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Neither death nor woman's sex can be faced directly.

—SARA KOFMAN, THE ENIGMA OF WOMAN[1]

What if the 'object' started to speak?

—LUCE IRIGARAY, SPECULUM OF THE OTHER WOMAN[2]

INTRODUCTION

In this Article, I attempt to solve a First Amendment puzzle by turning to a surprising source. Here is the puzzle: why would the Supreme Court offer robust First Amendment protection to non-obscene pornographic film, while relegating live erotic dance, far less sexually explicit, to the very "perimeter" of First Amendment protection?

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1. SARAH KOFMAN, THE ENIGMA OF WOMAN 20 (Catherine Porter trans., 1985).
2. LUCE IRIGARAY, SPECULUM OF THE OTHER WOMAN 135 (Gillian C. Gill trans., 1985).

I suggest that one way to understand this puzzle can be found in the ancient myth of Medusa, the monster Freud interpreted as standing for the castrated female genitals.[3] A direct confrontation with Medusa's stare was deadly. But Perseus slew Medusa by outsmarting her: he looked at her only in the reflection of his shield, thereby transforming her into the passive object of his gaze. I interpret Perseus's shield as a precursor of pornographic film. In my view, live erotic performance, in which the dancer interacts with the audience and claims her own role as a First Amendment speaker, conjures up some of the threat of the unmediated stare of Medusa. In contrast, pornographic film, like Perseus's shield, tames the monstrous threat of the woman's direct stare. Ultimately, I read the Court's puzzling distinction between live and filmed performance as bound up in anxieties about castration, the female gaze, and the possibility of female agency and speech that the gaze symbolizes.

My goal in this Article is to show how longstanding, indeed mythic, cultural assumptions about gender, sexuality and representation penetrate the Court's doctrinal analysis. This piece builds on two previous sets of articles. In the first, I explored the influence of sexuality and gender on our understanding of "speech."[4] In the second, I argued that unstated assumptions and anxieties about the nature of representation itself shape free speech decisions.[5] In this Article, issues of sexuality and representation merge, just as they do in the myth of Medusa. As my reading of the myth will show, the figure of Medusa conflates two kinds of dread: dread of the female body and dread of unmediated visual spectacle. As I will suggest, anxieties about both realms inform the Court's treatment of live versus filmed erotic speech.

This piece continues to build what I call a "cultural theory of the First Amendment."[6] Normally we presume that First Amendment law is rational and objective, based on a continually evolving, often contested, set of legal principles. When we question these assumptions, we often limit our discussion to whether "politics" is a force that could undermine claims to law's neutrality. In this piece, however, I suggest a very different vision of the First Amendment, as a body of law that is surprisingly irrational and contingent. This vision invites us to consider the ways in

3. *See infra* Section II.A.

4. *See* Amy Adler, *Symptomatic Cases: Hysteria in the Supreme Court's Nude Dancing Decisions*, 64 AM. IMAGO 297 (2007) (analyzing the Court's relegation of the nude dancer to an insignificant margin of speech); Amy Adler, *Girls! Girls! Girls!: The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005) (arguing that anxieties about female sexuality and corporeality inform the Supreme Court's puzzling First Amendment analysis of nude dancing).

5. *See* Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) (exploring implicit merger of representation and reality in child pornography law and in feminist anti-pornography theory); Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art Of Censorship*, 103 W. VA. L. REV. 205 (2000) (exploring divergent First Amendment treatment of verbal versus visual forms of representation).

6. *See* Adler, *Girls! Girls! Girls!*, *supra* note 4, at 1154-55.

which legal rules, especially those related to speech, are steeped in cultural anxieties and fantasies. Free speech law governs culture, yet in surprising ways, culture also governs free speech law.

I. DIFFERENTIAL TREATMENT OF NUDE DANCING AND PORNOGRAPHY

A. The Puzzle

A few stray remarks about pornography by Justices Rehnquist and Souter in the case of *Barnes v. Glen Theatre*[7] signal an unexplored conundrum in First Amendment law. In *Barnes*, female strippers brought a free speech challenge to a law that required them to wear pasties and G-strings rather than permit them to strip down to total nudity.[8] The dancers claimed that their striptease[9] was a form of constitutionally protected speech.[10]

The Supreme Court's first hurdle in *Barnes* was to determine whether a woman's nude, dancing body was "speech"—expressive conduct[11]—or whether it was mere conduct and thus outside of the First Amendment's reach.[12] The Court's answer was strange: nude dancing was speech—but

7. 501 U.S. 560 (1991).

8. The plaintiffs in the case included not only the dancers but also the owners of two clubs, the Kitty Kat Lounge and the Glen Theatre. Plaintiffs wanted to present "'totally nude dancing.'" *Id.* at 563. The Indiana statute at issue was Ind. Code § 35-45-4-1 (1988).

9. The district court in *Barnes* gave the following description of the dances: "[A] female, fully clothed initially . . . dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance." Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988).

10. *Barnes*, 501 U.S. at 562-63 (plurality opinion).

11. It is well settled that the First Amendment's protections extend to nonverbal "expressive conduct" or "symbolic speech." The Court has defined "expressive conduct" as conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." Spence v. Washington, 418 U.S. 405, 409 (1974). For further discussion of *Spence*, see *infra* notes 12 and 56.

12. Oddly, the *Barnes* Court never invokes the "*Spence* test." The *Spence* Court developed a formula todetermine when nonverbal activity qualifies as expressive conduct, thus bringing it within First Amendment protection. *Spence*, 418 U.S. at 410–11 ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). Although the opinion in *Barnes* does not rely on *Spence*, what little analysis the Court offers about the expressive value of nude dancing loosely tracks the principles set forth in *Spence*. For example, Justice Souter's analysis in *Barnes* seems to draw on *Spence*'s principles when he writes: "Not all dancing is entitled to First Amendment protection as expressive activity. . . . But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience." *Barnes*, 501 U.S. at 581 (Souter, J., concurring).

Courts have sometimes upheld restrictions on erotic dance as proper bans on lewd conduct or prostitution rather than as improper bans on expressive conduct. *See, e.g.*, People v. Hill, 776 N.E.2d 828 (Ill. App. Ct. 2002) (upholding as neither vague nor overbroad prostitution provision that prohibits dance involving physical contact with patron through clothing); State v. Conforti, 688 So.2d 350 (Fla. Dist. Ct. App. 1997) (holding that sex acts performed by dancers on each other to music are not expressive conduct and may be prohibited as lewd conduct). *But see* Ways v. City of Lincoln, 274 F.3d 514 (8th Cir. 2001) (striking down as overbroad a ban on sexual contact in commercial

just barely.[13] Without further explanation, the plurality wrote: "[N]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so."[14] The Court thus exiled nude dancing to an undefined and previously unheard of "perimeter" of the First Amendment.[15]

The Court then decided that Indiana could, without violating the First Amendment, force the dancers to alter their "marginal" speech:[16] the state was free to require the dancers to wear pasties and G-strings and to forbid them from stripping down to total nudity.[17] Although the result was clear, the fractured *Barnes* majority could not agree on a rationale to support the holding.[18]

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establishments without arts exception).

13. *Barnes*, 501 U.S. at 566 (plurality opinion).

14. *Id.* Although *Barnes* was a case famous for the inability of the Justices to agree on anything, eight of the nine agreed that nude dancing was subject to marginal First Amendment protection.

15. *See generally* Adler, *Symptomatic Cases: Hysteria in the Supreme Court's Nude Dancing Decisions*, *supra* note 4 (interpreting the Court's relegation of the nude dancer to the margin of free speech as reflecting the discourse of hysteria that in my view pervades the nude dancing opinions). The *Barnes* Court's interpretation of the speech status of the dancers' bodies was constrained by several previous cases in which the Court had suggested that dancing could be speech. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (invalidating ordinance which banned all live entertainment, including nude dancing); Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) (upholding preliminary injunction to prevent enforcement of prohibition on topless dancing); California v. LaRue, 409 U.S. 109 (1972) (upholding state ban on nude dancing in establishments licensed to sell liquor). All of the previous opinions acknowledged that nude dancing has some First Amendment value. *Schad*, 452 U.S. at 66 ("[N]ude dancing is not without its First Amendment protections."); *Doran*, 422 U.S. at 932 ("Although the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.")(internal citation omitted); *LaRue*, 409 U.S. at 118 ("[A]t least some [types of dancing] are within the limits of the constitutional protection of freedom of expression."). Other than by citing these precedents, the *Barnes* Court did not explain its curious assignment of nude dancing to the margins or outer perimeter of the First Amendment.

Notably, the *Barnes* Court did not invoke the "low value" speech doctrine. *See, e.g.*, Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (finding hierarchy of First Amendment values in which political speech is paramount and sexual or pornographic speech is of little value). In *Young*, a plurality of the Court suggested that some speech, such as sexual speech, is simply not as important as other speech. The question never arose in *Young* whether the low value material qualified as "speech" for First Amendment purposes. It was assumed to be speech. Instead, the question was whether some sexual speech merited a lower degree of protection: was there a hierarchy of First Amendment values, in which some kinds of speech (political) mattered more than others (pornographic)? In contrast, *Barnes* was an expressive conduct case in which a threshold question was whether nude dancing qualified as First Amendment "speech" to begin with. In light of my analysis in this piece, it may be interesting to consider that the speech in *Young* was pornographic film, as opposed to the live performance in *Barnes*.

16. *Barnes*, 501 U.S. at 565 (plurality opinion).

17. *Id.* at 563.

