

**EQUAL PROTECTION IN THE WORLD OF ART AND OBSCENITY:
THE ART PHOTOGRAPHER'S LATENT STRUGGLE WITH OBSCENITY STANDARDS
IN CONTEMPORARY AMERICA**

Abstract

In the realm of obscenity law in the United States, photography as an art form is not on equal footing with more traditional art forms such as painting, drawing, and sculpture. This is a latent dilemma for artistic photographers because the law itself – in the form of state obscenity laws and the Supreme Court's three-pronged test in *Miller v. California* – does not explicitly set forth varied standards of obscenity based on artistic medium. However, given the marginalization of photography in art history, there exists a bias against photography as “serious art.” Furthermore, evidence of the differential treatment of photography in areas of the law outside of obscenity affect the law's approach to photography within the realm of obscenity. Finally, the nature of photography as a multi-functional medium that is perceived as capturing objective truth is more readily offensive to the viewer because sexually explicit images seem inherently more “real.” As a result, the photographer as artist seems to be more restricted than the painter or sculptor when it comes to creating sexually explicit artwork. Yet if photography is indeed a valid art form, the photographer, simply because he or she photographs rather than paints or sculpts, should not be subjected to a higher tendency of courts and audiences to deem a sexually explicit photograph more readily obscene than a sexually explicit painting, drawing, or sculpture. With respect to obscenity standards, there should be equal treatment across all artistic media.

INTRODUCTION

The intersection of art and obscenity has long been a source of intrigue in light of the ever-changing nature of artistic movements and contemporary standards. The focus of the heated debate, however, is seldom placed on the effect that artistic medium has on the tendency of courts and audiences to find a particular work obscene.¹ More

¹ See, e.g., Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205 (2000) [hereinafter Adler, *Art of Censorship*] (arguing that the First Amendment offers greater protection over verbal rather than visual expression, but not suggesting that there is varied protection over different types of visual images); Cara L. Newman, *Eyes Wide Open, Minds Wide Shut: Art, Obscenity, and the First Amendment in Contemporary America*, 53 DEPAUL L. REV. 121 (2003) (charging that the First Amendment fails to adequately protect post-modern artists but not differentiating between various artistic media); Amy Adler, Comment, *Post-Modern Art and the Death of Obscenity Law*, 99 YALE L.J. 1359 (1990) [hereinafter Adler, *Death of Obscenity Law*] (emphasizing that the *Miller* standard of “serious artistic value” is obsolete in the world of post-modern art because the new art in general rebels against that standard).

specifically, the question of whether modern forms of art such as photography are more susceptible to obscenity charges by nature of intrinsic characteristics of the medium itself is an interesting one left relatively unexplored.

In order to warrant the protection of the First Amendment, it appears that sexually explicit photographs must possess an artistic value beyond that required for more traditional forms of art. But what of the post-modern art photographer who wishes to defy all standards and propose that something an average person might mistake as a “non-artistic” snapshot, or a page from a pornographic magazine, is art? Is a sexually explicit photograph somehow more likely to be found obscene than a sexually explicit painting or sculpture? If so, then it would seem that the art photographer is more restricted in producing sexually explicit work than the more traditional painter or sculptor. This varied standard, though invisible on paper, is ultimately harmful to both the photographer as artist and the advancement of photography as art. In the realm of obscenity law, courts and audiences must strive to place photography on equal footing with other forms of art despite the complications that arise with photography as a distinct and often problematically literal medium for expression.

Part I of this paper will establish the initial hurdles that photography faces with respect to First Amendment protection given the power of visual imagery and the three-pronged test for obscenity set forth in *Miller v. California*.² Of particular relevance is the “serious artistic value” prong of the *Miller* test and the problems inherent in *who* is to

² 413 U.S. 15 (1973). In *Miller*, the Supreme Court ruled that state courts should look to the following three guidelines for determining whether a work is obscene: a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24.

judge as well as *how* one might judge whether a work, particularly a photograph that may be construed to have a non-artistic function, constitutes “serious art.”

Part II will expand upon the obstacles inherent in artistic photography by exploring the multi-functional nature of photography and its marginalization in art history. The emergence of photography as an art form is a relatively modern phenomenon that effectuates a higher standard for proving that a photograph possesses “serious artistic value.”

Part III addresses the overall approach to photography in three distinct areas of the law outside of obscenity: copyright, privacy, and child pornography. In each of these areas, courts have demonstrated a bias against photography based on its inherent nature. This biased approach to photography in other areas of the law tends to translate into the tendency of courts to view photography differently in the realm of obscenity.

Part IV focuses on the effect of photography as a means of capturing objective truth. Because a photograph is perceived as intrinsically more “real” than a painting or sculpture, I argue that courts and audiences are more likely to find provocative photographs obscene. A sexually explicit photograph that is perceived as accurately depicting a real subject or action that took place in an actual moment of time may have a higher probability of appealing to the “prurient interest” or of being “patently offensive.” Combined with the problems in proving that photography has “serious artistic value,” these tendencies render photography more readily obscene than other forms of art.

Finally, Part V looks forward to the need to effectively apply an equal standard of obscenity across all art forms despite the limits that an artistic photographer faces in light of the obstacles explored throughout the previous sections.

I. VISUAL ART AND THE *MILLER* TEST: INITIAL HURDLES TO FIRST AMENDMENT PROTECTION

As a starting point, artistic photography faces two umbrella challenges with respect to First Amendment protection: the nature of it being a visual art, and the difficulties inherent in determining what constitutes “serious artistic value.” These challenges are not specific to photography as an artistic medium, though artistic photography falls squarely into the category of forms of expression that face both challenges. First, it is a visual art that arguably garners lesser First Amendment protection than verbal speech.³ Second, the relevant third-prong question from *Miller* is whether the photograph possesses “serious artistic value.” The definition of art, however, and the question of who should decide what art is, are enormously controversial.⁴ Furthermore, contemporary artistic movements such as the Post-Modernist movement seek to deliberately defy the notion that an artistic work be serious or possess any traditional artistic value.⁵ As such, given that it is a visual art and that it is subject to the arguably inadequate *Miller* standard on obscenity, artistic photography seems disadvantaged from the start, even before engaging in a deeper discourse on obscenity standards and varied forms of visual art.

