). First on display in London's Royal Academy of Art, *Sensation* included a controversial piece by Chris Ofili, an award-winning British artist. *Id.* at 190. *The Holy Virgin Mary*, intended as a commentary on Western and African ideology and iconography, incorporating elephant dung (a traditional African fertility symbol) and photographs of buttocks and female genitalia, was publicly denounced by the Mayor. *Id.* at 191. At a press conference, Mayor Giuliani stated that Ofili's collage was "sick" and offensive. *Id.* Soon afterward, the Mayor filed a suit to cut all city funding for the museum and cancel the lease. *Id.*

Chris Ofili, *The Holy Virgin Mary*, 1996, © Brooklyn Museum of Art

outraged viewers, and even symbolically torn to pieces on the Senate floor.[54] In a sense, works that speak to the viewer in such powerful ways have succeeded.[55] By provoking viewers rather than simply existing as beautiful things, these works invite viewers to question, consider, or defend their own religious, political, or moral beliefs.[56]

Shocking and beautiful by turns, Robert Mapplethorpe's photography grabs a viewer's attention. One of America's most celebrated photographers, Mapplethorpe, created sensual images of flowers, insightful portraits of celebrities, and classically presented nudes.[57]

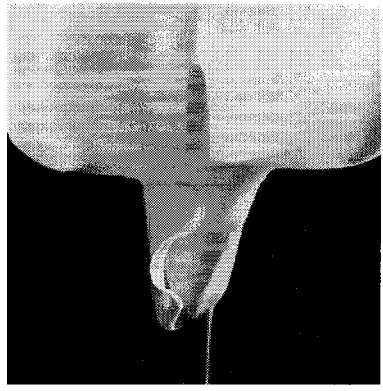
53. In 1990, the City of Cincinnati sued the Contemporary Arts Center and its executive director Dennis Barrie. De Grazia, *supra* note 7, at 810-17. *The Perfect Moment*, a Mapplethorpe retrospective, opened at the Center on April 6, and included many of Mapplethorpe's most famous images: floral still lives, celebrity portraits, a sample of homoerotic photographs, and several images of nude children. *Id.* at 815. One day later, on April 7, Barrie and the Gallery were indicted by a grand jury for exhibiting "obscenity" and "child pornography." *Id.* at 811. Police raided the gallery, ordered 400 patrons to leave, then seized seven photos. *Id.* Anthony Eckstein, a member of the jury that acquitted both defendants, noted: "[The State's argument] was missing an ingredient. [The exhibition] had artistic value, and that's what kept it from being obscene. We thought the pictures were lewd, grotesque, disgusting. But like the defense said, art doesn't have to be pretty or beautiful." *Id.* at 816.

54. "Shocking, abhorrent and completely undeserving of any recognition whatsoever," New York Senator Alphonse D'Amato commented in response to photographer Andres Serrano's *Piss Christ*, an image of a plastic crucifix submerged upright in a Plexiglas tank filled with the artist's urine. *Id.* at 789. In an essay in the exhibition's show catalogue, renowned art history professor Donald Kuspit noted that Serrano's work was intended as an attack on American superficiality. De Grazia, *supra* note 7, at 789. Senator D'Amato dramatized his disagreement with Kuspit's analysis by tearing up his copy of the catalogue on the Senate floor. *Id.*

55. For a good background on the theory underlying Postmodern Art, see SANDLER, *supra* note 25, at 332-74.

56. *Id.*

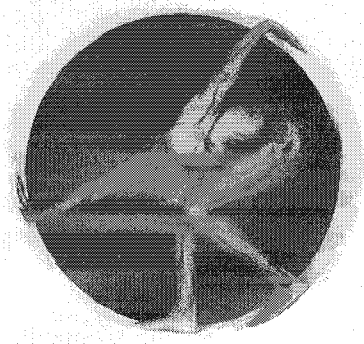
57. Speaking of his choice to photograph black male nudes, Mapplethorpe cited the lack of such images in art history: "I was attracted visually. That's the only reason I photographed them. But once I started, I realized there's a whole gap of visual things. There have been great photographs of naked black men in the history of photography, but they are very rare." De Grazia, *supra* note 7, at 781.



Robert Mapplethorpe, *Calla Lilly*, 1988, © The Mapplethorpe Foundation

While these photographs are reproduced in coffee-table books, calendars, posters, and stationary, Mapplethorpe's claim to fame and infamy are his images of sadomasochistic sex. These images capture a seldom-considered subculture for the first time in fine art photographs.[58] Personal and biographical, these images communicate profound messages about art[59] and society.[60]

Robert Mapplethorpe, *Gregory Hines*, 1985, © The Mapplethorpe Foundation



Robert Mapplethorpe, *Thomas*, 1987, © The Mapplethorpe Foundation

58. For more information on the artist's life, see PATRICIA MORRISROE, MAPPLETHORPE: A BIOGRAPHY (1997).

59. Mapplethorpe's intent "was to open people's eyes, to realize anything can be acceptable. It's not what it is, it's the way it's photographed." DeGrazia, *supra* note 7, at 782. Art critic Susan Weiley noted:

> Today we feel great art should never be overtly sexual. The sexually provocative is relegated to pornographic magazines . . . [Mapplethorpe] installs his exhibitions so that the sexual images are interspersed with other subjects. We view a sadistic tableau side by side with a celebrity portrait or a lyrical still life of baby's breath. The distinctions between corruption and innocence are blurred. [Mapplethorpe] insists it is all the same.

Id.

60. Art critic Susan Weiley observed:

> The sexual photographs . . . disturb us in light of our shift of attitude during this decade. These exotic images bloomed in a hothouse atmosphere now grown chill with fear and

In 1989, a retrospective of Mapplethorpe's works sparked such controversy that a coalition of conservative senators, outraged by federal support for exhibitions of Mapplethorpe's works, threatened to slash the budget of the government-funded National Endowment for the Arts.[61] Fearing that exhibiting Mapplethorpe's works would jeopardize their funding, several prominent galleries abruptly cancelled their exhibitions of the controversial retrospective.[62]

In the 1980s and 1990s, sexually explicit art like Mapplethorpe's faced obscenity challenges with surprising regularity.[63] In each of these situations, courts were called on to determine whether a chal-

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death. Today it is difficult to view [the photographs] without considering their celebration of sensuality as, in retrospect, indictments of our innocence. We are all implicated. They provoke a shudder similar to the one we feel looking at smiling faces in photographs of the Warsaw ghetto.

Id.

61. Republican Senators Jesse Helms, Alphonse D'Amato, and Slade Gordon adopted the position that "[i]f the NEA could not go about its business of helping to 'create and sustain . . . the material conditions facilitating the release of . . . creative talent' . . . without sponsoring blasphemous and obscene art and artists, it ought to go out of business." *Id.* at 789-90. "You know, man, I made [Piss Christ] in my own time on my own dime," Andres Serrano responded. *Id.* at 789.

62. In August 1989, Senator Helms sponsored a Senate bill to establish government supervision of American artists and art institutions supported by the National Endowment for the Arts. *Id.* at 784. Not long afterward, Christina Orr-Cahall, director of Washington D.C.'s Corcoran Gallery of Art, abruptly cancelled the Gallery's opening of *The Perfect Moment*, a collection of Mapplethorpe photographs. DeGrazia, *supra* note 7, at 784. Orr-Cahall and the Gallery's board had received over one million dollars in N.E.A. grant money over the past several seasons, and feared proceeding with the exhibition would be detrimental not only to their own museum, but to "every other art institution." *Id.* An end to N.E.A. funding threatened the museum's campaign to increase their endowment by damaging its ability to apply for private matching grants. *Id.* at 784-85. Outraged by the Gallery's decision, over nine hundred members of the Washington gay, lesbian, and arts community mobilized in protest. *Id.* at 790. Their activity culminated on the evening of June 30, 1989, when, from trucks parked across the street, slides of the Mapplethorpe photographs were projected onto the outside walls of the Corcoran Gallery. *Id.*

63. Adler noted:

> [A]rtists increasingly have been subject to criminal prosecution and arrest. . . . Since [the Barry prosecution], there have been several prominent criminal cases brought against artists: in both Alabama and Tennessee, prosecutors brought obscenity and child pornography charges against Barnes and Noble for selling photography books by Jock Sturges and David Hamilton. (Sturges' studio had been ransacked by an FBI raid in 1993 but a grand jury refused to indict him.) Oklahoma brought a child pornography prosecution against a video store for renting the Academy Award-winning film The Tin Drum based on a novel by Gunter Grass. Cincinnati police arrested bookstore employees for renting a film by acclaimed Italian director Pier Paolo Pasolini. Hollywood studios reportedly shunned the remake of the film *Lolita* because of fears of criminal prosecution; despite the filmmakers' careful use of body doubles for all controversial scenes, it took a year, as well as significant cutting, to find a studio willing to release the film. Police have routinely stormed shows by performance artist Karen Finley. Photographer Spencer Tunick, known for his work depicting large numbers of nude people in public places has been arrested five times.

Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 206-08 (2000).

lenged book, artwork, or performance work was obscene.[64] The ability of courts to discern obscenity from protected artistic expression in these cases is possible because of prior judicial attempts to define and distinguish obscenity. An overview of these efforts is outlined below.[65]

B. Obscenity and the First Amendment

It is well established that the right to free speech is limited.[66] Because of their harmful effects and limited social utility, defamation, perjury, and incitement to violence have long been classified as unprotected speech.[67] Obscene speech is another category long recognized to lie beyond the scope of First Amendment protection.[68] Consequently, a finding that a photograph, painting, or performance is "obscene" means that the federal, state, or local government may regulate that work. Though some profess the ability to "know [obscenity] when [they] see it,"[69] American courts have struggled for decades to define the precise parameters of obscenity.

This section will provide a brief overview of American obscenity jurisprudence. Turning first to several statutory interpretations, this section will identify the legal foundations of modern obscenity law.[70] The United States Supreme Court's obscenity authority will then be outlined and discussed.[71]

1. Obscenity and the Lower Courts: Statutory Interpretation

The United States is neither the first nor the only country to deny protection to obscene speech. The first American obscenity case, *Commonwealth of Pennsylvania v. Sharpless*,[72] was decided in the nation's infancy. The painting condemned in this case depicted a man and woman captured in an "obscene, impudent and indecent posture."[73] Fearful of the corruptive power of images such as this, the Pennsylvania Supreme Court held in 1815 that the publication and

64. *Id.*
65. *See infra* notes 66-142 and accompanying text.
66. *Id.*
67. Gertz v. Welch, 418 U.S. 323 (1974); Brandenburg v. Ohio, 395 U.S. 444 (1969).
68. *See infra* notes 66-142 and accompanying text.
69. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
70. *See infra* notes 72-92 and accompanying text.
71. *See infra* notes 93-142 and accompanying text.
72. 2 Serg. & Rawle 91 (Pa. 1815).
73. A more detailed description of the challenged artwork was withheld from the court, a point of contention on appeal. Pennsylvania Supreme Court Chief Justice William Tilghman rejected the argument in *Sharpless* that the prosecution's description of his allegedly obscene painting was deficient:

exhibition of lewd artworks could be proscribed, and that public or private exhibition of such works constituted an act of moral turpitude.[74]

In 1868, fifty years later, an English court adopted a narrower obscenity test. *Regina v. Hicklin*[75] involved a challenge to a pamphlet entitled *The Confessional Unmasked.*[76] Containing a lengthy diatribe against the Catholic Church, the pamphlet exposed "the depravity of the priesthood and the character of the questions [asked of] women" during confession.[77] One of the earliest Western attempts to define obscenity, the *Hicklin* court interpreted a Parliamentary law authorizing police seizure of obscene publications.[78] Sponsor Lord Campbell explained that this legislation applied "exclusively to works written for the purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well regulated mind."[79] Campbell made it clear that any work that even pretended to be literature or art, classic or modern, had little fear of being summarily censored.[80]

In spite of this, Lord Chief Justice Alexander Cockburn significantly broadened the scope of works subject to Lord Campbell's Act in *Hicklin.* Holding the definition of obscene works of art as tending "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall,"

> It is described *as a lewd and obscene painting, representing a man in an obscene, impudent and indecent posture with a woman.* We do not know that the picture had any name, and therefore, it might be impossible to designate it by any name. What then is expected? Must the indictment describe minutely the attitude and posture of the figures? I am paying for some respect to the chastity of our records; these are circumstances which may well be omitted.

Id. at 101-02.

Giulio Romano's 1524 painting, *Two Lovers,* provides an interesting comparison with the unnamed painting challenged in *Sharpless.* Painted for Federico Gonzaga, the Duke of Mantua, *Two Lovers* is a fine example of the artistic tradition of erotic paintings, and thought to be the artist's attempt to recreate one of the famous lost erotic pictures of antiquity. PAOLA TINAGLI, WOMEN IN ITALIAN RENAISSANCE ART 134-35 (1997). Romano's work depicts a man and woman lying on an antique bed. *Id.* Both figures are almost entirely nude, the woman lies between the open legs of her lover, one arm around his neck, and she looks into his eyes while she lifts a piece of drapery from his genitals. *Id.* An old woman, thought to be a procuress, looks in on the couple through an open door. *Id.* The woman prominently displays a set of keys, possibly a pun on the Italian word *chiavare* (to put a key in the lock), a colloquial term for sexual intercourse. *Id.*

74. *Sharpless*, 2 Serg. & Rawle at 100.

75. Regina v. Hicklin, 3 L.R.-Q.B. 360 (1868).

76. *Id.*

77. Commonwealth v. Gordon, 66 Pa. D. & C. 101, 124-25 (Phila. County Ct. 1949).

78. *Id.* at 124.

79. *Id.*

80. *Id.*

Lord Cockburn condemned the pamphlet and created what is commonly known as the "pervert's veto."[81]

Cockburn's formulation of obscenity entered American First Amendment case law in 1884 when the New York Supreme Court applied his corruption of the minds test in *People v. Muller*.[82] Upholding a conviction for selling indecent and obscene photographs, the court broadened *Hicklin*, eliminating lawful intent as a defense for those charged with distribution of indecent and obscene materials.[83]

As social norms evolved, however, the *Hicklin* obscenity standard and the pervert's veto it created grew antiquated,[84] and the court's concern with *Hicklin* grew more and more pronounced over time.[85] Condemnation of an entire work based on the isolated reading of a few passages, as allowed by *Hicklin*, could lead to widespread banning of classic literature.[86] Responding to this concern, the court in *Halsey v. New York Society for the Repression of Vice*[87] held that allegedly obscene literary works should be judged in their entirety, not by selected paragraphs or passages.[88]

By 1933, it was clear that *Hincklin* had fallen out of sync with post-World War I American morality. Citing *Halsey*, a federal district court in New York allowed publication of *Ulysses*, James Joyce's celebrated, experimental novel, in spite of its highly controversial content.[89] Rejecting *Hicklin*, which allowed portions of a work to be

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81. Donovan W. Gaede, *Policing the Obscene: Modern Obscenity Doctrine Re-Evaluated*, 18 S. ILL. U. L.J. 439, 440 (1994) (citing Randall D.B. Tigue, *Civil Rights and Censorship-Incompatible Bedfellows*, 11 WM. MITCHELL L. REV. 81, 105 (1985)).

82. 96 N.Y. 408 (1884).

83. *Id.* at 413.

84. *See generally* Donna R. Banks, *Conservatism in the 1980s: Art and Obscenity in Cincinnati, the Beauty and the Conflict*, 34 HOW. L.J. 439, 444 (1991).

85. *Id.*

86. *Id.*

87. 136 N.E. 219 (N.Y. 1922).

88. *Id.* at 221.

89. United States v. One Book Called "Ulysses," 5 F. Supp. 182, 183-84 (S.D.N.Y. 1933). According to Judge John M. Woolsey:

> It is because Joyce has been loyal to his technique and has not funked its necessary implications, but has honestly attempted to tell fully what his characters think about, that he has been the subject of so many attacks that his purpose has been so often misunderstood and misrepresented. For his attempt sincerely and honestly to realize his objective has required him incidentally to use certain words which are generally considered dirty words and has led at times to what many think is a too poignant preoccupation with sex in the thoughts of his characters . . . . The words which are criticized as dirty are old, Saxon words known to almost all men and, I venture, to many women, and are such words as would be naturally and habitually used, I believe, by the types of folk whose life, physical and mental, Joyce is seeking to describe . . . . As I have stated, *Ulysses* is not an easy book to read. It is brilliant and dull, intelligible and obscure, by turns. In many places it seems to me disgusting, but although it contains, as I have

excerpted for consideration, the *Ulysses* court adopted the "impact" test.[90] Under this analysis, literary and artistic works must be read as a whole, in a manner so as not to incite lustful thoughts or sexual impulses.[91] By requiring courts to consider allegedly obscene works in their entirety, *Ulysses* forced courts to look at the role of these works as "commentary on the inner communications of society."[92]

2. *Obscenity and the Supreme Court*

By 1957, the *Hicklin* formulation was all but dead. Driving the final nail in the coffin of its corruption-of-the-minds test, the United States Supreme Court created a new obscenity test, in part an adaptation of *Ulysses*, in part a novel creation.[93] Upholding convictions of two individuals charged with mailing obscenity in the companion cases of *Roth v. United States*[94] and *Alberts v. California*,[95] the Court explicitly rejected *Hicklin*, and held the consideration of isolated passages "unconstitutionally restrictive of the freedoms of speech and press."[96]

A landmark in American obscenity law, the *Roth* Court addressed the issue of constitutional protection of obscene speech for the first time.[97] Looking to implicit assumptions of earlier First Amendment

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> mentioned above, many words usually considered dirty, I have not found anything that I consider to be dirt for dirt's sake. Each word of the book contributes like a bit of mosaic to the detail to the picture which Joyce is seeking to construct for his readers . . . . If one does not wish to associate with such folk as Joyce describes, that is one's own choice. In order to avoid indirect contact with them one may not wish to read *Ulysses*; that is quite understandable. But when such a great artist in words, as Joyce undoubtedly is, seeks to draw a true picture of the lower middle class in a European city, ought it to be impossible for the American public legally to see that picture?

