Do You Know It When You See It? Cinema, Pornography, and the First Amendment

*Zoey Miller**

The current state of obscenity law is muddled, to say the least. The test itself is clear, laid out in the seminal case Miller v. California*. However, the vagueness of the prongs of this test has resulted in varied and confusing application that leaves the actual standard for obscenity difficult to discern in practice. And unlike the many other types of expression that have been found by the Supreme Court to fall under the First Amendment, obscenity remains just taboo enough to stay beyond the scope of free speech protection. While Americans have proven themselves willing to tolerate greater and greater amounts of sexual content in movies and television, it remains the law of the land that there is a "too much," and bumping up against the line of "too much" can have serious legal repercussions such as seizure of property, fines, and even imprisonment. American society has become increasingly sexually liberated over the last century, but there is a growing resistance to that trend. The continued availability of the* Miller *test could lead to a renewed era of obscenity prosecution and sexual repression. The inherent subjectivity of the "artistic merit" prong in particular allows art to be censored by those who do not understand it based on personal values rather than an objective legal standard.*

In this Note, I discuss the history and development of current obscenity doctrine and criticize the Court's current test primarily through the lens of cinema, focusing on the prong that measures the "artistic merit" of the allegedly obscene work. My discussion contains both actual, historical application of the Miller *test, as well as its theoretical application to films that blur the line between obscenity and non-obscenity, to highlight the vagueness and inconsistency of the* Miller *standard. Ultimately, I hope to highlight that while "obscene" works can pose some additional problems for society not typically presented by other types of media, the current test is simply untenable, and neither properly remedies those problems nor ensures that only such problematic works will be censored.*

---

* Associate Editor, Volume 101, *Texas Law Review*; J.D. Candidate, Class of 2023, The University of Texas School of Law. Enormous thanks to Professor David Rabban for teaching me everything I know about free speech law, and to Professor John Powers of the Washington University Film Department for introducing me to weird movies that make me think. Thanks also to my dear friend Alex Moore for her support, and for letting me loudly talk through the first draft of this paper with her at a very public Starbucks. Finally, thanks so much to the amazing team at *Texas Law Review*; this Note could not have happened without their thoughtful edits, hard work, and Wednesday morning bagels.

Introduction

When I was a sophomore in college, my class watched a film about vaginas. The class was "Women and Film," and we were studying feminist avant-garde cinema. For those readers who have never studied film before, most film classes come with a "screening" component, which means that once a week the class gathers in a lecture hall and watches whatever film or films will be discussed that week. So, on this particular Monday at 7:00 p.m., eleven film majors and one middle-aged professor sat together and watched Anne Severson's *Near the Big Chakra*,[1] a film consisting entirely of close-up shots of thirty-eight different vulvas. At some point during the screening, someone walked in not realizing the classroom was in use. He gasped and quickly walked back out, and before the door closed, we could hear him shout to his friends, "Dude they're watching porn in there!" We were mortified. We shrunk in our seats, bristling, irritated that we had been accused of watching *porn* when clearly this was cinema. Didn't this guy know the difference?

Years later, I am still left wondering whether there actually is such a difference between what we were watching and pornography. Most people have at some point come across Justice Stewart's famous description of pornography: "I know it when I see it."[2] Well, I'm not sure I do. What is it exactly that distinguishes sexually graphic cinema from obscenity? Legally,

1. NEAR THE BIG CHAKRA (Glide Methodist Church 1971).
2. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

the difference is clear. Material that would otherwise be considered obscene may be redeemed by "serious literary, artistic, political, or scientific value."[3] In short, cinema is not pornography because it is art. But the line dividing art from non-art is just as blurry as the line between cinema and pornography, and the courts have had no shortage of difficulty determining what is or is not art.[4]

State and federal courts, while well-situated to make important determinations of law, are not well-suited to the task of determining what does or does not have artistic merit. Not only do judges and Justices generally lack particularized training in film and art,[5] but whether something has artistic merit is quite subjective, rendering this kind of determination difficult even for those with formal training in these fields. Finally, there is no logical reason for the distinction between graphic sexual content with artistic merit and that without. Therefore, the Court should instead bring obscenity entirely under the protection of the First Amendment and use the constitutionally permissible time, place, and manner restrictions to protect vulnerable audiences from graphic material in cinema.

I. The *Miller* Test

For a long time, the courts have struggled with defining where exactly the dividing line is between obscenity and speech that is constitutionally immune from government suppression. The test for what constitutes obscenity has been through many iterations, with the first being adopted by American courts from a ruling in Great Britain. In *Regina v. Hicklin*,[6] the Queen's Bench determined that material was obscene if it had the "tendency . . . to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[7] This first test for obscenity was one of "tendency": the focus of the test was on the likely effect the material would have on its audience, not on any

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

4. *See, e.g.*, United States v. Perry, 146 U.S. 71, 74–75 (1892) (dividing works of art into four categories); United States v. Olivotti & Co., 7 Ct. Cust. App. 46, 48–49 (1916) (holding that the phrase "works of art" in a congressional statute was not meant to "cover the whole range of the beautiful and artistic"); Consmiller v. United States, 3 Ct. Cust. App. 298, 300–01 (1912) (holding that sculptures in question were not works of art because they lacked originality and artistic beauty).

5. Of the recent Supreme Court Justices, not one has a background in art or film. They opted instead for areas of study like political science (Gorsuch), history (Roberts), and philosophy (Breyer). The closest any Justice comes to an arts background is English (Thomas and Barrett). Michele Zipkin, *Former Jobs of Every Supreme Court Justice*, STACKER (Apr. 7, 2022), https://stacker.com/stories/3550/former-jobs-every-supreme-court-justice [https://perma.cc/RH6F-RFL8].

6. R v. Hicklin (1868) 3 LRQB 360 (Eng.).

7. *Id.* at 371.

particular criteria inherent to the work or on the intent of the author.[8] The *Hicklin* test provided significant leeway to the government to restrict and regulate speech. It is quite easy to define something as obscene when the test for whether it is obscene involves considering whether someone who is "open to such immoral influence[]" is likely to be immorally influenced.[9] Importantly, this test provided for no consideration of the merit of the work or whether it was "obscene" as a whole; if the work contained any material that was obscene, the work was obscene.[10]

The *Hicklin* test was used at the district and appellate levels across the United States[11] and was formally adopted by the Supreme Court in *Rosen v. United States*.[12] *Rosen* held that the obscenity test was in fact one of tendency, and that this test was "quite as liberal as the defendant had any right to demand."[13] Lower courts, however, would disagree and increasingly liberalized the standards throughout the early twentieth century. In *United States v. Kennerley*,[14] the court applied the test as was required but called to question how applicable its "mid-Victorian morals" were to "the understanding and morality of the present time."[15] In *United States v. One Book Entitled Ulysses by James Joyce*,[16] the court held that, when determining tendency under *Rosen*, the question must be posed "whether a publication taken as a whole has a libidinous effect," which is based in part on whether its "indecency" is for the purposes of literary "truthfulness in its depiction of certain types of humanity."[17] In *United States v. Levine*[18]—perhaps the most influential case for the Supreme Court's ultimate abandonment of the *Hicklin* test—the Second Circuit held that the likelihood of the work to "arouse the salacity of the reader" must outweigh the "literary, scientific or other merits" of the work as a whole.[19] *Levine* was the first case in which the "merit" of the work was singled out as something that could

8. For a more rigorous discussion of the history and use of the "bad tendency" test, see DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 132–46 (Arthur McEvoy & Christopher Tomlins eds., 1997).

9. *Hicklin*, 3 LRQB at 371.

10. *Id.* at 371–72.

11. *See, e.g.*, United States v. Bennett, 24 F. Cas. 1093, 1104–05 (C.C.S.D.N.Y. 1879) (No. 14,571) (quoting extensively from *Hicklin*); United States v. Foote, 25 F. Cas. 1140, 1140–41 (C.C.S.D.N.Y. 1876) (No. 15,128) (explaining that a grand jury's finding of obscenity can be omitted from the record).

12. 161 U.S. 29 (1896).

13. *Id.* at 43.

14. 209 F. 119 (S.D.N.Y. 1913).

15. *Id.* at 120.

16. 72 F.2d 705 (2d Cir. 1934).

17. *Id.* at 707.

18. 83 F.2d 156 (2d Cir. 1936).