18. The three-judge plurality, in an opinion written by Chief Justice Rehnquist and joined by Justices O'Connor and Kennedy, analyzed nude dancing as expressive conduct under the four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968). The well-known *O'Brien* test applies when the government seeks to impose a content-neutral regulation on expressive conduct; it governs situations in which "'speech' and 'nonspeech' elements combine[] in the same course of conduct" and the government's interest in regulating the latter justifies incidental burdens on the former. *Id.* at 376. To satisfy the test, a government regulation: 1) must be "within the constitutional power of the Government;" 2) must further "an important or substantial governmental interest;" 3) must be "unrelated to the suppression of free expression" (thus satisfying the demand of content-neutrality); and 4) cannot create an incidental restriction on First Amendment freedoms "greater than is essential

Twice in the case, the Justices refer to pornographic film. Justice Rehnquist observes that one of the plaintiff dancers in the case, Gayle Ann Marie Sutro, "in addition to her [striptease] performances at the Glen Theatre . . . can be seen in a pornographic movie at a nearby theater."[19] In his concurring opinion, Justice Souter emphasizes the significance of this fact to his reasoning.[20] It is as if Ms. Sutro's pornographic movie somehow consoles the Justice. Although Justice Souter admits, with some worry, that the ruling he votes for will interfere with Ms. Sutro's expression in her live performance, it seems to comfort the Justice that Ms. Sutro has an alternative outlet for her erotic speech: the film allows her to appear completely nude without a G-string to get in her way.[21] Thus, Justice Souter emphasizes that Ms. Sutro, in her film, can still express her "erotic message by representational means."[22] As they refer to Ms. Sutro's "pornographic movie . . . playing nearby without any interference from the authorities,"[23] it is as if the Court all but directs the interested viewer to the "nearby theater" to find the film.[24]

Here is the conundrum in these remarks: Why would Ms. Sutro's performance in a pornographic movie be less problematic from a First Amendment perspective than her live performance at the Glen Theatre?[25] Why was her film "playing nearby without any interference from the authorities," while her performance at the Glen Theatre was constrained? Surely the pornographic film was more graphic than her live performance. Pornographic films almost invariably include not only nudity, unadorned by G-strings, but sex acts; by comparison, the sexual content of nude dancing seems tame. Yet if the dancers at the Glen Theatre were simply to *film* themselves stripping to nudity, rather than performing live, their

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to the furtherance of that interest." *Id.* at 377. Applying the *O'Brien* test, Justice Rehnquist reasoned that the Indiana statute's purpose lay in "protecting societal order and morality" by preventing the evil of public nudity. *Barnes*, 501 U.S. at 568 (plurality opinion). Justice Rehnquist argued that the statute did not violate the First Amendment because it was not aimed at expression. *Id.* at 569.

Justice Souter voted with the majority but wrote separately. Although he agreed with most of the plurality's application of the *O'Brien* test, Justice Souter preferred to characterize the governmental interest not as the protection of morality, but as the prevention of tangible "secondary effects" associated with nude dancing. *Id.* at 582-86 (Souter, J., concurring).

The majority's fifth vote came from Justice Scalia, who argued that the regulation at issue did not specifically target expressive conduct, and that therefore the First Amendment did not apply to the case at all. *Id.* at 572 (Scalia, J., concurring in judgment).

In a vigorous dissent, Justice White, joined by Justices Marshall, Blackmun, and Stevens, argued that the true purpose of the Indiana statute was to regulate expression, not conduct, and that it was therefore a content-based regulation in violation of the First Amendment. *Id.* at 592–93 (White, J., dissenting).

19. *Barnes*, 501 U.S. at 563 (plurality opinion).

20. *Id.* at 587 (Souter, J., concurring).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 563 (plurality opinion).

25. Certainly, prosecutorial discretion plays a role in explaining why some pornographic films are not prosecuted even though they are potentially obscene. *See infra* text accompanying notes 32-37.

speech would be fully protected. Indeed, in *Erznoznik v. City of Jacksonville,*[26] the Supreme Court explicitly protected nudity in film. The Court offered films such protection even when the nudity in them was potentially distracting to passersby, as it was in the drive-in movies at issue in that case. In fact, the dancers at Glen Theatre would have been free to film themselves doing far more graphic acts than merely stripping to nudity. Apparently they could have engaged in explicit sex and been undisturbed by the government, so long as they were being filmed, and thus engaging in expression by "representational means" as Justice Souter puts it.[27]

There are, of course, limits on the freedom granted to pornographic films. One significant limit was established in *City of Renton v. Playtime Theatres*,[28] which held that the government may use zoning laws to restrict the location of the venue for pornographic speech. As critics and dissenters have argued, the practical effect of zoning could be to restrict severely, if not eliminate altogether, the availability of speech in certain areas.[29] But it is important to remember that no matter how draconian a zoning law might be in effect, from a constitutional perspective it is quite a different thing to zone speech than to ban it outright.[30] Unlike most pornographic film, nude dancing can be banned entirely.[31]

The second significant limit on pornographic film is obscenity law, which, depending on the facts, could permit the outright criminal prosecution of such movies.[32] As I have recently documented, however,

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26. 422 U.S. 205, 208-12 (1975).

27. *Barnes*, 501 U.S. at 587 (Souter, J., concurring). Once again, this is assuming that the films don't cross the threshold into being legally obscene, a standard that most pornographic films do not cross, at least on a practical level. *See infra* notes 32-37 and accompanying text.

28. 475 U.S. 41 (1986). *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976), a zoning case that was a predecessor to *Renton*, was also significant in paving the way for the Court's second nude dancing case, *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000). *See infra* notes 30, 39-42 and accompanying text.

29. In extreme circumstances, zoning ordinances have been struck down where they have been interpreted to operate as effective bans on adult entertainment by leaving too few alternative sites available for use. *See, e.g.*, Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1312 (11th Cir. 2003) (holding zoning portion of adult business ordinance unconstitutional for failure to leave open ample alternate means of communication); Univ. Books & Videos, Inc. v. Miami-Dade County, 132 F. Supp. 2d 1008, 1015 (S.D. Fla. 2001) (enjoining zoning ordinance that would reduce market for adult fare by "at least two-thirds"); R.W.B. of Riverview, Inc. v. Stemple, 111 F. Supp. 2d 748, 756 (S.D. W. Va. 2000) (enjoining regulation effectively banning all new nude entertainment businesses).

30. For a further discussion of the distinction between zoning and outright bans on speech, see Justice Stevens' passionate dissent in *City of Erie v. Pap's A.M.*, 529 U.S. at 320–22 (Stevens, J., dissenting). The plurality rejected Justice Stevens' characterization of the ordinance as a ban. *Id.* at 292–93 (plurality opinion).

31. Again, the Court disagreed about whether the G-string and pasties rule was a ban. *See supra* text accompanying note 17.

32. Miller v. California, 413 U.S. 15, 24 (1973). The so-called "*Miller* test" asks three questions in determining whether a given work should be labeled "obscene" and thus without constitutional protection: (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct; (c) whether the work, taken as a whole, lacks

obscenity law is of quite limited significance for the vast majority of pornographic films.[33] The doctrine fell into relative disuse in the 1990s. Although the Bush Justice Department began to stage a comeback for obscenity law, dramatically increasing the number of prosecutions in recent years,[34] I still conclude that the new war on obscenity is a losing one.[35] At the moment, obscenity law does pose a threat to the most extreme end of the hard-core pornography market, which has so far been the government's near-exclusive target in its recent wave of obscenity prosecutions.[36] We shouldn't entirely discount the potential chilling effect of the doctrine on ali pornography producers, especially given the Justice Department's ramped up approach. But it is clear that except for the hardest of hard-core fringes, pornographic film in the U.S. enjoys practical First Amendment freedom.[37]

Not so for live sexual performance. Indeed, the peculiar contrast between live and filmed sexual performance recurred when the Court, nine years after *Barnes*, returned to the troubled subject of nude dancing. The

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serious literary, artistic, political, or scientific value. *Id.* at_24. For my most recent criticism of *Miller*, see Amy Adler, *The Folly of Defining Art*, *in* THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS (Christopher W. Hawthorne, Mark Schapiro & András Szántó eds., 2004).

33. Amy Adler, *All Porn All the Time*, 31 N.Y.U. J. OF L. & SOCIAL CHANGE 695 (2007) (arguing that recent revival of obscenity law must be understood in the context of contemporaneous developments in child pornography law and the "harmful to minors" doctrine).

34. Statistics bear out the new wave of prosecution. *See* Adler, *All Porn All the Time*, *supra* note 33. In 2005, the Gonzales Justice Department emphasized that obscenity was "one of [its] top priorities," and created a task force devoted specifically to adult obscenity, diverting "eight agents, a supervisor and assorted support staff" to the project full time. Barton Gellman, *Recruits Sought for Porn Squad*, WASH. POST, Sept. 20, 2005, at A21. *See also* Alberto R. Gonzales, U.S. Attorney General, Prepared Remarks at the U.S. Attorney's Conference (April 21, 2005), *transcript available at http://www.usdoj.gov/archive/ag/speeches/2005/042105usattorneysconference.htm* ("I've made it clear that I intend to aggressively combat the purveyors of obscene materials.").