Id. at 184. Affirming Judge Woolsey's opinion at the circuit court of appeals, Judge Learned Hand added:

> That numerous long passages in *Ulysses* contain matter that is obscene under any fair definition of the word cannot be gainsaid; yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole, rather than to promote lust or portray filth for its own sake. The net effect even of portions most open to attack . . . is pitiful and tragic, rather than lustful. The book depicts the souls of men and women that are by turns bewildered and keenly apprehensive, sordid and aspiring, ugly and beautiful, hateful and loving. In the end, one feels, more than anything else, pity and sorrow for the confusion, misery and degradation of humanity . . . .

72 F.2d 705 (2d Cir. 1934).

90. *Ulysses*, 5 F. Supp. at 184.

91. *Id.* at 185.

92. Banks, *supra* note 84, at 445 (citing *Ulysses*, 5 F. Supp. at 185).

93. *See Ulysses*, 5 F. Supp. at 185.

94. 354 U.S. 476 (1957).

95. 354 U.S. 476 (1957).

96. *Id.* at 489.

97. *Roth*, 354 U.S. at 481.

case law and to laws in each state and in more than fifty other nations, the Court concluded that "obscenity is not within the area of constitutionally protected speech or press."[98] However, in order to prevent all artistic, literary, and scientific materials with sexual content from being condemned as obscene speech, the Court placed an important limitation on the reach of obscenity. According to the Court in Roth, speech that deals with sex in a manner appealing to the prurient interest in sex,"[99] tending to "excite lustful thoughts," fell outside the umbrella of constitutional protection.[100] Whether a work appealed to the prurient interest was to be decided by "the average person, applying contemporary standards."[101] Adopting the standard first suggested in *Ulysses*, the Court held that the dominant theme of a work, taken in its entirety, must appeal to the prurient interest.[102]

This definition of obscenity left judges better equipped to address the problems presented by literary, artistic, and scientific works with sexual content. *Roth's* flexibility forced an examination of challenged works as a whole;[103] no longer could a court deem a work obscene after reading only selected passages.[104] *Roth's* definition of obscenity also focused on the "average person," examining the work from the perspective of a contemporary community member rather than from "the point of view of the person most vulnerable to moral corruption."[105]

Roth survived for sixteen years with limited modification. In *Smith v. California*,[106] the Supreme Court reversed the conviction of a bookseller, and held that obscenity convictions without a showing of scienter violated the First Amendment.[107] The same year, in *Kingsley International Pictures v. Regents of New York University*,[108] the Court found a film version of D. H. Lawrence's novel, *Lady Chatterly's Lover*, to be protected by the First Amendment.[109] Challenged as immoral and obscene, opponents argued that Kingsley's film characterized adultery as acceptable in certain circumstances.[110] Echoing a

98. *Id.* at 485.
99. *Id.* at 487.
100. *Id.* at 476 n.20.
101. *Id.* at 489.
102. *Id.*
103. *Roth*, 354 U.S. 476.
104. *Id.*
105. Gaede, *supra* note 81, at 441-42.
106. 361 U.S. 147 (1959).
107. *Id.*
108. 360 U.S. 684 (1959).
109. *Id.*
110. *Id.*

concern raised thirty-seven years earlier in *Halsey*,[111] the Court soundly rejected this argument. A work, according to the Court in *Kingsley*, could not be deemed legally obscene based only on its alleged portrayal of an idea "contrary to moral standards, the religious precepts, and the legal code of a community."[112]

The most significant modification of *Roth* came in *John Cleland's Memoirs of a Woman of Pleasure v. Attorney General*,[113] a 1966 challenge to another literary classic. This time challenging the sexually explicit eighteenth-century novel known as *Fanny Hill*, the Court held that neither federal nor state governments could control the distribution of material unless three separate requirements were satisfied.[114] First, the Court required a showing that "the dominant theme of the [work], taken as a whole, [must] appeal to [the] prurient interest in sex."[115] Second, the test required evidence that the material was patently offensive, an affront to "contemporary community standards relating to the description or representation of sexual matters."[116] Third, *Memoirs* required a work be found to be "utterly without redeeming social value" before it could be classified as obscene.[117]

Though never supported by a majority of the Court, *Memoirs* added a third prong to the *Roth* test: by showing that a work was not "utterly" devoid of social utility, artworks challenged analyzed under this test could earn the Court's protection.[118] In this respect, *Memoirs* gave disputed works a viable defense to obscenity challenges,[119] and constitutes the height of protection for sexually explicit materials.[120]

3. *Paradigm Shift:* Miller v. California[121]

Following a decade of social and political upheaval, the Court reevaluated its obscenity standard in 1973. By granting certiori in *Miller*, the case of a publisher convicted of distributing obscenity in a "mass mailing campaign to advertise the sale of illustrated books, eu-

111. *Id.* *See* discussion at *supra* notes 86-88 and accompanying text.

112. *Kingsley Int'l Pictures*, 360 U.S. at 688.

113. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966).

114. *Id.*

115. *Id.* at 418.

116. *Id.*

117. *Id.*

118. *Id.*

119. *John Cleland's Memoirs*, 383 U.S. at 419-20.

120. After *Miller v. California*, 413 U.S. 15 (1973), the latitude available under *John Cleland's Memoirs*' "utterly without redeeming social value" test narrowed substantially. See *infra* notes 122-134.

121. 413 U.S. 15 (1973).

phemistically called 'adult' material,"[122] the Court placed itself squarely in the center of a national debate. The United States Commission on Obscenity and Pornography, established by Congress in 1967, submitted its report in 1970.[123] The Commission based its findings in part on controversial empirical studies of the social impact of sexual literature, and found no concrete link between sexually explicit material and the commission of sex crimes.[124] Concluding that patterns of sexual behavior were not "altered substantially by exposure to erotica," the Commission recommended lifting laws prohibiting the sale, exhibition, or distribution of sexual materials to consenting adults, and the adoption of more targeted laws to limit commercial distribution or display for sale of sexually explicit materials to minors.[125] These findings challenged the well-established presupposition that erotic materials were harmful to society, and were heavily criticized.[126]

California objected to Miller's material on two grounds. The Court addressed each in turn, and concluded that the State had the best argument in each instance.

First, Miller mailed advertisements for his "adult material" in an unsolicited mass mailing.[127] The Court recognized the State's legitimate concern that Miller's brochures, arriving in one's mailbox without request or invitation, could offend the sensibilities of unwilling adult recipients or, worse, fall into the hands of more vulnerable readers.[128]

California also objected to the *substance* of Miller's materials. Though some descriptive text was included, the brochures consisted primarily of drawings and pictures "very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activi-

122. *Id.* at 16.

123. KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 111 (1999).

124. *Id.*

125. *Id.*

126. LANE V. SUNDERLAND, OBSCENITY: THE COURT, THE CONGRESS AND THE PRESIDENT'S COMMISSION 78-79 (1974) (noting that "the complexities and subtleties of human sexuality within society are extremely difficult to duplicate in the laboratory," and that the Commission neglected "indirect effects" such as "the influence exerted on attitudes by public law, *qua* law," and "long-term effects of pornography"). *See also* Henry M. Clor, *Science, Eros and the Law: A Critique of the Obscentity Commission*, 10 DUQ. L. REV. 63, 76 (1971) (emphasizing the "limitations of behavioral science as a resolver of controversial questions in public policy," and suggesting that "[i]t will be unfortunate if people conclude that the obscenity problem has now been resolved because now, at last, we have the *scientific facts*"). The Minority Report of the Commission took a very different view, finding at least an "arguable" link between obscene materials and crime. *Id.*

127. *Miller*, 413 U.S. at 16.

128. *Id.* at 25.

ties with genitals often prominently displayed."[129] To determine whether the content of Miller's "literature" was within California's power to regulate, the Court was forced to sharpen the line between protected speech and unprotected obscenity in contemporary American society.

Holding that authors, artists, or filmmakers could not limitlessly exploit sex and nudity, the Court found that the First Amendment did not protect, and that states were therefore free to regulate "patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibitions of genitals."[130]

For material that was objectionable, but did not fall into this category of essentially per se obscenity, the Court formulated a new and fundamentally different three-pronged test. To classify such works as obscene, the trier of fact must find: (1) that the average person, applying contemporary community standards, would find the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) that the work, taken as a whole, lacks any serious literary, political, artistic, or scientific value.[131]

The first prong of this test paralleled *Roth* and its progeny; the second two materially broke with it. Explicitly rejecting *Memoirs*' "utterly without redeeming social value" test,[132] the *Miller* Court found that First Amendment values were adequately protected by the power of appellate review.[133] With its rejection of the *Roth-Memoirs* test, *Miller* allowed a work to be categorized as "obscene" not because it lacked any social value whatsoever, but because whatever social value within the work is found to lack seriousness by a reasonable person applying contemporary, local standards.[134] With this decision, the Court attempted to offer lower courts an adequate tool to discern valuable speech from obscenity in twentieth century America.