19. *Id.* at 158.

somehow offset its obscenity, and therefore most directly paved the way for the test established in *Roth v. United States*.[20] These adjustments to the application of the *Hicklin* test—which was adopted wholesale in *Rosen*—demonstrate the increasing discomfort lower courts had with existing obscenity law and reflect the growing resistance in the courts to using obscenity law to the detriment of scientific and literary advancement. The deepening divide between the letter of the law concerning obscenity and its application led the Court to reconsider the standard, resulting in the watershed decision in *Roth.*

While reaffirming that obscenity was different in kind from protected speech and therefore did not fall under the purview of the First Amendment, the Court nonetheless redefined the test to provide considerably greater protection to works containing explicit content.[21] Crucially, the Court separated sex from obscenity, stating that the presence of sex in a work was not automatically disqualifying of the work's right to constitutional protection.[22] The Court held that the *Hicklin* test was "unconstitutionally restrictive" and adopted as the new obscenity test that which the pioneering lower courts had been slowly piecing together: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[23] This test was later expanded in *Memoirs v. Massachusetts*.[24] In its most protective decision, the Court held that a work could only be held to be obscene if it was "utterly without redeeming social value."[25]

A far cry from the extremely restrictive *Hicklin* test, the *Roth-Memoirs* test was so lenient that it became nearly impossible to successfully prosecute obscenity.[26] For this reason, the Court revisited the obscenity test one last time and handed down the test that remains good law today in *Miller v. California*.[27] Calling the *Roth-Memoirs* test "a burden virtually impossible to discharge," the Court determined that a new, more workable test needed to replace it.[28] This new and supposedly improved test was:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a

20. 354 U.S. 476 (1957).

21. *Id.* at 485, 487–90.

22. *Id.* at 487.

23. *Id.* at 489.

24. 383 U.S. 413 (1966).

25. *Id.* at 418.

26. Justice Clark predicted that this would be the case, arguing that the broad new standard "gives the smut artist free rein to carry on his dirty business." *Id.* at 441 (Clark, J., dissenting).

27. 413 U.S. 15, 24–25 (1973).

28. *Id.* at 22.

> patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[29]

While the Court designed this new test specifically in response to the untenability of the *Roth-Memoirs* test, I argue that the *Miller* test is no more workable a standard. This is in large part due to the third prong, which requires courts to inquire into artistic merit. The lack of objective criteria for determining artistic merit and the reliance of the test on the highly variable tastes and preferences of judges has resulted in an inconsistent test that leaves exhibitors and distributors with very little idea of whether they can legally screen or sell certain films.[30]

II. Artistic Merit Applied

The Kiss,[31] directed by William Heise, is considered by many film scholars to be among the most iconic films from the dawn of filmmaking in the 1890s.[32] At less than twenty-seconds long, the film is nonetheless considered a classic that is rarely left out of a film textbook or course syllabus.[33] The film consists of a single medium close-up of two actors who talk and flirt before kissing. The titular kiss itself lasts only a few seconds. While now heralded as a treasure of film history, at the time of its premiere, this film received ferocious backlash.[34] Viewers were utterly scandalized at the presentation of physical intimacy on the big screen. As one reviewer vividly put it, "The spectacle of the prolonged pasturing on each other's lips was hard to bear. When only life size it was pronouncedly beastly. Magnified to Gargantuan proportions and repeated three times over, it is absolutely disgusting."[35] *The Kiss*—now designated as a culturally, historically, and

29. *Id.* at 24 (citation omitted) (citing Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

30. JEREMY GELTZER, DIRTY WORDS AND FILTHY PICTURES: FILM AND THE FIRST AMENDMENT 271 (2015).

31. THE KISS (Edison Manufacturing Company 1896).

32. *See, e.g.*, Mike D'Angelo, Noel Murray, Tasha Robinson, Keith Phipps, Scott Tobias, Sam Adams & Alison Willmore, *The 10 Best Films of the 1890s*, AV CLUB (Oct. 19, 2012, 11:00 AM), https://www.avclub.com/the-10-best-films-of-the-1890s-1798234254 [https://perma.cc/E98X-SXQU] (listing *The Kiss* at number seven).

33. I personally watched this film in three different film classes while completing my undergraduate studies, an honor shared only by one other piece of media: Episode 3.01 of *Black Mirror*, "Nosedive," which, fortunately for my university's film department, the government has not yet tried to censor.

34. GELTZER, *supra* note 30, at 7–8.

35. *Id.* at 8 (quoting *Notes*, 5 CHAP-BOOK 233, 240 (1896)); *see also* THE KISS, *supra* note 31 (noting that *The Kiss* was previously known as a play called *The Widow Jones*).

aesthetically significant motion picture by the Library of Congress[36]—once had the Catholic Church calling for its censorship.[37] This goes to show how difficult it is to determine both whether a work will violate "community standards" and whether the work has sufficient artistic merit. One man's masterpiece is another man's smut. Courts have struggled to draw the appropriate line for artistic merit, and filmmakers, distributors, and exhibitioners have struggled to conform their conduct to the nebulous standard.

A. How Much Is Too Much?

The Court has set some specific limits on what does or does not constitute obscenity under the *Miller* test that help to separate cinema from pornography. In *Jenkins v. Georgia*,[38] the Court emphasized that a film must contain "hard core sexual content for its own sake" as laid out in *Miller*.[39] There are two components to this requirement: first, the material must be "hard core"; and second, it must be so for the sake of being hard-core rather than for some other reason, such as artistic merit. *Jenkins* helps guide the lower courts—and potential violators of state obscenity statutes—as to what exactly will be considered hard-core by the Court. The film at issue in *Jenkins* was *Carnal Knowledge*, directed by Mike Nichols, a romantic drama following two college roommates through adulthood as they attempt to navigate complicated romantic and sexual relationships.[40] The film centers around sex, but its emphasis is not to provide erotic pleasure to its viewers but instead to highlight "the pity and anguish of our carnality" and "the human psyche and condition."[41]

For this reason, it is possible that the film would pass muster on artistic merit grounds, but the Court did not have to consider the purpose of the sexual content. The Court instead found that, for all its sexual themes, *Carnal Knowledge* did not present sufficient sexual content to be "hard core."[42] In *Miller*, the Court provided examples of what would constitute content

---

36. *Preserving the Silver Screen: Librarian Names 25 More Films to National Film Registry*, LIBR. OF CONG. (Dec. 1999), https://www.loc.gov/loc/lcib/9912/nfb.html [https://perma.cc/5AYK-YDEQ].

37. Victoria Bell, *The First On-Screen Kiss: How Couple's Awkward Embrace in Front of a Film Camera Outraged Victorian Society and Drew Fierce Response from the Vatican*, DAILY MAIL (Feb. 14, 2018, 9:14 AM), https://www.dailymail.co.uk/news/article-5391047/The-screen-kiss-couples-awkward-embrace-in.html [https://perma.cc/62XF-J8QN].

38. 418 U.S. 153 (1974).

39. *Id.* at 161 (quoting Miller v. California, 413 U.S. 15, 35 (1973)).

40. CARNAL KNOWLEDGE (AVCO Embassy Pictures 1971).

41. Ernest Callenbach, Short Notices, *Carnal Knowledge*, FILM Q., Winter 1971–1972, at 56, 56.

42. *Jenkins*, 418 U.S. at 161.

sufficiently hard-core to be eligible for the obscenity label.[43] These examples included "representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated" and "representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[44] In light of these, admittedly nonexhaustive, examples of hard-core content, the Court concluded that *Carnal Knowledge* was not sufficiently hard-core to be "patently offensive" as required by the obscenity standard.[45] While the film both depicts and discusses nudity and sexual acts, the Court found that it was filmed in such a way as to avoid a "lewd" focus on either.[46]

So, films that contain nudity or sexual reference but do not visually emphasize sexual intimacy or genitalia cannot be obscenity under the *Miller* standard. This is good news for filmmakers and distributors who want to include adult themes and imagery previously unthinkable under state law or the Hays Code,[47] such as "lustful kissing"[48] or "a woman with a bare midriff."[49] But what about filmmakers who want to include hard-core content? Obscenity law does not prohibit all hard-core sexual content but only that which is "hard core sexual conduct for its own sake."[50] "For its own sake" captures two prongs of the *Miller* test that work in tandem: the content must appeal "to the prurient interest" and not have some other reason, such as the dissemination of scientific knowledge or the purpose of artistic merit.[51] The Court in *Roth* defined "appealing to prurient interest" as "having a tendency to excite lustful thoughts," but the Court further elaborated that it adopted the Model Penal Code's definition of "prurient interest," which requires that the interest go beyond baseline sexual excitement.[52] To be "prurient," the interest must go "substantially beyond customary limits" and

43. *Miller*, 413 U.S. at 25.

44. *Id.*; *see also Jenkins*, 418 U.S. at 160 (repeating the same examples).

45. *Jenkins*, 418 U.S. at 161.

46. *Id.*

47. The Hays Code was the Hollywood film industry's effort at self-censorship to avoid both state regulation and religious resistance, both of which would be bad for Hollywood's vertical-integration and mass-release models. The Hays Code, also called the Motion Picture Production Code, was created in conjunction with the Catholic Church and prohibited a wide array of conduct considered immoral or obscene. Gregory D. Black, *Hollywood Censored: The Production Code Administration and the Hollywood Film Industry*, *1930–1940*, 3 FILM HIST. 167, 167 (1989).

48. ADDENDA TO THE MOTION PICTURE PROD. CODE § II (MOTION PICTURE ASSOC. OF AM. 1930), *reprinted in* THOMAS DOHERTY, PRE-CODE HOLLYWOOD: SEX, IMMORALITY, AND INSURRECTION IN AMERICAN CINEMA, 1930–1934 app. 2, at 363 (1999).