35. Adler, *All Porn All the Time*, *supra* note 33 at 695.

36. *Id.* at 705-06. For example, one of the most high profile recent targets was Extreme Associates, a website that billed itself (possibly truthfully based on descriptions I have read) as the "Hardest Hard Core on the Web." *See* United States v. Extreme Assoc., Inc., 352 F. Supp. 2d 578, 591, 593 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006); Jake Tapper, *Politics of Porn: Justice Department Launches Long-Anticipated War on Obscenity*, News Blog, Aug. 29, 2003, *available at* http://stevegilliard.blogspot.com/2003/08/politics-of-porn-justice-department.html. Another significant new use for obscenity law has arisen as prosecutors have begun to use obscenity law to target purely textual material that, had it been photographed or filmed, would have constituted child pornography. *See* United States v. Whorley, 550 F. 3d 326 (4th Cir. 2008); Adler, *All Porn All the Time*, *supra* note 33, at 708-710 (and sources cited therein). These prosecutions represent a departure from the pattern of obscenity prosecutions; prior to this trend, for at least the last twenty years, prosecutors did not bring obscenity cases against purely textual materials.

37. Adler, *All Porn All the Time*, *supra* note 33. *See also* Eugene Volokh, *Obscenity Crackdown—What Will the Next Step Be?*, 78 TECHKNOWLEDGE, Apr. 12, 2004, *available at* http://www.cato.org/tech/tk/040412-tk.html (arguing that we are unable to censor porn, at least within current constitutional confines). In a recent speech, Judge Kozinski declared obscenity law and pornography regulation "obsolete" in the face of technological proliferation. *See* Alex Kozinski, Free Speech in the 21st Century: What We Learned in the 20th Century, Symposium on Free Speech & Press in the Modern Age, Pepperdine University School of Law (Apr. 4, 2008), *quoted at* http://tushnet.blogspot.com/2008/04/first-amendment-is-dead-long-live.html.

Court's 2000 decision in *City of Erie v. Pap's A.M.*[38] considered a nude dancing case with almost identical facts to *Barnes v. Glen Theatre*.[39] As in *Barnes*, the Court agreed that while nude dancing is expressive conduct, "it falls only within the outer ambit of the First Amendment's protection."[40] Again as in *Barnes*, a plurality of the Court found that it was constitutional to require dancers to wear pasties and G-strings.[41]

It is revealing to contrast *Pap's* with another sexual speech case decided that same term: *United States v. Playboy Entertainment*.[42] In *Playboy Entertainment,* the Court invalidated under the First Amendment a portion of the Telecommunications Act that restricted sexually explicit cable television programming.[43] Playboy Entertainment, which challenged the law, offered "virtually 100% sexually explicit adult programming,"

38. 529 U.S. 277 (2000).

39. Erie, Pennsylvania enacted Ordinance 75-1994 on September 28, 1994. ERIE, PA., CODIFIED ORDINANCES art. 711 (1994). This public indecency statute made it illegal to "knowingly or intentionally, in a public place . . . appear[] in a state of nudity." Pap's A.M., 529 U.S. at 283. Respondent Pap's operated a club called Kandyland, which featured completely nude dancing, and filed suit seeking permanently to enjoin the statute's enforcement. *Id.* at 284. The Court of Common Pleas granted the injunction, and the Commonwealth Court reversed. *Id.* The Pennsylvania Supreme Court reversed again, holding that the ordinance violated respondent's rights to freedom of expression. *Id.* After determining that no clear decision had resulted from *Barnes*, the Pennsylvania court held that along with a purpose to combat deleterious secondary effects arising from nude dancing establishments, "[i]nextricably bound up with this stated purpose" was another "unmentioned" purpose: to bar nude dancing for the message the dances conveyed. Pap's A.M. v. City of Erie, 719 A.2d 273, 279 (1998), *rev'd*, 529 U.S. 277 (2000). On remand, the Pennsylvania Supreme Court once again invalidated the statute, this time under the Pennsylvania Constitution. Pap's A.M. v. City of Erie, 571 Pa. 375, 394 (2002).

The Pennsylvania ordinance differed from the ordinance in *Barnes*, however, in that it was drafted "for the purpose of limiting a recent increase in nude live entertainment within the City." Pap's A.M. v. City of Erie, 719 A.2d at 279. In *Barnes*, the plurality insisted that the target of the regulation was nudity in general, not nudity in performance, which the Court had decided was at least marginally speech. *Barnes,* 501 U.S. at 570-71. The preamble to the legislation in *Pap's* revealed that the law's target was nude dancing, not nudity in general. The plurality was able to overcome this problem in part, however, by reframing the question through the lens of the secondary effects doctrine. Now the plurality said that the target of the ordinance was only the secondary effects of the speech, not the speech itself. *Pap's*, 529 U.S. at 291-94 (plurality opinion).

40. *Id.* at 289 (plurality opinion).

41. *See id.* at 289 ("[G]overnment restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O'Brien* for content-neutral restrictions on symbolic speech."). Note, however, the introduction of the secondary effects doctrine into the mix. On the incoherence of this doctrinal merger, see Justice Stevens' dissent. *Id.* at 317 (Stevens, J., dissenting). Once the secondary effects doctrine merged into this line of cases, it became harder, in my view, for the Court to differentiate between nude dancing and film, even as it appeared to assume a distinction. Once again, Justice Scalia wrote a concurring opinion (joined this time by Justice Thomas) in which he insisted, as he had in *Barnes*, that the First Amendment did not apply to the case at all. *Id.* at 303 (Scalia, J., concurring).

42. 529 U.S. 803, 826 (2000). Commentators have noted the odd pairing of the two cases. *See, e.g.*, Arnold H. Loewy, *The Use, Nonuse, and Misuse of Low Value Speech*, 58 WASH. & LEE L. REV. 195, 220 (2001) ("Ironically, *Pap's* was decided less than two months before *Playboy*, in which the Court had refused to allow channeling or blocking of movies consisting of a lot more than nude dancing.").

43. Section 505 of the Telecommunications Act of 1996 placed certain restrictions on cable television operators whose channels were "primarily dedicated to sexually-oriented programming." *Id.* at 806 (quoting 47 U.S.C. § 561(a) (1994 ed., Supp. III, 1998)).

according to the district court.[44] Indeed, Justice Scalia in his dissent emphasized the explicit nature of the cable programming in *Playboy*, which depicted "'female masturbation/external,'" "'girl/girl sex,'" and "'oral sex/cunnilingus.'"[45]

In spite of the graphic nature of the material in *Playboy*—far more graphic than the striptease dances proffered by the barroom dancers in *Pap's*—the Court found that the pornography at issue in *Playboy* was subject to full First Amendment protection.[46] This pornography, according to the Court, was "speech *alone*" and could not be tampered with.[47] The speech of the live dancers in *Barnes* and *Pap's* was at best "marginal" to the First Amendment; the legislature was free to interfere. But in *Playboy*, the Supreme Court declared that "*basic speech principles* are at stake in this case."[48]

B. Other Doctrinal Analyses of the Relationship between Performance and Film

What accounts for these distinctions? Why was so much at stake in *Playboy* and so little in *Pap's*? Why was a plaintiff in *Barnes* free to appear without government interference in a pornographic movie but not in her live performance? Although the Court has never theorized or explained these distinctions, it seems clear from the Court's rulings that the same sexual behavior caught on film has more speech protection than when it is live. Why should this be so for First Amendment purposes? And what does this hierarchy reveal about the meaning of "speech" in the First Amendment, or more broadly, about the values that are embedded in First Amendment thinking?

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44. Playboy Entertainment Group, Inc., v. United States, 30 F. Supp. 2d 702, 707 (Del. 1998).

45. *Playboy*, 529 U.S at 834 (Scalia, J., dissenting) (quoting the record). Scalia criticized the Court's acceptance of the litigants' agreement that the film was not obscene. He termed the agreement a "highly fanciful assumption."

46. For another prominent example of a court attributing significant First Amendment value to non-obscene pornography, see American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), striking down Catharine MacKinnon and Andrea Dworkin's anti-pornography ordinance and suggesting the potential importance of non-obscene pornography under the First Amendment.

47. *Playboy*, 529 U.S. at 814 (emphasis added). Because of the fully protected status of the speech, the Court analyzed the regulations under strict scrutiny, which they failed. In contrast, the regulations in *Pap's* were subject to the less demanding scrutiny of the *O'Brien* test. Pap's A.M, 529 U.S. 277 (2000). The plurality considered the speech value of nude dancing as within only the "outer ambit of the First Amendment's protection." *Id.* at 289 (plurality opinion).

48. *Playboy*, 529 U.S. at 826 (emphasis added). The Court treated erotic live performance and pornography differently on two levels: both the level of First Amendment "coverage" and of First Amendment "protection." Fred Schauer has used these terms to denote the distinction between free speech "coverage"—whether the purported material in fact qualifies as speech so as to invoke the First Amendment in the first place, and its "protection"—whether material that qualifies as speech under the First Amendment should be protected by that Amendment, or if other factors should prevail to allow the government to ban the speech. FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 89 (1982). In the nude dancing cases, the issues seem to merge: the speech was marginal rather than "basic" to the First Amendment's coverage; it was also not protected.

These are vastly under-theorized questions. Indeed, the Court seems to have given them no overt thought. Only a handful of commentators and judges have considered the relationship between live performance and film, and two of them have reached an opposite conclusion from the Court. Professor Frederick Schauer, in his well-known argument that hard-core pornography should not be protected speech,[49] offers an extended discussion of the similarity, for First Amendment purposes, between hard-core pornographic film and live sexual performance, arguing that since the latter is not protected speech, the former should not be as well. He writes:

> Let us suppose a hypothetical extreme example of what is commonly referred to as hard-core pornography. Imagine a motion picture of ten minutes' duration whose entire content consists of a close-up colour depiction of the sexual organs of a male and a female who are engaged in sexual intercourse. The film contains no variety, no dialogue, no music, no attempt at artistic depiction, not even any view of the faces of the participants. The film is shown to paying customers who, observing the film, either reach orgasm instantly or are led to masturbate while the film is being shown.
>
> I wish to argue that any definition of "speech" that included this film in this setting is being bizarrely literal or formalistic. *There are virtually no differences [between the film] and the sex act itself.* [50]

At another point, Schauer writes, "[t]he mere fact that in pornography the stimulating experience is initiated by visual rather than tactile means is irrelevant if every other aspect of the experience is the same."[51] In stark contrast to the Court, Schauer posits that there should be no First Amendment distinction between filmed and live sexual performance. Mediation is simply irrelevant to whether sexual material is speech.