³ See Adler, *Art of Censorship*, *supra* note 1 (identifying the problem for art as part of the larger problem of greater First Amendment protection over verbal as opposed to visual speech).

⁴ See generally Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805 (examining “the extent to which the law makes aesthetic judgments” and the need for courts to recognize and “import” the complex discourse on what constitutes art); Newman, *supra* note 1 at 145 (“From a critical perspective, [the notion that good art is distinguishable from bad art] may be an impossible distinction to make because, before one can dismiss an image or performance as ‘bad’ art or ‘non-art,’ one must know what ‘art’ is.”); Adler, *Death of Obscenity Law*, *supra* note 1, at 1375-78 (identifying practical ways courts can determine whether a work is art rather than trying to answer the exhausting philosophical query of what “art” is).

⁵ Adler, *Death of Obscenity Law*, *supra* note 1, at 1359.

A. The Power of the Image

Visual imagery can evoke powerful emotions and reactions that render it distinct from, or simply unparallel to, other forms of expression. The age-old expression that a picture is worth 1,000 words finds its root in the idea that images have the ability to communicate in a uniquely powerful and effective way. Even the Supreme Court has suggested that images have a specific potent quality in that they act as a “short cut from mind to mind.”⁶ With respect to the First Amendment, the question has been raised as to whether it makes sense that art, in its “force beyond words, its power and its irrationality,”⁷ is protected at all, given that the underlying rationale of the First Amendment is to foster a marketplace of *rational* ideas.⁸ Additionally, there exists the argument that visual images are somehow dangerous given their power over human emotion and behavior.⁹ As Professor Amy Adler keenly observes:

“The seductive quality of artistic images, their appeal to the senses and the emotions, has been a recurring justification in the complex and centuries-old history of iconoclasm, censorship, and suppression of art. The voluptuousness of art, its power beyond words, the possibility that it could be worshipped, fetishized, or misinterpreted, paved the way for both adulation and censorship. This view, of course, helps to explain why First Amendment law would devalue images: by bypassing reason and appealing directly to the senses, images fail to participate in the marketplace of ideas.”¹⁰

Photography as an art form may in fact represent the epitome of the power of the image, particularly because a photograph is perceived as capturing and revealing an

⁶ *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943) (commenting on the power of visual images in the context of an emblem or flag); see Adler, *Art of Censorship*, *supra* note 1 (illustrating the value of visual images in part through discussion on the Supreme Court’s flag and flag burning cases).

⁷ Adler, *Art of Censorship*, *supra* note 1, at 205.

⁸ *Id.*

⁹ *Id.* at 211-213.

¹⁰ *Id.* at 213.

objective truth that is that much easier for an individual to relate to.¹¹ It would follow that powerful, provocative, or offensive photographs might be considered more “dangerous” images that, applying Professor Adler’s analysis, would warrant greater censorship. Yet even when disregarding the nature and effect of artistic photography specifically, the mere initial fact that it is a visual form of expression rather than a textual one automatically places it on lower footing with respect to First Amendment protection. Indeed, contemporary obscenity prosecutions have focused *exclusively* on visual rather than textual material.¹² Furthermore, anti-pornography writing, namely that of Catharine MacKinnon, suggests that pornographic photography is more harmful and degrading to women than textual pornography.¹³ Considering these assertions on the power of visual imagery, photography, by nature of its being an image rather than text, faces an initial obstacle to thwarting obscenity prosecutions.

B. The Problem of “Serious Artistic Value”

The second general obstacle artistic photography faces by nature of being an “art” relates to the third prong of the *Miller* test. Even if a work of art satisfies the first two prongs of the test, the work is not deemed obscene under *Miller* unless it also lacks serious artistic value. Yet what exactly is art, and who gets to decide what it is? If art is a means of self-expression and a critical societal and cultural medium for new ideas, creative development, and progress, then art’s sole constant may indeed be change. As a

¹¹ See *infra* Part IV.

¹² See Adler, *Art of Censorship*, *supra* note 1, at 210; Rudolf Arnheim, *The Images of Pictures and Words*, 2 WORD & IMAGE 306 (Oct.-Dec. 1986).

¹³ See generally CATHARINE A. MACKINNON, ONLY WORDS (Harvard University Press 1993); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (Harvard University Press 1989); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Harvard University Press 1987).

result, a single true and accurate definition of art would be ever-fleeting.¹⁴ Moreover, reasonable minds differ on what is and is not “aesthetic” for purposes of art. Perhaps more accurately, art is more often than not meant to defy reason entirely and appeal to one’s passion.¹⁵ It is therefore meant to be open to interpretation depending on each individual’s own emotional reaction.¹⁶ Furthermore, not all art is intended to be aesthetic or even fully interpretable.¹⁷ Post-modern art, for example, derives its value from defying past standards and expanding traditional boundaries of art, often attempting deliberately to shock and outright offend audiences.¹⁸ Perhaps most importantly for purposes of the current law on obscenity, not all art has “serious artistic value.”¹⁹ Therefore, First Amendment jurisprudence with respect to obscenity is riddled with the general dilemma of how to determine what art is in the first place, and how to reconcile the third prong of *Miller* with the idea that some legitimate art may, by its very character, purposely lack “serious artistic value.”

The problem with “serious artistic value” transcends into the realm of photography, and it is arguably even heightened there. To the extent that photography was not traditionally considered an “art” and is still seen today as having multiple “non-

¹⁴ See Newman, *supra* note 1, at 155-58.

¹⁵ See Adler, *Art of Censorship*, *supra* note 1 at 213; Renee Linton, *The Artistic Voice: Is it in Danger of Being Silenced?*, 32 CAL. W. L. REV. 195 (1995) (supporting government funding of the arts and making the opening statement that “[g]ood art moves your emotions and makes you think,” though emphasizing that “good” art encompasses “disliked” art and that all art deserves attention and protection).

¹⁶ See Linton, *supra* note 13, at 195 (“Art does not have to be liked or beautiful or innocent to be art. It must, however, be seen or heard, and it must strike your soul, your mind or both.”).