49. *Jenkins*, 418 U.S. at 161.

50. *Id.* (quoting Miller v. California, 413 U.S. 15, 35 (1973)).

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

52. Roth v. United States, 354 U.S. 476, 487 & n.20 (1957).

be "shameful or morbid."[53] Courts have interpreted this prong to be based on the nature of the content rather than the actual impact on the viewer.[54]

This gives courts and juries the very difficult task of determining not only what kind of graphic content arouses a normal, healthy sexual response as opposed to a "a leering or longing interest,"[55] but also whether the content appeals to a secondary interest beyond sexual gratification. This has proved to be an arduous task for the Court as changing social norms prompted filmmakers to push for increasingly graphic content on screen, particularly due to the influx of European films on American screens and the rise of the "porno chic" in the 1970s.[56]

B. Arthouse Erotica and the Porno Chic

European arthouse films and X-rated cinema created a category of film occupying a liminal space between what would, at first blush, be distinguishable as either pornography or art, and forced the courts to more thoroughly engage with artistic merit and social value. Prompted by the influx of foreign art cinema into the United States after World War II,[57] there was an increased interest by many American audiences in French and Scandinavian erotic dramas.[58] One such film was *I Am Curious (Yellow)*,[59] directed by Vilgot Sjöman, a "radical avant-garde pseudo-documentary mash-up of sex and politics."[60] While the film contained full-frontal nudity and sexual intercourse, it also depicted "Marxism, feminism, civil protest, sexuality, nuclear paranoia, monogamy, voyeurism, teen angst, eating disorders, sexually transmitted diseases, Eastern religion, and Franco's dictatorship in Spain."[61] Stylistically, the film also employed an art-house style, utilizing nonlinear editing and self-reflexivity comparable to that of French Modernism.[62]

---

53. MODEL PENAL CODE § 207.10(2) (AM. L. INST., Tentative Draft No. 6, 1957).

54. *E.g.*, Ripplinger v. Collins, 868 F.2d 1043, 1053–54 (9th Cir. 1989).

55. *Id.* at 1054.

56. GELTZER, *supra* note 30, at 240, 270–71.

57. BARBARA WILINSKY, SURE SEATERS: THE EMERGENCE OF ART HOUSE CINEMA 1–2 (2001).

58. *See* GELTZER, *supra* note 30, at 240 (identifying French and Scandinavian erotic films imported into the American market in the late 1950s).

59. I AM CURIOUS (YELLOW) (Sandrews 1967).

60. GELTZER, *supra* note 30, at 225.

61. *Id.*

62. French Modernism, also sometimes called "New Wave" or "Nouvelle Vague," was notable for its disruption of Hollywood-style narrative storytelling, often elevating an experimental style over a digestible story. For a more detailed discussion of French Modernism, see ANDRÁS BÁLINT KOVÁCS, SCREENING MODERNISM: EUROPEAN ART CINEMA, 1950–1980 303–06 (2007).

Despite the art-house aspirations of *I Am Curious (Yellow)*, it was heavily censored in America; even under the lenient *Roth-Memoirs* test, it was found to be obscene in about half of the jurisdictions in which it played.[63] In *Wagonheim v. Maryland State Board of Censors*,[64] the Court of Appeals of Maryland found the film to be obscene, stating that there was nothing in the film worthy of First Amendment protection.[65] While the court addressed the political commentary and stylistic experimentation of the film, it found that its use of the trappings of art-house cinema was merely meant to sneak obscenity past the censors.[66] The court described the film's "intellectual ambience" as "strained and contrived" and "artificially depicted."[67] In short, the court felt that this film was pornography dressed up as cinema. However, in *United States v. A Motion Picture Film Entitled "I Am Curious—Yellow,"*[68] the Second Circuit held that the film was not obscene in light of the testimony of expert witnesses such as film critics.[69] Considering the film's style and overall subject matter, the court determined "whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present these ideas artistically."[70] The court's particular evaluation of artistic merit is interesting here, as it attempts to remove subjectivity; regardless of whether or not the individuals on the court personally found artistic value, they permitted it to be legally classified as art based on an objective evaluation of its efforts to be art. While this is an admirable effort to lessen the inconsistencies inextricably bound up in legal evaluations of artistic merit, the very fact that plenty of other courts were unable to find any artistic merit demonstrates that there is little hope for objectivity in a legal evaluation of artistic value.

The burgeoning popularity of *I Am Curious (Yellow)* and similar foreign flicks prompted American filmmakers to take a stab at the art-house-erotica market. One prominent figure in the movement was Radley Metzger, an American experimental filmmaker and distributor who took to making erotic dramas in the European New Wave style.[71] Metzger's and others' relative

63. GELTZER, *supra* note 30, 234–35.
64. 258 A.2d 240 (Md. 1969).
65. *Id.* at 245.
66. *Id.*
67. *Id.*
68. 404 F.2d 196 (2d Cir. 1968).
69. *Id.* at 197–98, 198 n.2.
70. *Id.* at 199–200.
71. *See* GELTZER, *supra* note 30, at 240–41 (describing Metzger's transition from distributor to producer of erotic New Wave films).

success with both audiences and the courts,[72] as well as the continued importation of European films, led filmmakers to produce increasingly sexually explicit films.[73] This led to filmmakers—and society—embracing what came to be known as "porno chic."[74] The porno chic period marked a shift from pornography "masquerading" as art to pornography genuinely believing itself to be art. Films like *The Devil in Miss Jones*,[75] directed by Gerard Damiano, and *Behind the Green Door*,[76] directed by the Mitchell Brothers, had few qualms about being pornography but were of the mind that such designation did not make them not art. Famed porno chic director Gerard Damiano said of his work, "Why do we need socially redeeming values in these films? Why isn't pornography, in and of itself, of social merit?"[77] *Behind the Green Door* even competed for the Palme d'Or at the Cannes International Film Festival, further blurring the lines between pornography and cinema.[78]

III. *Deep Throat*—A Case Study

The intersection of pornography and art—and the resulting untenability of the artistic merit standard—is nowhere made clearer than in the context of one of the most famous and most censored pornographic films of all time: *Deep Throat*,[79] directed by Gerard Damiano. This film was highly controversial upon its release, resulting both in a series of attempts to ban it from public view and an increase in viewership from curious individuals

72. Metzger's *Therese and Isabelle* (Amsterdam Film 1968), for example, was found by the courts to have sufficient socially resonant themes to overcome its graphic content. Duggan v. Guild Theatre, Inc., 258 A.2d 858, 864 (Pa. 1969).

73. *See* GELTZER, *supra* note 30, 240–41 (discussing Metzger's production of increasingly sexually explicit films to test the boundaries of censorship).

74. Ralph Blumenthal, *"Hard-Core" Grows Fashionable—and Very Profitable*, N.Y. TIMES, Jan. 21, 1973, at 28, https://www.nytimes.com/1973/01/21/archives/pornochic-hardcore-grows-fashionableand-very-profitable.html [https://perma.cc/MPJ9-G4Y5].

75. THE DEVIL IN MISS JONES (Pierre Productions 1973).

76. BEHIND THE GREEN DOOR (Jartech 1972).

77. Roger Ebert, *Interview with 'Deep Throat' Director Gerard Damiano*, ROGEREBERT.COM (July 26, 1974), https://www.rogerebert.com/interviews/interview-with-deep-throat-director-gerard-damiano [https://perma.cc/LNV5-QKQS].

78. Douglas Martin, *Jim Mitchell, 63, Filmmaker, Is Dead; Made 'Behind the Green Door*,*'* N.Y. TIMES (July 19, 2007), https://www.nytimes.com/2007/07/19/arts/19mitchell.html [https://perma.cc/HR6E-BPD4]; GELTZER, *supra* note 30, at 268.

79. DEEP THROAT (Gerard Damiano Film Productions 1972). Please note that this Note is not intended to applaud *Deep Throat* or ignore the well-deserved controversy surrounding it. The problematic nature of *Deep Throat* and the porn industry at large is simply beyond the scope of this Note. While the sexism and abuse perpetuated by pornography are issues that should be addressed, my goal with this particular Note is only to demonstrate that the *Miller* test is a poor means for addressing them.

interested to see what all the commotion was about.[80] The premise of the film is simple: a suburban woman finds herself unsatisfied with sex and visits a doctor, who informs her that her clitoris is actually located in her throat. The remainder of the film follows the woman as she explores her newfound sexual interest, performing oral sex on a variety of men until she finds the man she wants to marry.

Considering the film's subject matter, it is of no surprise that it contains multiple explicit depictions of nudity and sexuality. However, the film has also been praised by some for its witty, comedic dialogue, and its cinematography has even been likened to the work of acclaimed director Martin Scorsese.[81] It had significant box office success, with the highest estimates claiming that it grossed around $600 million in today's dollars—although that figure may be complicated by the film's partial funding by a crime syndicate and its alleged use as a money-laundering scheme.[82] *Deep Throat*'s viewership included "diplomats, critics, businessmen, women alone and dating couples, few of whom, it might be presumed, would previously have gone to see a film of sexual intercourse," as well as notable celebrities and film industry figures including Jack Nicholson,[83] Brian De Palma, and Martin Scorsese.[84] So, was *Deep Throat* art or obscenity? Courts could not seem to decide.

