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PORN WARS: SERIOUS VALUE, SOCIAL HARM, AND THE BURDENS OF MODERN OBSCENITY DOCTRINE

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ABSTRACT

During the 1980s, anti-pornography ideologues—an unlikely alliance of feminist activists and right-wing evangelical Christians—waged an open war against pornography and the anti-censorship feminists who supported legal protection for pornographic works. Following a pivotal defeat of an anti-pornography ordinance in federal court, the ideologies constituted in the so-called "Porn Wars" continued to guide obscenity doctrine. These ideologies have informed lower courts' understanding of the harms and values associated with sexually explicit content more than constitutional scholars recognize, at least explicitly. Although courts recognize core feminist values such as sexual autonomy and privacy in sexually explicit content, they have built doctrine that essentially forestalls the exchange of sexual content, even among consenting adults in private and quasi-private spaces. Anti-pornography presumptions of harmful effects predominate lower court decisions in ways that could produce disastrous consequences for artistic speech, privacy, and even public health.

INTRODUCTION

For decades, the struggle for sexual expression has waged in halls of national power, community institutions, and private homes. The conflict has

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advice, input, and support throughout her academic career.

coalesced around sexual expression's (namely pornography's) utility in modern political and cultural discourse. To staunch members of the conservative right, pornography threatens to degrade public morality and, with it, social cohesion.[1] Among certain factions of the liberal left, pornography represents a means of accessing sexual autonomy and engaging with the boundaries of mores around sex.[2] This conflict is ongoing, but there is still little focus on how the courts contribute to the fomenting and exacerbated doctrinal blind spots in the law of sexual expression.

The modern genesis of the conflict over pornography's legal status is a period during the 1980s and early 1990s known as the "Porn Wars," in which an unlikely alliance of anti-pornography feminists and the conservative Christian Moral Majority fought to outlaw pornography.[3] Christian political figures and activists eschewed pornography on moral and religious grounds, while anti-pornography critical-feminist activists viewed pornography as both a symptom and a cause of systemic violence against women. For these feminists, all of the abuses that women struggled so long even to begin to articulate: the rape, the battery, the sexual harassment, the prostitution, and the sexual abuse of children—existed in one place, pornography.[4]

Pro-pornography and anti-censorship feminists argued that anti-pornography policies—including obscenity and indecency laws, generally—criminalized legitimate expression that, though graphic, empowered female and LGBTQ+ people.[5] The conflict between these perspectives eventually spilled over into the courts. In 1985, *American Booksellers v. Hudnut*[6] tested the constitutionality of an Indianapolis anti-pornography ordinance that was modeled after an ordinance feminist activists Catharine MacKinnon and Andrea Dworkin drafted[7]—defining pornography as illegal discrimination

1. *See* Matt Welch, *Opinion: Conservatives are coming for your Pornhub*, L.A. TIMES (Jan. 3, 2020).

2. Ellen Willis, *Feminism, Moralism, and Pornography*, 38 N.Y. L. REV. 351 (1992) (explaining a liberal feminist's view of pornography).

3. CAROLYN BRONSTEIN, BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT, 1976-1986 1-2 (2011).

4. Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. L. REV. 1, 16–17 (1985).

5. *See, e.g.* Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 304 (1992) (concluding that community health organizations improved community sexual health by utilizing graphics, comic books, and explicit materials to educate the at-risk gay community during the height of the AIDS crisis).

6. *See* 771 F.2d 323 (7th Cir. 1987).

7. *See id.*

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and a civil rights violation.[8]

The ordinance was ill-fated. Writing for the United States Court of Appeals for the Seventh Circuit, Judge Frank Easterbrook found the ordinance unconstitutional under the First Amendment, holding that it made no accommodation for sexually explicit material with serious literary, artistic, political, or scientific value.[9] This was due to the landmark Supreme Court case *Miller v. California*,[10] which held that sexual expression only qualifies as unprotected obscenity when it lacks such value—serious literary, artistic, political, or scientific value—as a matter of law.[11] According to Judge Easterbrook, *Miller* sets a high bar.[12] The legal conceptualization of value lies at the heart of the Porn Wars and their resonant effects on the law of sexually explicit media. It is, therefore, critical to better understand how courts have articulated the parameters of harm, value, and feminism after both *Miller* and *Hudnut*.

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8. *See* Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 14–15 (1987) (recounting Catherine MacKinnon's testimony before the Minneapolis Zoning and Planning Committee on the subject of zoning ordinances aimed at restricting pornography to certain parts of the city) (hereinafter *Brest)*; *see* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985) (describing how, under the ordinance, unlawful pornography included depictions in which: "(1) [w]omen are presented as sexual objects who enjoy pain or humiliation; (2) [w]omen are presented as sexual objects who experience sexual pleasure in being raped; (3) [w]omen are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; (4) [w]omen are presented as being penetrated by objects or animals; (5) [w]omen are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; (6) [w]omen are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.").

9. *See* Brest, *supra* note 8, at 656 (providing that the Court of Appeals affirmed the decision to strike down the ordinance after determining it was unconstitutional).

10. *See* 413 U.S. 15, 24 (1973).

11. *See id.* (explaining that the *Miller* test asks: (1) "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the 'prurient interest'"; (2) "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the relevant state law[s]"; and (3) "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value").

12. *Hudnut*, 771 F.2d. at 331–32 (determining that the Supreme Court in *Miller* and its progeny held "there is no such thing as a false idea" under the First Amendment); *see also* Jenkins v. Georgia, 418 U.S. 153, 160 (1974) (providing that "it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is 'patently offensive.'").

The legacy of the Porn Wars jurisprudence reflects two important principles. First, the regulation of pornography involves much more than the regulation of sexual acts and morality.[13] It involves disputes that intersect with criminal justice, healthy sexual behavior, sexual deviance, media effects, free expression, discrimination, and power.[14] Second, the historical significance of the Porn Wars and the resurgence of its core components in the current political zeitgeist demands a revisit of obscenity jurisprudence. How do courts come to understand the stakes of the power struggle over graphic depictions of sex in modern culture? How do they articulate the harms, cultural and expressive values, and politics of this contested space?

Using the Porn Wars as an organizational starting point, this article reviews the Supreme Court's obscenity jurisprudence and the ideological positions represented during the Porn Wars. This article focuses on how social movement actors and courts have articulated the extent to which sexual expression has "serious value" under the *Miller* obscenity standard. Part I of this article analyzes doctrinal articulations of harm and value in obscenity cases following the defeat of the anti-pornography ordinance in *Hudnut*. Part II of this article then reviews the dominant theoretical bases for regulating sexually explicit content and banning obscene pornography, including relevant feminist scholarship and the legal theory of so-called "low-value" expression.[15] Although courts have recognized protectable interests in sexual privacy and freedom of sexual fantasy (two core anti-censorship feminist values), they generally presume that pornography has powerful deleterious effects.[16] This presumption has driven two important outcomes. First, applying the "variable obscenity" doctrine, courts have often upheld regulations aimed at the distribution channels of sexual expression (i.e. adult bookstores and Internet websites). Second, courts have applied obscenity standards in ways that seem to unduly burden groups whose sexual interests fall outside the mainstream. The case law appears to

13. *See* Jesse Merriam, *Regulate Pornography: See Centuries of State Obscenity Laws*, NATIONAL REVIEW, (Dec. 23, 2019) https://www.nationalreview.com/2019/12/pornography-regulation-state-obscenity-laws/.

14. *See id.* (providing a brief history of government regulation of pornography).

15. Pornography includes a wide variety of sexually explicit materials, at times referring to both obscene and non-obscene sexual content. This paper does not attempt to define pornography; however, the definition of "obscenity" is part of the doctrinal problem investigated in this study. *See* Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1103–04 (1993) (describing how "[t]he term 'pornography' is so vague, subjective, and expansive" that it can apply to anything sexual in nature).

16. *See id*. at 1140 (elaborating on anti-censorship feminist values and providing arguments that pornography censorship would negatively impact women's rights).

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treat non-mainstream modalities of pornography such as erotic BDSM photography[17] as if they have lower value than heteronormative depictions of sex. This article then concludes by warning legislatures that post-Porn-Wars obscenity doctrine has negatively impacted free speech, sexual privacy, and public health.

I. OBSCENITY DOCTRINE FROM *BUTLER V. MICHIGAN* TO *AMERICAN BOOKSELLERS V. HUDNUT*

The primary justification for obscenity regulation in Western democracies is that graphic depictions of sex either lack communicative value or have the potential to do serious harm.[18] Early twentieth-century American courts reasoned that obscene depictions tend to corrupt public morality, especially when exposed to children.[19] Courts also held repeatedly that obscenity appeals purely to prurient—that is, lustful or morbid—sexual appetites, rather than discourse, further justifying unbridled regulation. In *Chaplinsky v. New Hampshire*, a landmark case outlining the constitutional "fighting words" doctrine, the Supreme Court asserted that the First Amendment does not protect obscenity because it affords no opportunity for a useful exchange of ideas and has very low value to political discourse.[20] However, the idea that obscene content is "nonspeech" and incapable of containing expressive elements has largely faded from free speech jurisprudence.[21] The evolution of the obscenity doctrine starts with courts attempting to balance defining societal values with a robust obscenity doctrine, often having to reassess those interests in light of social change.[22]

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17. BDSM is an acronym for sexual practices related to bondage and discipline, domination and submission, and sado-masochism. BDSM, sometimes referred to as "kink," has a long history of stigmatization. Those who practice BDSM are often labeled as deviant. *See* Beverly L. Stiles & Robert E. Clark, *BDSM: a Subcultural Analysis of Sacrifices and Delights*, 32 DEVIANT BEHAV. 158, 159 (2011).

18. *See* Merriam, *supra* note 13.

19. *See* United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913) (quoting Regina v. Hicklin, L.R. 3 Q.B. 360, 371 (1868) by framing the inquiry as "[w]hether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall"); MacFadden v. United States, 165 F. 51 (3d Cir. 1908) (determining that a publication is obscene if it tends to corrupt the minds of individuals who come into contact with it, especially if the publication is particularly addressed to children); *see also* United States v. Bennett, 24 F. Cas. 1093, 1104 (S.D.N.Y. 1879).

20. 315 U.S. 568, 572 (1942).

21. Frederick Schauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1276 (1977).

22. *See* Merriam, *supra* note 13.

By the late 1950s, the Supreme Court justified regulations of obscene sexual expression on moral and obscenity grounds. In 1957, a little more than a decade after the Court held fighting words as having the same level of value as obscenity,[23] it finally articulated a clearer meaning to modern obscenity in *Butler v. Michigan*.[24] *Butler* involved a conviction under a Michigan statute prohibiting the distribution of obscene materials that "manifestly tend[ed] to the corruption of the morals of youth."[25] A unanimous Supreme Court overturned the conviction, holding that the statute unconstitutionally "reduce[d] the adult population of Michigan to reading only what is fit for children."[26] It is clear *Butler*'s narrow holding represents a successful challenge to an inartful attempt to legislate adult morality.

The Court later affirmed *Butler's* proposition in *Roth v. United States*.[27] Writing for the majority, Justice William J. Brennan turned to First Amendment history and tradition to hold that obscenity, by its very nature, lacks any redeeming social importance.[28] In *Roth*, the Court defined unprotected obscenity as having a dominant theme that, according to the average person applying contemporary community standards, appeals to prurience.[29] *Roth* set a skeletal framework for the Court's current obscenity test, which was announced a decade and a half later in *Miller v. California*.[30] *Miller* involved the prosecution of an adult bookstore owner for mailing unsolicited sexually explicit advertisements to unsuspecting recipients.[31] The *Miller* standard maintained *Roth*'s focus on materials with prurient appeal, but at the same time tightened its First Amendment safeguards.[32] Under *Miller*, obscenity is limited to "work [that] depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" and "taken as a whole, lacks serious literary, artistic, political, or scientific value."[33] The decision in *Miller* intended to safeguard from

23. *Chaplinsky*, 315 U.S. at 572 (defining fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.").

24. Butler v. Michigan, 352 U.S. 380, 381 (1957).

25. *Id*.

26. *Id*. at 383.

27. *See* 354 U.S. 476, 484 (1957).

28. *See id.*

29. *Id*. at 489.

30. Miller v. California, 413 U.S. 15, 24 (1973).

31. *Id*. at 16-17.

32. *Id*. at 23–24.