¹⁷ *Id.*

¹⁸ See Adler, *Death of Obscenity Law*, *supra* note 1 (denouncing the *Miller* test as being inadequate for protecting Post-Modern art such as the works of Finley, Sprinkle, Mapplethorpe, and Kern, all of which seek to rebel against traditional notions of art and therefore often shock, offend, or insult the common public).

¹⁹ See *id.* at 1359 (introducing the dilemma that *Miller* came at a turning point in art history, and that the new Post-Modern art rendered the third prong of the test obsolete).

artistic” functions,²⁰ it is harder to prove that provocative photographs that teeter on the “art/non-art” distinction have “serious artistic value.” In this sense, the art photographer is not only restricted by the same challenges regarding “serious artistic value” that confront all other artists, but is additionally restricted by nature of being a photographer. Though this is likely the case, the overarching problem with defining “serious artistic value” looms over the entire picture, be it a painting, drawing, or photograph, thereby presenting a so-called initial hurdle. Yet this difficulty in defining and judging art constitutes only half of the problem with “serious artistic value.”

The other half of this looming issue concerns the question of *who* should determine whether a work possesses “serious artistic value.” Justice Holmes’s famous quote in the 1903 case of *Bleistein v. Donaldson Lithographing Company*²¹ reveals the sentiment that it is not the role of judges to evaluate the legitimacy of art or to make aesthetic determinations.²² Courts, however, are not always apt to pay heed to Holmes’s admonition.²³ For this reason, some judges do make themselves out to be arbiters of art, subjecting more questionable works of art to their own whims and notions of what warrants protection from the law.

²⁰ See *infra* Part II.

²¹ 188 U.S. 239 (1903).

²² *Id.* at 251 (“It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations.... At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.”).

²³ See, e.g., *Leibovitz v. Paramount Pictures Corp.*, 139 F.3d 109, 111 (2d Cir. 1998) (providing extensive background on the artistic origins of the pose in question in a prominent fair use case); *Miller v. United States*, 431 F.2d 655 (9th Cir. 1970) (ruling a photographic magazine obscene because the pictures contained in it reflected no attempt at artistic composition); *People v. Gonzales*, 107 N.Y.S.2d 968 (1951) (denying the defendant’s motion to dismiss a prosecution for violation of the state obscenity statute because the works in question were “not even good photography” and therefore no argument could be made that they constituted art).

In *Pope v. Illinois*,²⁴ the Supreme Court announced a reasonable person standard for *Miller*'s third prong.²⁵ In determining whether a work has "serious artistic value," a jury should therefore ask itself how a reasonable person would evaluate the work as a whole rather than base the determination on contemporary community standards and what an average person in a given community would think.²⁶ While expert testimony may be used to help the trier of fact make this determination,²⁷ it is not required,²⁸ and the opinion of art experts and critics is not necessarily determinative given *Pope*'s reasonable person standard.²⁹ Furthermore, critics of the *Pope* majority warn that the reasonable man standard exacerbates the difficulties that lie in the "serious artistic value" prong.³⁰ As Justice Stevens warns in his dissent, the reasonable person standard poses a greater threat to unpopular or misunderstood art because juries may be more inclined to neglect the testimony of art experts, thinking a reasonable person would evaluate art differently from an art critic.³¹ While art experts may use more defined analyses such as a subjective "four-corners" test or objective "Dickey" analysis to determine whether a work possesses

²⁴ 481 U.S. 497 (1987).

²⁵ *Id.* at 501.

²⁶ *Id.*

²⁷ See, e.g., *Luke Records, Inc. v. Navarro*, 960 F.2d 134 (11th Cir. 1992); *United States v. Ten Erotic Paintings*, 432 F.2d 420 (4th Cir. 1970) (acknowledging the weight of affidavits filed by claimants in which art experts including critics and museum curators certified the works in question and their authors, deeming that the works possessed artistic, historic, and anthropological merit); *Tipp-It, Inc. v. Conboy*, 596 N.W.2d 304, 314 (Neb. 1999) (deferring to the single expert witness's testimony in the case to conclude that the works lacked serious artistic value under the various expert analyses proposed); Elizabeth Hess, *Art on Trial: Cincinnati's Dangerous Theater of the Ridiculous*, VILLAGE VOICE, Oct. 23 1990 (reporting on the famous trial involving Robert Mapplethorpe's controversial works and the effectiveness of the expert testimony in convincing the jury to acquit the Contemporary Art Center and its director).

²⁸ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973) (regarding consideration of the works in and of themselves sufficient for the determination of the question of obscenity).

²⁹ See Adler, *Death of Obscenity Law*, *supra* note 1, at 1372-73 (criticizing *Pope* as an extremely dangerous standard because it devalues expert testimony and therefore may further threaten sexually explicit Post-Modern artists).

³⁰ *Id.*

³¹ *Pope*, 481 U.S. at 512 (Stevens, J., dissenting).

serious artistic value,³² the *Pope* standard subjects controversial art to more popular, and often more limiting, concepts of art and artistic value.³³

All of this suggests that, for better or worse, current First Amendment jurisprudence and standards on obscenity render the preconceived notions and popular perceptions of “art” by the common public extremely relevant to the analysis. This will be particularly important in the discussion on artistic photography’s distinct impact on audiences and how it relates to a greater likelihood that a provocative photograph will be considered obscene.³⁴ Sexually explicit artistic photography must therefore grapple with a variety of issues – the fact that it is a visual art, the requirement that it meet the problematic “serious artistic value” prong of *Miller*, the influence of generic public views on art versus that of experts – even before confronting the consequences of its characteristics as a distinct medium. It is therefore disadvantaged from the get-go. These overarching obstacles only begin to pave the rocky road for art photographers in their struggle for equal treatment under the First Amendment, though they are critical in their relation to the more medium-specific explanations for why sexually explicit photography may be more readily charged as obscene.

³² See *Conboy*, 596 N.W.2d at 314 (discussing the expert witness’s consideration of two analyses used by art experts: the subjective “four-corners” test that evaluates specific criteria such as space, composition, design, color, harmony, and form and balance; and the objective “Dickey” analysis which takes into account where the art has been exhibited and the degree of respect and recognition in the art world that the work or artist has attained).