4. *Obscenity Since* Miller

The same year *Miller* was decided, the Court clarified its new obscenity formulation in *Paris Adult Theater I v. Slaton* in 1973.[135] This

129. *Id.* at 18.
130. *Id.* at 25.
131. *Id.* at 24.
132. *Id.* at 24-25.
133. *Miller*, 413 U.S. at 24-25.
134. *Id.* at 33-34.
135. 413 U.S. 49 (1973).

case, involving the performance of two sexually explicit films, showed lower courts how to apply *Miller*. *Paris Adult Theater* reaffirmed *Roth's* conclusion that obscene speech was unprotected, and therefore not entitled to First Amendment protection.[136] The Court also asserted that, while there may be a right to view obscene materials in one's own home,[137] there was no corresponding right to view obscenity in places of public accommodation.[138] This held true even with respect to establishments admitting only consenting adults over twenty-one years of age.[139] Furthermore, the Court rejected the notion that legislatures should wait to regulate obscenity until empirical evidence of the harmful effects of obscenity in society emerged to support these assumptions.[140]

Attempting to further clarify how the trier should evaluate a work's serious literary, artistic, political, or scientific value, the Illinois trial court's jury instruction was overturned in *Pope v. Illinois*.[141] In *Pope*, the Supreme Court interpreted *Miller* to ask not whether an *ordinary member* of any given community would find serious value in the allegedly obscene material, but whether a *reasonable person* would find merit in the work.[142]

Since affirming *Miller*, the Court's conception of obscenity has remained largely unchanged, and the test continues to mark the line between obscenity and protected artistic speech.

III. ANALYSIS

The consequences of the United States Supreme Court's failure to update the obscenity test and properly protect the communicative power of images are both varied and profound. Without adequate prophylactic measures in place, artists whose works toe the line between beauty and obscenity have few defenses left to save their work from condemnation. Part III of this Comment will examine, in light of the cases outlined above, the extent of the problem facing sexually explicit art today, and suggest several consequences for Contemporary art and artists.[143]

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136. *Id.*

137. Stanley v. Georgia, 394 U.S. 557 (1969).

138. *Paris Adult Theater I*, 413 U.S. at 66.

139. *Id.* at 68-69.

140. *Id.*

141. The trial court had instructed the jury to analyze the challenged materials in the way ordinary adults throughout the state would view the material. Pope v. Illinois, 413 U.S. 497, 504 (1987).

142. *Id.*

143. *See infra* notes 143-232 and accompanying text.

A. Modern Law, Postmodern Art

For artists working on the fringes of social morality, the Supreme Court's continued adhesion to *Miller* and its progeny affords sexually explicit Contemporary artwork inadequate protection. A "Modernist" test, *Miller* is a true reflection of the theory underlying Modern art.[144] At the heart of *Miller* is the fundamental premise that it is possible to separate good art from bad, and that reasonable people, applying their community's prevailing standards, can distinguish between the two.[145] In the Modernist era, when artists strove to create serious works and "art for art's sake,"[146] this distinction may have been possible.[147] But times were changing even as the Court decided *Miller,* and the line between good and bad art is growing murkier.[148]

1. Postmodern Art and Artistic Value

Over the last half-century, the theoretical foundations of Contemporary art have evolved at breakneck speed. Replacing the pattern of evolution of techniques, subject matter and styles that dominated art history, art since the 1970s has been characterized by a "multiplicity of attitudes jostling for attention."[149] As anarchic as this situation might seem, it would be wrong to characterize this fragmentation and individuality as chaos. Despite this seeming diversity, the movements that together constitute Postmodern and Contemporary art share strong common bonds.

Built on the shoulders of Modernism, Postmodern art is a rejection of Modernism's artistic requirements.[150] Free from the critic's demands that art must be serious and intellectual to be great,[151] many Postmodern and Contemporary artists also rejected the notion that good art must have any traditional value.[152] Adopting attitudes of irreverence, frivolity, and insolence, these artists question, attack, and

144. *See supra* notes 121-134 and accompanying text.

145. *See infra* notes 172-189 and accompanying text.

146. *See supra* note 31 and accompanying text.

147. *See supra* note 25 and accompanying text. Consider, though, how many reasonable community members would have accurately predicted that Warhol's Brillo boxes and Campbell's Soup can labels would have achieved such longstanding fame and continuing relevance.

148. *See infra* notes 149-216 and accompanying text.

149. According to Italian art critic Achille Bonito Oliva, the effect of this was to liberate artists from looking strictly behind for inspiration; artists were now free to look anywhere. ARCHER, *supra* note 46, at 145. "Trans-avantgarde," as Oliva called the art of the 1980s, quoted from any period, movement, or style it liked, combining the elements of high and low art with arts and crafts to produce something new, timely, and meaningful. *Id.*

150. Weinstock, *supra* note 18, at 820.

151. *Id.*

152. *Id.*

deconstruct the foundations of Modernism.[153] These artists may speak boldly to their audiences, often with deliberately shocking images.[154] Holding this art accountable to the antiquated *Miller* standard forces artists like Karen Finley to defend challenged works with the very thing her works reject: overt, serious value.[155] Contemporary artists use their works to force the viewer to consider the seeming absence of the artist from the work and the multiplicity of interpretations of a work of art that are possible when the artist's intent becomes unknowable.[156] Allowing informative and provocative works like these to be classified as obscenity because they lack serious value perversely punishes artists for not including the very elements their works reject.

2. *New Math: Does Art + Sexual Content = Obscenity?*

Categorizing explicit artworks like Finley's as obscene also flies in the face of *Roth*'s insistence that "sex and obscenity are not synonymous."[157] To the *Roth* Court, the "portrayal of sex . . . in art, literature, and scientific works . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press."[158] As the cases set forth in Part II[159] demonstrate, the Supreme Court has determined that obscenity is "neither 'part of any

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153. *See* Greenberg, *supra* note 25.

154. Consider the performance works by Karen Finley, one of the "NEA Four," whose pieces are characterized by profanity, nudity, and frequently overt sexuality.

> Described by one detractor as "obscenity in its purest form," Finley's images may be shocking, but her message is much more profound. Combining "pain, rage, love, loneliness, need, fear, dehumanization, oppression, brutality [,] consolation" and society's objectification of women, Finley's performances force viewers to confront tough issues. "Deathcakes and Autism," one of her earliest performance works, is "based on the events of her father's funeral [Finley's father shot himself to death in the family's garage], where everyone became preoccupied with the food brought to the bereaved." Finley recalls: "People were actually having arguments over which ham to eat. Or saying, 'Was it much of a mess? Did you have to clean it up?' While [sic] they were bringing in two dozen Tollhouse cookies."

De Grazia, *supra* note 7, at 829-30.

155. The work of Jeff Koons, a celebrated Contemporary American, has been included in several of the prestigious Whitney Museum biennial exhibitions. Often resembling little more than "tacky lawn sculpture," Koons's work blurs the line between valueless trash and valuable "high" art. Commissioning highly skilled Italian craftsmen to sculpt a porcelain porn star in the arms of the Pink Panther, Koons, for example, "makes art that looks like trash and trashes high art." Adler, *supra* note 28, at 1367.

156. *Id.*

157. Roth v. United States, 354 U.S. 476, 487 (1957).

158. *Id.*

159. *See supra* notes 72-142 and accompanying text.

exposition of ideas,' nor of more than 'slight social value.'"[160] Yet Finley's works are dismissed as obscene "shock" art in spite of their valuable content.

Often performing nude, Finley "places, dabs, smears, pours and sprinkles food on her body to symbolize the violation of the female characters whose tales she shrieks and whines on stage."[161] Addressing themes like incest, rape, violence, and discrimination, Finley's performances are an assault on society's objectification of women and the female body.[162] Her performances deconstruct the marginalization of women, female sexuality,[163] and the passive role society imposes upon women because of their gender.[164] For example, though she appears nude before her audience, Finley works to disrupt the voyeuristic pleasure the audience would ordinarily take from viewing her body.[165]

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160. Anne Salzman Kurzweg, *Live Art and the Audience: Toward a Speaker-Focused Freedom of Expression*, 34 HARV. C.R.-C.L. L. REV. 437, 442 (1999).

161. De Grazia, *supra* note 7, at 829.

162. *Id.* Consider the following excerpt from Finley's work entitled *Aunt Mandy*:

> It's my body
> It's not Pepsi's body
> It's not Nancy Reagan's body
> It's not Congress's body
> It's not the Supreme Court's body
> It's not Cardinal O'Connor's Catholic-church-homophobic-hate women-hate queers-oppressive-DEVIL-SATAN-no children body
>
> IT'S NOT YOUR BODY. . . .
> One day, I hope to God, Bush
> Cardinal O'Connor and the Right-to-Lifers each
> returns to life as an unwanted pregnant 13-year old girl working at McDonalds at minimum wage.

Id. at 829-30.

163. Karen Finley often refers back to childhood feelings about her own gender:

> When I was very young in my life I noticed that due to the fact that I was a woman I wasn't able to express myself in the same way that men could. Certain opportunities weren't open to me, and I considered that going against my freedom. When I was six, in Catholic school, I wore culottes and I was told I couldn't wear them to school. But I did anyway, and talked back to everyone, and wore shoe boots, which I guess were considered sexual or something. I didn't know what shoe boots meant but I continued to wear them, and the culottes, and I felt that I had more body freedom wearing culottes and boots.

Id. at 831.