33. *Id*. at 24. Indeed, an obscenity statute is unconstitutionally overbroad if it fails to limit the definition of obscenity to material that lacks these values. *See, e.g.*, Cmty. Television v. Wilkinson, 611 F. Supp. 1099, 1108–09 (D. Utah 1985).

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censorship sexually explicit works against overly conservative juries by asking whether a reasonable person would find value in the work as a matter of law—a determination left for the court.[34] The *Miller* framework is an imperfect but significantly more speech-protective standard than pre-*Roth* standards, that focuses on shielding youth from toxic obscenity.[35]

The obscenity doctrine focuses solely on sex.[36] The doctrine excludes whole swaths of explicit, non-sexual material from the *Miller* obscenity definition. Although their literary, artistic, political, or scientific value is not presumed, depictions of excretory activities,[37] depictions of gore and violence,[38] and misogynist or racist language[39] do not implicate *Miller*. Furthermore, *Miller*'s value inquiry is inapplicable to obscene materials in private domains.[40] The obscenity analysis under *Miller* requires a social lens because of the doctrinal emphasis on community standards, the shared interests and social norms of bodies politic.[41] And yet, pornography is experienced almost exclusively alone or with willing partners in private. Obscenity law, therefore, necessarily involves some consideration of privacy; as Justice Thurgood Marshall, writing for the majority, observed in *Stanley v. Georgia*:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may

34. Pope v. Illinois, 481 U.S. 497, 500–01 (1987).

35. *See, e.g.*, Ginsberg v. New York, 390 U.S. 629, 637 (1968) (finding that a statute prohibiting the sale of non-obscene, sexually explicit material to minors did not "invade[] the area of freedom of expression constitutionally secured to minors.").

36. This is not to say that law enforcement has refrained from using obscenity statutes to reach other offensive speech. For example, in *Baker v. Glover*, a federal court in Alabama held that applying Alabama's obscenity statute to criminalize the phrase "Eat Shit" on a bumper sticker violated the plaintiff driver's First Amendment rights. *See* Baker v. Glover, 776 F. Supp. 1511, 1515 (N.D. Ala. 1991). In *Baker*, the government urged the court to interpret the phrase "Eat Shit" as a prurient reference to sexual pleasure related to "coprophilia" (the fixation upon the products of bodily excretion), "coprophagy" (erotic interest in consuming fecal excrement), and "coprolalia" (the uttering of obscenities in order to achieve sexual gratification), a position the court swiftly rejected.

37. *See* FCC v. Pacifica Found., 438 U.S. 726, 731–32 (1978); FCC v. Fox Television Stations, 567 U.S. 239, 246 (2012).

38. *See* Brown v. Entm't Merch. Assoc., 564 U.S. 786, 795–96 (2010).

39. *See* Elena Kagan, *Regulation of Hate Speech and Pornography after* R.A.V., 60 U. CHI. L. REV. 873, 889–90 (1993).

40. *See* Roth v. United States, 354 U.S. 476, 484-85 (1957) (holding that obscenity is not within area of constitutionally protected speech).

41. *See* United States v. Miller, 413 U.S. 15, 15 (1973) ("applying contemporary community standards" to determine whether material is obscene).

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> read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[42]

We cannot overstate the importance of the serious value prong, especially in government attempts to regulate public and private discourses of sex. The serious value prong represents a critical, outcome-determinative component of obscenity law built around experienced *and* theoretical conceptualizations of value.

II. PORNOGRAPHY, OBSCENITY, AND THE CONCEPT OF LOW-VALUE SPEECH

Since *Roth*, the Supreme Court has heard more than a hundred cases involving sexual expression and obscenity. This study focuses on a cross-section of post-*Hudnut* federal obscenity cases in which judges devote substantial discussion to *Miller*'s serious value prong. The unifying theme across this body of case law is that, among the courts, sexual expression holds limited social value, justifying its suppression in domains where restrictions would be constitutionally intolerable for equally provocative subject matter unrelated to sex.[43] The low-value approach suggests that protected speech falls in one of two tiers: (1) a high-value tier in which socially valuable speech, such as political campaign communications[44] and religious proselytizing,[45] receives the strongest First Amendment protection; and (2) a low-value tier in which sexual expression may be regulated more liberally,[46] particularly on platforms accessible to children.[47]

This tiered value system, commonly referred to as low-value theory or the

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42. *See* Stanley v. Georgia, 394 U.S. 557, 565 (1969).

43. *Compare* Roth v. United States, 354 U.S. 476, 485 (1957), Miller v. California, 413 U.S. 15, 20–21 (1973), *and* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 97–98 (1973), *with* Pacifica Foundation, 438 U.S. at 746–48 (providing that the social value of expression depends on the context) *and* Snyder v. Phelps 562 U.S. 443, 453 (2011) (stating that the inappropriateness of a statement is inconsequential to the question of whether a statement deals with a matter of public concern).

44. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339–40 (2010).

45. Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 79–81 (2001).

46. *See* Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10 (1960) (tracing the roots of two-level approach to *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

47. *See* Ginsberg v. New York, 390 U.S. 629, 636 (1968) (citing Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966) (stating, "Because of the State's exigent interest in preventing distribution to children of objectionable material, it can exercise its power to protect the health, safety, welfare and morals of its community by barring the distribution to children of books recognized to be suitable for adults.").

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low-value approach, emerged from *Chaplinsky v. New Hampshire*,[48] in which a Jehovah's Witness was convicted for breaching the peace after calling a city marshal a "God damned racketeer" and "a damned fascist."[49] The Supreme Court found that interests in peace and order outweighed whatever contribution Chaplinsky's "fighting words" made to the ideological exchange, and upheld the conviction.[50] The Court also articulated the core characteristics of low-value speech:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words–those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[51]

Chaplinsky installed courts as assessors of social value and began the Supreme Court's work of categorizing speech, for First Amendment purposes, based on its social value, sometimes with puzzling results.[52]

The low-value approach is often criticized, most notably by scholars who argue that subjectively assessing speech's value is antithetical to the principle that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[53] But, the Court seemingly modified the low-value approach in *United States v. Stevens*,[54] where it overturned a conviction for selling illegal dog fighting videos under a federal law criminalizing depictions of animal cruelty.[55] The government argued that the Court should have upheld the conviction under *Chaplinsky*'s balancing framework—that the social costs of depicting animal cruelty

48. *See* 315 U.S. 568, 569 (1942).

49. *See id*.

50. *Id*. at 573.

51. *Id*. at 571–72.

52. First Amendment jurisprudence has classified a variety of speech as low-value, but the level of protection given to the speech can vary. For example, both libel and so-called "hate speech" have limited value, but libel receives no First Amendment protection *see* Beauharnais v. Illinois, 343 U.S. 250, 266 (1952), while hate speech is protected, *see* Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

53. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

54. 559 U.S. 460, 481–82 (2010).

55. *Id*. at 482 (referencing the law aimed at "crush videos," which often depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes in order to appeal to persons with a sexual fetish for such content).

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vastly outweighed any beneficial contributions to social discourse.[56] But in an 8-1 decision reversing the conviction, the Court rejected the government's call to balance the speech's social costs and benefits, reasoning:

> The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: "Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs." As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[57]

The *Stevens* Court determined that speech is low-value only if it falls into a "previously recognized, long-established category of unprotected speech" or constitutes a "category of speech that has been historically unprotected, but has not yet been specifically identified or discussed as such in the case law."[58] First Amendment scholar Genevieve Lakier criticized the Court's approach to history, arguing that it allows courts to subjectively bend determinations of value to match their preferred (and disputable) understanding of the historical record and historical importance.[59] In fact, according to Lakier, there is little evidence supporting that recognized categories of low-value speech were historically unprotected.[60]

A significant shortcoming of the low-value approach to sexual expression is that it creates an inextricable relationship between value determinations and the subjectivities of courts and jurors. In the context of pornographic texts, First Amendment theorist Larry Alexander argues:

> [T]rying to tell whether a piece of explicit sexual art is pornography based upon the intent of the speaker—that is, whether the artist intended to communicate a message or intended merely to create sexual arousal—is very difficult and problematic. One cannot, by definition, look at the art and make the distinction on that basis, since the same picture might be

56. *Id*. at 495–96.

57. *Id*. at 470 (internal citations omitted).

58. *Id*. at 471-72.

59. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2176-77 (2015).

60. *Id*. at 2177.

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drawn with different intentions.[61]

Alexander further asserts that, "[u]nder the guise of the value distinctions among speech," the Court is actually crafting and entrenching preferences for certain ideas and audiences, rather than critically examining causal links between speech and harm.[62]

Unlike some forms of speech that must meet affirmative criteria to be unprotected,[63] explicit sexual expression becomes legally obscene only when a court determines that it lacks serious literary, artistic, political, or scientific value as a matter of law.[64] Non-obscene sexual expression and its distribution channels, such as adult bookstores, are subject to stricter regulation because of presumed or perceived value deficiencies in sexual expression.[65] Labeling sexual expression as low-value also justifies regulations aimed at harmful secondary effects, such as the loss of community peace and quiet, increases in crime linked to adult entertainment, legalized forms of sex work, and sexually-oriented speech.

For example, in *Young v. American Mini Theaters, Inc.*,[66] the city of Detroit enacted a series of zoning laws regulating adult entertainment business locations, such as adult movie theaters and strip clubs.[67] American Mini Theaters, an adult movie theater, argued that the law, as applied, was both unconstitutionally vague and infringed upon protected sexual expression.[68] The government countered that while the law targeted specific businesses on the basis of the content of speech, the laws were targeting the "secondary effects"—the business diminishing property values, and not the speech itself.[69] The Court affirmed the government's position, thus cementing the secondary effects doctrine. According to the Court, the regulations were properly tailored to addressing the non-ideological consequences of low-value speech and not aimed at suppressing adult access to the speech.[70] As such, the regulations needed only survive the intermediate

61. Larry Alexander, *Low Value Speech*, 83 NW. U. L. REV. 547, 552 n.19 (1989).

62. *Id*. at 554.

63. *See* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 228 (1989).

64. *See* Miller v. California, 413 U.S. 15, 24 (1973).

65. *See Strip Club Laws and the Regulation of Sexually Oriented Business*, FINDLAW, https://smallbusiness.findlaw.com/business-laws-and-regulations/adult-entertainment-law-zoning-and-other-regulations.html (last visited Mar. 25, 2020).

66. *See* 427 U.S. 50, 52 (1976).

67. *See id*.

68. *Id*. at 58-59.

69. *Id*. at 55, 62-63.

70. *See id*. at 69-71.

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constitutional scrutiny, typically applied to content-neutral regulations.[71] Writing for the majority, Justice John Paul Stevens questioned whether the speech was so integral to public political debate that it warranted any collective sacrifice to safeguard its protection:

> [E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.[72]

A decade later, in *City of Renton v. Playtime Theaters, Inc.*,[73] the Court incorporated the secondary effects doctrine as its core rationale for the constitutionality of zoning ordinances targeting sexual content.[74] The Court delimited the secondary effects doctrine again in *City of Erie v. Pap's A.M.*[75] when it upheld a ban on public nudity—effectively censoring nude dancing—as a constitutional content-neutral regulation.[76] Moreover, the Court in *Pap's A.M.* determined that:

> Even if Erie's public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers at Kandyland and other such establishments are free to perform wearing pasties and G-strings. Any effect on the overall expression is therefore *de minimis*.[77]

Pap's A.M. affirmed Justice Stevens's assertion in *Young* that, although the First Amendment will tolerate artistic erotica, society's interest in free speech is distinct from personal interests in sexual expression; such interests do not create a right to see "[s]pecified anatomical areas exhibited at

71. *See id.* at 68-70.
72. *Id.* 70-71.
73. *See* 475 U.S. 41, 49 (1986).
74. *See id.*
75. 529 U.S. 277, 283 (2000).
76. *Id.*
77. *Id*. at 294.

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establishments like Kandyland."[78]

Despite many criticisms, the low-value approach dominates the debate over pornography's constitutional status.[79] What unites First Amendment jurisprudence on sexual expression, from obscenity to secondary effects regulations, is that sexually explicit discourse is treated as low-value speech—even when such discourse deals with what political theorist Alexander Meiklejohn calls the "human scene."[80] According to media scholar Richard Cante, pornography requires "rumination upon just what a sex act is, and what it entails . . . If pornography is a lowly and debased genre, it is also an inherently analytical and philosophical one."[81] Pornography prompts an examination of morality, philosophy, and humanity. A basic question of obscenity jurisprudence, therefore, is whether the government has a sufficiently important interest in maintaining a public morality with respect to sex.[82] Historically and economically, pornography is inextricably tied to sex work, in many ways supplanting the tangible work of prostitution.[83] From its creation to the many attempts to regulate it, pornography is also profoundly political.[84] The competing moral politics of the Porn Wars, waged in legislatures and courtrooms during the ebb of second-wave feminism, illustrates the intense social friction surrounding the regulation of sex, whether obscene or merely pornographic.[85] The following section reviews the dominant, competing ideologies that emerged during the Porn Wars and debates over the social and communicative value of pornography.