³³ See Newman, *supra* note 1, at 151 (denouncing courts’ beliefs that ordinary and reasonable men and women are best suited to evaluate a sexually explicit work’s artistic value because the general public often regards art with suspicion, and may therefore “condemn a work as obscene based on superficial content alone”).

³⁴ See *infra* Parts II and IV.

II. MIXED FUNCTIONS AND THE MARGINALIZATION OF PHOTOGRAPHY IN ART HISTORY

In addition to the initial proposition that photography receives a lesser degree of First Amendment protection because it is a visual art, photography faces an added layer of obstacles to equal protection given its distinct multi-functionality and its relatively recent emergence as an art form. The difficulties that lie in determining what constitutes art, and more specifically, what does and does not have “serious artistic value,” are heightened by several factors intrinsic to photography itself: the fact that photography serves multiple non-artistic functions, the historical perception that a photograph is the “plastic verification of a fact”³⁵ and a mere product of a machine and chemical process, and the marginalization by critics of the medium as an art form as compared to other art forms.

A photograph is very often used outside of the world of art in a wide variety of areas such as criminal evidence, science, journalism, and advertising, to name a few.³⁶

An average person may merely take a photograph for leisure, to record memories and

³⁵ Marias de Zayas, *Photography and Photography and Artistic-Photography*, in CLASSIC ESSAYS ON PHOTOGRAPHY 125, 125 (Alan Trachtenberg, ed., Leete’s Island Books, Inc. 1980).

³⁶ See, e.g., SUSAN SONTAG, ON PHOTOGRAPHY 5 (Farrar Straus and Giroux 1977) (1973) (introducing the early uses of photography in modern states as surveillance and proof in evidence and providing discussion on how early controversies on photography as art focused on whether it could distinguish itself from its other functions in science and trade); JOHN TAGG, THE BURDEN OF REPRESENTATION 60, 66 (University of Massachusetts Press 1988) (delineating the expansion of the photographic industry into advertising, journalism, and the domestic market, and the use of photographs in medicine, evidence, and the growth of the state); Laszlo Moholy-Nagy, *Photography in Advertising*, in PHOTOGRAPHY IN THE MODERN ERA 86-93 (Christopher Phillips, ed., The Metropolitan Museum of Art and Aperture 1989) (regarding photography not primarily as an art form, but rather as a vehicle for transforming modern visual culture through fields such as advertising); Albert Renger-Patzsch, *Photography and Art*, in PHOTOGRAPHY IN THE MODERN ERA 142-44 (Christopher Phillips, ed., The Metropolitan Museum of Art and Aperture 1989) (noting that modern life would be unthinkable without photography because of its multitude of everyday functions, including its influence through film, the illustrated press, and science); Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 64 U. PITT. L. REV. 385, 393 (2004) (discussing the cultural theory on photography and the ways in which audiences might interpret a photograph in a museum versus the same one used as evidence of a crime).

special moments. It may have no formal artistic intent whatsoever. Photography in and of itself has never been, nor will likely ever be, understood solely as “art” in the traditional sense.³⁷ Its historical development simply did not take shape in such a way. In contrast, an oil painting, no matter how displeasing or avant-garde, is still a painting. It enjoys a reputation as a traditional form of “art” that photography does not.

While this is not to say that more traditional kinds of art such as paintings have no function outside of the world of art, the development of photography and its historically standard classification as an “art-science” are surely distinct.³⁸ If a photograph has traditionally had, and will continue to have, such prominent functions outside of the world of art,³⁹ then the distinction between “artistic” photography and “non-artistic” photography is that much more confusing. As previously discussed, the difficulties in defining art and evaluating a given work for its “serious artistic value” are far-reaching and problematic in and of themselves. With respect to photography, the proper

³⁷ See, e.g., JOHN L. WARD, *THE CRITICISM OF PHOTOGRAPHY AS ART* (University of Florida Press 1970) (criticizing pictorialism, a school of thought on the analysis of photography as art, for its claim that photographs can be judged by the same standard as paintings, drawings, and prints, because the standard is not broad enough to fit all cases); Erno Kallai, *Painting and Photography*, in *PHOTOGRAPHY IN THE MODERN ERA* 94 (Christopher Phillips, ed., The Metropolitan Museum of Art and Aperture 1989) (comparing the mediums of painting and photography and expressing disappointment with the mixture of art and mechanical technology).

³⁸ See, e.g., MARY WARNER MARIEN, *PHOTOGRAPHY AND ITS CRITICS: A CULTURAL HISTORY, 1839-1900* 57-66 (Cambridge University Press 1997) (describing the association of photography with progress in science and technology during the invention’s first decade); SONTAG, *supra* note 36 at 126 (stressing that the earliest controversies surrounding photography concerned whether it could establish itself as “distinct from a merely practical art, an arm of science, and a trade”); Peter Henry Emerson, *Hints on Art*, in *CLASSIC ESSAYS ON PHOTOGRAPHY* 99 (Alan Trachtenberg, ed., Leete’s Island Books, Inc. 1980) (criticizing the standard definition of photography as an art-science and recommending varied analyses for artistic, scientific, and commercial photography); Erno Kallai, *Pictorial Photography*, in *PHOTOGRAPHY IN THE MODERN ERA* 116, 116 (Christopher Phillips, ed., The Metropolitan Museum of Art and Aperture 1989) (supporting the formula of comparison between painting as a “personal and psychological encapsulation of form” and photography as the “outcome of a mechanical and chemical process”).

³⁹ See CHRISTOPHER DUVERNET, *PHOTOGRAPHY AND THE LAW* 74-109 (Self-Counsel Press 1991) (1986) (summarizing for the professional photographer the relevant legal issues that affect uses of photography in distinct areas such as advertising, news, court, and professional competitions); MARIEN, *supra* note 38, at 45 (calling the lack of definition of photography a benefit given its ability to be comprehended in the public experience across all realms, including family life, commerce, government, war, education, science, and art).

determination of whether a “reasonable person” would appreciate a photograph as serious art is further burdened by the multi-functional nature of the medium itself.