In *United States v. One Reel of Film*,[85] the First Circuit easily disposed of the issue in a brief opinion, holding that the film was certainly obscene under the *Miller* test.[86] The court found that the film not only contained images of sexual intercourse but that "[t]hey dominate the film in depiction and running time."[87] The sheer volume of sexual acts depicted, in comparison to the brief scenes not containing such acts, prompted the court to consider

80. This phenomenon is known as the Streisand effect according to a theory that posits that efforts to ban works tend to have the opposite effect and instead inadvertently spark curiosity and increase the works' popularity. *See* Sue Curry Jansen & Brian Martin, *The Streisand Effect and Censorship Backfire*, 9 INT'L J. COMMUC'N. 656, 657 (2015) (discussing the Streisand effect and offering examples).

81. Simon Hattenstone, *After 33 Years, Deep Throat, the Film That Shocked the US, Gets Its First British Showing*, GUARDIAN (June 10, 2005, 8:05 PM), https://www.theguardian.com/uk/2005/jun/11/film.filmnews [https://perma.cc/G8X6-CMH5].

82. *See* Vincent L. Barnett, *'The Most Profitable Film Ever Made':* Deep Throat *(1972), Organized Crime, and the $600 Million Gross*, 5 PORN STUD. 131, 135–36 (2018) (discussing possible links between organized crime and the low production budget of *Deep Throat* potentially contributing to the film's high gross revenue).

83. Blumenthal, *supra* note 74.

84. RICHARD SCHICKEL, CONVERSATIONS WITH SCORSESE 116 (2011).

85. 481 F.2d 206 (1st Cir. 1973).

86. *Id.* at 210.

87. *Id.* at 208 (quoting United States v. One Reel of Film, 360 F. Supp. 1067, 1068 (D. Mass. 1973)).

the prurient interest prong satisfied.[88] The court even went as far as to say "[i]f the film does not appeal to 'prurient interest,' it is difficult to know what possible other interest the film attempts to reach."[89] The First Circuit in this case appeared to dismiss immediately the idea that a film containing this kind of content could be art.[90] The court does not engage at all with the visual or narrative quality of the film; rather, it takes for granted that a film containing this amount of graphic sexual content is inherently for the purpose of sexual gratification and sexual gratification alone. The court states that "the dominant theme of the film is precisely the depiction of such conduct without recognizable forays into other areas which might be said to lend to the work as a whole 'serious literary, artistic, political, or scientific value,'"[91] essentially holding that pornographic content cannot itself be considered to have artistic merit, regardless of how cleverly it is written or how artfully it is filmed.

The First Circuit was hardly the only court to hold so. In the Criminal Court of the City of New York, Judge Joel Tyler called the film "a Sodom and Gomorrah gone wild before the fire"[92] and "one throat that deserves to be cut."[93] The defense put on witnesses explaining that the film had "entertainment value and humor,"[94] in essence arguing that it had artistic merit. Reviewing the film's alleged artistic merit, the court found that there was merely a "gossamer of a story line," that the humor was "sick," and that both were present for the sole purpose of thinly disguising the film's fully pornographic nature.[95] In response to the expert claims that the film did in fact have entertainment value comparable to that of Hollywood filmmaking, Judge Tyler responded, "Presumably, the Romans of the First Century derived entertainment from witnessing Christians being devoured by lions."[96] Suffice to say that Judge Tyler was not of the mind that *Deep Throat* was the

88. *Id.* at 210.

89. *Id.*

90. *See id.* at 209 (stating that the film had no "redeeming social value in the explicit portrayal, without more, of sexual congress itself").

91. *Id.* (quoting Miller v. California, 413 U.S. 15, 24 (1973)).

92. People v. Mature Enters., 343 N.Y.S.2d 911, 912 (Crim. Ct.), *supplemented*, 343 N.Y.S.2d 934 (Crim. Ct. 1973), *aff'd*, 352 N.Y.S.2d 346 (App. Term 1974), *modified*, 323 N.E.2d 704 (N.Y. 1974).

93. 343 N.Y.S.2d at 926.

94. *Id.* at 913.

95. *Id.* at 913–14 (citing the opinion of drama critic, Vincent Canby, to support the court's assertion).

96. *Id.* (quoting People *ex rel*. Hicks v. Sarong Gals, 103 Cal. Rptr. 414, 417 (Ct. App. 1972)).

"Ben-Hur of porno pix [sic]"[97] or "the 'Jaws' of the porn industry,"[98] as some viewers claimed it to be.

But not all courts found *Deep Throat* so deeply abhorrent as to warrant across-the-board censorship. A Sioux Falls, South Dakota jury found the film to not be obscene in 1975.[99] A jury in Binghampton, New York also determined that the film was not obscene because of its "redeeming social value."[100] The very fact that *Deep Throat* was still widely screened and viewed in many jurisdictions is by itself indicative that there were differing views as to whether it was appropriate to suppress the film under obscenity law. Neither courts nor individuals quite knew what to make of *Deep Throat*'s status under the law. For example, a Texas theater operator whose conviction was overturned in 1976 expressed surprise after his arrest, noting that while he could recognize that the film was more "explicit than the general fare," he was stunned to find that screening the film was against the law.[101]

Perhaps most notably in the long history of litigation surrounding this film, one of the film's stars—Harry Reems, née Herbert Streicher—was charged with conspiracy to distribute obscenity across state lines for his participation in the film.[102] He was convicted in the Western District of Tennessee in Memphis, "the buckle on the Bible Belt," after being prosecuted by Larry Parrish, one of pornography's most fervent opponents.[103] Reems's ultimately successful appeal was handled by a young Alan Dershowitz, who took the case as an opportunity to assert that "obscene" works should not be excluded from First Amendment purview; he argued "[i]f you want to have free speech, then you have to include *Deep Throat*."[104] The conviction was reversed on the grounds that the *Miller* test should not have been applied,

---

97. Variety Staff, Film Review of *Deep Throat*, VARIETY (Dec. 31, 1971, 11:00 PM), https://variety.com/1971/film/reviews/deep-throat-1200422816/ [https://perma.cc/Z5PV-J9GY]; GELTZER, *supra* note 30, at 255.

98. Ted Morgan, *United States Versus*, N.Y. TIMES, Mar. 6, 1977, at 193, https://www.nytimes.com/1977/03/06/archives/united-states-versus-the-princes-of-porn-porn.html [https://perma.cc/Y8EW-4X8W].

99. GELTZER, *supra* note 30, at 262.

100. Paul L. Montgomery, *Obscenity Trial of 'Throat' Ends*, Jan. 4, 1973, at 34, https://www.nytimes.com/1973/01/04/archives/obscenity-trial-of-throat-ends-ruling-expected-in-a-monthboth.html [https://perma.cc/G9JN-FNLE].

101. Rebecca Salinas, *The 1974 'Deep Throat' Trial That Shocked San Antonio*, MYSA, https://www.mysanantonio.com/150years/article/A-look-back-at-the-Deep-Throat-trial-in-San-6078026.php [https://perma.cc/7GA9-NQLY] (June 16, 2018, 7:48 PM).

102. Morgan, *supra* note 98.

103. *Id.*

104. *Firing Line: Deep Throat and the First Amendment*, at 37:21 (PBS television broadcast Dec. 13, 1976), https://digitalcollections.hoover.org/objects/6435/deep-throat-and-the-first-amendment [https://perma.cc/5G24-ZR3G].

because Reems's conduct occurred while *Roth-Memoirs* was still the law of obscenity.[105]

While the court's decision did not ultimately turn on whether *Deep Throat* had sufficient artistic merit to avoid obscenity prosecution, Reems's defense took every opportunity to argue that pornography was not different in kind from art. Dershowitz warned, "It's no exaggeration to say today Harry Reems, tomorrow Marlon Brando or Jack Nicholson."[106] Reems himself became something of a short-term freedom-of-speech icon; speaking on the matter at Harvard Law School and echoing Dershowitz's warning, he said that under *Miller*, "no artist is going to experiment with sexuality for fear of prosecution. It will stagnate sexuality as a form of expression."[107] These sentiments clearly resonated with other artists, as prominent Hollywood figures like Jack Nicholson, Warren Beatty, and Gregory Peck helped fund Reems's defense.[108] In a world where nudity and sexual content were seen as having no value as speech, all art attempting to portray those things was potentially imperiled.