III. THE PORN WARS

The Porn Wars are usually framed as an ideological dichotomy. An

78. *Id*.

79. *See generally* Chaplinsky v. United States, 315 U.S. 568 (1942).

80. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 262 (1961).

81. Richard C. Cante, *Pornography and Research*, THE SAGE ENCYCLOPEDIA OF COMMUNICATION RESEARCH METHODS 1286, 1287 (2017).

82. *See* Erwin A. Elias, *Sex Publications and Moral Corruption: The Supreme Court Dilemma*, 9 WM. & MARY L. REV. 302, 306 (1967) (arguing that following *Roth v. United States*, the Supreme Court had identified public morality as the driving state interest in regulating pornography).

83. Cante, *supra* note 81, at 2.

84. *See* LINDA WILLIAMS, HARD CORE: POWER, PLEASURE AND "THE FRENZY OF THE VISIBLE" 23 (1999); *see also* LAURA KIPNIS, BOUND AND GAGGED: PORNOGRAPHY AND THE POLITICS OF FANTASY IN AMERICA 162 (1999).

85. *See id.*

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alliance between conservatives led by Christian evangelist Rev. Jerry Falwell and GOP operative Bill Bennett, and critical-feminist activists MacKinnon and Dworkin, have long represented the anti-pornography position.[86] Free speech absolutist scholars and a cohort of second-wave feminists, such as Nadine Strossen, constituted the anti-censorship opposition.[87] This dichotomy, though roughly appropriate for framing the debate over pornography, obscures the variant social movements involved in the Porn Wars. This section briefly addresses the social conservative and free speech absolutist positions for context, but its primary purpose is to explore the relevant feminisms that frame the analysis of the case law.

A. Anti-Pornography Feminism.

Anti-pornography feminism, a branch of second-wave feminism that classifies pornographic texts as sex and gender-based violence, is grounded in the examination of social structures that subjugate women.[88] These structures, anti-pornography feminists argue, convert sexist ideology into manifest violence.[89] Susan Brownmiller's provocative feminist article *Against Our Will* captured this core tenet: "[w]ithin the heterosexual world . . . sexual violence is exalted by men to the level of ideology only when the victims are female and the victimizers are male. Hard-core pornography is the most extreme example of this destructive principle."[90] The pornographization of women occurs in mundane, everyday life.[91] Brownmiller's work spurred a cavalcade of activists who saw pornography as the ultimate instantiation of women's second-class status. Masculinity defined legitimate harms and women suffered as a result.[92] In the words of second-wave feminist activist Robin Morgan, "[p]ornography is the theory, and rape is the practice."[93] On that premise, anti-pornography feminists aimed to eradicate pornography from root to stem.

America's uniquely libertarian approach to freedom of expression was a

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86. JERRY FALWELL, LISTEN, AMERICA! 17-23 (1980); MacKinnon, *supra* note 4, at 1.

87. NADINE STROSSEN, *The Perils of Pornophobia*, 55 HUMANIST 7, 9 (1995).

88. *See generally* Susan Brownmiller, Against Our Will: Men, Women, and Rape 1 (Random House, 1975).

89. *See id.*

90. *See id.* at 293.

91. *Id*.

92. DIANA E. H. RUSSELL, AGAINST PORNOGRAPHY: THE EVIDENCE OF HARM 7 (1994).

93. ROBIN MORGAN, GOING TOO FAR: THE PERSONAL CHRONICLE OF A FEMINIST 169 (1977).

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considerable legal obstacle for anti-pornography feminist policy. The Supreme Court had decided *Miller* just two years prior to Brownmiller's publication of *Against Our Will*, and the Court had overturned numerous obscenity convictions in the preceding two decades, further protecting pornography from regulation.[94] Practically, both scholars and lawmakers located the bulk of pornography within the bounds of normal, and thus protected, engagement of ideas about sex.[95] Despite this approach, Catharine MacKinnon, perhaps the most vocal and notorious proponent of anti-pornography feminism, argued that pornography is regulable because it amounts to conduct, not speech; it manifests violence and coercion that may be regulated in spheres of society in ways speech may not.[96] MacKinnon and Andrea Dworkin conceptualized pornography as conduct by arguing that it facilitates coercive and discriminatory encounters, such as workplace sexual harassment, forcible or violent rape, and other sexual violence such as date rape.[97] According to MacKinnon, harm and sex are inseparable because they represent an entirely normalized coupling of social phenomena: "[i]n pornography, the violence is the sex. The inequality is sex. The humiliation is sex. The debasement is sex. The intrusion is sex. Pornography does not work sexually without gender hierarchy. If there is no inequality, no violation, no dominance, no force, there is no sexual arousal."[98]

MacKinnon's critique of pornographic hegemony specifically equated heterosexual sex with sexual violence.[99] Dworkin similarly argued that depictions of heterosexual sex demonstrate a world in which access to women is treated as a male birthright, perpetuating violence by men against women.[100] Diana E. H. Russell regarded the relationship much more simply, arguing that pornography causes rape because it meets three requisite conditions: first, it feeds the male desire to rape women; second, it undermines men's internal inhibitions against sexual predation and rape fantasy; and, third, it diminishes the social costs men pay if they act on a

94. Miller v. California, 413 U.S. 15, 24 (1973); BROWNMILLER, *supra* note 88.

95. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 211 (1989).

96. *Id*. at 206-07.

97. *Id*. at 208.

98. *Id.* at 211.

99. *See id*. at 174 (stating, "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance.").

100. Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, 8 HARV. WOMEN'S L. J. 1, 11 (1985).

desire to rape.[101] Russell further argued that making pornography often involves sex that, but for the exchange of monetary consideration, would amount to assault.[102] Like MacKinnon and Dworkin, Russell regarded the structures surrounding depictions of sex as durable, violent social constructs.[103]

While Brownmiller, MacKinnon, Dworkin, and Russell represented a radical feminist vanguard against pornographic content, modern anti-pornography feminism has coalesced around critiques of the pornography industry. For example, Susan Easton points out that collective attitudes toward female sex workers subject women working in adult film to additional social marginalization.[104] Women's participation in various forms of sex work is too quickly presumed to be consensual and free of coercion.[105] Pornography industry professionals—actors, talent agents, and production companies—enter into intricate contractual relationships that, Easton argues, manufacture legally valid consent, removing the opportunity for sex workers to negotiate terms.[106] Therefore, Easton suggests, systemic power imbalances in the pornography industry preclude participant equality: "[t]he sex industry, far from being an aggregate of consenting buyers and sellers, can be viewed as both reflecting and perpetuating gender inequalities, institutionalizing access to women's bodies."[107] Media scholar Robert Jensen echoes these core tenets, arguing that heterosexual pornography depicts a false world in which women always want sex from men and unequivocally enjoy the sex acts that men perform or demand.[108] Even when they resist, women are depicted as persuadable. Pornography is "one part of a sexist system," but its messages of sexuality are reinforced everywhere.[109]

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101. *See* RUSSELL, *supra* note 92 at 122, 130-31, 138.

102. *Id.* at 133 (Russell recounted the testimony of an adult film actor who described young women coerced into anal sex with male actors and were left crying in pain).

103. DIANA H. RUSSELL, INTRODUCTION IN MAKING VIOLENCE SEXY 2-3 (1993) (defining pornography as "material that combines sex and/or the exposure of genitals with abuse or degradation in a a manner that appears to endorse, condone or encourage such behavior.")

104. SUSAN EASTON, THE PROBLEM OF PORNOGRAPHY: REGULATION AND THE RIGHT TO FREE SPEECH 8 (1994).

105. *Id*. at 7.

106. *See Id*. at 6-8; *see also*, GAIL DINES, DIRTY BUSINESS: PLAYBOY MAGAZINE AND THE MAINSTREAMING OF PORNOGRAPHY, IN PORNOGRAPHY: THE PRODUCTION AND CONSUMPTION OF INEQUALITY 8 (Gail Dines, Robert Jensen & Ann Russo, eds., 1998).

107. EASTON, *supra* note 104, at 8.

108. *See* ROBERT JENSEN, GETTING OFF: PORNOGRAPHY AND THE END OF MASCULINITY 48 (2007).

109. *Id*.

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B. Social Conservatism and Pornography.

In February 2018, New York Times columnist Ross Douthat made a seemingly anachronistic policy proposal: "Let's Ban Porn."[110] Douthat's op-ed centered on the rise of the #MeToo social movement, involving multiple public allegations against powerful men in media and politics who had harassed or sexually assaulted women, including in some cases their female coworkers.[111] Douthat argued that the #MeToo movement calls on America to deal with its "porn addiction."[112] For Douthat, #MeToo stories share a common thread with the moral case against pornography—it is a primary ingredient in the sexual education of young American men.[113] Victims' stories, according to Douthat, depict a "sort of male personality that a pornographic education seems to produce: a breed at once entitled and resentful, angry and undermotivated, 'woke' and caddish, shaped by unprecedented possibilities for sexual gratification."[114] Douthat claimed the national porn contagion is to blame for declines in intimacy between the sexes,[115] and therefore the birthrate.[116]

In May 2018, Diane Black, a Republican congresswoman from Tennessee more speciously claimed that access to pornography is partly to blame for school shootings carried out by young men.[117] Representative Black's reasoning is an extreme example of the moral conservative case against pornography.[118] Together, Douthat's and Black's concerns, divergent as they are in their facial validity, point to a significant revival of the dormant political debate over pornography's social effects.[119] The philosophical foundations for this moral case against pornography were laid by political coalitions such as the New Right and the Moral Majority, whose members

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110. Ross Douthat, *Let's Ban Porn*, N.Y. TIMES (Feb. 10, 2018), https://www.nytimes.com/2018/02/10/opinion/sunday/lets-ban-porn.html.

111. *Id*.

112. *Id*.

113. *Id*.

114. *Id*.

115. *See* Ross Douthat, *The Sterile Society*, N.Y. TIMES, (Dec. 2, 2017), https://www.nytimes.com/2017/12/02/opinion/sunday/the-sterile-society.html (arguing that the more sophisticated and curated pornography becomes, the less likely men are to seek gratification from real-world relationships).

116. *See id*.

117. Greg Price, Republican Congresswoman Says Porn is a Cause of School Shootings, NEWSWEEK (May 29, 2018, 4:09 PM), http://www.newsweek.com/porn-school-shootings-congresswoman-948092.

118. *See id.*

119. *See id*; *see also* Douthat, *supra* note 115.

allied with Catharine MacKinnon and Andrea Dworkin to form the anti-pornography movement of the 1980s.[120] The New Right and Moral Majority were conservative Christian political coalitions that emerged onto the national political stage in the 1980s alongside the rise of Reagan conservatism.[121] Led by evangelists such as Pat Robertson and Jerry Falwell Sr., these new factions collectively believed that America's supposed moral decline could be reversed by a resurgence of traditional conservative family values.[122] They preached the embrace of traditional gender roles, wholesale rejection of sexual permissiveness, and a turn back toward the mainline Christian church.[123] Through grassroots activism and, ultimately, anti-pornography legislative strategy, the New Right and Moral Majority entered the political fray surrounding pornography.[124]

Late in President Ronald Reagan's first term, a faction of conservative Republican senators aimed to curb the "[e]xplosion in the volume and availability of pornography in [American] society."[125] Congress expanded the power of federal law enforcement to seize assets related to the trafficking of obscene materials under the Racketeering Influenced and Corrupt Organizations Act.[126] The Department of Justice commissioned a study, known as the 1986 Attorney General's Commission Report on Pornography (the "Meese Report"), of criminal enterprises and harmful social effects related to pornography.[127] Conservatives pointed to the Meese Report to argue that pornography was neither victimless nor consensual for female participants.[128] Central to social conservative ideology was the idea that the proliferation of pornography represented facial evidence of moral decay and

120. *See* Mickey Z., *The Dworkin-MacKinnon Anti-Pornography Civil Rights Ordinance*, WORLD NEWS TRUST (Feb. 12, 2017), https://worldnewstrust.com/the-dworkin-mackinnon-anti-pornography-civil-rights-ordinance-mickey-z.