164. *See generally*, Kate Linker, *Representation and Sexuality*, *in* Brian Wallis, ART AFTER MODERNISM: RETHINKING REPRESENTATION (NEW MUSEUM OF CONTEMPORARY ART 1984). For further analysis, see JAQUES LACAN, *Guiding Remarks for a Congress on Feminine Sexuality*, *in* FEMININE SEXUALITY 86-98 (Juliet Mitchell & Jacqueline Rose eds., 1958).

165. In this sense, Finley's works are similar to the two-dimensional photomontage images by Barbara Kruger as seen in Kruger's slide show, *We Are Your Circumstantial Evidence*. Like Finley, Krueger simultaneously constructs, deconstructs, and subverts the position assigned to women as submissive, looked-at "other." SANDLER, *supra* note 25, at 390-95. The artist then selects black and white images of women from mass media and crops and enlarges them to an

In doing so, she challenges the role of women as rightful subjects of the controlling male gaze,[166] obliged to submit to being viewed.[167]

Linking sexual or otherwise "offensive" speech with obscenity simply because both contain superficially similar subject matter exhibits a fundamental misunderstanding of the role of sexual imagery in art and society. Artistic genius has been realized for centuries through the presentation and manipulation of socially offensive topics and images, both sexual and nonsexual. A great and mysterious force in human history, issues of gender and sexuality have captured the attention of artists and patrons for centuries. Created to inspire,[168] titillate,[169] and teach,[170] images of human sexuality have been used to address our most universal problems. Thus, the history of art, music, and literature provides ample evidence that sexually explicit images and obscenity are by no means synonymous.[171]

B. *Objective Definitions, Subjective Interpretations*

Miller[172] left the fate of challenged artworks to fact finders and state legislatures. Before an artwork could be condemned as obscene, *Miller* required that state statutes set forth specific acts and images

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imposing scale. *Id.* Kruger then superimposes text (e.g., "we don't play nature to your culture," "you construct the category of missing persons," and "your gaze hits the side of my face") over these images. *Id.* The cumulative effect of Kruger's works is to simultaneously draw the viewer's eye and comment on the act of gazing at the image.

166. Linker, *supra* note 164, at 409. To Lacan, woman is shown to be "inscribed in an order of exchange of which she is the object" of a system that subverts her. *Id.* at 409-10.

167. To Sigmund Freud, looking is inherent in a system of control. *Id.* at 407. He termed the sexual pleasures of gazing at another person "scopophilia," and in *Three Essays on the Theory of Sexuality*, noted the coexistence and alternation of scophoplilia in its passive and aggressive forms in children. *Id.* Thus, to Freud, voyeurism was the pleasure in submitting another to a distanced, controlling gaze.

168. Renaissance artisans in Florence usually included large-scale images of idealized nudes and other explicit images inside ornate wedding chests (*cassone*). Given as gifts to newlyweds, the images reinforced the importance of children to aristocratic families, and were believed to both arouse the viewer, and to ensure the couple produced beautiful children. TINAGLI, *supra* note 73, at 22-23.

169. *See supra* note 73.

170. High Renaissance artist Leonardo da Vinci conducted an extensive, humanistic study of human anatomy in his quest to gain the wisdom that brought individuals closer to the state of divine Grace. MARY ANNE STANISZEWSKI, BELIEVING IS SEEING: CREATING THE CULTURE OF ART 53 (1995). Through life drawing and dissection, da Vinci and the other early Renaissance artists were able to depict human subjects in realistic, proportional and three-dimensional form. WALTER ROBINSON, INSTANT ART HISTORY 70-72 (1995). For further reading on the accomplishments of early Renaissance art and artists, see RICHARD G. TANSEY & FRED S. KLEINER, GARDNER'S ART THROUGH THE AGES 734-35 (10th ed. 1996).

171. *See infra* notes 149-170 and accompanying text.

172. Miller v. California, 413 U.S. 15 (1973); see *supra* notes 121-142 and accompanying text for further discussion.

upon which obscenity convictions could be based.[173] If the challenged artwork contained any of this imagery, the fact finder was required to determine whether a reasonable[174] person would consider the work, "taken as a whole," to appeal "to the prurient interest in sex," whether the conduct described in the state's obscenity statute was depicted in a "patently offensive way," and whether the work as a whole possessed any serious artistic value.[175]

If the Court's aim was to craft a test that would allow rational men and women to play a role in policing their community's morality, *Miller* fits the bill, for it succeeds in giving fact finders the opportunity to express their moral indignation and outrage. Whatever the benefits of this conviction-as-symbolic condemnation may be,[176] *Miller's* utility is severely undermined by its unsound theoretical basis.

1. The Problem with Defining "Art"

Implicit in *Miller* is the notion that "good" art is separate from "bad" or "obscene" art.[177] From a critical perspective, this may be an impossible distinction to make because, before one can dismiss an image or performance as "bad" art or "non-art," one must know what "art" is.[178] This in turn requires a definition of "art." While a full discussion of the precise status and definition of art is beyond the scope of this Comment, the following analysis serves to highlight the difficulties of crafting any definition of art that would assist fact finders in their analysis of a challenged artwork.

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173. *Miller*, 413 U.S. at 24.

174. In *Pope v. Illinois*, 481 U.S. 497, 501-02 (1987), the Court held that fact finders were required to assume the perspective of a reasonable person when evaluating a challenged artwork.

175. *Miller*, 413 U.S. at 24.

176. Dan Greenberg & Thomas H. Tobiason, *The New Legal Puritanism of Catharine MacKinnon*, 54 OHIO ST. L.J. 1375, 1396 (1993). Seen in this light, obscenity convictions are little more than condemnations of behaviors contrary to a particular system of value judgments, "a way for people to symbolically reject, through legal prohibition, such ways of thinking." *Id.* While symbolic condemnations such as these clearly benefit those with the power and influence to impose their normative constructs on the rest of society, they "run the risk . . . of susceptibility to the inflamed and transient passion[s]." *Id.* at 1397. When the expression involved is as emotive and contentious as pornography, the risk of this kind of imposition becomes all the more real. *Id.*

177. De Grazia, *supra* note 7, at 828.

178. Art, as society conceives of it today, is a recent phenomenon. STANISZEWSKI, *supra* note 171, at 28. Before it was contained in museums, exhibited by dealers, and acquired by collectors, art was an essential part of everyday life. *Id.* at 39. The Sistine Chapel ceiling, one of the greatest masterpieces of the Italian Renaissance, was not art as it the term is conceived of today. *Id.* at 43.

a. What is Art?

The *Miller* Court assumed that, by their very essence, certain things are art, and is joined in this understanding by the defenders of traditional artistic boundaries.[179] What the *Miller* Court ignores, however, is that there has always been—and will always be—a purely linguistic dimension to the definition of art.[180] Words inherently lack rigid essences;[181] they are "empty variables that can be converted to different uses."[182] For this reason, the meaning of any word is grounded in its usage.[183] To be called art, then, is little more than to be called art by those that shape its usage—artists, critics, curators, art historians, and so on.[184]

The humanists have defined art as "a man made object demanding to be experienced aesthetically."[185] To them, the role of an artist and his art is to rescue and restore the virtues of subjectivity, creativity, and cultural memory in art.[186] To others, the locus of art lies in the artist him or herself. Kant, for example, believed that aesthetics[187] was the product of predestined genius, ungoverned by rules or science.[188] There was, therefore, "no science of the beautiful, but only a critique of it."[189] French artist Leon Gerome's *Pygmalion* embodies this "definition" of art.[190] In this painting, Gerome depicts the magical moment in which the sculptor's creation becomes flesh.[191] Thomas Eakins, Gerome's student, seems to embrace a different definition in his painting, *William Rush Carving His Allegorical Figure of the Schuylkill River.*[192] Eakins stresses the artist as a leathery-faced workman, chiseling a modestly veiled female figure out of marble.[193] To

179. Thomas McEvilley, *Art in the Dark*, *in* THEORIES OF CONTEMPORARY ART, 287, 289 (Richard Hertz ed., 1985)

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Erwin Panofsky, *The History of Art as a Humanistic Discipline*, *in* Erwin Panofsky, MEANING IN THE VISUAL ARTS 14 (Overlook Press 1974).

186. Benjamin H.D. Buchloh, *Hans Haacke: Memory and Instrumental Reason*, ART IN AM., Feb. 1983, at 98.

187. Aesthetics is the theoretical partner of Art. STANISZEWSKI, *supra* note 170, at 119.

188. *Id.* (citing IMMANUEL KANT, CRITIQUE OF JUDGMENT (1790)).