IV. *Miller* at the Movies

A. Removed

Reems and Dershowitz's warnings ring true. There are many films, both commercial and experimental, that fit poorly into the *Miller* framework, particularly in light of the Court's hazy guidance for determining artistic merit. Some cases are clearer than others. For instance, Naomi Uman's *Removed*[109] contains actual pornography, as the base of the film is a strip from a 1970s pornographic film. However, Uman individually bleached each cell of the film strip to remove the female figure. The resulting film contains blurred colors, strobing lights, and images of half-visible intimacy where the majority of the nudity and sexual contact has been obscured by the bleach. The film is a "disruption to porn's visual fixations," removing all sense of

105. *Judge Grants New Trial for 'Deep Throat,'* N.Y. TIMES, Apr. 12, 1977, at 12, https://www.nytimes.com/1977/04/12/archives/judge-grants-new-trial-for-deep-throat-star.html [https://perma.cc/9GA7-EHKH]; Marks v. United States, 430 U.S. 188, 196–97 (1977).

106. Michael Moynihan, *How "Deep Throat" Turned Harry Reems into a Free-Speech Star*, NEWSWEEK (Mar. 25, 2013, 4:45 AM), https://www.newsweek.com/how-deep-throat-turned-harry-reems-free-speech-star-62929 [https://perma.cc/FY6H-L4R4].

107. Donald Berk, *Charge Against 'Deep Throat' Limits Freedom, Reems Says*, HARV. CRIMSON (Dec. 9, 1976), https://www.thecrimson.com/article/1976/12/9/charge-against-deep-throat-limits-freedom/ [https://perma.cc/7ZUB-VA9C].

108. *Harry Reems Dies at 65; Porn Actor Starred in 'Deep Throat,'* L.A. TIMES (Mar. 20, 2013, 7:02 PM), https://www.latimes.com/local/obituaries/la-me-harry-reems-20130321-story.html [https://perma.cc/9K7V-KRAR].

109. REMOVED (1999).

eroticism from the underlying pornographic content.[110] Uman herself has stated that part of the purpose of the film was to "'see what would happen if [she] remove[d] the women' from her found footage, asking: 'Would it still be pornography?'"[111]

Legally, the answer is almost certainly no, at least under the assumption that pornography is tantamount to obscenity. The film would certainly fail—or perhaps pass, depending on what perspective we're taking—both the patently offensive and artistic merit prongs of the test. First, the film lacks explicit display of sexual contact or genitalia. While both are present in the underlying found footage, they have been removed by Uman in her film. To find that the suggestion of graphic sexual content is sufficient to be patently offensive would be a radical departure from existing case law. Furthermore, the film has fairly obvious artistic merit. There is clear intervention by the filmmaker evident in the lighting, themes, and creative technique of using lacquer and bleach to alter the cellulose.[112] However, in no small part, the artistic merit would be informed by the fact that Uman's technique disrupted the sexuality of the work. Uman's central thesis was turning pornography into non-pornography, making this a fairly easy case. But what of experimental film that leaves sexually explicit material intact?

B. Hiroshima mon amour

Alain Resnais's *Hiroshima mon amour* (*Hiroshima*)[113] is one of the most famous films of the French New Wave movement.[114] The film is credited as "open[ing] the modern era"[115] and has remained "an 'avant-garde classic' that has continued to circulate in repertory theaters, film courses, and festivals."[116] The film famously opens with an extreme close-up of two bodies tangled together in an intimate embrace. Their limbs are dusted with ash and glisten with sweat. They writhe and caress, and while every shot is painstakingly distanced and angled to never reveal too much, it is clear that the two figures are engaged in sexual activity. The sequence is intercut with

110. Hilary Bergen & Sandra Huber, *Pornography, Ectoplasm and the Secret Dancer: A Twin Reading of Naomi Uman's* Removed, SCREENING THE PAST (Apr. 2018), http://www.screeningthepast.com/issue-43-dossier-materialising-absence-in-film-and-media/pornography-ectoplasm-and-the-secret-dancer-a-twin-reading-of-naomi-umans-removed/ [https://perma.cc/GUG7-LXAE].

111. *Id.* (quoting Soledad Santiago, *Milking the Subject: Experiments in Film*, SANTA FE NEW MEXICAN, Jan. 27, 2006).

112. *See id.* (describing the artist's film-alteration process and its effects).

113. HIROSHIMA MON AMOUR (Argos Films 1959).

114. Kyo Maclear, *The Limits of Vision:* Hiroshima Mon Amour *and the Subversion of Representation*, *in* WITNESS AND MEMORY: THE DISCOURSE OF TRAUMA 233, 233 (Ana Douglass & Thomas A. Vogler eds., 2003).

115. KOVÁCS, *supra* note 62, at 303.

116. Maclear, *supra* note 114, at 233.

documentary-style images of Hiroshima, Japan, both before and after the atomic bomb was dropped. The cross-cutting is underscored with haunting dialogue between the man and the woman as she describes what she saw at Hiroshima—including harrowing sights like mangled metal and charred flesh. The man responds that she was not there, that the things she claims she saw do not exist, and repeatedly tells her, "You saw nothing at Hiroshima." *Hiroshima*'s opening scene has been lauded as "[u]nforgettable" and a "modernist masterpiece."[117] And while the scene is suggestive, it was not explicit enough to draw the ire of the censors. But it is not difficult to imagine an alternate version of *Hiroshima*, or perhaps a successor to this film, in which a similar technique is used with more hard-core content. If the sexual acts between the two characters were explicit rather than implicit, would this film survive *Miller*?

Imagine the following counterfactual: the opening scene of *Hiroshima* remains precisely the same in terms of dialogue, cross-cutting, and themes. The only difference is that the cross-cutting now occurs between documentary-style footage of Hiroshima and content that meets the hard-core criteria laid out in *Miller*—showing, for instance, "ultimate sexual acts."[118] Is this still art? Is this still a modernist masterpiece? Or is this smut? If a pornographic film attempted to intercut images and dialogue about a modern social problem, a court would likely find that this was a shameless attempt to circumvent the censors, as the court found in *Wagonheim*.[119] Remember, the *Wagonheim* court in this case found the film's depiction of Sweden's political and social ills to be a "phony setting" for the film's true obscene purpose.[120] A court in the case of a reworked *Hiroshima* could just as easily accuse the film of using New Wave style, and themes of trauma and memory, to slap obscenity up on the silver screen. As Judge Friendly once observed, "a truly pornographic film would not be rescued by inclusion of a few verses from the Psalms."[121]

Does that mean that *Hiroshima* only had artistic merit because it did not include explicit sexual content? If courts are able to take a work containing both hard-core content and artistic and social quality and determine that the artistic merit is an act of trickery, then the *Miller* test is set up to fail. The basis of the *Miller* test, and obscenity law more generally, is that it is not violative of free speech because it excludes only cases that are so extreme

---

117. Hiroshima Mon Amour*'s Unforgettable Opening*, CRITERION (July 27, 2015), https://www.criterion.com/current/posts/3640-hiroshima-mon-amour-s-unforgettable-opening [https://perma.cc/H658-N42Q].

118. Miller v. California, 413 U.S. 15, 25 (1973).

119. Wagonheim v. Md. State Bd. of Censors, 258 A.2d. 240, 245 (Md. 1969).

120. *Id.* at 242.

121. United States v. A Motion Picture Film Entitled "I Am Curious—Yellow," 404 F.2d 196, 201 (2d Cir. 1968) (Friendly, J., concurring).

that they contain no value as speech.[122] However, by permitting courts to say that—even in cases where such value exists—it is mere artifice, the limiting principle supposedly put in place in *Miller* does not provide any substantive limitation. The court simply cannot have it both ways.

C. Near the Big Chakra

How might a court apply the *Miller* test to the film that first sparked my interest in this topic: *Near the Big Chakra*?[123] First, *Miller* asks: Does the film appeal to a prurient interest?[124] Whether something appeals to a prurient interest is a question left to the jury based on personal taste and knowledge of community standards, with fairly broad discretion for its finding.[125] "Community standards" are not permitted to be actually standardized by the legislature; they are left to the jury to be determined based on a reasonable person standard.[126] As such, it is difficult to know precisely whether a jury would find this film to be prurient. However, given that the film displays no images other than female genitalia, it would be hard to argue that no reasonable person could find the film to appeal to a lustful, sexual interest.

Second, *Miller* asks: Does the film depict sexual conduct in a "patently offensive" way?[127] While this too is a decision left up to the jury, the jury is limited by the requirement that anything patently offensive must be "hard core."[128] This film could easily be found to be hard-core and patently offensive, as "lewd exhibition of the genitals"—the very thing that makes up every single frame of this film—is one of *Miller*'s named examples.[129] Unlike in *Jenkins*, where the Court determined that the film at issue was not patently offensive in part because "[t]here is no exhibition whatever of the actors' genitals,"[130] every shot of *Near the Big Chakra* is a close-up of a vulva, centered in the frame. It is impossible to look at the screen and not see genitals; they are the intended focal point of each shot. A jury could quite easily find this film to satisfy the second prong of the test, and any appellate court would be unlikely to determine that such finding is incorrect in light of *Miller* and its progeny.

---

122. *See* Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2171 (2015) ("Other low-value categories, such as obscenity, continue to receive in theory no constitutional protection whatsoever . . . .").

123. *See supra* note 1 and accompanying text.

124. *See* Miller v. California, 413 U.S. 15, 24 (1973) (outlining the first step of the test).