121. CLYDE WILCOX, ONWARD CHRISTIAN SOLDIERS?: THE RELIGIOUS RIGHT IN AMERICAN POLITICS 7-8 (1996).

122. *Id*. at 36-37

123. *See* Joseph D. Harder, "Heal Their Land:" Evangelical Political Theology from the Great Awakening to the Moral Majority 6 (April 2014) (unpublished Ph. D. dissertation, University of Nebraska-Lincoln) (on file with University of Nebraska-Lincoln) (available at https://digitalcommons.unl.edu/historydiss/67).

124. *See id.* at 138; *see also* Ruth Murray Brown, For a "Christian America": A History of the Religious Right (2002).

125. S. Res. 2682, 98th Cong., 130 CONG. REC. 5434 (1984) (remarks of Sen. Helms).

126. *Id.*

127. 1986 ATT'Y GEN. COMM'N ON PORNOGRAPHY REP.

128. Robin West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General''s Commission on Pornography Report*, 12 AM. BAR FOUND. RES. J. 681, 686 (1987).

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an attack on traditional Judeo-Christian value systems.[129] It was this perceived attack that spurred the Moral Majority to political action.

The Moral Majority promised that family-oriented Christian populism could counter the threats of an overbearing liberal bureaucracy seeking to undermine how parents instilled moral lessons in their children.[130] In a sermon broadcast on Jerry Falwell's "Old-Time Gospel Radio Hour," the Reverend summarized evangelicals' populist appeal: "we've also had the enemy to stand up against us, bureaucrats, politicians, amoralists, humanists, all kinds of people from all strata of society . . . We're just trying to bring the country back to moral sanity."[131]

As a candidate, President Reagan echoed the Moral Majority's appeals to small-government conservatism, equating their campaign against sexual promiscuity and pornography with his own resistance to big government and moral relativism.[132] "Despite some intolerable court decisions," then-candidate Reagan argued, "we do not have to forever tolerate the pornography that defaces our neighborhoods or the permissiveness that assails our schools."[133] Buoyed by Reagan, conservative ministers developed robust media empires that spanned the American coasts and garnered tremendous political support for GOP candidates in the Sunbelt.[134]

Having secured the political support of a vocal constituency, the GOP and the Moral Majority aimed to curtail the pornography industry through policy initiatives based on the Meese Report and companion studies sponsored by conservative think tanks.[135] First Amendment scholar Mary-Rose Papandrea argued that when read alongside efforts to limit access to contraception and abortion services, the Moral Majority's anti-pornography campaigns under President Reagan aimed to negate female empowerment, maintain separate spheres of social and political influence for men and women, and effectively

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129. Schauer, *supra* note 21, at 5; Leo M. Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 43-44 (1938) ("It may be summarized with safety that, up to this point, obscenity in literature had not been the concern of the courts; it is offenses against religion which have comprised the issues").

130. FALWELL, *supra* note 86.

131. *Id*.

132. Ronald Reagan, Address to the Religious Roundtable National Affairs Briefing, (Aug. 22 1980), (transcript available in the University of Wyoming Library).

133. *Id.*

134. Daniel K. Williams, *Jerry Falwell's Sunbelt Politics: The Regional Origins of the Moral Majority*, 22 J. POL'Y HIST. 125, 129 (2010).

135. Mary-Rose Papandrea, *Sex and Religion: Unholy Bedfellows*, 116 Mich. L. Rev. 859, 878 (2018) (citing Geoffrey Stone, Sex and the Constitution: Sex, Religion, and Law from America's Origins to the Twenty-First Century 405 (2017)).

"put women back in their place."[136]

Whatever the motivations, conservatives grounded their political approach to sexual expression in deference to majoritarian community standards.[137] In fact, legal scholar and jurist Robert H. Bork, whom President Reagan nominated to the Supreme Court, argued that in matters of expression, just as in matters of pollution or traffic control, the political majority "[h]as as much control over the moral and aesthetic environment as it does over the physical."[138] Government by the majority, Bork argued, was the only principled manner of avoiding unconstitutional moral encroachment by the judiciary.[139] Although the Court has stressed that it has not allowed its collective or its individual members' moral beliefs to color the jurisprudence of sexual expression,[140] and indeed the constitution may prohibit the practice in free speech cases,[141] United States courts have upheld purely morals-based legislation of non-expressive conduct under rational basis review.[142] Although morality must give way to substantive due process in intimate matters of sexual privacy,[143] the compelling interest in public morality is a central component of the conservative legal case against pornography. Anti-pornography conservatism is therefore as much about individual and community morality as it is about individual liberty and free will within a democratic system. The rise of the Moral Majority merged the ethos of moral purification with the conservative ethos of libertarian self-determination.[144] This synthesized New Right conservatism persists in conservative commentary, policy, and among the modern GOP base.[145]

Eventually, competing feminist factions balked at the notion that a

136. *Id.*

137. Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 20 (1971).

138. *Id.*

139. *Id*. at 10.

140. Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 301 (2008).

141. For a thorough review of moral relativism as a constitutional device, *see generally* Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995).

142. Ronald Turner, Traditionalism, *Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from Bowers to Lawrence*, 53 U. KAN. L. REV. 1, 61-62, 69 (2004).

143. *Id*. at 4.

144. *See generally* Glenn Feldman, The Great Melding: War, the Dixiecrat Rebellion, and the Southern Model for America's New Conservatism 302-303 (2015).

145. *See generally id.*

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majority—constituted predominantly by white, male voters—could develop an equitable approach in addressing harms associated with pornography.[146] Anti-censorship feminists challenged the alliance between the Moral Majority and anti-pornography feminists squarely on free expression grounds.[147]

C. Anti-Censorship Feminism.

The Moral Majority's accumulation of political clout during the Reagan presidency, and its alliance with anti-pornography feminists, alarmed feminists who considered censorship a threat to women's liberty.[148] The anti-censorship feminist ethic did not arise from libertarian free speech absolutism, however. It was a commitment to unfettered sexual expression and the rejection of the harm underlying the so-called conservative "pornophobia."[149] Rather than arguing that pornography deserves protection from first amendment principles, anti-censorship feminists think of pornographic texts as sites of stereotype resistance, activism against sexual repression, subversion of sex roles, and sources of sex-positive social critique.[150] As feminist free speech activist Nadine Strossen puts it, feminist pornography subverts misogynistic stereotypes, challenges the male gaze, and turns the tables of power:

> Although Catharine MacKinnon has described pornography with characteristic oversimplification as 'man's boot on woman's neck,' in many film and photos, the shoe is, literally, on the other foot—rather, the woman's boot is on the man's neck, if not on an even more vulnerable section of his anatomy.[151]

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146. Jeffrey M. Gamso, *Sex Discrimination and the First Amendment: Pornography and Free Speech*, 17 TEX. TECH L. REV. 1577, 1586 n.50 ("Indeed, so bizarre were the machinations involved, and so extreme the variations in the law, that both the authors of the model ordinance, Andrea Dworkin and Professor Catherine A. MacKinnon, found themselves in opposition to what had been wrought. "The original ordinance 'was not merely truncated-it was lobotomized,' MacKinnon said.").

147. *See generally* Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights 163 (2000).

148. Judith R. Walkowitz, *Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 419, 434 (Ann Snitow et al. eds., 1983); Rosalind P. Petchesky, *Antiabortion, Antifeminism, and the Rise of the New Right*, 7 FEMINIST STUD. 206 (1981).

149. STROSSEN, *supra* note 87, at 7.

150. *See* Avedon Carol, *Free Speech and the porn Porn Wars*, 75 NAT'L F. 25 (1995); Strossen, *The Perils of Pornophobia*, *supra* note 78, at 9; Laura Antoniou, *Defending Pornography*, 19 GAY & LESBIAN REV. 23, 24 (2012).

151. STROSSEN, *supra* note 87, at 7.

Sex work, pornography specifically, is now entering an era of intense privatization, personalization,[152] and normalization in popular culture.[153] Professors Clay Calvert and Robert Richards explored the implications of pornography's migration from the back alley to the mainstream in interviews with adult entertainment icons such as Stormy Daniels and Nina Hartley.[154] They found that industry insiders believe adult entertainment is often subjected to outdated stereotypes, particularly the notion that women involved in pornography have uniformly suffered abuse and debasement.[155] Furthermore, Calvert and Richards suggest that adult entertainers share a vision of feminism as the autonomous pursuit of—and exploration of—sexual preferences.[156] The ability to determine one's sexual identity is a basic civil liberty, better safeguarded when even the most graphic depictions of sex are given robust protection.[157] Professor Robin West has similarly argued that even if pornography generally lacks surface-level ideological substance, it produces a more enlightened and egalitarian society.[158] "Good" pornography—that which acknowledges women's pursuit of healthy sexual pleasure on their own terms—derives social value from the way it aims to dismantle sexuality constructs built on heteronormative male' preferences:

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152. Ronald Weitzler, *Sex Work: Paradigms and Policies*, *in* SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY 2 (2010) ("porn has migrated from the movie house to the privacy of the viewer's house").

153. *See* Lynn Comella, *Remaking the Sex Industry: The Adult Expo as a Microcosm*, *in* SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY 285, 287 (2010).

154. *See* Clay Calvert and Robert D. Richards, *Porn in Their Words: Female Leaders in the Adult Entertainment Industry Address Free Speech, Censorship, Feminism, Culture and the Mainstreaming of Adult Content*, 9 VAND. J. ENT. & TECH. L. 255, 263-265 (2006).

155. *Id.* at 283, 296.

156. *Id*. at 283.

157. *See* Robert D. Richards and Clay Calvert, *Nadine Strossen and Freedom of Expression: A Dialogue with the ACLU's Top Card-Carrying Member*, 13 GEO. MASON U. CIV. RTS. L.J. 185, 223 (2003); Judith Kegan Gardiner, *What I Didn't Get to Say on TV About Pornography, Masculinity, and Representation*, 38 N.Y. L. SCH. L. REV. 319, 331 (1993) (suggesting that pornography often validates women's sexual desires and allows women to develop their own preferred version of sexual expertise). *But see*, Barbara Herman, *'Hot Girls Wanted' On Netflix: Documentary Looks Into The Darker Corners Of 'Pro Amateur' Porn*, INT'L BUS. TIMES (June 8, 2015), http://www.ibtimes.com/hot-girls-wanted-netflix- documentary-looks-darker-comers-pro-amateur-porn- 1956985 (describing how pro-amateur pornography managers take advantage of women by promising them wealth and urging them to act out torture and rape fantasies on camera).

158. West, *supra* note 116, at 706-707.

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"[W]hat good pornography assaults, however, is not true virtue, as the conservative claims, but rather a source of oppression: the marital, familial, productive, and reproductive values that the conservative wrongly identifies as necessary to the creation of a virtuous life and a virtuous society."[159]

As it relates to pornography, anti-censorship feminism aims to achieve moral, political, and intellectual independence for women, devoid of governmental or patriarchal control.[160] Censorship of pornography, Thelma McCormack suggests, is problematic because it "infantilizes women and contributes to their dependency."[161] McCormack compares censorship to a protection racket in which a patriarchal state promises to protect women from pornography's symbolic subjugation, only to make women further dependent on the state.[162] This does nothing to achieve equality for women in the face of real subjugation in both employment and business markets.[163]

Lynn Chancer, a feminist scholar of pornography and sex work, argued that proposed anti-pornography feminist policies failed to advance women's independence in two ways.[164] First, anti-pornography policies curtail women's sexual agency.[165] As Chancer argued in a 1996 review of Nadine Strossen's *Defending Pornography*, Porn Wars-era censorship proposals forestalled women's right to communicate sexual desire and engage freely with depictions of sexual pleasure.[166] Second, Chancer argued that anti-pornography feminism embraced viewpoint discrimination,[167] rarely tolerated in First Amendment jurisprudence,[168] leading to increased antagonism from the Court.[169] "The Supreme Court," Chancer points out, "excludes obscenity from First Amendment protection because of its alleged

159. *Id*. at 691.

160. Ronald Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD. 177, 194 (1981).

161. Thelma McCormack, *If Pornography is the Theory, is Inequality the Practice?*, 23 PHIL. SOC. SCI. 298, 298 (1993).

162. *Id*. at 320.

163. *Id*. at 317.

164. *See generally* Lynn S. Chancer, Feminist Offensives: Defending Pornography and the Splitting of Sex from Sexism, 48 STAN. L. REV. 739 (1996).

165. *See id.* at 744.