189. *Id.*

190. LEO STEINBERG, OTHER CRITERIA: CONFRONTATIONS WITH TWENTIETH-CENTURY ART 57 (1972).

191. *Id.*

192. *Id.*

193. *Id.*

Eakins, art is not a magical transformation but the product of the artist's hard work.[194]

Artists in the last century broadened the scope of the definitional debate, pushing the boundaries of what images and objects to which the term could be applied. This notion came to fruition in the late 1950s, when critic Alain Robbe-Grillet insisted that "if art is going to be anything it has to be everything."[195] In a similar vein, French artist Yves Klein declared, "Life, Life itself . . . is the absolute art."[196] Using the process of universalization, artists began to appropriate objects outside the realm of art into their artwork, transforming nonart into art.[197] In 1947, taking his cue from Marcel Duchamp's *Readymades*,[198] Klein signed the sky, symbolically appropriating it into his personal portfolio.[199] In 1959, Piero Manzioni put a can of feces for sale in an art gallery for its weight in gold;[200] eight years later, Dennis Oppenheim cordoned off areas of the world as art with his ceremonial stakes called *Sitemarkers*.[201]

This process of universalization left art in a precarious position, for "to be everything is not to be anything in particular."[202] Artists responded by courting nonart, their goals no longer to create art directly, but to "intend something else and still come up with art."[203] The result was art that was not traditional "art," but happenings, social action, experiment, behavioral stimulus or politics.[204] Hans Haacke's installation works redefine the meaning of aesthetic representation and exemplify this nonart art.[205] Leaving traditional aes-

194. *Id.*

195. McEvilley, *supra* note 179, at 289.

196. *Id.*

197. *Id.*

198. *See supra* note 44.

199. McEvilley, *supra* note 179, at 289.

200. *Id.* at 287. Photographer Andres Serrano's *Body Fluids* series, including the highly controversial *Piss Christ* image, is reminiscent of Manzioni's work. These images, produced between 1985 and 1990, use blood, saliva, and urine as though they were pure color. In *Piss Christ,* Serrano immersed a plastic crucifix in a vial of urine. An exploration of the alternate realities photographers can create with color, form and light, *Piss Christ* is an exploration of Serrano's own struggle with his faith, and a comment on the contemporary exploitation of religious values. Perhaps owing more to its title than to the actual image, *Piss Christ* provoked outrage among religious groups and political conservatives who viewed it as an attack on organized religion. ARCHER, *supra* note 46, at 198. The images leave the viewer to reconcile the beauty of the substances with their known dangers. For an interesting discussion of the use of blood in art, see BLOOD: ART, POWER, POLITICS AND PATHOLOGY (James M. Bradburne ed., 2002).

201. McEvilley, *supra* note 179, at 289.

202. *Id.* at 291.

203. STEINBERG, *supra* note 190, at 57.

204. STEINBERG, *supra* note 190, at 63.

205. Buchloh, *supra* note 186, at 98.

thetic merit and traditional procedures of artistic production almost entirely behind, Haacke views representation as the practice of accumulating and displaying knowledge as a critique of ideology.[206] His installation *MetroMobiltan*[207] exposes the bitter irony of Mobil's support for an exhibition of ancient African culture at a time when Mobil was the largest U.S. investor in South Africa and its apartheid government. *MetroMobiltan*, like many of Haacke's works, also ridicules the Modernist faith in the autonomy of art by exposing the "self-serving reasons corporations [use] their profits to sponsor art, notably the favorable publicity value of their patronage as well as the evils this publicity was meant to counteract."[208]

b. Is This Art?

In his 1757 dissertation, *Of the Standard of Taste*, David Hume argued that beauty was in the eye of the beholder.[209] A proposition frequently cited in support of aesthetic relativism, Hume's words would have been interpreted in light of the eighteenth century notion that taste was objective.[210] Philosophers and critics subscribing to this notion considered aesthetic beauty to be no less subjective than color, warmth, or smoothness.[211] Thus, when Hume argued that there could be no arguing about taste, he meant that similarly educated individuals would interpret beauty as consistently as they would interpret sensation.[212]

The Court's opinions in *Roth*[213] and *Miller*[214] assume that there is an objective line between art that is beautiful and worth protecting and art that is worthless smut. An easy line to draw in the world envi-

206. *Id.*

207. STANISZEWSKI, *supra* note 170, at 268. *MertoMobiltan* consists of a miniature façade of Manhattan's Metropolitan Museum of Art with Haacke's version of exhibition banners hanging outside. *Id.* at 268-69. The center panel advertises the Met's *Treasures of Ancient Nigeria* exhibition. *Id.* On the outer panels, Haacke has reprinted the response Mobil executives made when asked by a shareholder to prohibit sales to South Africa: "[D]enial of supplies to the police and military is not responsible citizenship." *Id.* Behind these panels Haacke placed photos taken during the funeral for several black South Africans shot by the police in 1985. *Id.*

208. SANDLER, *supra* note 25, at 403.

209. Arthur C. Danto, *Book Reviews: The Analysis of Beauty*, *available at* http://www.bookforum.com/archive/tocs/sum98.html (last visited Dec. 18, 2003).

210. *Id.*

211. *Id.*

212. *Id.*

213. Roth v. United States, 354 U.S. 476 (1957); *see* discussion of *Roth*, *supra* notes 93-120 and accompanying text.

214. Miller v. California, 413 U.S. 15 (1973).

sioned by Hume and William Hogarth,[215] the art-obscenity distinction blurs in any society favoring the Romantic[216] doctrine of aesthetic relativism. Contemporary society continues to struggle with these two perspectives, and it remains to be seen whether it is possible to draw the line at all.

2. *Who Should Decide What Art Is?*

Assuming that the Court's *Miller* test is right, and that worthy art can be distinguished from worthless obscenity, to whom should the difficult task fall? Should critics and art historians determine artistic value? Should judges make the determination? Should artists? This section will examine the problems with leaving this crucial task to any of these groups.

a. Artists?

In *Kois v. Wisconsin*,[217] the Supreme Court considered the artist's subjective intent when determining whether the challenged work was obscene or merely offensive. Although this approach would create a substantial role for artists in obscenity determinations, it is difficult to recommend. Aside from the difficulty of determining the true motives behind a work, leaving determinations of artistic value to artists would give pornographers free reign. It also places artists whose works reject overt artistic value in the difficult position of compromising their principles in order to save their art.

b. Art Insiders?

Art historians, critics, and curators shape the face of the artistic world by praising, censuring, and discussing art. Yet limiting the definition of valuable art to include only that admired by art insiders would leave a great deal of important material unprotected. Though he had been producing artworks for twenty-five years, Hans Haacke[218] only broke into the art world in 1987.[219] Professor Benja-

215. In *The Analysis of Beauty*, Hogarth appeals to "the reader's eye, and common observation," and speaks of taste in common-sense terms, "in the way they are daily put in practice . . .." Danto, *supra* note 210.

216. The Romantics argued that beauty overwhelms the rational intellect, and believed that taste was a personal and emotional phenomenon. *Id.*

217. Kois v. Wisconsin, 408 U.S. 229 (1972).

218. *See supra* note 207 and accompanying text.

219. Buchloh, *supra* note 186, at 98. Before this time, only two American museums—Ohio State University and the Allen Memorial Art Museum at Oberlin College—possessed any of his works. *Id.* At the time of his breakthrough, only one museum in his native West Germany had acquired any of his works. *Id.*

min Buchloh attributes Haacke's difficulty to, in part, his frequent institutional challenges: "[w]hat the reception of Haacke's work does prove is that the supposedly all-embracing liberalism of high-cultural institutions and of the market may be far more selective than is generally believed, and that those institutions can be rather rigorous in their secret attacks of revenge and clandestine repression."[220] Haacke's experience teaches that the art establishment is not the detached, neutral observer that should be entrusted with determinations regarding artistic value.

Aside from the issue of bias, critical acclaim cannot be the arbiter of artistic value because a great deal of valuable art never reaches the gallery, museum, or critic. When critics are able to evaluate art, they must wait until the work's intention comes into focus.[221] Folk art, outsider art,[222] and new talent would thus be unprotected or underprotected until it garnered critical acclaim.

c. Judges?

If artists and the art insiders cannot be trusted with determinations of artistic value, should the question be left to the judiciary? Courts have recognized since the last century that they were improper arbiters of artistic value. In 1903, Justice Oliver Wendell Holmes questioned the ability of judges to evaluate the content of art:

> It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations . . . At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether

220. *Id.*

221. Steinberg, *supra* note 190, at 63. To Norman Bryson, art history is in crisis:

> It is a sad fact: art history lags behind the study of the other arts. Whether this unfortunate state of affairs is to be attributed to the lethargy of the custodians of art . . . or to the particular history of the institutions devoted to the study of art . . . or to some less elaborate reason, such as the plain stasis, conservatism and inertia fostered by the sociology of the profession of art history, I cannot say . . . . [W]hile the last three or so decades . . . have witnessed extraordinary and fertile change in the study of literature, of history, of anthropology, in the discipline of art history there has reigned a stagnant peace . . . .

Donald B. Kuspit, *Conflicting Logics: Twentieth-Century Studies at the Crossroads*, ART BULL., Mar. 1987, at 117 (quoting NORMAN BRYSON, VISION AND PAINTING: THE LOGIC OF THE GAZE xi (1983) (internal quotation marks omitted)).

222. Outsider art refers to artworks created by artists outside of established culture and society. The term has broadened from its original definition to encompass works created by untrained or "naïve" artists, and produced outside the "system" of galleries, schools, museums, and other traditional forums. For general information, see *Raw Vision: Definitions, at* http://rawvision.com (last visited Sept. 12, 2003).