125. Smith v. United States, 431 U.S. 291, 302 (1977).

126. *Id.* at 302–03.

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

128. *Smith*, 431 U.S. at 301.

129. *Miller*, 413 U.S. at 25.

130. Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

That would mean that *Near the Big Chakra*'s only chance to survive an obscenity case would be the *Miller* test's third prong: artistic merit.[131] Based on the varied approaches to artistic merit jurisprudence seen throughout the United States, it is quite easy to imagine a world in which this experimental art film is not viewed as having serious artistic merit. The mere label of being feminist experimental avant-garde would do little to help its case. After all, *I Am Curious (Yellow)* has also been called an "avant-garde" film,[132] but that did not prevent many jurisdictions from instead labeling it obscenity.[133] In terms of theme, Anne Severson's goal was to demystify the female body and elicit "an understanding and a relation to the body as an organism, an evolving process, rather than as a conventionally erotic, static icon."[134] In short, the artistic and social purpose of this film was to remove the prurient interest in the female body by exposing it to the point that it is no longer sexually enticing. This film seeks to normalize genitalia by exhibiting them "lewdly." While this may sound like a goal to which American courts would respond positively, a similar argument was actually made about the social goal of *Deep Throat*. In *One Reel*, the appellants made the argument that *Deep Throat* would help to normalize sexuality and have a "liberating impact."[135] The court responded that for otherwise obscene works, it could not be found that "because of its liberating impact, [it] has for that reason alone, serious literary, artistic, political, or scientific value."[136] If the court were to find that Severson's normalization by demystification was sufficiently similar to the normalization by liberation purpose in *One Reel*, then *Near the Big Chakra* would fail the third prong of the *Miller* test and could be labeled as obscenity.

What about finding artistic merit in the image of the vulva crafted by Severson? At least one court has found that obscenity cannot be redeemed by its own merit; there must be a "something else" in addition to the obscene content.[137] But is there sufficient logic in the finding that sexually explicit films are not art when nude art hangs in museums across the world? Is there

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

132. GELTZER, *supra* note 30, at 225.

133. *Id.* at 234–35.

134. Scott MacDonald, *Two Interviews. Demystifying the Female Body: Anne Severson*—Near the Big Chakra*, Yvonne Rainer*—Privilege, FILM Q., Fall 1991, at 18, 18.

135. United States v. One Reel of Film, 481 F.2d 206, 210 (1st Cir. 1973).

136. *Id.*

137. *See id.* (holding *Deep Throat* to be obscene because it is "without recognizable forays into *other areas* which might be said to lend to the work as a whole 'serious literary, artistic, political, or scientific value'" (emphasis added) (citing Miller v. California, 413 U.S. 15, 24 (1973)).

a difference between the display of genitals in *Near the Big Chakra* and Gustave Courbet's *L'Origine du monde*?[138]

D. Robert Mapplethorpe

Consider the work of Robert Mapplethorpe. Mapplethorpe is as well-known for his provocative, black-and-white photography as he is for the controversy surrounding it.[139] In 1990, an exhibit of Mapplethorpe's work, ranging from "flower still lifes" to "homosexual S&M" opened at the Contemporary Arts Center in Cincinnati, Ohio.[140] The very day the exhibit opened, the museum and its director were indicted for criminal obscenity.[141] Both the exhibit and the resulting indictments were met with significant backlash.[142]

Supporters of the exhibit argued that the work had artistic importance and should be protected as free speech.[143] Opponents argued that the work was "morally reprehensible trash" masquerading as art.[144] Senator Jesse Helms was a vocal opponent of the work and strongly criticized its alleged artistic merit, arguing, "There is a big difference between 'The Merchant of Venice' and a photograph of two males of different races (in an erotic pose) on a marble-top table."[145] The Hamilton County Sheriff echoed Helms's sentiment, saying, "When you put a fist up a person's rectum, what do you call that? That is not art."[146] The jury, however, disagreed: finding in favor of the museum and its director, the jury held that the work failed to qualify as obscenity.[147]

In the Mapplethorpe case, the defense relied on two primary strategies. First, the defense emphasized that the works alleged to be obscene were only

---

138. *L'Origine du monde* is an oil painting by acclaimed French artist Gustave Courbet. Gustave Courbet, *L'Origine du monde* (1866), oil on canvas, Musée d'Orsay, Paris, https://www.musee-orsay.fr/en/artworks/lorigine-du-monde-69330 [https://perma.cc/3EVJ-DLFV]. Painted in 1866, this piece shows a woman's vulva. In terms of visual composition, the painting is quite similar to the images in *Near the Big Chakra*.

139. Alex Palmer, *When Art Fought the Law and the Art Won*, SMITHSONIAN MAG. (Oct. 2, 2015), https://www.smithsonianmag.com/history/when-art-fought-law-and-art-won-180956810/ [https://perma.cc/HHY3-8S7W].

140. *Id.*

141. John Faherty & Carol Motsinger, *Pornography or Art? Cincinnati Decided*, CINCINNATI ENQUIRER, https://www.cincinnati.com/story/news/2015/03/28/pornography-art-cincinnati-decided-robert-mapplethorpe-trial-25-year/70591342/ [https://perma.cc/8QEQ-CFT5] (Mar. 29, 2015, 1:09 PM).

142. *Id.*; Palmer, *supra* note 139.

143. Faherty & Motsinger, *supra* note 141.

144. *Id.*

145. *Id.*

146. *Id.*

147. *See* Palmer, *supra* note 139 (returning verdict of not guilty on all obscenity-related charges).

a few pieces of an entire collection, the majority of which could not possibly be labeled as obscene.[148] This is particularly important in the context of the *Miller* test because *Miller* requires that works be "taken as a whole."[149] As the defense pointed out, it is inadequate to say that the exhibit was obscene as a whole when the prosecution presented only seven photos out of the nearly two hundred in the collection.[150] The second key strategy of the defense was to emphasize that art is not solely about beauty.[151] Experts testified as to the artistic quality of the lighting, composition, and other visual qualities of the photographs, but the focus was on the themes of the works and their ability to challenge social norms.[152] The strategy worked, but perhaps at a cost. After the verdict, one juror remarked, "'The pictures were not pretty. No doubt about it[.]' . . . 'But, as it was brought up in the trial, to be art, it doesn't have to be pretty.'"[153]

And thus, the battle was won but perhaps the war was lost. Or at least no strides were made in reversing the longstanding belief that there is no artistic merit to "obscene" content unless that content is accompanied by some kind of commentary or criticism about that obscenity. Even though Mapplethorpe employed the same techniques and "the same criteria" in his sexually explicit works as he would "when he would [photograph] a flower,"[154] the former were subjected to a higher scrutiny.

Mapplethorpe's "X" exhibit could not simply highlight the beauty of sex; it had to justify itself by serving as a window into "a troubled portion of his life that he was trying to come to grips with."[155] Are Mapplethorpe's sexually explicit works any less worthy of designation as art than his self-portraits or still lifes? Are they less artfully taken? Did they require less work on the part of the artist? Are they less beautiful? Herein lies a serious problem with the artistic merit standard. As the current jurisprudence goes, it does not really take into account differing perceptions of beauty. It may require an artist or an exhibitor to deride a work's inherent beauty by arguing that "art does not have to be pretty" in order to avoid a prison sentence or hefty fine.

---

148. *See id.* (explaining that the defense argued the alleged obscene photos "composed a body of work that had to be considered as a whole").

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

150. Palmer, *supra* note 139.

151. *See* Marc Mezibov, *The Mapplethorpe Obscenity Trial*, LITIGATION, Summer 1992, at 12, 13 ("Rather than attempt to sell the jurors on the beauty of the photographs, we offered them the notion that to be valued, art need not—indeed sometimes should not—please the eye.").

152. Faherty & Motsinger, *supra* note 141; Andy Grundberg, *Critic's Notebook; Cincinnati Trial's Unanswered Question*, N.Y. TIMES, Oct. 18, 1990, at C17, https://www.nytimes.com/1990/10/18/arts/critic-s-notebook-cincinnati-trial-s-unanswered-question.html [https://perma.cc/BG2J-FQHQ].

153. Faherty & Motsinger, *supra* note 141.

154. *Id.*

155. *Id.*

And above all else, it labels nudity and sexuality as lesser and inherently suspect categories of art that must justify their existence through claims of social commentary. To reiterate Damiano's argument: Why can't pornography be art in and of itself?[156]

V. Alternatives to *Miller*

This Note does not seek to say that all pornography is art, or that there is no harm done by permitting pornography to be produced and screened to anyone, anywhere, at any time. I readily acknowledge that there is evidence supporting the harms caused by both the consumption and production of pornography. Feminist legal theorist Catharine MacKinnon has written extensively on the topic of pornography and has criticized it frequently for degrading women and conditioning men to continue the subordination of women.[157] Scientific research has also demonstrated that the overconsumption of pornography, particularly at a young age, can stunt sexual and social development and have a lasting impact on sexual behavior.[158] Furthermore, the porn industry has frequently come under fire for alleged unsafe and inequitable practices, including unfair compensation,[159] verbal abuse, and even sexual assault.[160] Linda Lovelace, star of *Deep Throat*, came forward years after the film's release and controversy with claims of sexual assault on set and alleged, "Virtually every

156. Ebert, *supra* note 77.

157. *See* Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 17 (1985) ("More generally, [pornography] eroticizes the dominance and submission that is the dynamic common to them all. It makes hierarchy sexy and calls that 'the truth about sex' or just a mirror of reality. Through this process, pornography constructs what a woman is as what men want from sex." (footnote omitted) (citing Michael Foucault, *The West and the Truth of Sex*, SUB-STANCE, Autumn 1978, at 5)).