Judge Posner, who wrote an extensive opinion in the *Barnes* case when it was in the Seventh Circuit, also concludes that mediation is irrelevant to the speech status of erotic material.[52] Yet in direct contrast to Schauer,

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49. *See* SCHAUER, *supra* note 48 at 178-88. *See also* Frederick Schauer, *Speech and "Speech" – Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979). I disagree, as others have, with Schauer's assertion that pornography is not speech; I do so primarily because Schauer relies on what I find to be an untenable distinction between cognition and sexual excitement, between mind and body. For criticism of Schauer's argument that pornography is not "speech," see Andrew Koppelman, *Is Pornography "Speech"?*, 14 LEGAL THEORY 71, 72-78 (2008). *See also* MARTIN REDISH, FREEDOM OF EXPRESSION 75 (1984); David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 124-31 (1994); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1594 (1988); Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 CARDOZO L. REV. 677, 711-13 (1989).

50. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY, *supra* note 48, at 181 (emphasis added).

51. *Id.* at 182.

52. Miller v. Civil City of South Bend, 904 F.2d 1081, 1089 (7th Cir. 1990) (en banc) (Posner, J., concurring).

who views the similarities between sexual acts and films of those acts as evidence that both should be *excluded* from First Amendment coverage, Judge Posner views the similarity between filmed and live sexual performance as evidence that both might be *included* within the First Amendment's coverage. He writes:

> [T]he "line" between live performances and performances on paper, videotape, or compact disc, is a blur. . . . Normally, although not always, the medium in which experience is encoded is irrelevant to its expressive character and social consequences. The pitter-patter of raindrops does not become expressive activity by being recorded, and a recording of Beethoven's Ninth Symphony is not entitled to more constitutional protection than the live performance from which the recording was made.[53]

Even though they come to conflicting outcomes, Judge Posner and Professor Schauer both see the question of whether speech is live or mediated as a red herring.[54] In contrast, Judge Easterbrook draws a sharp distinction between live and recorded speech. To him the fact that material has "been committed to parchment (or canvas, or celluloid, or vinyl, or today pitted aluminum on plastic)" is likely to give it speech status.[55] To Easterbrook, things not so "committed" are conduct and therefore not deserving of the First Amendment's protection except in certain circumscribed cases.[56] Thus, in Judge Easterbrook's view, the distinction between pornography and nude dancing is clear: they occupy opposite sides of the First Amendment line between speech and conduct.[57]

As the forgoing accounts suggest, there is no consensus on—and almost no analysis of—the questions that I address in this paper. To the extent that others have approached these questions, their accounts are conflicting and under-theorized.

There is certainly more room to analyze these questions from a doctrinal perspective. My goal in this piece, however, is not to resolve this doctrinal puzzle but instead to diagnose its origin. In my view, cultural anxieties,

53. *Id.* at 1099 (Posner, J., concurring). One primary exception Posner cited was the realm of child pornography. I address the distinction in child pornography law between an act and the representation of that act in Amy Adler, *Inverting the First Amendment*, *supra* note 5.

54. This is so at least in the realm of sexual expression. Schauer's views on mediation, from what I can discern, are limited to the case of sexual expression.

55. *Miller*, 904 F.2d at 1121, 1124 (Easterbrook, J., dissenting). Nonetheless, the fact of mediation is not conclusive. Judge Easterbrook also dwells on other distinctions, particularly between high and low, to determine whether an utterance is speech. Thus he distinguishes between "Tolstoy's *Anna Karenina*" and "the scratching of an illiterate" or between a Rembrandt painting and "a bucket of paint hurled at a canvas." *Id.* at 1125. Judge Easterbrook's views on this subject seem deeply bound up in class distinctions.

56. In other words, when they rise to the level of expressive conduct. *See* Spence v. Washington, 418 U.S. 405, 409 (1974).

57. Although he acknowledges that this line is notorious within First Amendment law for its blurriness, he nonetheless asserts that in this case, it is clear.

not merely doctrinal factors, explain the Court's disparate First Amendment treatment of the live versus the filmed female body. In particular, deep-seated, indeed mythic, anxieties about female sexuality, corporeality, and subjectivity map almost perfectly onto the Court's analysis. I propose that the legal assumptions about the speech status of the nude female body can be fully understood only when placed within a broader context: the highly charged terrain of female sexuality.

II. MEDUSA

A. Why Medusa? The Freudian Account of Sexuality and Sight

I have previously written about the nude dancing cases from a psychoanalytic perspective.[58] One central argument that I made in these articles is that the nude dancing cases are parables of castration anxiety and fetishism. I argued that the terrible dangers the Court attributed to nude dancing—dangers the Court thought would be "solved" by the laughably useless device of the G-string—can be understood as the danger of castration anxiety provoked by the sight of women's uncovered vaginas. In this narrative, the Court's absurd[59] assertion that G-strings will prevent the crime, disease, and violence the Court attributes to nude dancing makes sense: the G-string acts as a Freudian fetish, warding off violent fantasies of castration.

One of Freud's central texts on castration anxiety is his influential and elliptical essay, *Medusa's Head*.[60] Freud famously interprets Medusa's decapitated head as "a representation of the [castrated] female genitals."[61]

In this Article, I return to Freud's account of Medusa to unlock the First Amendment puzzle I described earlier: the disparate First Amendment treatment of the live versus the filmed female body. First, I explore the

58. *See supra* note 4.

59. Even the Justices in the plurality acknowledged the frailty of this reasoning. City of Erie v. Pap's A.M., 529 U.S. 277, 301 (2000). The dissenting Justices were more blunt. For example, Justice Stevens wrote that the plurality's analysis "required nothing short of a titanic surrender to the implausible." *Id.* at 323 (Stevens, J., dissenting). Justice Souter accused the Court of abandoning "common sense." *Id.* at 313 n.2 (Souter, J., dissenting). Although he voted with the majority in both cases, even Justice Scalia could not refrain from writing that he was "highly skeptical, to tell the truth," of the rationality of the legislative solution the Court labored to uphold. *Id.* at 310 (Scalia, J., concurring). Judge Posner wrote that the nude dancing line of cases "cannot be taken seriously." Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 741–42 (2002) (comment).

60. SIGMUND FREUD, *Medusa's Head*, *in* 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 273, 274 (James Strachey et al. eds., James Strachey trans., Hogarth Press 1955) (1922).

61. *Id.* at 273; *see also* SANDOR FERENCZI, ON THE SYMBOLISM OF THE HEAD OF MEDUSA (1923), *as reprinted in* THE MEDUSA READER 86 (Marjorie Garber & Nancy Vickers eds., 2003) [hereinafter TMR] (interpreting Medusa's head as standing for the petrifying sight of the castrated female genitals).

theme of visuality and its connection to sexual panic in Freud's account. Second, I consider a pivotal episode of the myth that Freud leaves out: Perseus's slaying of Medusa.

For Freud, castration anxiety is bound up in visuality.[62] Although Freud's essay on Medusa's head is brief, just over one page, he refers to the link between castration and sight three separate times in the piece. Freud begins the essay by writing, "The terror of Medusa is . . . a terror of castration that is linked to the *sight* of something."[63] He continues, again invoking "sight": "Numerous analyses have made us familiar with the occasion for this: it occurs when a boy, who has hitherto been unwilling to believe the threat of castration, catches *sight* of the female genitals, probably those of an adult, surrounded by hair, and essentially those of his mother."[64] And finally, Freud emphasizes the visual at the end of his brief essay: "[T]he *sight* of Medusa's head makes the spectator stiff with terror, turns him to stone."[65]

Freud's emphasis on vision in the Medusa myth is consistent with a great deal of scholarship about the myth.[66] But curiously, Freud omits the central episode of the myth—the visual trick that Perseus uses to slay Medusa.[67] In my view, Perseus's role in this episode deepens and complicates Freud's emphasis on visuality in the myth. Indeed, as I argue below, I view the myth as a narrative about the gendered struggle for possession of the "gaze."[68] At stake in this struggle are questions of power, sexuality, agency, and speech. Using Freud's interpretation as a starting point, then, I turn directly to the myth to set forth the basis for my own reading.

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62. Similarly, French psychoanalytic theorist Jean Laplanche claims that perception and castration are ineluctably linked by way of the child's narcissism. *See* NEIL HERTZ, *Medusa's Head: Male Hysteria Under Political Pressure*, *in* THE END OF THE LINE: ESSAYS ON PSYCHOANALYSIS AND THE SUBLIME 161, 167 (1985).

63. FREUD, *Medusa's Head*, *supra* note 60, at 273 (emphasis added).

64. *Id. See also* SIGMUND FREUD, *The Dissolution of the Oedipus Complex*, *in* 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 173, 175–76 (James Strachey et al. eds., James Strachey trans., Hogarth Press 1961) (1924) (referring to development of castration anxiety as "deferred effect"); SIGMUND FREUD, *Some Psychical Consequences of the Anatomical Distinction Between the Sexes*, *in* FREUD, *supra*, at 248, 252. On the connection between visibility and Freud's theory, see Thomas Albrecht, *Apotropaic Reading: Freud's "Medusa's Head,"* 4 LITERATURE & PSYCHOL. 1 (1999), discussing visibility and the play between presence and absence in Freudian theory of castration.