> the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time.[223]

A half-century later, Justice William O. Douglas added that judges were "judges, not literary experts . . . We are not competent to render an independent judgment as to the worth of this or any other book."[224] Justice Antonin Scalia's concurrence in *Pope*,[225] however, is perhaps the most revealing: "[f]or the courts to decide 'what is beauty' is a novelty even by today's standards."[226]

d. "Reasonable" Men and Women?

If artists, art insiders, and judges are not the proper arbiters of artistic value, should the task fall to the rest of us? By leaving the decision in the hands of the fact finder in *Roth*[227] and *Miller*,[228] the Supreme Court seems to believe that ordinary men and women are best suited to evaluate aesthetic and artistic value. Because of its estrangement from traditional notions of beauty and aesthetic value, theirs is a flawed belief.

Leo Steinberg noted that Americans have a long-standing suspicion of art, and tend to associate art with "aristocracy and snob appeal, with pleasure, wickedness and finesse."[229] Perhaps rightfully, those outside the art community may often regard it with great wariness and suspicion.[230] Publications like *ArtForum*, *Art in America*, and *ArtNews* go largely unread by many people outside the industry.[231] Thus, individuals unfamiliar with the theory underlying a challenged work may condemn a work as obscene based on superficial content alone when asked to evaluate a sexually explicit artwork's value.[232]

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223. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

224. Memoirs v. Massachusetts, 383 U.S. 413, 427 (1966) (Douglas, J., concurring).

225. 481 U.S. 497 (1987).

226. *Id.* at 505 (Scalia, J., concurring).

227. 354 U.S. 476 (1957).

228. 413 U.S.15 (1973).

229. STEINBERG, *supra* note 190, at 56.

230. Kurzweg, *supra* note 160, at 443.

231. STANISZEWSKI, *supra* note 170, at 260. A recent review of Mental Floss Magazine's suggestions for appreciating Jackson Pollock's artwork confirms Staniszewski's observation:

> You can admit it, if it's true: Jackson Pollock's art gives you a headache. You really, really want to get what all those lines and squiggles and colors mean, but it's just not happening for you .. . . In [Mental Floss'] latest issue, [the magazine] covers the artist, his turbulent life and his influences (besides booze). It also offers ways of looking at the man's art that might not have occurred to you.

Wrapping Head Around Pollock Work, CHI. TRIB., Aug. 10, 2003, § 13 at 9. The magazine then offers valid suggestions to help a viewer unfamiliar with Pollock's work fully appreciate its brilliance. "Aspirin, anyone?" the article's author retorts. *Id.*

232. Missouri Senator John Danforth's interpretation of several Mapplethorpe photographs is revealing: "These are gross. These are terrible . . . I do not think they are art . . . and my guess is

IV. IMPACT

By failing to reevaluate its obscenity doctrine, the United States Supreme Court risks robbing nonobscene, sexually explicit art of the First Amendment protection it needs and deserves. This section addresses two potential consequences.

A. Consistent Inconsistencies

First, to best serve its noble goals, the boundaries of First Amendment protection must be clearly delineated.[233] Based on the Western belief that rational actors are free to steer between lawful and unlawful conduct, if it is possible to distinguish between the two,[234] the philosophy supporting American criminal law does not tolerate convictions for actions not recognized as unlawful when they were committed.[235] Where laws are made, they should explicitly describe the behavior they proscribe, and must be enforced consistently and equally.[236] Without these characteristics, enforcement of the law becomes the kind of arbitrary, "cruel and unusual punishment" so abhorrent to the framers.[237] Inconsistent, arbitrary laws affecting First Amendment expression create a dangerous power in the hands of those entrusted with their enforcement. Worse, laws like this open the door to selective prosecution of those speakers or ideas law enforcement find disagreeable, offensive, or inferior.[238] Rather than drawing a firm line between art and obscenity, the *Miller* test abdicates obscenity decisions to fact finders unsuited to making the determination,[239] and fails to provide an adequate, objective tool by which to measure the value of a work.[240] The murky art-obscenity distinction it forces fact finders to draw invites arbitrary law enforcement[241] and self-censorship. Armed with this ambiguous test, law enforcement may capi-

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that not a single resident of my state would like them." Adler, *supra* note 28, at 1372 (citing 135 CONG REC. S12116 (daily ed. Sept. 28, 1989)).

233. Kurzweg, *supra* note 160, at 453.

234. *Id.*

235. *Id.*

236. Greenberg & Tobiason, *supra* note 176, at 1408.

237. U.S. CONST. amend. VIII. Judge Benjamin Cardozo seemed to have the virtues of consistent law enforcement in mind when he remarked: "Our jurisprudence has held fast to Kant's categorical imperative, 'Act on a maxim which thout canst will to be law universal.' It has refused to sacrifice the larger and more inclusive good to the narrower and smaller . . . ." Greenberg & Tobiason, *supra* note 176, at 1384.

238. H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—Or Absurdity?* 15 ST. THOMAS L. REV. 517, 536 (2003).

239. *See supra* notes 218-232 and accompanying text.

240. *See supra* notes 142-232 and accompanying text.

241. Robbins & Mason, *supra* note 238, at 531.

talize on the vague parameters of obscenity jurisprudence to prosecute galleries and museums for exhibiting works they find offensive, while leaving nonoffensive, though equally sexual, materials alone.[242] This haphazard prosecution leaves artists like Karen Finley, who uses explicit sexuality and offensive symbolism to communicate deeper socio-political messages, particularly vulnerable.[243]

The flip side of arbitrary law enforcement is self-censorship. The most pernicious and deleterious kind of suppression, self-censorship occurs when artists elect not to perform, display, or publish a work rather than risk an adverse government response.[244] Harmful because it prevents speech from ever reaching a public debate about its artistic merit,[245] the temptation to stifle one's own expression may become

242. Punishing artists whose works challenge the borders established by society and their artistic predecessors and condemning as obscenity those works that deal with the same subject matter, have the highly unsatisfactory effect of punishing artists not for their explicit content, but for treating it in a certain way.

Many critics, for example, have interpreted the floral paintings of twentieth-century American artist Georgia O'Keeffe as symbolic allusions to female genitalia. Upon viewing a 1925 exhibition of the artist's works, the *New Yorker's* art critic reported, "The show is strong: one long loud blast of sex, sex in youth, sex in adolescence, sex in maturity, sex bulging, sex tumescent, sex deflated. After this description, you'd better not visit the show: inevitably you'll be a little disappointed. For perhaps only half the sex is on the walls; the rest is probably in me." Jackie Wullschlager, FINANCIAL TIMES (London), Apr. 19, 2002, at 16. Though the artist denied that her simplified floral images were veiled allusions to sexuality, "three-quarters of a Freudiansied century later, our uncertain response persists." *Id.* The lesson here is two-fold. On one hand, O'Keeffe's works illustrate the pervasive influence of sexuality on art—whether in the artist's mind or the viewer's eye. On the other hand, the popularity of these works reveals society's willingness to embrace works with extreme and explicit subject matter so long as it is depicted via symbolism, allusion, and metaphor.

243. Salzman notes:

> As illustrated by the example of performance art, creativity is more and more often used to give birth to images that are calculated to shock. Many of these images will inevitably be sexual in nature because of the psychological force of sex combined with heavy social taboos imposed upon it. As artists continue to rail against the constraints placed upon them by legal and public morality, it is doubtful offensive art will just go away – art presumably will continue, for a long while at least, to provoke negative emotion and outrage.

Salzman, *supra* note 33, at 1257.

244. The Harrisburg affair is an extreme example of self-censorship. Concerned that circular forms in an abstract painting visible from the state capitol rodunda would be interpreted as a woman's breasts, state officials requested that that particular work be removed from view. Burton Caine, *The Dormant First Amendment*, 2 TEMP. POL. & CIV. RTS. L. REV. 227, 240 (1993). This is an unfortunate act of institutional censorship in and of itself; even worse is the fact that the artist whose work was removed censored himself in order to avoid state censorship, by withholding paintings he feared would arouse comment. *Id.*

245. *Id.*

overwhelming when it is impossible to determine a priori the extent of First Amendment protection for one's expression.[246]

B. *Secondary Effects?*

Until recently, speech was viewed as either protected or unprotected.[247] In the latter half of the twentieth century, however, the Supreme Court's viewpoint shifted, and several justices began to embrace the notion that "not all speech is of equal First Amendment importance."[248] Having achieved a "curious persistence"[249] in recent years, this conception of First Amendment expression is often referred to as the low value speech theory. Home to fighting words, child pornography, as well as obscenity, the Court has denied low-value speech constitutional protection because it makes only minimal contributions to the social discourse.[250]

Professor Jeffrey Shaman argues that *Roth*[251] is "a manifestation of low-value speech theory in pristine form."[252] In *Roth*, the Court flatly refused to balance the potential for harm in the challenged speech against the potential harm in censorship, and explained only that obscenity was not "speech" and, therefore, not entitled to First Amendment protection.[253] While the Court's refusal to extend protection to the broad and enigmatic category of obscenity is itself quite troubling, the secondary effects doctrine—a consequence of this refusal—has the potential to substantially censor Postmodern artistic expression.