158. *See* Eric W. Owens, Richard J. Behun, Jill C. Manning & Rory C. Reid, *The Impact of Internet Pornography on Adolescents: A Review of the Research*, 19 SEXUAL ADDICTION & COMPULSIVITY 99, 108 (2012) ("These data suggest that adolescents are being exposed to sexually explicit material and engaging in a variety of sexual behaviors; some of which are considered risky and problematic.").

159. Harry Reems, for example, earned about $800 (adjusted for inflation) for his work on *Deep Throat*. David A. Keeps, *Porn-Again Christian*, GUARDIAN (May 21, 2005, 9:35 PM), https://www.theguardian.com/film/2005/may/22/features.magazine [https://perma.cc/Q659-6UA4]. The film is believed to have made around $600 million. *Id.*

160. *Does the Porn Industry Have Ethical Business Practices?*, FIGHT THE NEW DRUG (May 19, 2022), https://fightthenewdrug.org/uncovering-porn-industry-shady-business-practices/ [https://perma.cc/946H-Y3ZR]. For an opposite take on the ethics of the porn industry, see Reegan von Wildenradt, *Porn Insiders Reveal What It's Like to Work in the Industry*, MEN'S HEALTH (June 30, 2017), https://www.menshealth.com/sex-women/a19523677/confessions-of-people-who-work-in-porn/ [https://perma.cc/WT77-352W].

time someone watches that movie, they're watching me being raped."[161] While these evils exist, the *Miller* test is far from the best means for remedying them.

A. Shortcomings of the Miller *Test*

This Note's primary point of criticism for the *Miller* test is that it is overinclusive, difficult to predict and therefore to comply with, and not rationally related to the interests it allegedly serves. If the concern is the subjugation of women, why should a film like *Near the Big Chakra* risk punishment under the existing standard? The goal of that film is precisely to work against the objectification of women, fitting quite well with the goals of MacKinnon and other anti-pornography proponents. How then does it make sense that the film could be censored under the *Miller* test?

If the concern is the social and sexual development of adolescents, how does the artistic merit of the sexually explicit content they watch help fix that problem? In *American Booksellers Association, Inc. v. Hudnut*,[162] the court examined an obscenity statute that defined pornography as material subjugating women, as MacKinnon has defined it.[163] The court expressed concern about the statute's lack of distinction for works that depicted the sexual subjugation of women but were also of artistic or literary merit.[164] But why should this be of importance? Are adolescent boys less likely to objectify their female peers if they learn objectification through *Leda and the Swan*[165] rather than through *Deep Throat*? Furthermore, if studies show that the majority of pornography is consumed by adolescents via the internet,[166] and cases like *Reno v. ACLU*[167] have determined that pornography cannot be censored from the internet in order to prevent adolescents from accessing it,[168] what if anything is the *Miller* test doing to prevent adolescent overexposure to harmful, sexually graphic material?

---

161. Carolyn Bronstein, *Why the New Movie About 'Deep Throat' Could Be Important*, ATLANTIC (Jan. 7, 2013), https://www.theatlantic.com/entertainment/archive/2013/01/why-the-new-movie-about-deep-throat-could-be-important/266850/ [https://perma.cc/26Y3-R9ZD]. Linda Lovelace details in her biography her abusive relationship with her ex-husband, Chuck Traynor, who forced her into the porn industry. *E.g.*, LINDA LOVELACE, ORDEAL 33–35 (1980).

162. 771 F.2d 323 (7th Cir. 1985).

163. *Id.* at 324.

164. *Id.* at 331.

165. *Leda and the Swan* is a poem by W.B. Yeats telling the story of the Greek god Zeus's rape of the "apparently subordinate" Leda. *Id.* at 327. It is referenced by the court as one of the works that may be censored under the statute at issue. *Id.*

166. Owens et al., *supra* note 158, at 100 ("Given these circumstances, one may assume that adolescents' access to pornography via the Internet is unmatched by any other medium . . . .").

167. 521 U.S. 844 (1997).

168. *Id.* at 849.

Again, if the concern is the unsafe practices of the pornography industry, why does the resulting artistic merit of the work have anything to do with this goal? While Linda Lovelace's allegations have revealed a dark side of the porn industry, what happened to her was not the result of *Deep Throat* lacking sufficient artistic merit to avoid being labeled as obscenity. Actress Maria Schneider has said of a scene in Bernardo Bertolucci's *Last Tango in Paris*[169]—during which her character is raped by Marlon Brando's character—that she did not know about or consent to the way the scene was filmed.[170] Schneider has said of the experience, "I felt humiliated and to be honest, I felt a little raped, both by Marlon and by Bertolucci."[171] Unlike *Deep Throat*, *Last Tango in Paris* would likely pass the *Miller* test, demonstrating that existing obscenity law does little to protect actors from unsafe conditions. Rather than prohibit films containing rape under obscenity law, the better approach would be to follow the reasoning set out in *New York v. Ferber*,[172] in which the Court determined that distribution of child pornography is "intrinsically related" to the sexual abuse itself.[173] Following this logic, distribution of a film containing actual rape is intrinsically related to the crime of rape, regardless of whether the film is determined to be legally obscene and therefore outside the protection of the First Amendment. Not only would this approach be better tailored to preventing abusive practices and the circulation of recorded assault, but it would also avoid the unfortunate implication of the *Miller* test as applied to these cases that rape is somehow of less concern if it is accompanied by socially valuable themes and thoughtful cinematography.

B. Obscenity as Speech

Whatever the *Miller* test's noble goals may be, obscenity law is simply ineffective at accomplishing those goals. The better approach is to do what has been done with nearly all "low value" speech categories that were historically excluded from the legal classification of speech: bring them under the protection of the First Amendment. Protected speech is not speech entirely without restriction. Commercial speech was initially considered non-speech that could be regulated like any commercial activity.[174] When

169. LAST TANGO IN PARIS (Produzioni Europee Associati 1972).

170. *See* Elahe Izadi, *The Story Behind Filmmaker Bernardo Bertolucci's Last Public Controversy*, WASH. POST (Nov. 26, 2018, 11:37 AM), https://www.washingtonpost.com/arts-entertainment/2018/11/26/story-behind-filmmaker-bernardo-bertoluccis-last-public-controversy/ [https://perma.cc/ZFF8-9DE8] (including Bertolucci's description of how he and Marlon Brando planned the scene without Schneider's consent).

171. *Id.*

172. 458 U.S. 747 (1982).

173. *Id.* at 759.

174. Valentine v. Chrestensen, 316 U.S. 52, 55 (1942).

commercial speech was brought under First Amendment protection, it still maintained less protection than other types of speech, as it could be regulated or banned where it was found to be false or misleading.[175] While the false or misleading test would not necessarily work for obscenity, it shows that the courts are able to limit certain types of speech even when they are generally protected as speech.

Libel, too, was not protected by the First Amendment until *New York Times Co. v. Sullivan*,[176] in which the Court held that libel must be protected as speech to prevent chilling speech that is worthy of protection, such as criticism of political figures.[177] Bringing libel under the First Amendment, however, did not spell the end of libel suits and has not entirely precluded individuals from seeking remedies for defamation. Libel directed at purely private figures[178] or not pertaining to a matter of public concern[179] does not carry heightened protection, so many libel cases can proceed successfully despite libel no longer being legally distinct from speech. Even with First Amendment protection, libel law has permitted courts to balance the interests of free speech and the negative impact of some types of speech. Obscenity law could perhaps benefit from the use of a public-concern standard as a limiting principle. Whether a work touches on a matter of public concern is a considerably lower threshold to protection than whether it has artistic merit.[180] Under such a standard, a film like *I Am Curious (Yellow)* could enjoy protection across the board, while truly degrading and exploitative content could remain censored.

Both commercial speech and libel first came under the purview of the First Amendment when courts became concerned about the collision of non-speech and political speech—the type of speech the Court has historically

175. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976).

176. 376 U.S. 254 (1964).

177. *See id.* at 270 ("Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

178. Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974).

179. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985).