65. FREUD, *Medusa's Head*, *supra* note 60, at 273.

66. Interpreters have often focused on visuality in the myth (in part because of Freud's influence). *See infra* Section II.C.

67. Could Freud have omitted the episode because he unconsciously identified with Perseus? Consider that Freud insisted that the analyst should be "like a mirror" to his patients. *See* Diana Fuss and Joel Sanders, *Berggasse 19: Inside Freud's Office*, *in* STUD: ARCHITECTURES OF MASCULINITY (Joel Sanders ed., 1996), *as reprinted in* TMR, *supra* note 61, at 267 (quoting Freud). Exploring this notion of the analyst as mirror, Fuss and Sanders argue that Freud's office was spatially arranged in a way that presented the analysand in the metaphorical position of Medusa. *Id.* at 267-70. Was Freud, in holding a mirror to the patient, playing Perseus to the patient's Medusa?

68. *See infra* Section II.D.

B. The Medusa Myth

The Medusa myth has been told and retold since antiquity. Early written accounts appear in Homer, Hesiod, Pindar, Euripides, Ovid and others.[69] Medusa has continued to obsess modern thinkers, figuring in the work of theorists from Marx and Freud to Nietzsche and Sartre,[70] among others, as well as in the works of poets,[71] artists,[72] and even advertisers.[73]

Although the myth has a dizzying array of variations,[74] here are the elements of the story: Medusa was one of three Gorgon sisters and the only mortal one. When she angered Athena, the goddess punished Medusa by transforming the beautiful Gorgon into a hideous monster with snakes for hair. Medusa's deadly stare now turned men[75] to stone.[76] Indeed, in several accounts, the stony bodies of men who had dared to approach

69. Marjorie Garber & Nancy J. Vickers, *Introduction*, *in* TMR, *supra* note 61, at 3.

70. *See generally* TMR, *supra* note 61 (compiling works about Medusa by a diverse array of writers and visual artists from antiquity to the present).

71. Romantics such as Goethe and Shelley were particularly under Medusa's spell. Garber & Vickers, *supra* note 69, at 4.

72. For particularly famous examples of artworks depicting Perseus holding Medusa's severed head, see CELLINI, PERSEUS WITH THE HEAD OF MEDUSA (sculpture c. 1545-54); and CANOVA, PERSEUS WITH THE HEAD OF MEDUSA (sculpture c. 1804-06). *See also* PETER PAUL RUBENS, THE HEAD OF MEDUSA (painting c. 1618).

73. TMR, *supra* note 61, at 276-77; *see also id.* figs. 28 & 29 (documenting use of Medusa's head as logo for the fashion label Versace and use of Medusa and Perseus as motifs in some of Versace's most prominent advertising campaigns, shot by famed photographer Bruce Weber).

74. The primary texts include APOLLODORUS, THE LIBRARY 153 (James Frazier trans., G.P. Putnam's Sons 1921) (c. 2nd century C.E.); LUCAN, PHARSALIA (Robert Graves trans., Penguin Books 1957) (1st c. C.E.); OVID, METAMORPHOSES 100-14 (Rolfe Humphries trans., Indiana Univ. Press 1955) (1st c. B.C.E.). In this Article, I have drawn from these sources, as well as other variations. Several versions also attempt to explain the myth through a rational perspective. *See, e.g.*, PALAEPHATUS, ON UNBELIEVABLE TALES 62 (Jacob Stern trans., Bolchazy-Carducci Publishers, 1996) (presenting rational explanation of Medusa as African queen) (4th c. B.C.E).

75. It seems that Medusa's deadly gaze may have worked only on men. As critic John Freccero observes, "whatever the horror the Medusa represents to the male imagination, it is in some sense a female horror. In mythology, the Medusa was said to be powerless against women, for it was her feminine *beauty* that constituted the mortal threat to her admirers." John Freccero, "Medusa: The Letter and the Spirit" in DANTE: THE POETICS OF CONVERSION 119, 125 (1986). Furthermore, there do not appear to be any tales of Medusa turning a woman to stone. *See* JEAN-PIERRE VERNANT, MORTALS AND IMMORTALS 132 n.48 (Thomas Curley & Froma I. Zeitlin trans., Princeton Univ. Press 1991) (1985). Some variations of the myth suggest that women were safe from Medusa's gaze. *See, e.g.*, John Freccero, *supra*, at 125. However, many versions of the story suggest a wider power. *See, e.g.*, APOLLODORUS, *supra* note 74, at 157 ("[T]hey turned to stone such as beheld them."); LUCAN, *supra* note 74, at 252 ("No creature can stand her gaze."). A painting by Sir Edward Burne-Jones also depicts Perseus showing Andromeda Medusa's head in a pool of water, hinting that Andromeda would turn to stone if she viewed the head directly. SIR EDWARD BURNE-JONES, THE BALEFUL HEAD (painting c. 1886-1887). Of course, many versions of the myth that specify Medusa's power over "men" may simply use "men" to indicate humankind and not to distinguish between the sexes. *See, e.g.*, FRANCIS BACON, *Perseus, or War*, *in* 6 THE WORKS (James Spedding et al. eds., Garret Press 1968) (1609), *as reprinted in* TMR, supra note 61, at 69 ("[T]he mere sight of her turned *men* to stone.") (emphasis added); OVID, *supra* note 74, at 106 ("He saw the forms of men and beasts, made stone by one look at Medusa's face.").

76. Athena did so in retaliation for Medusa's sexual encounter with Poseidon in Athena's temple. *See* Garber & Vickers, *supra* note 69, at 2. In some versions of the story, Poseidon raped Medusa; but in others, the liaison was consensual. *Id.*

Medusa surrounded her home.[77]

Perseus, the half-mortal son of Zeus, set out to slay Medusa. But how can you kill a monster you cannot look at directly, whose gaze is deadly?[78] Perseus outsmarted Medusa by looking at her in the reflection of his shield. He backed up on her and beheaded her using her reflection to guide him.[79] This use of her mediated image was the optical trick that allowed Perseus to slay Medusa by avoiding her deadly gaze.[80]

Although capturing Medusa's reflection was the major ploy Perseus used to kill her, there were other significant details to the plot. Aided by gods and nymphs, Perseus gathered a variety of tools in addition to the polished metal shield Athena gave him. Wearing a helmet of invisibility from Hades[81] and winged sandals, Perseus carried an unbreakable sword and a *kibisis*, or magic wallet, in which to hide Medusa's head.[82] In preparation for his attack, Perseus visited the Graeae, or Gray sisters.[83]

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77. *See, e.g.*, OVID, *supra* note 74, at 106 ("He saw the forms of men and beasts, made stone by one look at Medusa's face.").

78. I have followed the version of the story in which Medusa's stare possesses the power to petrify anyone she gazes upon. However, many versions suggest that it is not Medusa's stare, but rather the mere sight of her by an onlooker that petrifies. For example, in one retelling, Perseus's enemy Kepheus was unaffected by Medusa's severed head because he was blind. *See, e.g.*, JOHN MALALAS, THE CHRONICLE OF JOHN MALALAS (Elizabeth Jeffreys et al. eds., Austl. Ass'n for Byzantine Stud., 1986) (c. 500-600). *See also* DANTE ALIGHIERI, INFERNO, (Allen Mandelbaum, trans., U. of California Press 1989) (c. 1310-1314) *as reprinted in* TMR, *supra* note 61, at 52 (covering his eyes with two pairs of hands so as not to look upon the Medusa should she appear). Other versions suggest that, at the least, Medusa must return the gaze of an onlooker before he will turn to stone. *See, e.g.*, BACON, *supra* note 75, at 69 (describing Perseus gazing safely at Medusa while she slept and was unable to gaze back). Any of these versions of the myth are consistent with my analysis in this Article. However, the retellings that attribute power to Medusa's gaze fit best with my reading. In alternate versions, where simply looking at Medusa kills the viewer, Medusa does not assert her own stare and thus does not appropriate the "male gaze." Nonetheless, she still *thwarts* the male gaze because she punishes with death any man who dares to gaze at her and treat her as the traditional "object-to-be-looked-at." *See infra* notes 96-100 and accompanying text.

79. Although it has become central to a modern understanding of the myth, it appears that Perseus's use of his shield as a mirror was not present before the fourth century B.C.E. VERNANT, *supra* note 75, at 147.

80. In another telling of the myth, Medusa appears to kill herself with her petrifying powers. *See, e.g.*, Craig Owens, *The Medusa Effect or, The Specular Ruse*, ART IN AM. Jan. 1984, at 97 ("Medusa sees herself and is immediately turned to stone."). One oddity of this reading is that if Medusa's reflected gaze does turn her to stone, her subsequent beheading by Perseus seems hard to explain, since it would have required Perseus's sword to cut through stone.

81. HESIOD, THE SHIELD OF HERAKLES (Richard Lattimore trans., U, of Michigan Press, 1991) (c. 700 B.C.E.), *as reprinted in* TMR, *supra* note 61, at 11 ("[T]he temples of the lord Perseus were hooded over by the war-cap of Hades, which confers terrible darkness.").