Although photography is generally accepted today as a branch of high art, it has historically been marginalized as a lesser art form compared to painting and other traditional forms of art.⁴⁰ This marginalization is, in a sense, intuitive: practically anyone can take a photograph. It involves, in the most primitive sense, the clicking of a button. While today the majority of the population would recognize that although nearly anyone can take a photograph, not anyone can be a professional art photographer, an artist’s sexually explicit photograph that defies aesthetic and more widely-accepted technical standards in the Post Modernist fashion may very likely still be denied any recognition of serious artistic value. In applying *Pope*’s reasonable person standard to the value prong of the obscenity test, the relative ease of taking a photograph very believably comes into play. If a sexually explicit photograph does not look like “art” in the intuitive aesthetic sense, and it is much easier to snap a picture rather than paint one, then is it really art? Does the inherent automatism of photography somehow render it less deserving of serious artistic value? A version of this thought process may very well enter a juror’s mind, particularly if the photographic work does not appeal to traditional aesthetic notions of beauty or reflect an established technical prowess.⁴¹

⁴⁰ See generally SONTAG, *supra* note 36, at 115-149 (providing an intriguing discourse on the relation of photography to art and knowledge and outlining the various ways photography as a form of art defended itself); Kallai, *supra* note 38, at 116-17 (comparing a photographic still life to a similar painting and finding that the photograph was inferior from a technical standpoint and generally more limited as a visual medium); Renger-Patzsch, *supra* note 36, at 142 (“There was a time when one looked over one’s shoulder with an ironical smile at the photographer, and when photography as a profession seemed almost invariably a target for ridicule.”).

⁴¹ Cf. Hess, *supra* note 27 (relaying how the art expert for the defense convinced the jury that Robert Mapplethorpe’s works were not obscene because of their formalist qualities). While the defense’s art expert in the famous trial may have convinced the jury of the works’ serious artistic value using an analysis based on artistic technique, the question is whether an artist attempting to drastically push the limits of

The era following its invention in 1839 in which photography had to defend itself as a form of fine art was relatively short,⁴² though the defenses brought forth were distinct to photography's inherent nature:

Against the charge that photography was a soulless, mechanical copying of reality, photographers asserted that it was a vanguard revolt against ordinary standards of seeing, no less worthy an art than painting.⁴³

Indeed, the very basis for a modern-day juror's tendency to deem a photograph as less deserving of serious artistic value replicates that which emerged during photography's early criticism as mechanical rather than artistic. The automatism of photography, the relative ease of taking a photograph, and its dependence on a machine made critics suspicious of its artistic value.⁴⁴ As the English critic John Ruskin lamented regarding the invasion of photography into the realm of art, "Next, you will have steam organs and singers, and turn on your cathedral service."⁴⁵

Throughout the course of photography's development in art history, practitioners themselves felt pressured to defend their work and prove its value. The influential nineteenth and twentieth-century artistic photographer Alfred Stieglitz himself initially took on an additional interest in painting in part because he feared that there was not

photography as art by disregarding current considerations of technique would automatically be accused of producing pornography because the reasonable person might be influenced by the ease with which a photograph is taken and subsequently dismiss the work for any artistic value.

⁴² SONTAG, *supra* note 36 at 115 ("The era in which photography was widely attacked (as parricidal with respect to painting, predatory with respect to people) was a brief one.... [B]y 1854, a great painter, Delacroix, graciously declared how much he regretted that such an admirable invention came so late.").

⁴³ *Id.* at 126.

⁴⁴ See, e.g., MARIEN, *supra* note 38, at 58-60. Photography was further marginalized in relation to other pre-existing forms of art because many of the artists who did choose to adopt photography and "jump ship" were second-rate artists to begin with. Farley, *supra* note 36, at 419.

⁴⁵ *Id.* (quoting Ruskin, *Works*, vol. 22, p. 510, n.8).

enough good photography to fill his famous magazine and gallery.⁴⁶ However, as an avid leader in the movement for recognition of photography as a valid art form, he believed that exhibiting paintings and photographs side-by side might help define photography more effectively and in turn help it rise to an equal status among the arts.⁴⁷ In sum, artistic photographers have struggled to find their place in the world of art. While few today would dispute that photography *can* be an art, this unique medium does not enjoy the same treatment as other forms of art given its troubled history. Considering the marginalization of photography in art history and its inherent multi-functionality, it is likely that courts and audiences will struggle in their determination of the serious artistic value of questionable photographic works to a greater degree than they would for other forms of art that do not share the same past.

III. THE EFFECT OF ARTISTIC MEDIUM ON LEGAL BIASES: THE LAW'S DISTINCT APPROACH TO PHOTOGRAPHY OUTSIDE OF OBSCENITY

While statutes and courts have not explicitly allocated a varied obscenity standard based on artistic medium, nor ever expressly indicated that photography shall be treated as a lesser art more likely to be considered obscene, certain areas of the law outside of obscenity law suggest an overall legal bias against photography. These areas help reveal the general approach to photography by courts and lawmakers as being distinct from other vehicles for expression. Evidence of bias in the realms of copyright, privacy, and child pornography law demonstrates the likelihood that this distinct approach to

⁴⁶ See Sarah Greenough, *Alfred Stieglitz, Rebellious Midwife to a Thousand Ideas*, in MODERN ART AND AMERICA: ALFRED STIEGLITZ AND HIS NEW YORK GALLERIES (National Gallery of Art 2000).

⁴⁷ *Id.* at 27; see also MICHAEL NORTH, CAMERA WORKS: PHOTOGRAPHY AND THE TWENTIETH-CENTURY WORD 35 (Oxford University Press 2005).

photography transcends those realms into the realm of obscenity law. It helps support the proposition that photography is simply treated differently by the law. This unfavorable bias has far-reaching consequences for art photographers who produce sexually explicit work.