180. *See* Snyder v. Phelps, 562 U.S. 443, 453 (2011) ("Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" (quoting Connick v. Myers, 461 U.S. 138, 146 (1983))). The Court has further elaborated that the "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 387 (1987).

considered to be the worthiest of protection.[181] As seen with films like *I Am Curious (Yellow)*, obscenity can overlap just as much with political speech as commercial speech or libel. *I Am Curious (Yellow)* provided specific criticism about the Swedish government at the time—criticism which some courts dismissed as a mere cover for the film's obscene purpose.[182] What if an American filmmaker were to make a similar film, weaving together one narrative thread of criticism of the American government with another showing, in explicit detail, the sexual relationship between two characters? Is this obscenity or political speech? Under the *Miller* test, it could be either; more concerningly, it could be both, as the *Miller* test provides ample avenues for different jurisdictions to have different impressions of whether a work is obscene. This could allow certain jurisdictions to silence political speech simply because of distaste for the manner in which it was delivered, something that the Supreme Court expressly prohibited in *Cohen v. California*.[183]

In *Cohen*, the Court held that the defendant could not be punished for wearing a jacket that said "Fuck the Draft" in a public place.[184] The defendant's jacket was expressing his strong opposition to compulsory service in the Vietnam War, a contentious political issue, and the Court adamantly held that the use of vulgarity did not undermine the political nature of the defendant's speech.[185] The Court specifically distinguishes this vulgarity from obscenity,[186] but why should that be the case? If a work that is "obscene" also contains political speech, why should the vulgarity of expression outweigh the importance of free political speech when it does not in *Cohen*? It is possible that the Court did not believe this should ever be the case because any work containing political speech should be found to have social value and therefore not be obscene. But as we have seen in different courts' treatment of the same works, this is not always how the analysis comes out.[187] The Court acknowledges in *Cohen* that "one man's vulgarity is

181. *See* Aziz Z. Huq, *Preserving Political Speech from Ourselves and Others*, 112 COLUM. L. REV. SIDEBAR 16, 16 (2012) ("A central concern in First Amendment jurisprudence is the proper scope of government authority to regulate speech on matters of national political concern."); *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 329 (2010) (calling political speech "central to the meaning and purpose of the First Amendment").

182. Wagonheim v. Md. State Bd. of Censors, 258 A.2d 240, 245 (Md. 1969) (citing United States v. A Motion Picture Film Entitled "I Am Curious—Yellow," 285 F. Supp. 465 (S.D.N.Y. 1968)).

183. 403 U.S. 15 (1971).

184. *Id.* at 16, 26.

185. *Id.* at 24–25.

186. *Id.* at 20.

187. *See Wagonheim*, 258 A.2d at 245 (holding that *I Am Curious (Yellow)*'s political commentary did not give it the requisite "redeeming social value"). *But see* United States v. A

another's lyric," and itself admits that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual."[188] How then can the Court claim to be capable of determining what works do or do not have artistic merit?

If obscenity is brought under the First Amendment, sexually graphic works can still be regulated to prevent captive or vulnerable audiences from being forced to view them. As with all areas of protected speech, legislatures may still use time, place, and manner restrictions to place reasonable restrictions on when and where obscene works may be viewed.[189] For instance, *Near the Big Chakra*—whether determined to be legally obscene or not—could be prohibited from screening on a projector outside of a public high school but could be permitted to show in a movie theater or ticketed exhibit. Likewise, zoning laws can be used to restrict the specific locations of businesses showing obscene works without running afoul of the First Amendment.[190] While zoning regulations do not provide free and full access to obscene speech, they also do not permit the outright ban of certain works—or punishment for those participating in their creation or dissemination—as is currently permitted under *Miller*. Finally, the Hollywood rating system distinguishes films based on their content and both provides sufficient information to individuals about whether they may be offended by a particular film and places age restrictions on access to certain films.[191] Even if the *Miller* test is abolished and obscenity is brought under the purview of the First Amendment, there are ample avenues for preventing offense or other ills that motivate the current legal distinction between obscenity and speech.

Conclusion

Some readers may be wondering why any of this matters. It is rare in this day and age that films are banned from release. Sex and violence abound in popular media. The famously graphic *Game of Thrones* won nearly sixty

---

Motion Picture Film Entitled "I Am Curious—Yellow," 404 F.2d 196, 199 (2d Cir. 1968) (holding that it did).

188. *Cohen*, 403 U.S. at 25.

189. For an introduction to time, place, and manner restrictions and their associated tests, see R. George Wright, *Time, Place, and Manner Restrictions on Speech*, 40 N. ILL. U. L. REV. 265, 267–72 (2020).

190. *See* Young v. American Mini Theaters, Inc., 427 U.S. 50, 72–73 (1976) (holding that the zoning ordinances affecting adult motion picture theaters do not violate the Equal Protection Clause of the Fourteenth Amendment).

191. *See* Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185, 186 (1973) (explaining that under this rating system, more than 92% of commercially exhibited films in the United States are classified into one of four categories, and that the "X category . . . is the most restrictive of the four and indicates" that no one under seventeen years old may be admitted to see the film).

Emmy Awards.[192] Chloë Sevigny performed unsimulated oral sex in Vincent Gallo's *The Brown Bunny*,[193] and that film not only avoided obscenity prosecution but also premiered at the Cannes International Film Festival.[194] Clearly America has progressed beyond its dark past of censorship, right?

Before we celebrate the sexual liberation of American society, I think it is important to note that obscenity is still a federal crime, and it is illegal to "send, ship, or receive obscenity, to import obscenity, and to transport obscenity across state borders for purposes of distribution."[195] There are also still state laws prohibiting obscenity,[196] and offenders could face fines or imprisonment under either the state or federal statutory schemes.[197] The problem here is that *Miller* is still the standard by which works are judged to be obscene, and as this Note has hopefully demonstrated, the *Miller* test can be quite unpredictable, leaving individuals unsure of how to comply with the law. Because whether a film is deemed obscene within a jurisdiction is based on juries' and judges' differing interpretations of what is offensive, what is prurient, and what is artistic, people cannot know whether their creation, distribution, or screening of a particular film is illegal. Such a standard is likely to either chill what should actually be constitutionally protected speech or to prompt individuals to be punished for what they reasonably and in good faith believed was perfectly legal behavior.

Case in point: when teaching about the law of obscenity, a professor set up an optional, supplemental screening of *Deep Throat* for his class to provide a "common frame of reference for debate, analogous to what a jury or appellate court might face in deliberating upon the obscenity of a particular work."[198] The film was then seized from the professor's possession and the state moved to destroy the copy.[199] The Florida Supreme Court dismissed the case because the film was never "seized" according to the legal definition,

192. Sarah Whitten, *'Game of Thrones' Ends Run with Outstanding Drama Award, 59 Total Emmy Awards*, CNBC (Sept. 22, 2019, 11:45 PM), https://www.cnbc.com/2019/09/22/game-of-thrones-ends-run-with-best-drama-award-59-total-emmy-awards.html [https://perma.cc/E3X3-ZVVQ].

193. THE BROWN BUNNY (Gray Daisy Films 2003).

194. While this film drew considerable criticism, it was less due to concerns about its obscene content and more due to the fact that it simply wasn't very good. *See, e.g.*, Lisa Schwarzbaum, *Critic's Choice*, ENT. WKLY. (June 6, 2003, 4:00 AM), https://ew.com/article/2003/06/06/critics-choice-2/ [https://perma.cc/CP2Z-RR6J]. So much for artistic merit.

195. *Citizen's Guide to U.S. Federal Law on Obscenity*, U.S. DEP'T OF JUST. (Nov. 9, 2021), https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-obscenity [https://perma.cc/DXC6-LRSM].

196. *E.g.*, TEX. PENAL CODE ANN. § 43.23 (West 2013); 18 PA. CONS. STAT. § 5903 (2022); COLO. REV. STAT. § 18-7-102 (2022).

197. *See supra* note 195 and accompanying text.

198. Roberts v. State, 373 So.2d 672, 673–74 (Fla. 1979) (internal quotation marks omitted).

199. *Id.*

and therefore was not properly brought before the trial court for an obscenity determination, although the court did not address the substantive questions of whether the film was obscene or the obscenity statute unconstitutional.[200] This case quite vividly illustrates that many people—even professors who teach the topic of obscenity—are bewildered by what content and conduct is prohibited under existing obscenity law.

Under the *Miller* test, a court must inquire into whether the material is hard-core, whether the intended response is a "healthy interest in sex,"[201] and whether the material is redeemed by artistic merit or other social value. These are three highly subjective standards. In particular, the need to assess artistic merit has resulted in a body of inconsistent and confusing case law in which even works created by well-established artists, containing creative cinematic choices and addressing important social issues, have failed to meet the standard.[202] It is time for the Court to abandon the untenable *Miller* standard and bring obscenity under the protection of the First Amendment. How can the Court be confident this is the right move for free speech protection? It'll know it when it sees it.

200. *Id.* at 674.

201. Ripplinger v. Collins, 868 F.2d 1043, 1054 (9th Cir. 1989).

202. Take, for example, Andy Warhol's *Blue Movie* (Andy Warhol Films 1969), a film containing both unsimulated sexual intercourse and criticism of America's involvement in the Vietnam War. It was found to be obscene "even though the pornographic activities depicted were interspersed with some political and social dialogue." People v. Heller, 307 N.E.2d 805, 816 (N.Y. 1973).