82. Perseus's catalog of tools varies, but often includes the helmet of invisibility, winged sandals, a sword, a *kibisis*, and Athena's shield. *See, e.g.*, *id.* at 11 ("On Perseus' feet were the flying sandals, and across his shoulders was slung the black-bound sword . . . and the bag floated about [the head] . . . and the temples of the lord Perseus were hooded over by the war-cap of Hades. . . .") His method of acquisition also varies: the tools were alternatively given to him by the gods or by the nymphs the Graeae led Perseus to after he stole their eye. *Compare* APOLLODORUS, *supra* note 74, at 157, (describing nymphs giving Perseus the *kibisis*, winged sandals, and Hades' hood) *with* FRANCIS BACON, *supra* note 75 (describing Perseus receiving tools as gifts from various gods prior to visiting the Graeae).

83. Sometimes there are three Graeae, mirroring the three Gorgons. *See, e.g.*, APOLLODORUS, *supra* note 74, at 155. Occasionally, there are only two Graeae. *See, e.g.*, HESIOD, THEOGONY AND

These elder sisters of the Gorgons shared one eye between them, passing it back and forth. Perseus stole the eye, holding it hostage until the Graeae agreed to aid him in his search for Medusa.[84]

After decapitating Medusa, Perseus brandished her severed head, using it to turn his enemies to stone.[85] Thus, even in death, Medusa's gaze still had terrible power, but now the power was no longer hers to control; Perseus had appropriated it for himself. Perseus later gave the head to Athena, the virgin goddess, who pinned it to her shield and exploited its ability to instill terror and repel sexual desire.[86]

C. Perseus's Shield: The Precursor of Pornographic Film

In this Part, building on the Freudian reading, I reinterpret the Medusa myth as a narrative about representation and sexuality. In my reading, the myth becomes a story about the capacity of representation to blunt the petrifying threat posed by the live, powerful female body. As a result, the Medusa myth offers a new way to approach the First Amendment puzzle I began with: the Supreme Court's preferential treatment of the filmed versus the live female body.

In my interpretation, Perseus's shield serves as a precursor of film.[87] When Perseus captures Medusa's image in his shield, he uses a proto-

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WORKS AND DAYS 11 (M.L. West trans., Oxford Univ. Press 1999) (c. 700 B.C.E.) (naming only Pemphredo and Enyo, not Dino).

84. Occasionally, the eye is said to belong to the Gorgons, not the Graeae. *See, e.g.*, COLUCCIO SALUTATI, ON THE LABORS OF HERCULES (B. L. Ullmam ed., Lesley E. Lundeen original trans., 1998) (1406) *as reprinted in* TMR, *supra* note 61, at 54 (eye belongs to Gorgon sisters); *see also* PALAEPHATUS, *supra* note 74, at 62-63 (describing eye as advisor to the three sister queens).

85. See OVID, *supra* note 74, at 100-06 (narrating the story of Atlas).

86. Both Perseus and Athena use Medusa's head to turn their enemies to stone. *See, e.g.*, OVID, *supra* note 74, at 112-14 (describing Perseus's use of the Medusa head to defeat Phineus). Because the power no longer belongs to Medusa, she is tamed, her image "controlled . . . directed according to the disparate religious, military, and aesthetic strategies required." VERNANT, *supra* note 75, at 141. Depictions of Medusa's head became a Greek symbol of terror and persisted as a common motif used to adorn shields, armor, and paintings. *See, e.g.*, HOMER, THE ILIAD 128-53 (Richard Lattimore trans., U. of Chicago Press 1961) (750-725 B.C.E.) (describing Athena's use of Medusa's head to adorn her shield); *see also* Garber & Vickers, *supra* note 69, at 2-4 (describing repeated use of Medusa's head as adornment in armor and in works of art).

87. In my research, I have discovered a few scholars who briefly equated Perseus's shield with the film screen. *See, e.g.*, SIEGFRIED KRACAUER, THEORY OF FILM 304-06 (Princeton Univ. Press, 1997) (1960) (discussing imagery of the Holocaust and suggesting that we can only see horror when mitigated by screen). For a feminist interpretation, see TERESA DE LAURETIS, *Desire in Narrative*, *in* ALICE DOESN'T 103, 107-11, 134-37 (1984) (equating, in passing, Perseus's shield with a movie screen because "not only does that shield protect Perseus from Medusa's evil look, but later on, after her death (in his further adventures), it serves as a frame and surface on which her head is pinned to petrify his enemies"). *See also* Stanley Cavell, *On Makavejev on Bergman*, 6 CRITICAL INQUIRY 305, 327, 329 (1979) (claiming directors are Perseus and shield acts as woman acts because it creates distance only felt through lack). Some articles touch on the similar idea of the photograph as Perseus's shield. *See, e.g.*, Jan Jagodzinski, *Women's Bodies of Performative Excess: Miming, Feigning, Refusing, and Rejecting the Phallus*, 8 J. FOR PSYCHOL. CULTURE & SOC'Y 23, 24 (2003) (exploring female bodybuilding magazines); Mier Wigoder, *The Story of the Head: The Suicide-Bomber, the Medusa and the Aesthetics of Horror in Photography*, 20 THIRD TEXT 449, 452-54 (2006) (applying Kracauer's ideas, as well as those of others, to portraits of suicide bombers).

photographic,[88] cinematic technique. The screen-shield nullifies Medusa's power. Perseus is now free to look at her without her looking back at him. He thereby transforms Medusa from an unmediated, live monster into the passive object of his gaze, trapped within the pictorial space of his shield.

Other elements of the myth reinforce my reading. To prepare himself for slaying Medusa, Perseus steals an eye, emphasizing his position as viewer, not viewed. The curious device of the *kibisis*, the wallet that Perseus uses to magically hide Medusa's severed head, continues the myth's trope of visual trickery and concealment. And Perseus's helmet of invisibility further deepens the filmic analogy. As Apollodorus wrote of Perseus's helmet, "Wearing it, he saw whom he pleased, but was not seen by others."[89] Invisible, Perseus sees without being seen, gazing with triumphant abandon at the formerly powerful, now-neutered woman, reduced to nothing but an image. Perseus has become the ultimate voyeur, the ultimate moviegoer.[90]

D. Medusa as Gender Outlaw: The Woman as Object Not Subject of the Gaze

> The woman as subject of the gaze is clearly an impossible sign.
>
> — Mary Anne Doane, *Film and the Masquerade*[91]

> No creature can stand her gaze.
>
> — Lucan, *Pharsalia*[92]

Laura Mulvey's seminal work on psychoanalytic feminist film theory can help us unpack the significance of Medusa's transformation from live monster to cinematic image. In her now canonical essay, *Visual Pleasure*

88. See Craig Owens, *The Medusa Effect or, The Specular Ruse*, ART IN AM. Jan. 1984, at 97, 101. Owens calls this "proto-photographic" effect the center of the myth itself, describing how Perseus uses the gaze—first an eye, then a mirrored reflection—to transform Medusa into a petrified, powerless image. *Id.* at 101-104. While Owens focuses on the telling of the myth in which Medusa turns herself to stone by seeing her reflected gaze, the analogy fits with other accounts of Medusa's death. In every version, including Owens's, Perseus transforms Medusa into an image, whether it is a three-dimensional sculpture or a two-dimensional reflection.

89. APOLLODORUS, *supra* note 74, at 24.

90. On this theme of the moviegoer as voyeur, see, for example, STANLEY CAVELL, THE WORLD VIEWED: REFLECTIONS ON THE ONTOLOGY OF FILM (1971).

91. Mary Anne Doane, *Film and the Masquerade*, *in* THE FEMINISM AND VISUAL CULTURE READER 60, 68 (Amelia Jones ed., 2001).

92. LUCAN, *supra* note 74, at 252.

and Narrative Cinema,[93] Mulvey sets forth her thesis that cultural portrayals of the sexes consistently depict women as objects and not subjects of the gaze. Dwelling on the connection between a woman's object status and the castration anxiety she provokes, Mulvey writes that "the woman as icon . . . always threatens to evoke the [castration] anxiety it originally signified."[94] Thus for Mulvey, "[w]oman's desire is subjugated to her image as bearer of the bleeding wound."[95] Mulvey posits that in cultural representations, particularly film, women connote "to-be-looked-at-ness"[96] and men occupy the position of "the bearer of the look" and, therefore, the position of power.[97] Observing the way in which cinema casts women into a passive object for the active male[98] viewer, Mulvey writes:

> [W]oman then stands in a patriarchal culture as a signifier for the male other, bound by a symbolic order in which man can live out his fantasies and obsession through linguistic command by imposing them on the silent image of woman still tied to her place as bearer, not maker, of meaning.[99]

Building on Freud and Mulvey, we can now recast the struggle between Medusa and Perseus as a struggle over possession of "the gaze." Medusa

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93. Laura Mulvey, *Visual Pleasure and Narrative Cinema*, 16 SCREEN 6 (Autumn 1975), *reprinted in* LAURA MULVEY, VISUAL AND OTHER PLEASURES 14 (1989).

94. *Id.* at 14.

95. *Id.*

96. *Id.* at 19. Mulvey's position is so influential that examples of its impact are too numerous to cite. For one particularly prominent example of its use, see LINDA WILLIAMS: HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE" 45 (2d ed. 1999). For criticism of Mulvey, as well as her own revision of her original views, see TERESA DE LAURETIS, ALICE DOESN'T: FEMINISM, SEMIOTICS, CINEMA (1984); Mary Ann Doane, *Film and the Masquerade: Theorizing the Female Spectator*, SCREEN, Sept.-Oct. 1982, at 74-87 (considering the theoretical implications of the female spectator); Laura Mulvey, *Afterthoughts on* Visual Pleasure and Narrative Cinema *Inspired by King Vidor's* Duel in the Sun, 15-16-17 FRAMEWORK 12 (1981) (reconsidering aspects of her theory). One problem with Mulvey's initial formulation was the rigidity with which it posited gender identification. Recent work establishing the cross-identification available to the viewer of a scene offers a helpful corrective to Mulvey's pioneering thesis. *See, e.g.*, Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, *in* FEMINISM AND PORNOGRAPHY (Drucilla Cornell ed., 2000). For criticism of Mulvey along these lines, see, for example, JUDITH HALBERSTAM, FEMALE MASCULINITY 178-79 (1998).