A. Photography and Copyright Law

The intersection of photography and copyright law came to a head in the prominent 1884 Supreme Court case of *Burrow-Giles Lithographic Co. v. Sarony*.⁴⁸ While the case is well-known for its determinations about the originality standard central to copyright law, what is most important and relevant is that the case more specifically resolved the issue of whether a photograph could be deemed the product of an author and therefore receive copyright protection in the first place.⁴⁹ The details of this case highlight the history of photography's troubled development as an art form. Given photography's mechanical nature and the charge that a photograph is merely the product of a soulless machine, the defendant in this case argued that the work was not that of an author and that it therefore failed the basic requirement for copyright protection. Essentially, this argument rode on the very criticisms of photography that provided the basis for its struggle to establish itself as art.⁵⁰

⁴⁸ 111 U.S. 53 (1884).

⁴⁹ See Farley, *supra* note 36, at 386. The history of how photographers began to assert copyright in their work is an interesting one and perhaps telling of photography's late start in the law, its struggle paralleling the overall debate of whether it was worth the distinction as "art." Photographers did not seek out copyright protection until two decades after photography was invented, at which time only several of the most successful portraitists including Mathew Brady, Napoleon Sarony, and Benjamin J. Falk exhibited such progressive boldness. *Id.* at 402.

⁵⁰ *Burrow-Giles*, 111 U.S. at 58-59 (acknowledging the defense's contrasting of engravings, paintings, and prints from photographs in that the former forms of art "embody the intellectual conception of its author, in which there is novelty, invention, originality" while the latter is merely mechanical reproduction of an object, in which there is no originality or novelty).

The mere fact that the differences between photography and other forms of art were so prominently considered in *Burrow-Giles* shows that there was a tendency for the Court to take an alternative approach to photography, even though the plaintiff in the case prevailed. While the Court ultimately ruled that the work, the famous portrait of Oscar Wilde, was indeed the work of an author rather than a machine, what is significant is that it used an approach separate from that which it would have used to find authorship in a painting or other form of art.⁵¹ The necessity of taking the “human trace” approach to justifying copyright of a photograph rather than the more traditional labor or innovation justifications used to support copyright of paintings and other forms of art reveals that despite the outcome of the case, there was still an underlying bias, or at least constructive acknowledgment, that photography’s inherent differences had to somehow be accommodated in order to reach the most appropriate decision. This accommodation is dangerous in its relation to the primary discussion on obscenity, for if photography must be treated differently, what is the likelihood that it would be afforded this same accommodation in the realm of obscenity? In all likelihood, a varied approach would work to photography’s disadvantage in the area of obscenity, particularly given common perceptions of its stark objectivity.⁵²

Another important copyright case involving a photograph, *Gross v. Seligman*,⁵³ demonstrates further that despite the general acceptance that photography warrants copyright protection, there exists an underlying bias against it. This is evidenced by the

⁵¹ See Farley, *supra* note 36, at 426-28 (recognizing that the Court, in order to reach its result of finding authorship in photography, could not rely on more traditional rationalizations for copyright such as acknowledging labor or innovation, but rather had to focus on the “human trace” in photography).

⁵² See *infra* part IV (discussing an additional obstacle to equal protection given the inherent realness of a photograph and the effect of this perceived fidelity to reality on a viewer’s reaction to sexually explicit photographs).

⁵³ 212 F. 930 (2d Cir. 1914).

proposition that despite the language in the opinion, the Second Circuit’s decision and rationale in the case were influenced by the fact that the artistic medium involved was photography. In *Gross*, the original photographer sold his copyright in a nude portrait and then later used the same model in a similar pose for a portrait under a different title.⁵⁴ The court ruled that the production of the second picture was an infringement on the copyright of the first because there was strong indication that the artist used his talents not to produce another picture, but rather to duplicate the original.⁵⁵

While the *Gross* opinion begins with a reference to *Burrow-Giles* and suggests that the court is treating the work as a photograph in the same way it would have had it been a painting,⁵⁶ the fact that the case involved a photograph still seems significant. Given the historic criticism of photographs as being mere products of a machine and copiers of reality, it is conceivable that a court would naturally think a photograph is easier to reproduce than an oil painting. This could have affected the court’s distaste for the actions of the original photographer – the court may have wanted to prevent the cheapening of copyright by disallowing the artist to take a second bite of the apple, but the court desired to come to its result even more because of the perceived ease of re-photographing something. This might explain why the court completely ignored attaching any significance to the fact that the second photograph had a distinct title, “Cherry Ripe,” that may have been a creative and original commentary on the first photograph, “Grace of Youth.” Such an analysis may have led the court to come to a

⁵⁴ *Id.*

⁵⁵ *Id.* at 931.

⁵⁶ *Id.* (“If the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by artist, he would infringe the purchaser’s rights if thereafter the same artist, using the same model, repainted the same picture with only trivial variations of detail and offered it for sale.”).

different result based on the fair use doctrine, though this possibility was apparently a non-issue given the opinion's complete lack of attention to it.

In the professional practice of photography, the general advice given to photographers is to take caution when it comes to the issue of copyright. With respect to the fair use defense in copyright law, the practical advice to photographers has been to seek as much help as possible given the complexity of the area despite the law's attempt to define it.⁵⁷ Photographers are also advised that the safest defense to copyright lawsuits is to introduce as many variations in the photograph as artistically possible.⁵⁸ But could this be harder for the photographer than for the painter? Arguably with today's technology and the advent of digital photography, it would not be. Nonetheless, the perception that a photograph is a literal translation of reality – and the law's notice of this perception – is an inescapable one for the artistic photographer. The obstacles that a photographer faces in the realm of copyright illustrate its distinctiveness as an art form – a distinctiveness that proves problematic beyond any single area of the law.

B. Invasion of Privacy and the Release

Another area of the law that suggests a varied approach to photography is that involving the right of privacy. In the early days of photography when it met its harshest and most widespread criticism, critics scorned the medium as being “predatory with respect to people.”⁵⁹ Photographic discourse in the mid-to-late nineteenth century on the invention's effect on modern society stressed its ability to make things more visible to the

⁵⁷ See ROBERT M. CAVALLO AND STUART KAHAN, PHOTOGRAPHY: WHAT'S THE LAW? 72-74 (Crown Publishers, Inc. 1979).

⁵⁸ See DUVERNET, *supra* note 39, at 123.