166. *Id*.

167. *Id*. at 748.

168. Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

169. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2223-24 (2015).

lack of ideas, while MacKinnon and Dworkin want to censor speech *because* of its ideas."[170] Assuming, for the sake of argument, that MacKinnon and Dworkin's position was articulated as an attempt to punish only speech that directly causes harm, not as an effort to constrain ideas, Chancer argued that it still fails scientific—if not constitutional—scrutiny.[171] The anti-pornography position requires a "decidedly vulgar view of human beings" that presumes a causal relationship between pornography and violence.[172] This article discusses this presumptive direct effects model in Part IV of this study. Suffice it to say for now that Chancer was troubled by MacKinnon's and Dworkin's failure to address the array of intervening social, political, and cultural factors that influence harms against women independently of pornographic texts.

In addition to strained notions of harm, feminist scholars argued that anti-pornography activists misguidedly promoted singular "ordinary sexualit[ies]"[173] and failed to consider how pornography bans disparately impacted LGBTQ+ communities. Feminist historian Whitney Strub argues that early obscenity doctrine, particularly the definition of prurience, was rooted in policies targeting homosexuals.[174] For example, the State of New York amended its obscenity law in 1927 to include prohibitions on depictions of "sex degeneracy or perversion," which were common euphemisms for homosexuality.[175] Decades later, in the early post-*Miller* era, authorities targeted depictions of lesbian sex. Police confiscated memoirs that dealt with lesbian sex[176] and threatened to close nightclubs showing films displaying lesbian stereotypes.[177] Anti-pornography feminists generally—and Women Against Pornography in particular—conspicuously omitted references to queer feminism from their platform while looking to New Right conservative donors for funding.[178] In sum, the political alliances and obscenity enforcement regimes used by anti-pornography activists "reif[ied] the conflation of queerness and obscenity" well into the twentieth

170. Chancer, *supra* note 164, at 748.

171. *Id*.

172. *Id*.

173. Jean Bethke Elshtain, *The Victim Syndrome*, 28 THE SOC'Y 31, 32 (1991).

174. Whitney Strub, *Lavender, Menaced: Lesbianism, Obscenity Law, and the Feminist Antipornography Movement*, 22 J. WOMEN'S HIST. 83, 84-86 (2010).

175. *Id*. at 86.

176. *Id*. at 97.

177. *Id*. at 92.

178. *Id*. at 98.

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century.[179] Standing outside the pornography conflict, however, were free speech absolutists.

D. Free Speech Absolutism.

Supreme Court scholars generally agree that the government may freely regulate low-value speech, including obscenity.[180] However, a small, vocal minority of jurists and commentators argue the First Amendment absolutely prohibits state action from infringing upon speech or expressive conduct, including pornography.[181] Generally, absolutists occupy one of two positions: "absolute absolutism" and "qualified absolutism."[182] Absolute absolutism is "unyielding in never permitting, under any conditions, restraints or penalties on speech."[183] Perhaps its most vocal proponent, Supreme Court correspondent Lyle Denniston, puts the absolutist position simply: "in the realm of ideas, and in the closely related realm of expressive conduct, there can be *no law* or *public regulation*."[184] To Denniston, the First Amendment is "an unbelievably bold experiment in radical individualism."[185] Although such a broad reading subjects members of society to speech-related harm without redress, liberty of expression is sufficiently valuable and critical to self-government worth the exchange.[186] First Amendment scholar Rodney Smolla considers absolute absolutism unworkable and unappealing; it would immunize any conduct, evil or benign, that is facilitated through communication, creating a constitutional exception too broad for civil society to accept.[187]

Qualified absolutism, on the other hand, incorporates a number of speech-prescriptive safety valves designed to address undesirable effects of speech, of which is only unprotected if it is inextricably tied to unlawful non-expressive conduct.[188] Most absolutists fall into this camp.[189] Often in dissent, Justices Hugo Black and William Douglas were fierce proponents of

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179. *Id*. at 100.

180. *See, e.g.*, Kalven, *supra* note 46, at 11.

181. RODNEY SMOLLA, FREE SPEECH IN OPEN SOCIETY 24 (1992).

182. *Id.*

183. *Id.*

184. Lyle Denniston, *Absolutism: Unadorned, and Without Apology*, 81 GEO. L.J. 351, 352 (1992) (emphasis added).

185. *Id*. at 359-60.

186. *Id*. at 360.

187. SMOLLA, *supra* note 181, at 24.

188. *Id*. at 24.

189. *Id*. at 23.

qualified absolutism in the Court's obscenity cases from *Butler* to *Miller*, while the Warren Court crafted a rapidly evolving, and occasionally confusing, obscenity jurisprudence.[190]

To the extent that absolutism remains a viable First Amendment theory, it remains a theoretical exercise of defining "speech" within the reach of the First Amendment.[191] The crux of absolutism is, therefore, the task of categorical balancing. If expression falls into a category of human behavior recognized as speech, then it merits protection.[192] Free speech absolutists argue that at that categorial tipping point, "Congress shall make no law . . . abridging the freedom of speech,"[193] rendering protection a constitutional mandate.[194] The speech clause makes the right to engage in speech behavior "utterly impregnable"[195] and its constitutional protection, accordingly, unwavering.[196] However, even Justice Black's absolutism was not derived from individualistic, rights-based libertarianism.[197] Justice Black often adhered strictly to a distinction between speech and conduct, with regulatable conduct encompassing activities that might have some form of speech such as trespasses—unrelated to the expressive aspects of speech, assembly, petition or any other enumerated First Amendment protection.[198] In obscenity cases, other values triggered Justice Black's absolutism. In his dissent in *Mishkin v. New York*, a companion obscenity case decided

190. *See* Mishkin v. New York, 383 U.S. 502, 515 (1966) (Black, J., dissenting); Ginsberg v. New York, 390 U.S. 629, 650 (1968) (Douglas, J., dissenting); United States v. Thirty-Seven Photographs, 402 U.S. 363, 379 (1971) (Black, J., dissenting); Miller v. California, 413 U.S. 15, 37 (1973) (Douglass, J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 70 (1973) (Douglas, J., dissenting).

191. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

192. Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981).

193. U.S. CONST. amend. I.

194. *See* Beauharnais v. Illinois, 343 U.S. 250, 275 (1952) (Black, J., dissenting) (arguing that "the First Amendment, with the Fourteenth, 'absolutely' forbids such laws without any 'ifs' or 'buts' or 'whereases'"); *see also* Carlson v. Landon, 342 U.S. 524, 555 (1952) (Black, J., dissenting) (declaring that "the First Amendment grants an absolute right to believe in any governmental system, discuss all governmental affairs, and argue for desired changes in the existing order").

195. SMOLLA, *supra* note 181, at 23.

196. Patricia R. Stembridge, *Adjusting Absolutism: First Amendment Protection for the Fringe*, 80 B.U. L. REV. 907, 912 (2000).

197. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 246-48 (1961).

198. Gregory v. Chicago, 394 U.S. 111, 124-25 (1969) (Black, J., dissenting).

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alongside *Memoirs v. Massachusetts*[199] and *Ginzburg v. United States*,[200] Justice Black argued that obscenity doctrine vested in the Court a censorial authority,[201] imperiling basic constitutional and democratic principles:

> I believe for reasons stated in my dissent in *Ginzburg* and in many other prior cases that this Court is without constitutional power to censor speech or press regardless of the particular subject discussed. I think the federal judiciary because it is appointed for life is the most appropriate tribunal that could be selected to interpret the Constitution and thereby mark the boundaries of what government agencies can and cannot do. But because of life tenure, as well as other reasons, the federal judiciary is the least appropriate branch of government to take over censorship responsibilities by deciding what pictures and writings people throughout the land can be permitted to see and read.[202]

Here, Justice Black's absolutism shifted away the categorical balancing of making the critical speech-conduct distinction and toward skepticism of the federal judiciary's *de facto* censorship power.[203] His primary concern was not the deprivation of ideas about sex, but how the power to censor should be exercised in a democratic society, if at all.

Feminist libertarian Ellen Willis suggests what Justice Black implied in *Mishkin*: the power wielded under the obscenity doctrine itself is a violation of First Amendment rights.[204] Willis, like anti-censorship feminists, social conservatives, and anti-pornography feminists reviewed above, calls attention to the politics of pornography regulation: "[i]t makes no sense to oppose pornography on the grounds that it's sexist propaganda, then turn around and argue that it's not political."[205] Moreover, Ellis finds no constitutional basis for anti-pornography policy because of the First Amendment's protection extending to offensive and oppressive speech: "[b]ut aside from the evasion involved in simply equating pornography with misogyny or sexual sadism, there are no legal or logical grounds for treating sexist material any differently from (for example) racist or anti-Semitic

199. Memoirs v. Massachusetts, 383 U.S. 413, 419-20 (1966).

200. Ginzburg v. United States, 383 U.S. 463, 470-71 (1966).

201. *See* Nadine Strossen, *Obscenity & Indecency Law: Why Howl Is Still Silenced*, 37 SEATTLE U. L. REV. lxi (2013-2014) (describing Justice William Douglas's refusal to participate in screenings of alleged obscenity among members of the Courts on the grounds that the justices ought to repudiate the role of official censors).

202. Mishkin v. New York, 383 U.S. 502, 516 (1966) (Black, J., dissenting).

203. *Id.*

204. Ellen Willis, *Feminism, Morality, and Pornography*, 38 N.Y. L. SCH. L. REV. 351, 356 (1993).

205. *Id*. at 357.

propaganda; an equitable law would have to prohibit any kind of public defamation."[206]

Absent proof of harm, the First Amendment prohibits different levels of constitutional protection on the basis of offensiveness.[207] This position has been articulated by the Court,[208] but not in the context of sexual expression. Collectively, free speech absolutists reject the notion that the substantive aspects of any speech act should figure into First Amendment analysis.[209] To do so threatens to erode basic freedoms. Case analysis suggests that neither free speech absolutism nor extreme anti-pornography feminism secured a meaningful foothold in obscenity case law after *Hudnut*.[210] However, anti-censorship values of sexual liberty, agency, and privacy still guide some courts.[211] These are limited findings however, due to most courts making the presumption of pornography's negative effects on social and communal morality.[212]

IV. FEMINIST VALUES IN POST-*HUDNUT* CASE LAW

There are two distinct themes in the post-*Hudnut* obscenity case law. Each comports with one of the Porn Wars' dominant ideological traditions. The first theme is the doctrine of variable obscenity, which finds certain materials to be obscene for some audiences—namely, children—and not others.[213] These cases focus on the social costs to communities when pornography is publicly accessible—such as in adult stores or sex clubs.[214] Courts in these cases use the value inquiry in *Miller* to analyze the distributed obscenity and its effects, rather than focusing on possession or private use.[215] Conspicuously absent from the cases is any in-depth discussion of the harmful effects the MacKinnon-Dworkin camp articulated and often attributed to the consumption of pornography: violence against women, viewer desensitization or apathy to sexual violence,[216] and promoting

206. *Id*.

207. *See* Snyder v. Phelps, 562 U.S. 443, 459 (2011).

208. *See id*.

209. *See* SMOLLA, *supra* note 181.

210. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324–25 (7th Cir. 1985)

211. *See* Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 304 (1992).

212. *See* Chaplinsky v. United States, 315 U.S. 568, 571-72 (1942); United States v. Kennerley, 209 F. 119, 120 (S.D.N.Y. 1913).

213. Schauer, *supra* note 21, at 1277.

214. *See generally* Sullivan, 792 F. Supp. at 278; Ginzburg v. United States, 383 U.S. 463, 468 (1966).

215. *See* Sullivan, 792 F. Supp. at 278.

216. Some researchers have found empirical evidence in laboratory settings that men

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unhealthy constructs of the ideal female self.[217] The second theme discusses the extent to which pornography facilitates the exploration of private sexual fantasy and sexual desire, and the communication if between partners.[218] These are key focal points of the anti-censorship feminist position toward pornography.