97. Mulvey, *supra* note 93, at 20.

98. I should stress that "male" designates a subject position, not necessarily a material one. The work of Jacques Lacan was of obvious importance to Mulvey. See generally JACQUES LACAN, FREUD'S PAPERS ON TECHNIQUE, 1953-1954, THE SEMINAR OF JACQUES LACAN BOOK I, (Jacques-Alain Miller ed., John Forrester & Sylvana Tomaselli trans., 1988). Describing Lacan's view of sexual difference, psychoanalyst Juliet Mitchell wrote: "One must take up a position as a man or a woman. Such a position is by no means identical with one's biological sexual characteristics, nor is it a position of which one can be very confident." Juliet Mitchell, *Introduction I*, *in* JACQUES LACAN, FEMININE SEXUALITY: JACQUES LACAN AND THE ÉCOLE FREUDIENNE 1, 6 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1982); *see also* Jacqueline Rose, *Introduction II*, *in* JACQUES LACAN, FEMININE SEXUALITY: JACQUES LACAN AND THE ÉCOLE FREUDIENNE 27, 49 (Juliet Mitchell & Jacqueline Rose eds., Jacqueline Rose trans., 1982) ("All speaking beings must line themselves up on one side or other of this division [between man and woman], but anyone can cross over and inscribe themselves on the opposite side from that to which they are anatomically destined.").

99. Mulvey, *supra* note 93, at 15.

dared to look. With her deadly stare, she dared to occupy the male position of bearer of the gaze. Indeed, in true gender outlaw fashion, she feminized men: She punished with death—and with feminized, object status—any man who dared to gaze at her and thus to cast her in the traditional role of object-to-be-looked-at. Stephen Heath invokes the Medusa myth to emblematize the danger that occurs when the gendered rules of gazing are violated: "If the woman looks, the spectacle provokes, castration is in the air, the Medusa's head is not far off; thus she must not look."[100]

Medusa's gaze therefore illustrates her masculine aspirations. After all, she oversaw what Palaephatus described as a "kingdom in the hands of women."[101] Siculus suggested that Medusa's role as female ruler was part of what provoked Perseus to kill her: "[F]or it was a thing intolerable to him . . . to suffer any nation to be governed any longer by women."[102] In this sense, we may picture Perseus as waging a battle for gender conformity. It is no wonder that some writers have said that Perseus stood for "manliness" itself.[103]

On this analysis, we can see that Perseus's usurpation of the power of the gaze restores sexual order. By wresting away the gaze from Medusa and appropriating it for himself, Perseus returns Medusa and the male subject to their rightful places. The cinematic shield neuters Medusa's masculine gaze and reduces her to an impotent image. Perseus's capture of the Graeae's eye, his helmet of invisibility, and his triumphant display of Medusa's severed head further emphasize his role as viewer and Medusa's role as object-to-be-looked-at. Medusa now occupies her rightful place as Mulvey's "bearer, not maker, of meaning,"[104] an object of language rather than its subject.

Mulvey posits that filmic portrayals of women typically defeat castration anxiety through two alternate avenues: either through "voyeuristic scopophilia" or through fetishism.[105] According to Mulvey, voyeuristic scopophilia involves subjecting the woman to a voyeuristic gaze as a means of punishing her and unmasking her true castrated status.[106] In contrast, the fetishistic strategy involves "complete disavowal of castration by the substitution of a fetish object or by turning the represented figure [of woman] itself into a fetish so that it becomes

100. Stephen Heath, *Difference*, *in* THE SEXUAL SUBJECT 81 (Mandy Merck ed., 1992).

101. PALAEPHATUS, *supra* note 74, at 62-64.

102. Diodorus Siculus, 1 THE HISTORICAL LIBRARY OF DIODORUS THE SICILIAN, IN FIFTEEN BOOKS (G. Booth trans., 1814) (c. 60-30 B.C.E.), *as reprinted in* TMR, *supra* note 61, at 25, 29.

103. FULGENTIUS, FULGENTIUS THE MYTHOGRAPHER (Leslie G. Whitbread trans., Ohio State Univ. Press 1971) (c. 400-500 C.E.), *reprinted in* TMR, *supra* note 61, at 47, 48.

104. Mulvey, *supra* note 93, at 14.

105. *Id.* at 21. Mulvey points to the films of Sternberg, and particularly his work with Marlene Dietrich, to illustrate the scopophilic/fetishistic strategy. *Id.* at 21-23. The second strategy that filmmakers use to combat castration anxiety, according to Mulvey, is a punitive kind of voyeurism. *Id.* at 21. Hitchcock's work provides an exemplar of this strategy. *Id.* at 23-24.

106. *Id.* at 21.

reassuring rather than dangerous."[107]

Both avenues are present in my reading. As I suggest in my moviegoer analogy, Perseus becomes a voyeur, the film viewer Mulvey posits.[108] Furthermore, as Mulvey would predict, Perseus's voyeuristic gaze is punitive: subjecting Medusa to the gaze is essential to beheading and symbolically castrating her.[109]

My reading also reveals a fetishistic solution: cinema itself becomes the fetish that removes the threat associated with viewing a woman's body. The screen mimics the structure of the fetish because the screen is the place where the female body is both present and absent.[110] As Freud explains, "the fetish is a substitute for the woman's (the mother's) penis that the little boy once believed in and—for reasons familiar to us—does not want to give up."[111] By focusing on a compensatory object, the male viewer of female sexual organs masters the threat of castration that the sight of her body poses.[112] The reflected image of Medusa in Perseus's shield is this compensatory object.[113] In this reflected space, the body becomes bearable rather than menacing. Perseus thus triumphs over the sight of the castrated woman by employing the fetishistic logic of substitution.

Just as Perseus's shield allows Perseus to tame Medusa's monstrous sexuality, so too does pornographic cinema tame the threat of the live woman. The live stripper can look back at her customer. Even as he gazes at her, she returns his look.[114] Indeed, the live performer frequently

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107. Mulvey, *supra* note 93, at 21.

108. MARJORIE GARBER, *Macbeth: The Male Medusa*, *in* SHAKESPEARE'S GHOST WRITERS: LITERATURE AS UNCANNY CAUSALITY 87, 111 (1987) ("[T]he Medusa head incorporates the elements of sexual gazing (scopophilia) and its concomitant punishment, castration.").

109. Perseus's beheading of Medusa is the ultimate punishment: a symbolic castration. On the symbolic connection between beheading and castration, see, for example, FREUD, *Medusa's Head*, *supra*, note 60, at 274 and Linda Hutcheon & Michael Hutcheon, *Staging the Female Body: Richard Strauss's* Salome, *in* SIREN SONGS: REPRESENTATIONS OF GENDER AND SEXUALITY IN OPERA 204 (Mary Ann Smart ed., 2000).

110. SIGMUND FREUD, *Fetishism*, *in* 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 152, 154 (James Strachey et al. eds., James Strachey trans., Hogarth Press 1961) (1927).

111. *Id.* at 152–53. The fetish allows the subject to maintain that, despite evidence to the contrary, castration is not a danger and, in fact, that castration has not even befallen the woman. *Id.* For a discussion of the logic of disavowal that informs the fetish, see SIGMUND FREUD, *The Splitting of the Ego in the Process of Defence*, *in* 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 275, 277 (James Strachey et al. eds., James Strachey trans., Hogarth Press 1964) (1938), where Freud writes: "The boy did not simply contradict his perceptions and hallucinate a penis where there was none to be seen; he effected no more than a displacement of value—he transferred the importance of the penis to another part of the body. . . ."

112. In this way, the fetish "remains a token of triumph over the threat of castration and a protection against it." FREUD, *Fetishism*, *supra* note 110 at 154. The fetish is a triumph over not only castration and the woman who signifies this threat, but over homosexuality as well. *Id.* ("[The fetish] saves the fetishist from becoming a homosexual, by endowing women with the characteristic which makes them tolerable as sexual objects.")

113. See my analysis of the G-string as fetish. Adler, *Girls! Girls! Girls!*, *supra* note 4.

114. Although beyond the scope of this paper, I note here another potential avenue for analysis:

positions the male spectator as the object of *her* gaze.[115] Yet in stark contrast, the woman captured in pornography is deprived of her gaze, her agency and her ability to look back at the viewer. Most significantly, as I demonstrate in the next Part, she is deprived of speech. Ultimately, what the filmed woman lacks, when compared with the live woman, is subjectivity itself.

III. MEDUSA AND SPEECH

> The woman is a threat to the man's speaking position.[116]
>
> —DRUCILLA CORNELL, FEMINISM AND PORNOGRAPHY

> Woman is the 'ruin of representation.'[117]
>
> —Stephen Heath, *Difference*

Medusa was an uppity woman. She not only looked, she spoke. She struck men dumb,[118] while she herself was frequently associated with eloquence.[119] Lucian wrote that "one distant glimpse of her and you are

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perhaps the threat posed by the stripper is the threat felt by some male viewers when faced with a relationship of "intersubjectivity." This is the term used by some psychoanalysts to envision a relationship in which two subjects engage in mutual recognition. *See, e.g.*, JESSICA BENJAMIN, THE BONDS OF LOVE: PSYCHOANALYSIS, FEMINISM, AND THE PROBLEM OF DOMINATION 15-31 (1988) (explaining importance of the concept in the context of pre-Oedipal development and later in male-female adult sexual relations).