⁵⁹ SONTAG, *supra* note 36, at 115.

masses.⁶⁰ Together, these general sentiments lay a foundation for the intersection of photography and privacy rights. If a photograph did indeed capture the reality of a person, and if technology allowed such information to reach more people, then it makes sense that the invasion of privacy would become a greater concern. The ease of taking a picture, the picture's ability to reflect reality, and its dissemination in multiple facets of society and culture made it that much more dangerous to one's sense of privacy and anonymity.

Issues on the right to privacy and the use of the release are relevant here in that they reflect the uniqueness of photography as a medium. After all, the development of laws recognizing the right to privacy stemmed from the era of yellow journalism and excesses of the press – an era that was ultimately made possible by the advent of photography and its widespread use.⁶¹ The nation's first privacy law, embodied in sections 50 and 51 of the New York Civil Rights Law,⁶² was enacted as a response to the public's outrage regarding a company's use of a woman's *photograph* in advertising and the denial of a legal right to obtain damages for use of the photograph.⁶³

Although the New York right of privacy statute does not differentiate between various artistic media, but rather forbids use of a person's name, portrait, or picture for purposes of trade of advertising without that individual's written consent,⁶⁴ case law

⁶⁰ See, e.g., MARIEN, *supra* note 38, at 47.

⁶¹ See DUVERNET, *supra* note 39, at 65-69, 75 (describing the importance of every photographer's attention to the rights and obligations that lie in the area of privacy law given that the development of the law on the matter, in the form of the country's first privacy statute, was largely in response to a prominent dispute in New York involving photography); Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (lamenting the invasion of journalism into the lives and mental well-being of individuals and calling for the extension of American law to protect the rights of private individuals).

⁶² N.Y. CIV. RIGHTS LAW §§ 50, 51 (2005).

⁶³ DUVERNET, *supra* note 39, at 66-67 (discussing the 1902 New York case of *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902)).

⁶⁴ N.Y. CIV. RIGHTS LAW § 50.

revealing the exceptions to the statute shed light on the law's distinct approach to photography in privacy law. Of particular relevance is the newsworthiness exception – that is, if the image is editorial or newsworthy, it serves the public interest and thus falls outside of the scope of the privacy statute.⁶⁵ Because of its prevalent use in areas such as journalism and the assumption that a photograph is the sole medium that can provide the most direct representation of an event or object of reality, it would seem that photography is more likely than other media to fall under this newsworthiness exception. In this regard, photography's inherent nature offers it differential treatment in the eyes of privacy law. Of course, this favorable differential treatment does nothing for the category of artistic photography, but rather only protects journalistic photography. Whether these two types of photography should overlap and receive the same protection is a separate issue beyond the scope of this paper. Nevertheless, the newsworthiness exception in the law on privacy rights is but one area that reflects the relationship between the nature of artistic medium and its effect on the law.

Another relevant aspect of the intersection of photography and privacy law that evidences a distinct approach to photography involves the pending New York Supreme Court case between Mr. Erno Nussenzweig, a Hasidic Jewish man, and the internationally-acclaimed photographer Philip-Lorca diCorcia.⁶⁶ The photograph in dispute, “#13” of a larger collection entitled “Heads,” was taken by diCorcia in Times Square and has since been sold in multiple prints for roughly \$20,000 each.⁶⁷ While

⁶⁵ See, e.g., *Stephano v. News Group Publications, Inc.*, 474 N.E.2d 580 (N.Y. 1984); *Arrington v. New York Times*, 434 N.E.2d 1319 (N.Y. 1982); *Dallesandro v. Henry Hold and Company, Inc.*, 166 N.Y.S.2d 805 (N.Y. App. Div. 1957); *DUVERNET*, *supra* note 39, at 67 (advising the professional photographer that although courts provide for a newsworthiness exception, there are strict restrictions on the manner of obtaining photographs).

⁶⁶ See David Hafetz, *What's a Picture Worth? He Wants \$1.6 Mil*, NEW YORK POST, June 26, 2005.

⁶⁷ *Id.*

Nussenzweig has sued pursuant to sections 50 and 51 of the New York Civil Rights Law, which apply to use of name or likeness regardless of artistic medium, the argument can be made that the fact that this dispute involves a photograph, rather than a painting or other art form, is critical.

For starters, if this were a painted portrait, the subject would have likely posed for it, and would therefore be aware of the intended use of the work. It would be much harder, or even impossible, for the painter to create a work similar to “#13” without having the subject right in front of him, or at least seeing him for longer than the split second it takes to shoot a photograph. In other words, the immediacy associated with taking a photograph was what allowed diCorcia to capture the moment, and the relationship of photography to technology was what allowed him to capture it from a distance. Furthermore, Nussenzweig’s argument that he suffered “severe mental anguish, emotional distress, humiliation and embarrassment”⁶⁸ may become more believable given that his particular religion prohibits him from being photographed. Might these medium-specific considerations, and the biased perception that a photograph is more “real” and therefore more attached to the subject,⁶⁹ affect the court’s outcome on this case, much in line with the way early critics of photography found the medium so “predatory?”

Courts have struggled in their approach to photographs taken in public places because the photographer is arguably presenting what was already open to public view.⁷⁰ The general consensus is that there are situations in which privacy laws apply even in

⁶⁸ *Id.*

⁶⁹ See discussion *infra* Part IV.

⁷⁰ See DUVERNET, *supra* note 39, at 67-68 (detailing case law that reflects the notion that even in public, a person’s dignity may be violated and therefore deserve the protection of privacy laws).

public.⁷¹ If this is the case, the only way to get around using a photograph in trade or advertising is to obtain the subject's written consent. This is done through the release.⁷² Yet in cases involving photography such as diCorcia's, where the subject is meant to be anonymous and the photograph is taken spontaneously without the subject's knowledge, obtaining any sort of formal release is difficult and burdensome. Arguably, the release is most prevalent in the profession of photography,⁷³ but to the extent that it is required for art photographers like diCorcia, it is the least feasible.