A. Variable Obscenity and Regulating Distribution in the Public Sphere

"Variable obscenity" is an approach that defines obscene materials based on methods of distribution, circumstances surrounding publication, and its intended audience.[219] In contrast to "constant obscenity,"[220] which treats obscene expression as obscene in all circumstances and audiences, variable obscenity doctrine accepts sexually explicit material being published for different purposes.[221] For proponents of the variable approach, obscenity analysis should consider the motivations of the publisher, the character of the audience, and the latent dialogue between them. At its core, the doctrine attempts to distinguish between depictions that are of little value and depictions creating an ongoing exchange of ideas.[222] The Supreme Court has indicated that where a publisher distributes material designed to attract the "leer of the sensualist,"[223] they cannot avoid prosecution by claiming that the material exhibits some of the contemplated values discussed in *Miller* that are appreciated by some part of the population. This is a profoundly context-dependent way to classify speech.[224]

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habitually exposed to non-violent pornography have lower concern for violence against women. *See* Gert Martin Hald, et. al., *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 1, 14 (2010) (a 2010 meta-analysis of non-experimental studies that suggests there is an overwhelmingly positive correlation between pornography consumption and acceptance of violence against women).

217. Stephanie Nicholl Berberick, *The Objectification of Women in Mass Media: Female Self-Image in Misogynist Culture*, 5 N.Y. SOCIOLOGIST 1, 2-3 (2010).

218. *See* Mishkin v. New York, 383 U.S. 502, 509 (1966).

219. *See* Schauer, *supra* note 21, at 1277.

220. William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68 (1960). *Regina v. Hicklin*, L.R. 3 Q.B. 360, 360 (1868) (the concept of variable obscenity traces back to *Regina v. Hicklin* where the English court judged obscenity based, in part, according to its likely recipient).

221. *See* Schauer, *supra* note 21, at 1277. It can titillate, and thus have prurient appeal, as well as critique, thus claiming artistic or political status.

222. *See id*.

223. Ginzburg v. United States, 383 U.S. 463, 468 (1966).

224. Schauer, *supra* note 192, at 1278.

The purpose of this section is to examine how courts use variable obscenity to highlight feminist interests and theories of value. What we find is that courts apply variable obscenity principles only as they relate to potential minor viewers and their relationship with standards of community morality. As a result, courts apply variable obscenity principles to justify serious incursions on private businesses, even when there is little contact with children or the general population of non-interested consumers of pornography.[225] Courts have also, because of the fundamental goal of variable obscenity, struggled to develop a coherent theory that distinguishes between the public and private spheres involved in the distribution of sexual expression.[226] Together, these trends undermine both *Miller*'s speech-protective value prong and the pre-*Miller* cases acknowledging that obscenity depends on the preferences of consenting adults.[227]

Because *Stanley v. Georgia* prevents the government from prosecuting individuals for merely possessing obscene content,[228] modern obscenity cases have focused on distribution. The problem with courts' conceptualization of public distribution, however, is that it is often in direct tension with the *Stanley* Court's seemingly limited focus on *commercial*[229] distribution of obscene pornography, not private transmission. Indeed a unanimous Court in *Stanley* warned that "the door barring federal and state intrusion into [private possession] cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests."[230] Justice Thurgood Marshall famously stated, "if the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[231] *Stanley* raises questions regarding how modern obscenity laws should treat how individuals come to

225. *See generally* Mishkin v. New York, 383 U.S. 502 (1966).

226. *See id.*

227. *See id.* at 509 ("We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group.").

228. Stanley v. Georgia, 394 U.S. 557, 568 (1969).

229. *Id.* (Stanley v. Georgia was decided in an era preceding the Court's commercial speech doctrine. It is unclear whether the commercial aspects of obscenity matter at all in light of the Supreme Court's recent expansion of commercial speech protections for forms conduct that are speech-related though not quite speech). *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1144 (2016) (finding that a prohibition on credit surcharges amounted to a regulation of speech).

230. *Stanley*, 394 U.S. at 563.

231. *Id*. at 565.

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privately possess obscene materials, the power of government authorities to control distribution of those materials, and potential abuse of that power. A significant theme in obscenity case law since *Hudnut* has been courts allowing municipalities to police modes of distribution and display of material that is sexually explicit on its face—even when such material, viewed as a whole, may be non-obscene under *Miller*. This is a concept related to variable obscenity, but distinct in that it focuses, not on the effects of pornography after its distribution to a vulnerable audience, but how the pornography was made accessible at all.

The linchpin of the Court's jurisprudence on obscene depictions outside the home is its refusal in *Paris Adult Theatre I v. Slaton* to acknowledge a privacy right of possessing obscenity materials in quasi-private places of public accommodation, such as adult-only theaters.[232] In *Slaton,* Atlanta district attorney Lewis Slaton sued to enjoin Paris Adult Theatre from showing two adult films arguing that the films were obscene.[233] The Supreme Court of Georgia found that the films were obscene, presuming that obscenity encompassed actors "cavort[ing] about in the nude" and depictions of simulated sex acts, were designed to carry prurient appeal with some viewers.[234] The theater appealed, and the Supreme Court granted certiorari on the question of whether the First Amendment prevented the State of Georgia from enjoining the depiction of the films to consenting adult audiences.[235] A divided Court ruled that neither the First Amendment nor *Stanley v. Georgia* restricted the state's ability to limit obscenity in businesses classified as places of public accommodation.[236]

It is hardly surprising that the conservative justices, led by Chief Justice Warren E. Burger, sided with Georgia in an obscenity matter. What is interesting about *Paris Adult Theatre I* is that the Court's conservative bloc relied on the definition of public accommodations in the Civil Rights Act of 1964 in their argument in favor of Georgia. In dicta, the Court found that privacy and public accommodations were mutually exclusive, even in the context of an adult-oriented business that had taken special efforts to prevent access to minors.[237] Chief Justice Burger argued that a sufficient nexus existed between "tide of commercialized obscenity" and damaging effects to "total community environment, the tone of commerce in the great city

232. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66 (1973).

233. Slaton v. Paris Adult Theatre I, 185 S.E.2d 768, 768 (Ga. 1971).

234. *Id*.

235. *Id.*

236. *Slaton*, 413 U.S. at 66-67.

237. *Id*. at 53.

centers, and . . . public safety itself" such that, the state could regulate even carefully controlled venues for obscene depictions.[238] The Chief Justice cited Professor Alexander Bickel:

> A man may be entitled to read an obscene book in his room, or expose himself indecently there . . . .We should protect his privacy. But if he demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but *accessible to all—with others who share his tastes, then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies*. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), *what is commonly read and seen and heard and done intrudes upon us all*, want it or not.[239]

Two parts of this argument warrant emphasis. First, the conservative justices signing onto Chief Justice Burger's opinion were convinced that venues such as Paris Adult Theatre had made obscene content "accessible to all" in the public marketplace.[240] Second, the justices assumed—admittedly without any empirical support—that the sexual content housed in adult theaters "intrudes upon us all."[241] In *Paris Adult Theatre I*, the Court signaled that harms from obscene depictions were unavoidable because they are intrusive and presumptively pollutive by nature.[242] This decision forestalls any opportunity for interested populations to seriously consider redeeming value in pornography without any understanding of how it is used in adult-oriented businesses,[243] or how consenting adult communities use adult businesses to explore sexual attitudes, ideas, and experiences.[244] Indeed, the Court's approach to adult materials and adult-oriented spaces in *Paris Adult Theatre I* adopts the same moral panic that energized the Moral Majority in the 1980s. It also sidesteps the existence and importance of consent protocols among communities that engage in non-mainstream (and often stigmatized) sex practices.[245]

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238. *Id*. at 57-58.

239. Alexander Bickel, *On Pornography: Concurring and Dissenting Opinion*, 22 PUBLIC INTEREST 25, 26 (1971) (emphasis added).

240. *Id*.

241. *Slaton*, 413 U.S. at 60 ("It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution").

242. *See id*.

243. *See generally*, GEORGINA VOSS, STIGMA AND THE SHAPING OF THE PORNOGRAPHY INDUSTRY 2-3 (2015).

244. Claire Kimberly, *Permission to Cheat: Ethnography of a Swingers' Convention*, 20 SEXUALITY & CULTURE 56, 56 (2016).

245. Brad J. Sagarin et al., *Collective Sex Environments Without the Sex? Insights*

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Similarly, the jurisprudential points of the secondary effects doctrine in cases like *Paris Adult Theatre I* do not reflect empirical reality. Although evidence exists that the presence of sexually oriented businesses correlate with increases in crime, crime-prevention experts suggest that sexually oriented businesses typically cluster in neighborhoods where poverty and substance abuse rates tend to be high and motivated violent offenders are drawn to the easy "marks" the businesses attract.[246] Empirical field studies have contradicted the secondary effects presumptions serving as the basis for restrictions on the distribution of obscene materials in quasi-public spaces.[247] Clearly, deleterious secondary effects cannot be presumed.

Nevertheless, in the immediate and long-term aftermath of *Hudnut*, federal judges considered the presumed effects of publicly available sexually explicit media disregarding the target audience or community.[248] The result has been the creation of a variable obscenity framework restricting material marketed primarily to willing adults, even if marketing was not intended for minors merely passing by. The bookstore distribution cases strengthened the secondary effects doctrine from *Paris Adult Theatre I* even though local governments were unable to criminalize pornographic content directly.[249] Federal courts in *Upper Midwest Booksellers Association v. City of Minneapolis*[250] and *Jones v. Wilkinson*[251] applied the variable obscenity doctrine as its own form of social-value balancing test.

In *Upper Midwest Booksellers Association v. City of Minneapolis*, an adult bookstore proprietor and a merchant trade association challenged an ordinance that required sellers to seal material "harmful to minors" in an opaque wrapper.[252] Under the ordinance, businesses were shielded from liability if they segregated the explicit material and posted signage warning

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from the BDSM Community, 48 ARCH. SEX. BEHAV. 63, 63 (2018); Katherine Frank, *Rethinking Risk, Culture, and Intervention in Collective Sex Environments*, 48 ARCH. SEX. BEHAV. 3, 3 (2018).

246. Richard Tewksbury & Eric S. McCord, *Crime at Sexually Oriented Businesses*, 27 SEC. J. 349, 349 (2014).

247. *See, e.g.*, Daniel Linz et al., *An Examination of the Assumption that Adult Businesses Are Associated with Crime in Surrounding Areas: A Secondary Effects Study in Charlotte, North Carolina*, 38 LAW & SOC'Y REV. 69, 69 (2004).

248. *See* Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F. 2d 1389, 1391 (8th Cir. 1986); *see also* Jones v. Wilkinson, 800 F. 2d 989, 997 (10th Cir. 1986).

249. *See Upper Midwest Booksellers Ass'n*, 780 F.2d at 1389; *see also Jones*, 800 F.2d at 989.

250. *See Upper Midwest Booksellers Ass'n*, 780 F. 2d at 1391.

251. *See Jones*, 800 F. 2d at 997.

252. *Upper Midwest Booksellers Ass'n*, 780 F. 2d at 1390.

patrons that only adults over 18 were permitted to enter.[253] The United States Court of Appeals for the Eighth Circuit rejected the challenge, holding that display practices are not speech. According to the court, even if the contents of the book or magazine possessed significant value, children "who may never acquire and read or view the entire work" could be enticed and therefore harmed by the cover alone.[254] Coupled with the ordinance that triggered the segregated display requirements for material considered "harmful to minors," the court seemed to presume instantaneous harmful effects even for fleeting passers-by.[255] So powerful were these effects, in fact, that explicit covers rendered entire works worthy of quarantine. This accords with anti-pornography feminist thought to some degree, but focuses on harm to the observing child rather than systemic societal harms. Under the variable obscenity approach developed in the bookstore distribution cases, the *Miller* value inquiry stops if minors are potentially in the audience.

According to the court in *Upper Midwest Booksellers*, the ordinance did not materially impinge upon adults' First Amendment interests because they maintain "access to the material simply by purchasing it."[256] The court offered a solution: adults could ask permission from the retailer to view the material they wish to purchase, even if that material was bound in opaque film.[257] The court justified the plan by finding that such speech is "likely to be on the 'borderline'" of artistic expression.[258] This reasoning implicitly rejects the pro-pornography feminist ethic of minimizing sexual stigma because it creates a speech marketplace that forces a patron to ask a stranger for permission to view explicit depictions of sex.

The court's value judgments reflect the entrenchment of sexual expression's second-class status under the low-value approach. The categorical presumption of low-value status for sexually oriented material means that content-neutral distribution regulations can preempt such works based on a presumptive harmful effects theory. Lawmakers regulate sexual expression based on its effects, which truly means its content, but with the deference of intermediate review.[259]

This approach was sanctioned more explicitly in *Jones v. Wilkinson*, a 1986 case in which the court applied the variable obscenity doctrine to

253. *Id*. at 1395-96.
254. *Id*. at 1401.
255. *Id.*
256. *Id*. at 1396.
257. *Id*. at 1395-96.
258. *Id*. at 1396.
259. American Library Ass'n v. Reno, 33 F.3d 78, 81 (D.C. Cir. 1994).