115. For an analysis of the stripper's interactive relationship with viewers, through which she can position them as "objects of her gaze," see KATHERINE LIEPE-LEVINSON, STRIP SHOW: PERFORMANCES OF GENDER AND DESIRE (2002). Likewise, Anna McCarthy describes the network of gazes at play in striptease: "Rather than the singular stare of the audience member toward the performer, the theatrical context of striptease involved a network of looks in which the visual was not always pleasurable. To begin with, audience members were themselves objects of scrutiny from theater management; during periods of close municipal and civic supervision, theaters adopted extensive surveillance techniques to police audience behaviors." Anna McCarthy, *The Invisible Burlesque Body of La Guardia's New York*, *in* HOP ON POP: THE POLITICS AND PLEASURES OF POPULAR CULTURE 415, 425 (Henry Jenkins et al. eds., 2002). For an historical analysis of the genre of stripping and the male viewer's subjection to the female gaze or the gaze of management, see MORTON MINSKY & MILT MACHLIN, MINSKY'S BURLESQUE: A FAST AND FUNNY LOOK AT AMERICA'S BAWDIEST ERA 141 (1986).

116. DRUCILLA CORNELL, FEMINISM AND PORNOGRAPHY 743 (2000).

117. Heath, *supra* note 100, at 73.

118. Roland Barthes also hints at the connection between Medusa and speechlessness. ROLAND BARTHES, ROLAND BARTHES 122-23 (Richard Howard trans., 1994) ("I am in a stunned state, dazed, cut off from the popularity of language.").

119. For a discussion of the relationship between Medusa and eloquence, see Nancy Vickers, *"The blazon of sweet beauty's best": Shakespeare's* Lucrece, *in* SHAKESPEARE AND THE QUESTION OF THEORY 95, 109-110 (Patricia Parker & Geoffrey Hartman eds., 1985). Vickers describes Medusa's face as one "that reduces eloquent rivals to silent stone" and possesses the "ability to stupefy a male opponent." *Id.* at 10. Vickers also relies on Plato's *Symposium* to support this connection. *Id.* at 109-110 (citing PLATO, *Symposium*, *in* THE COLLECTED DIALOGUES OF PLATO 550 (Edith Hamilton &

speechless."[120] Salutati pictured Medusa's eloquence as a weapon that weakened men: "Medusa signifies oblivion, which is doubtless the art of oratory, an art which, by changing men's desires, erases their former thoughts."[121] In recent years, Hélène Cixous has idealized Medusa as an icon of a kind of feminist speech, the powerful woman who ruptured language itself by "speaking" through her "poetic body."[122]

Medusa even claimed the role of artist. Perseus approached her through a sculpture garden of her own making: statues of the stony bodies of previous men who had dared to approach her.[123] Other aspects of the myth deepen her connection to the arts. She was the mother of Pegasus, the winged horse of the Muses. Pindar associated Medusa with the music of the pipes.[124] The Romantics saw Medusa as a figure not only for woman, but also for art itself.[125]

When Perseus seized back the gaze, he also seized the power of speech and, ultimately, the power to make an image rather than to become one. Appropriating Medusa's power, Perseus assumed her former role as artist. Wielding her head as a weapon, he turned his enemies into statues. After one such display, Ovid tells us that Perseus "touches the nearest bodies and finds them all marble."[126]

And just as Medusa was uppity, so too were the nude dancers in the Supreme Court's cases: they dared to claim that they were First Amendment speakers. Women in pornography know their place. They never claim that their bodies are speech; they know they are only

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Huntington Cairns eds., Michael Joyce trans., Princeton 1961)). *See also* SALUTATI, *supra* note 84, at 55 ("Medusa is artful eloquence[.]"). Medusa's association with eloquence also stems from her son, Pegasus, who was the winged horse of the Muses of artistic inspiration. *See* FULGENTIUS, *supra* note 103, at 47.

120. *See* LUCIAN, 3 THE WORKS OF LUCIAN OF SAMOSATA 20 (Henry Watson Fowler & Francis George Fowler trans., Forgotten Books 2007) (1905) (2nd c. C.E.).

121. SALUTATI, *supra* note 84, at 55.

122. Hélène Cixous, *The Laugh of the Medusa,* 1 SIGNS 875, 886 (Summer 1976) (Keith Cohen and Paula Cohen, trans.) . Medusa's body became an exemplar of *"l'écriture féminine"* for Cixous, a "subversive" possibility within language. *Id.* at 888; *see also* Peggy Kamuf, *To Give Place: Semi-Approaches to Hélène Cixous*, 87 YALE FRENCH STUD. 68 (1995) (discussing Cixous and language); Mary Lydon, *Re-Translating No Re-Reading No Rather: Rejoycing (With) Hélène Cixous*, 87 YALE FRENCH STUD. 90 (1995) (discussing Cixous' goals to unsettle language and the masculine/feminine polarity). For an important critique of Cixous, see TORIL MOI, SEXUAL/TEXTUAL POLITICS 110, 111-19 (2002) (criticizing Cixous for contradicting her Derridean agenda with a "metaphysics of presence").

123. *See, e.g.*, OVID, *supra* note 74, at 106 (describing Perseus's approach: "On all sides, through the fields, along the highways, / He saw the forms of men and beasts, made stone by one look at Medusa's face.") For an analysis of the Medusa myth from the point of view of her function as a producer of images, see Owens, *supra* note 80 at 101-104; Louis Marin, *To Destroy Painting* (Mette Hjort, trans., U. of Chicago Press 1985), *as reprinted in* TMR, supra note 61, at 137; Françoise Frontisi-Ducroux, *The Gorgon, Paradigm of Image Creation*, 1 LES CAHIERS DU COLLÉGE ICONIQUE: COMMUNICATION ET DÈBATS (Institut national de l'audiovisuel, Paris, 1993) (Seth Graebner trans., 1999), *reprinted in* TMR, *supra* note 61, at 262.

124. *See* PINDAR, *Twelfth Pythian Ode, in* THE COMPLETE ODES 87 (Anthony Verity trans., Oxford Univ. Press 2007) (c. 490 B.C.E.).

125. Garber & Vickers, *supra* note 69, at 4.

126. OVID, *supra* note 74, at 38-39.

instruments for someone else's expression. Women in pornography dutifully follow Laura Mulvey's description of the rules: the woman's body must be a "bearer, not maker, of meaning."[127]

Indeed, nowhere else in First Amendment law does the sexual woman—the ultimate object—dare to claim she is a First Amendment speaker, a subject in language. Think, for example, of who asserts First Amendment rights in obscenity cases: producers, distributors, vendors, publishers, curators, photographers, directors. These are the First Amendment speakers, not the women who display their bodies. Catharine MacKinnon writes of women's bodies in pornography: "Pornographers use our bodies as *their language*. Anything *they say*, they have to use us to say."[128] Women's bodies are just vehicles for pornographers' speech. The silence that we expect from the sexually objectified woman normally extends into case law.

When the strippers in the nude dancing cases asked the Supreme Court to categorize their stripping as speech, the demand violated these conventions. Now the sexual object claimed that she was also a subject in language.[129] This violation helps to explain the Court's odd, unprecedented and unexamined creation of a new category of speech—on the "margin" of the First Amendment—in these cases. Suddenly the woman's body, the very incarnation of silence, "to-be-looked-at-ness" itself, had begun to speak.[130]

Thus, when the women in the nude dancing cases demanded that the Court acknowledge them as First Amendment speakers, they violated not only cultural norms but also First Amendment expectations. Pornography, unlike nude dancing, keeps us safely in the comfort of the usual state of affairs: the pornographer is the speaker and the sexualized woman is the medium for his speech. She really should keep quiet.[131]

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127. Mulvey, *supra* note 94, at 15.

128. Catharine A. MacKinnon, Op-Ed., *Who Was Afraid of Andrea Dworkin?*, N.Y. TIMES, Apr. 16, 2005, at A13 (quoting Andrea Dworkin) (internal quotations omitted) (emphasis added). Indeed, MacKinnon sometimes speaks of "pornographed women," emphasizing their passive, object status. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 57 (1987).

129. The possibility of female agency is at stake here. Lacan writes of "all those beings who take on the status of the woman—if indeed, this being takes on anything whatsoever of her fate." LACAN, FEMININE SEXUALITY, *supra* note 98, at 151.

130. "What if the 'object' started to speak?" Feminist theorist Luce Irigaray posed the question, envisioning that impossible moment when the sexual object claimed that she was a subject in language. IRIGARAY, *supra* note 2. Unwittingly, the Supreme Court has begun to answer Irigaray's question.

131. I do not mean to idealize the woman's performance or to suggest that if the Supreme Court would only stay out of her way, her stripping would represent some sort of feminist triumph or somehow reveal her "true" voice. *See generally* Adler, *Girls! Girls! Girls!*, *supra* note 4. Instead, my analysis focuses on what I think are the anxieties and fantasies that we as viewers project onto the female body, not some inherent truth that resides in the body that is in danger of being suppressed. *See also id.* at 1111-12, n.10 (discussing fantasy of a pre-discursive "true" female body).

CONCLUSION

If the nude woman in pornography is Medusa captured in Perseus's shield, silent and deprived of her power, then the nude, live woman is Medusa in all her glory, a castrated and castrating monster, claiming for herself gaze, agency, artistry and speech. Of course the Supreme Court knows how to deal with her.