A victory for civic republicans like Professor Cass Sunstein,[254] the secondary effects doctrine upholds speech regulations seeking to "re-

246. *See generally* Robbins & Mason, *supra* note 238, at 532-33 (pointing out that it is impossible to positively identify obscenity until it is identified by the United States Supreme Court as such, and that before this time, a speaker can only attempt to guess what an "average person" would regard his image or performance in light of his or her community's standards).

247. Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 196 (2001).

248. Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 SMU L. Rev. 297, 298 (1995) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985) (internal quotation marks omitted) (holding credit reports are matters of purely private concern and, as such, of lesser First Amendment value than matters of public concern)).

249. *Id.* at 300.

250. *Id.* Commentators have suggested adding a number of other categories of expression, from hate speech to pornography, to the catalogue of low value speech. *Id.* at 300.

251. Roth v. United States, 354 U.S. 476.

252. Shaman, *supra* note 248, at 305.

253. *Id.* at 308.

254. Professor Sunstein supports a Madisonian interpretation of the First Amendment that views freedom of expression as a means to a greater social end. Kurzweg, *supra* note 161, at 440. Although he believes free speech is critical to the development of a deliberative democracy, Sunstein argues that too much speech—particularly speech that bears little or no connection to the ultimate democratic goal—falls within the First Amendment's protective embrace. *See gen-*

duce the harmful non-speech antecedent effects that derive from certain types of speech."[255] Under this doctrine, speech can be restricted with little or no showing of harm,[256] because *Roth* views obscenity as nonspeech and, therefore, requires no balancing of interests.[257] Although the secondary effects doctrine's roots lie in zoning ordinances affecting adult entertainment,[258] courts have expressed a willingness to expand the scope of the doctrine to sexually explicit speech that is offensive but not obscene.[259] The transformation of this inclination into a legal reality is a frightening prospect for Postmodern and Contemporary artists like Mapplethorpe and Finley.

Unless and until expression is deemed obscene, expression with sexual content is entitled to the full array of First Amendment protections. Among these is the requirement that courts balance the benefits of censorship against the harms of the potential expression. To regulate nonobscene expression, a court must find that the speech subject to the regulation causes harm. For example, the Court upheld a statute prohibiting the distribution of child pornography in *New York v. Ferber*[260] after it determined that production of the material was harmful to the physiological, mental, and emotional health of the children involved.[261]

Unlike child pornography, sexually explicit speech involving adult subjects has never been conclusively linked to any actual harm. In 1970, the President's Commission on Obscenity and Pornography challenged the longstanding assumption that obscenity caused antisocial behavior.[262] Its majority report concluded that exposure to erotica had "little or no effect" on attitudes about sex or morality and had

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erally Brandon K. Lemley, *Effectuating Censorship: Civic Republicanism and the Secondary Effects Doctrine*, 35 J. MARSHALL L. REV. 189 (2002). Consequently, Sunstein and the civic republicans support restrictions on speech as a means to promote public deliberation. *Id.* at 201. When regulating specific categories of speech, Sunstein proposes a two-tiered approach to the First Amendment: if the speech involved falls within the constitutional "core," it can be regulated only if it poses grave harm; speech falling outside this core may be regulated upon a showing of "sufficiently weighty reasons." *Id.* at 202.

255. Lemley, *supra* note 254, at 192.

256. *See* Caine, *supra* note 244, at 234.

257. Shaman, *supra* note 248, at 301.

258. *See, e.g.*, Young v. American Mini Theatres, 427 U.S. 50, 72-73 (1976) (upholding local prohibition of adult movie theaters within one thousand feet of any other regulated use); City of Renton v. Playtime Theatres, 475 U.S. 41, 54 (1986) (upholding statute prohibiting operation of adult movie theaters within one thousand feet of residences, churches, parks, and schools based on negative secondary effects associated with these establishments).

259. Lemley, *supra* note 254, at 192-93.

260. 458 U.S. 747 (1981).

261. *Id.* at 758.

262. Shaman, *supra* note 248, at 307.

little impact on sexual behavior.[263] Despite Professor Catharine MacKinnon's passionate arguments to the contrary,[264] the overwhelming weight of the evidence supports the conclusions of the 1970 commission.[265]

Based on this evidence, any harm posed by nonobscene sexually explicit speech does not rise to the level which would justify denying it full First Amendment protection. Application of the secondary effects doctrine to nonobscene sexually explicit speech is thus little more than paternalistic censorship, with the state-censor imposing the standards of popular morality upon the public in an attempt to shield the people from offensive—but harmless—speech.[266]

Although offensive to the morals and sensibilities of many viewers, subordinating freedom of expression to the desire of unwilling viewers to be shielded from objectionable images is no solution to the problem posed by sexually explicit Contemporary art. To the contrary, preventing artists from challenging the status quo of social, gender, and sexual norms by dismissing any such content as low value speech, courts effectuate the private moral judgments of the majority.[267] In so doing, they meddle with the individual right of self-realization of the artists whose works they condemn,[268] clipping the artists' wings before they are fully grown.[269] Society is also harmed by the failure to fully protect the freedom of all its artists, for it is often society that benefits the most from its artwork. Art is a vehicle for new ideas and self-expression, a critical element in the search for the universal truths.[270] Indeed, the art most valuable to society may well be its most controversial, for these shocking works bravely force society to confront new challenges and answer the difficult questions.[271] By punishing works that make it uncomfortable, a society punishes those who choose to

263. *Id.* at 306-07.

264. Professor MacKinnon argues that pornography "reflects and reinforces the subordinating structure of male sexuality and power." Greenberg & Tobiason, *supra* note 177, at 1386 (quoting CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 171 (1987) (internal quotation marks omitted)). To MacKinnon, no distinction should be drawn between valuable and valueless works; so long as a woman is subjugated, any value in the expression is irrelevant. *Id.* Pornography with artistic merit may, in fact, be more harmful than obscenity because it is better able to construct the reality of female submission. *Id.* at 1402.

265. Gaede, *supra* note 81, at 449.

266. Lemley, *supra* note 254, at 193.

267. *Id.*

268. Salzman, *supra* note 33, at 1245.

269. *Id.*

270. *Id.*

271. *Id.*

"shame the devil and tell the truth."[272] That a government cannot tolerate unfettered artistic liberty, in the end, is more a commentary on that society than on the art and the individuals it seeks to silence.

No government censors speech it perceives to be harmless.[273] While Mapplethorpe's photographs and Finley's confrontational performances contain graphic, explicit, and even offensive images, they also contain insight and ideas. More dangerous than guns, according to Vladimir Lenin,[274] ideas challenge society to grow and develop, to discard outdated prejudices and break free of the status quo. The censorship effectuated by the Supreme Court's inadequate obscenity jurisprudence cannot "save" America from moral corruption and decay. If our society collapses, it will not be because people were allowed to view a Mapplethorpe photograph, attend a Finley performance, or read Joyce's *Ulysses*. It will collapse because Americans stood passively by and watched their civil rights and liberties drain away. To borrow a phrase from an outstanding essay on the absurdity of obscenity law, "the loss of freedom in a democracy must surely come like a slowly rising river whose danger we do not perceive until the water is already rising under our door."[275]

V. CONCLUSION

American First Amendment jurisprudence fails to provide adequate protection to Postmodern artists like Robert Mapplethorpe and Karen Finley. When applied to artworks with controversial, sexually explicit imagery, the prevailing obscenity test is unable to distinguish valuable art from valueless, unprotected obscene expression. Lacking the originality, authenticity, and serious value required to prove their works possess the serious artistic value required by *Miller*, these artists teeter on the brink of censorship.

On a more theoretical level, the United States Supreme Court's First Amendment doctrine wrongly assumes that artistic value—or art itself, for that matter—can be objectively defined in a one-size-fits-all

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272. Lawrence Duell, commenting on *Sexus*, the explicitly sexual first book of Henry Miller's trilogy *The Rosy Crucifixion*, recognized:

> By its very nature, such a task must transgress the narrow limits of . . . the search for truth. Often the result is shocking, terrifying; but then the truth has always been a fierce oracle rather than a bleat or a whimper . . . It isn't pretty, a lot of it, but then neither is real life.

Salzman, *supra* note 33, at 1247.

273. Nicholas Wolfson, *Eroticism, Obscenity, Pornography and Free Speech*, 60 BROOK. L. REV. 1037, 1061 (1997).

274. Greenberg & Tobiason, *supra* note 176, at 1414.

275. Robbins & Mason, *supra* note 238, at 544.

test. The Court also wrongly believes that the fact finders charged with separating art from obscenity can objectively determine the presence or absence of artistic value.

The consequences of these failures for Contemporary American art are profound. By failing to provide a useful tool to use in obscenity determinations, the Court has opened the door to arbitrary enforcement and, in time, self-censorship. More troubling, however, is that the Court's refusal to acknowledge the value inherent in controversial artworks allows valuable art to be lumped into the category of low value speech based on its superficial content and regulated based on its secondary effects.

Grounded in the belief that censorship is more dangerous than free speech could ever be, the First Amendment requires tolerance and protection for all expression, whether it is beloved, reviled, rejected, or embraced. The time has come for the Supreme Court to recognize the valuable role Contemporary art, even at its most controversial, plays in society. The time has come for the Court to open its mind to Contemporary art, and to extend this art the protection it deserves.

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