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restrictions targeting cable television portrayals of "indecent material"[260] as a nuisance to potential minor viewers.[261] The court in *Jones* suggested that state and community regulations encompassing the display and distribution of sexually explicit materials does not pose a constitutional threat to the speaker's right to sexual liberty and freedom of thought.[262] Restricting display, the court said, is fundamentally different from restricting content and ideas if the restrictions do not clearly "suppress or greatly restrict access."[263] The *Jones* court, like the court in *Upper Midwest Booksellers*, reasoned that glimpses of sexually explicit material might harm minors.[264] The court reiterated that governments have a substantial interest in maintaining the "quality of urban life," but did not place any burden on the city to prove that quality of life was threatened by the display of sexually oriented materials to narrow classes of customers.[265]

In the wake of *Hudnut*, regulations had the ability to constrain adult speech practices if adult access to speech was still available. Practically, however, display and distribution schemes dramatically restrict adult markets without considering the literary, artistic, scientific, or social value the work may have once it is possessed by the intended audience. As construed in these cases, the variable obscenity framework lacks corresponding protection for the exchange of ideas between adults related to shared interests in sexual content.

The result of all of this is a disregard of the interests of distributors who market sexual expression primarily to adults with a private interest in exploring the thoughts and ideas generated by depictions of sex. The court in *Upper Midwest Booksellers* reached neither of these issues because it classified the Minneapolis ordinance as a time, place, or manner regulation

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260. Jones v. Wilkinson, 800 F. 2d 989, 990-91 (10th Cir. 1986) (the Utah statute defined "indecent material" as the "visual or verbal depiction or description of human sexual or excretory organs or functions, [including exposure of] genitals, pubic area,[] buttocks, . . . or [the] showing of [any portion of] the female breast . . . below the top of the nipple . . . ."; *See* Cable Television Programming Decency Act, UTAH CODE ANN. §§ 76–10–1701-1708 (1983) (repealed 1990).

261. *See* Cable Television Programming Decency Act, UTAH CODE ANN. §§ 76–10–1701-1708 (1983) (repealed 1990) (the statute was not directly overturned at trial or on appeal, but was considered preempted by federal law governing cablecast television). *See Jones*, 800 F. 2d at 993.

262. *Jones*, 800 F. 2d at 998.

263. *Id.*

264. *See generally id*.

265. *Id.* at 996.

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and not a content limitation.[266] This choice of framework puts such ordinances on a constitutional course, avoiding both the rigors of strict constitutional scrutiny and the least-speech-restrictive means test the Court applies in cases involving sexually explicit content and variant harms.[267] Despite the Supreme Court's decades-old warning that statutes should not operate to "[r]educe the adult population . . . to reading only what is fit for children,"[268] the presumptions applied to internal content in pornography unfairly burden works that may have survived under *Miller* when fully analyzed. Courts considered harms to children, but never considered harms against women and other disempowered groups.[269] Such themes that were so prevalent in the 1980s Porn Wars simply do not emerge post-*Hudnut*.

B. Liberty of Thought and Fantasy

Whatever can be said of pornography as a moral issue, research across a range of disciplines, from social psychology to sociology to media effects, show that diverse populations use sexually explicit texts for a variety of purposes.[270] These purposes include: developing knowledge and attitudes about sexual practice,[271] constructing individual identity,[272] and exploring or performing one's gender or sexuality.[273] Generally, pornography is used for these purposes in private settings known only to the users in any given instance. Therefore, the regulation of pornographic texts, including the obscene, implicates privacy concerns triggered in *Stanley v. Georgia*.[274]

The ubiquity of internet infrastructure has contributed to concerns over free speech rights, sexual liberties, and the competing conceptions of moral and social harms of pornography with the capacity to be accessible across simple—and ostensibly private— peer-to-peer networks. Beginning in the early 2000s, some plaintiffs went so far as to challenge the *Miller* test on the

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266. *Upper Midwest Booksellers Ass'n*, 780 F. 2d at 1398.

267. *See* United States v. Playboy Entm't Grp., 529 U.S. 803, 826-27 (2000).

268. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957); Ashcroft v. Free Speech Coal., 535 U.S. 234, 252 (2002) (reaffirming unanimously this language in *Butler v. Michigan*).

269. *See generally Upper Midwest Booksellers Ass'n*, 780 F.2d at 1389; *Jones,* 800 F.2d at 989; *Playboy Entm't Grp*., 529 U.S. at 803.

270. Feona Attwood, *What do people do with porn? Qualitative research into the consumption, use, and experience of pornography and other sexually explicit media*, 9 SEX. & CULTURE 65, 65 (2005).

271. *Id.* at 78.

272. *See* Simon Hardy, *Reading pornography*, 4 SEX EDUC. 3, 3 (2004).

273. LISA PALAC, THE EDGE OF THE BED: HOW DIRTY PICTURES CHANGED MY LIFE 37-38 (1998).

274. Stanley v. Georgia, 394 U.S. 557, 565 (1969).

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grounds that it unconstitutionally restricted consensual adult speech, particularly speech exploring non-mainstream sexualities.[275] Courts roundly declined to limit *Miller*'s proscriptive force, affirming the traditional conceptualization of the community's determination of serious social value— rather than groups with a shared sexual ethos identity.

A particularly notable case involved a hardcore visual artist's challenge to the oft-maligned and frequently contested Communications Decency Act ("CDA").[276] The artist, Barbara Nitke, uses photography to explore alternative sexualities, identities, marginalized sexual practices, and fetishes such as sadomasochism and bondage.[277] Sometimes Nitke's work graphically depicts consummated sex acts that, having met many state obscenity statutes' definition for a patently offensive depiction of sexual content,[278] trigger the *Miller* analysis. In *Nitke v. Ashcroft*, the federal district court for the Southern District of New York dismissed Nitke's challenge to the prohibition on obscene internet transmissions under the CDA.[279] In the facial overbreadth challenge to the CDA's obscene transmission provision, Nitke and the National Coalition for Sexual Freedom argued that the CDA unconstitutionally chilled artistic speech by preventing hardcore artists from expressing beliefs about sex and sexuality, the core serious values under *Miller*.[280] The plaintiffs' arguments were grounded in an intuitive—if not universally accepted—position that courts have found some media, such as musical compositions, as having inherent artistic value.[281] Although courts do find such intrinsic values in certain sexually explicit texts, there has been a struggle over the extent to which a depiction is obscene, even when it possesses a narrative, plot, fiction, or lyric.[282] The *Nitke* court was asked to decide whether federal obscenity law overburdened such boundary art. The court dismissed the overbreadth challenge as having a lack of support in the

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275. *See* Nitke v. Ashcroft, 253 F. Supp. 2d 587, 592-93 (S.D.N.Y. 2003); *see also* Nitke v. Gonzales, 413 F. Supp. 2d 262, 272-73 (S.D.N.Y. 2005).

276. *See* 47 U.S. CODE ANN. § 223(a)(1)(B)(ii).

277. *See* Barbara Nitke, *About the Work*, www.barbaranitke.com/about-the-work (last visited Nov. 17, 2019).

278. *See* NY PENAL L. § 235.00 (2015).

279. *See* Nitke v. Ashcroft, 253 F. Supp. 2d 587, 592-93 (S.D.N.Y. 2003).

280. *See Id*. at 597.

281. *See* United States v. McCoy, 602 F. App'x. 501, 505 (11th Cir. 2015) (citing Luke Records, Inc. v. Navarro, 960 F. 2d 134, 137 (11th Cir. 1992)).

282. *See* United States v. Gendron, No. S2-4:08CR244RWS(FRB), 2009 WL 5909127, at *6 (E.D. Mo. Sept. 16, 2009) (stating "The fictional nature of obscene material does not change [the result of obscenity analysis]. Obscenity in any form is not protected under the First Amendment.").

record of undue burdens on artists under the CDA that warranted declaratory relief.[283] Having given leave to replead, the court asked the plaintiffs to provide empirical proof that variation in the jurisdictional application of the *Miller* test could result in an unconstitutionally overbroad restriction on sexual expression.[284]

Despite the dismissal, the *per curiam* opinion in *Nitke*, the case highlighted anti-censorship feminist concerns regarding the *Miller* test and its application to intimate communications between sexual partners. The *Nitke* court noted that the common law traditionally defined a prurient interest in sex as a "shameful or morbid" practice, a characterization that subjects marginalized sexual subgroups to social exclusion and ridicule and fails to recognize that a marketplace for these ideas exists.[285] The court further stated that the serious value inquiry's "protectiveness . . . should not be overstated," because it "does not provide much protection for those content providers whose material portrays non-mainstream sexual practices."[286]

The court noted that *Miller*'s imprecision lies in its linguistic flexibility.[287] By allowing courts to examine artistic intent to determine prurience and social value, the serious value inquiry "leaves ample room" for judges and jurors to criminalize content that contributes to conversations surrounding sex.[288] The Court apparently did not envision this sort of chilling effect when it decided *Miller*. Such subjective standards may result in factfinders and judges using a community standard for serious value when they were intended to use a broad cultural standard. This foists additional burdens upon artists contributing artistic value to non-mainstream community conversations by exploring sex graphically and in intimate, vulnerable forms. The *Nitke* court's acknowledgment of artistic intent recognizes that artists like Nitke are participating in dialogue with willing audiences by giving audiences a choice to accept or reject the merits of the artist's version of the world of sex. This stays true to the nature of artistic production and critique because, regardless of the ultimate audience reception, the work is not criminalized or censored. The work remains for the audience's continued consideration. The *Nitke* court's recognition of artist-audience relationships is also important because it appears nowhere in *Miller*, at least not

283. *See Ashcroft*, 253 F. Supp. 2d at 606-607.

284. *See id*.

285. *Id*. at 600-601.

286. *See id*. at 602.

287. *See id.*

288. *See id*.

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explicitly.[289] While *Miller* protects a status quo version of "value," *Nitke* represents a small yet significant shift toward a modern, anti-censorship framing of the inherent value in the discourse on sex, even when such discourse is graphic and explicit.[290]

When *Nitke v. Ashcroft* was re-pleaded and dismissed in *Nitke v. Gonzales* (*Nitke II*), the federal district court for the Southern District of New York declined to address whether the plaintiffs could prove that their "chilled speech would be protected by the social value prong of the *Miller* test."[291] The court narrowly held that the plaintiffs failed to bear the heavy burden of showing substantial overbreadth required to succeed in a facial challenge.[292] However, the ruling in *Nitke II* left intact the court's extended discussion of *Miller*'s weaknesses.[293] On that basis, *Nitke II* remains a significant commentary on the liberty of sexual expression that might inform an as-applied challenge to both state obscenity laws and the CDA if revisited under similar facts.

In *United States v. Extreme Associates*, decided the same year as *Nitke II*, the federal district court for the Western District of Pennsylvania dismissed a criminal obscenity indictment against an internet pornography company, holding that applicable federal obscenity statutes were unconstitutionally overbroad.[294] Although the district court's decision was ultimately overturned by the United States Court of Appeals for the Third Circuit, the district court's ruling in *Extreme Associates* is important because of its extended discussion of *Miller*'s serious value prong.[295]

The district court opinion in *Extreme Associates* dealt squarely with the privacy interests of adult Internet users who view hardcore sexual content in their homes.[296] Relying heavily on *Stanley v. Georgia*, the court recognized that, although obscenity had never been considered protected speech, free speech rights include the right to "receive information and ideas regardless of their social worth."[297] The court also relied on *Lawrence v. Texas*, a 2003 Supreme Court case that struck down a criminal sodomy statute on due process grounds, in recognizing a privacy interest in the acquisition of

289. *See generally* United States v. Miller, 413 U.S. 15 (1973).
290. *See Ashcroft*, 253 F. Supp. 2d 587 (S.D.N.Y. 2003).
291. *See* Nitke v. Gonzales, 413 F. Supp. 2d 262, 272-73 (S.D.N.Y. 2005).
292. *See id*. at 273.
293. *See id.* at 262.
294. *See* Extreme Assoc. v. United States, 352 F.Supp.2d 578, 578 (W.D. Pa. 2005)
295. *See id.* at 585.
296. *See id*. at 585-87.
297. *See id.* at 588 (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969)).

obscene materials over the internet.[298] According to the court, hardcore sexual expression's value derives from the same fundamental link between privacy, expression, and association found in *Lawrence,* not from national or geographically defined community standards. "[P]ublic morality," the Court said, "is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public's sense of morality."[299] Similarly, the interest in protecting unwitting audiences does not justify the suppression of even patently offensive sexual content when access to the content requires a series of affirmative and consensual steps by the end-user.[300] To permit otherwise would unconstitutionally allow the state's moral preferences to supplant the private moral preferences of the individual. The district court's opinion in *Extreme Associates* echoed the anti-censorship feminist' goal of preventing majoritarian regulations from dismissing private sexual practices.

Ultimately, the United States Court of Appeals for the Third Circuit overturned the district court's finding in *Extreme Associates* that federal obscenity laws violated the First Amendment.[301] However, Judge D. Brooks Smith, writing for the majority, rejected the district court's overbreadth finding, and considered whether private Internet speech was sufficiently public to warrant suppression under the obscenity doctrine.[302] Judge Smith noted the Supreme Court's emphasis on personal intimacy, which was at the core of *Stanley* and acknowledged in *Paris Adult Theatre v. Slaton*: the "Constitution extends special safeguards to the privacy of the home."[303] However, Judge Smith found that core privacy interests bestow no corresponding right to use publicly available, though privately accessed, Internet technology to transmit sexually explicit material.[304] Simply put, the sexual privacy interests implicated in obscenity possession cases erode when obscenity is carried over quasi-public infrastructure.[305]

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298. *See* Lawrence v. Texas, 123 S. Ct. 2472, 2488 (2003).

299. *See id*. at 591.

300. *See id*. at 581.

301. *See* United States v. Extreme Assoc., Inc., 431 F.3d 150, 150 (3d Cir. 2005).

302. *See id.* at 158.

303. *See id*. at 158 (citing United States v. Orito, 413 U.S. 139, 142 (1973)).

304. *See id*. at 160-61.

305. *See* United States v. Stagliano, 693 F. Supp. 2d 25, 38 (D.D.C. (2010) (upholding an Internet obscenity prosecution and holding "[T]here is no substantive due process right to sexual privacy that would include the right to obtain or distribute obscene materials and because the government's interest in morality is a sufficient justification for regulating the public dissemination of obscenity . . . ."); *see also* United States v. Handley, 564 F. Supp. 2d 996, 1001 (S.D. Iowa 2008) (limiting the zone of privacy

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Judge Smith's opinion reflects the anti-censorship ethic of privacy, but in a manner that both anti-pornography and moral majoritarian deference to government control of the public sphere still heavily dominate. Although Judge Smith recognized that "the government can no longer rely on the advancement of a moral code, i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest,"[306] the court limited private space to the brick and mortar of the home, ignoring the private distribution channels to which the home connects. Congress may freely regulate commercial activity that "spread[s] evil, whether of physical, moral, or economic nature," which includes the power to regulate Internet speech.[307] Read alongside *Nitke*, *Extreme Associates* reaffirms a core aspect of obscenity jurisprudence: private, obscene communications are not protected under the First Amendment, even when all parties willingly engage with the material. *Extreme Associates* stands for the proposition that sexual liberty remains relegated to the mind and the home, both of which remain narrowly defined. Sexual liberty and privacy appear to be peripheral values in obscenity cases.

C. A Note on Marketplace Theory and Value of Obscenity

Although the marketplace of ideas is rarely invoked in obscenity cases, the Supreme Court's decision in *United States v. Stevens*,[308] an obscenity case involving fetish pornography known as "crush videos,"[309] suggests that serious value is sometimes created by market forces. In *Stevens*, the Court overturned a statute prohibiting the sale or distribution of depictions of animal cruelty.[310] Although the Court did not apply *Miller*'s serious value prong *per se*, it considered whether the government may suppress the market for unpopular sexual practices and ideas related to harmful speech.[311] This raised concerns with the stigmatization of fetishes dealt with by other federal courts.[312] Chief Justice Roberts noted, "[m]ost of what we say to one another

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acknowledged in *Stanley v. Georgia* to exclude receipt of obscene materials).

306. *See Extreme Assoc., Inc.,* 431 F.3d at 154.

307. *See id*. at 161 (implying that regulation of obscenity in interstate commerce fell within Congress's authority to prevent citizens of one state from causing "harm" to citizens of another state).

308. *See* United States v. Stevens, 559 U.S. 460, 476 (2010).

309. *See id.* at 465-466 (explaining that crush videos frequently depict women wearing stiletto heels crushing small animals, which purportedly excites viewers who enjoy this particular sexual kink).

310. *See id*. at 460.

311. *See id.* at 468.

312. *See, e.g.*, Nitke v. Ashcroft, 253 F. Supp. 2d 587 (S.D.N.Y. 2003).

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lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."[313] Chief Justice Roberts's theory of value drew on libertarian market theory in the context of borderline speech. The majority opinion suggests that sexual speech may warrant enhanced First Amendment protection when it acquires sufficient social marketability.[314]

Pointing to the robust market for hunting magazines and videos, Chief Justice Roberts acknowledged that laws suppressing speech—even potentially low-value depictions of animal cruelty—must be weighed against the market's acceptance of the ideas suppressed.[315] The greater the public market for historically low-value speech, the greater the overbreadth doctrine's sensitivity to potential constitutional overreach. This approach to value echoes the anti-censorship feminist rhetoric of the 1980s.[316] Although graphic sexual expression thrives in a robust market, the foregoing analysis has shown that much sexual expression never enters the marketplace because of government control over public accommodations and quasi-public distribution channels. The results of this amount to undue burdens on legitimate societal interests of non-mainstream adult populations.

V. THE BURDENS OF PSEUDO-FEMINIST VALUE THEORY

The post-*Hudnut* obscenity case law exhibits a pseudo-feminist approach to the value of sexual expression. It is pseudo-feminist because it clearly acknowledges sexual privacy interests while doing far too little to protect the practical benefits of those privacy interests.[317] After *Hudnut*, numerous cases have recognized adults' interest in possessing materials that, though too sexually explicit to be fully protected, enable private engagement with sexual fantasies and ideas on their own terms.[318] That recognition of sexual pleasure and agency is central to second-wave and post-second-wave feminism. However, the obscenity case law so drastically limits the scope of privacy

313. 559 U.S. at 479.

314. *See id*. at 476 (citing Brief for Professional Outdoor Media Association et al. as Amici Curiae 9–10).

315. *See id*. at 481-482.

316. *See id.* at 471 (noting that even though child pornography exists in a lucrative black market, its harms far outweigh recognizing its "acceptance" among some class of consumers).

317. *See* Upper Midwest Booksellers Ass'n v. City of Minneapolis, 780 F. 2d 1389, 1391 (8th Cir. 1986); *see also* Jones v. Wilkinson, 800 F. 2d 989, 997 (10th Cir. 1986); Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 304 (1992).

318. *See Upper Midwest Booksellers Ass'n*, 780 F. 2d at 1391; *see also Jones*, 800 F.2d at 997; *Sullivan,* 792 F. Supp. at 304.

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that it can only be recognized as pseudo-feminist. Consenting adults are permitted to possess many sexually explicit materials, but they are practically prohibited from procuring the materials, even in places commonly carrying a reasonable expectation of privacy and cater to adults willing to enter a consensual and non-coercive market. The framework created in the courts acknowledges some value in sexually explicit material, as long as it remains virtually inaccessible.[319]

In the years between *Roth* and *Miller*, the Supreme Court acknowledged that "[i]t is well established that the prurient appeal inquiry requires a fact-finder to assess a work in terms of the sexual interests of its intended and probable recipient group."[320] Yet, by focusing on the ostensibly public distribution of sexually explicit materials and narrowly construing the freedom of speech interests of non-mainstream sexualities, courts have practically ignored the Supreme Court's admonition to consider the material's audience.

To make matters worse, state legislatures have crafted obscenity statutes targeting practices common to non-mainstream sexualities, including BDSM and kink communities. For example, North Carolina's obscenity statute defines "sexual conduct" as "[a]n act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume."[321] Such material is considered obscene regardless of whether it depicts actual sex acts, and the statutory language "bizarre costume" has already survived constitutional vagueness challenges.[322] Alabama similarly criminalizes depictions of "flagellation, in an act of sexual stimulation," dubbing such depictions as "sadomasochistic abuse," regardless of whether the depictions are pure fantasy or engaged between consenting adults.[323] And since 1989, Alabama obscenity law has criminalized the sale and distribution

319. Pope v. Illinois, 481 U.S. 497, 500–01 (1987); *see* Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 278 (1992).

320. *See* Mishkin v. New York, 383 U.S. 502, 508-509 (1966) (Black, J., dissenting) (exclaiming that the Court should refrain from deciding exactly which materials amount to obscenity: "I wish once more to express my objections to saddling this Court with the irksome and inevitably unpopular and unwholesome task of finally deciding by a case-by-case, sight-by-sight personal judgment of the members of this Court what pornography (whatever that means) is too hard core for people to see or read.").

321. N.C. GEN. STAT. § 14-190.1(c)(3).

322. *See* Cinema I Video, Inc. v. Thornburg, 351 S.E.2d 305, 317 (N.C. App. 1986) (affirming 358 S.E.2d 383 (N.C. 1987)).

323. ALA. CODE. § 13A-12-200.1(21).

of sex toys.[324] Such statutes encroach upon the sexual privacy of individuals and further stigmatizes private, healthy sexual practices and intimacy by criminalizing devices. In a nationally representative study published in the Journal of Sexual Medicine in 2009, researchers found that more than half of female respondents report using vibrators to address a number of health issues including sexual dysfunction.[325] These women also report a significantly higher frequency of regular gynecological self-exams and visits to gynecological healthcare providers.[326] Thus, an unintended consequence of closing off distribution channels for devices and materials promoting private exploration of sexual pleasure is diminished attention to personal sexual health. Value frameworks in the law of speech directly impact other realms of social policy. In the long run, overly restrictive obscenity laws threaten the privacy that facilitates improved public health.

This serious problem is not new. In 1986, during the height of the United States HIV and AIDS epidemic, the Centers for Disease Control and Prevention ("CDC") enacted a series of regulations aimed at some community health organizations' use of "explicit content of some of the proposed written and audiovisual materials" to educate gay men about the risk factors associated with HIV and AIDS.[327] The CDC required federally-funded AIDS education materials to be "[u]noffensive to most educated adults beyond [the target] group."[328] More than six years thereafter, public health advocacy groups challenged the constitutionality of the regulations in lawsuits against the Department of Health and Human Services and the CDC. The United States District Court for the Southern District of New York struck down the regulations as unconstitutionally vague,[329] and more to the point of this study, found that the CDC exceeded its statutory authority by conflating offensiveness and obscenity.[330] The court found that during the grant-making process, the CDC improperly applied its offensiveness

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324. ALA. CODE. § 13A-12-200.2(a)(1)-(2).

325. *See* Debra Herbenick, et. al., *Prevalence and Characteristics of Vibrator Use by Women in the United States: Results from a Nationally Representative Study*, 6 J. SEX. MED. 1857 (2009).

326. *See id.* at 1861.

327. *See* Program Announcement and Notice Availability of Funds for Fiscal Year 1986; Cooperative Agreements for Acquired Immunodeficiency Syndrome (AIDS); Health Education and Risk Reduction Programs, 51 Fed. Reg. 3427, 3431 (Jan. 27, 1986).

328. *See id.*

329. *See* Gay Men's Health Crisis v. Sullivan, 792 F. Supp. 278, 292 (S.D.N.Y. 1992).

330. *See id*. at 298.

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standard to materials that were not sexually explicit.[331] The result of the overzealous application of the obscenity standard was censorship where candor and openness were needed most. Unchecked, the CDC's discriminatory approach to materials that clearly possessed profound societal value under *Miller*, was truly a matter of life and death. Such are the flagrant, if unintended, consequences of standards for sexually explicit material that fail to consider the value of sexually explicit materials from the perspectives of the marginalized.

CONCLUSION

The Porn Wars make clear that obscenity cases impact far more than arid doctrinal issues. By impacting the accessibility of sexually explicit content, legal burdens on sexual expression impact how communities, particularly marginalized communities of LGBTQ+ and HIV-positive people, build identity and engage in discourse around sexual preferences and subjects. Doctrine that impacts the bounds of privacy, public participation, stigmatization, and distribution of materials related to sexual practice affects much more than public morality. These concerns are not new, but they are underappreciated and ought to be considered in any discussion surrounding the values and harms purportedly associated with sexually explicit media and any attempt to reform obscenity law.

331. *See id.*