C. The Realm of Child Pornography

A third pertinent area of law outside of obscenity, and perhaps the one that most clearly shows a bias against photography due to its inherent nature, is that of child pornography. Much of the literature surrounding the specific connection between photography and obscenity frames the issue with respect to child pornography rather than general artistic photography.⁷⁴ Indeed, child pornography is perhaps the one area in which it is least disputed that pornographic pictures of children are inappropriate, harmful, offensive, and illegal.⁷⁵

⁷¹ *E.g.*, *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976); *Daily Times Democrat v. Graham*, 162 So. 2d 474 (Ala. 1964).

⁷² *See* CAVALLO AND KAHAN, *supra* note 57, at 46.

⁷³ *See, e.g.*, CAVALLO AND KAHAN, *supra* note 57, at 46-56 (providing detailed practical information and sample releases for the professional commercial photographer, noting that use of a release is a matter of good business practice in the field); DUVERNET, *supra* note 39, at 110-19 (offering advice to the professional photographer on how to obtain a release, what it should say, and what issues may arise from it, and warning that any photographer who anticipates use of a photograph for commercial purposes must obtain a release).

⁷⁴ *See, e.g.*, Clay Calvert, *Regulating Sexual Images on the Web: Last Call for Miller Time, But New Issues Remain Untapped*, 23 HASTINGS. COMM. & ENT. L.J. 507 (2001); Dannielle Cisneros, "Virtual Child" Pornography on the Internet: A "Virtual" Victim?, 2002 DUKE L. & TECH. REV. 19 (2002); Jasmin J. Farhangian, *A Problem of "Virtual" Proportions: The Difficulties Inherent in Tailoring Virtual Child Pornography Laws to Meet Constitutional Standards*, 12 J.L. & POL'Y 241 (2003).

⁷⁵ *See* Cisneros, *supra* note 74, at 1 ("Most people would agree that the use of actual children in the production of sexually explicit videos or photographs is grotesque child abuse."). *But see* Calvert, *supra*

It is noteworthy, however, that child pornography laws constitute a distinct set of laws separate from obscenity laws. While child pornography laws mainly seek to protect the subject, obscenity laws mainly seek to protect the audience. In one sense, obscenity laws are more expansive than child pornography laws, in that the former applies to a wider variety of works, while the latter focuses exclusively on pictures – either photographic or live.⁷⁶ In another sense, child pornography laws are more expansive than obscenity laws in that the *Miller* standard, including the third “value” prong, is completely irrelevant to the determination of whether something constitutes child pornography. Child pornography can therefore be banned even if it is not defined as obscene under *Miller*

In *New York v. Ferber*,⁷⁷ the Supreme Court stated that child pornography is an “exception to First Amendment freedoms because it exploits and abuses our nation’s youth” and that child pornography can therefore be banned without regard to whether it possesses value.⁷⁸ The Court further emphasized that child pornography laws should be limited exclusively to photographs and live performances or visual productions of live performances, noting that the “distribution of descriptions or other depictions of sexual conduct [of children], not otherwise obscene... retains First Amendment protection.”⁷⁹

The rationale was that it is only in photography and film that there would be a true

note 74, at 533-36 (highlighting the work of David Hamilton, which features photographs of pubescent girls, as representative of a new gray area of artistic photography that makes it “very difficult, under current laws, to distinguish between illegal child pornography and protected art”).

⁷⁶ This limitation on the scope of media subject to child pornography laws is reminiscent of the earlier discussion on the power of the image and initial hurdles to equal protection for all visual imagery. See Adler, *Art of Censorship*, *supra* note 1, at 210 (observing that the preference for First Amendment protection over text prevails in child pornography law in that the laws only include specific types of images).

⁷⁷ 458 U.S. 747 (1982).

⁷⁸ *Id.* at 762.

⁷⁹ *Id.* at 764.

exploitation of the child, since the photograph or video reveals that there was an actual child used in the work itself.⁸⁰ Thus reveals a prime example of an area wherein the law blatantly distinguishes between photography and other forms of art such as painting, drawing, sculpture and so forth.

The need to take a distinct approach to photography as compared with other forms of art in the area of child pornography also presents itself clearly in the more recent Supreme Court case of *Ashcroft v. Free Speech Coalition*.⁸¹ The issue in this case was whether “virtual child” pornography, involving completely fictional subjects in which no actual child was used in the production process, could be criminalized under child pornography laws. The Court held that the government could not criminalize such activity because it did not constitute sexual abuse of any child.⁸² While Congress, in direct response to the Court’s decision, proposed new legislation in an attempt to proscribe virtual child pornography,⁸³ the approach by the Court on the issue is quite clear: child pornography laws should remain true to *Ferber*’s intent and be limited to photographs or live productions or reproductions of *actual* children.

The Court’s outcome on the issue of virtual child pornography is analogous to the distinction between a photograph and a painting. A painting that does not involve a child model, but is rather conjured up by the artist’s imagination, is “virtual.” Only a photograph, not a drawing or painting or sculpture, definitively and without dispute uses a real-life subject. Therefore, in the realm of child pornography law, it is the sexually

⁸⁰ See Cisneros, *supra* note 74.

⁸¹ 535 U.S. 234 (2002).

⁸² *Id.* at 250 (opining that virtual child pornography is not “intrinsically related” to the sexual abuse of children and is therefore distinguishable from actual child pornography, and that the causal link between virtual child images and actual child abuse is “contingent and indirect”).

⁸³ See Farhangian, *supra* note 74 (addressing the constitutionality of Congress’s recent attempts to ban virtual child pornography through the COPPA of 2002 and 2003 and the PROTECT Act).

explicit photograph involving a minor that can be criminally charged, not an alternative art form whose relation to a subject is treated as more tenuous. The basis of this differential treatment – that a photograph is inherently more tangible and true, ever filial to reality – brings the discussion back to the realm of obscenity and lays the foundation for the final piece of the puzzle illustrating the artistic photographer’s struggle with contemporary obscenity standards.

IV. OBSCENITY AND THE EYE OF THE BEHOLDER: PHOTOGRAPHY’S INHERENT NATURE AND THE CAPTURING OF OBJECTIVE TRUTH

Courts and audiences are more likely to find sexually explicit photographs obscene not only because it may be harder to find that a photograph possesses “serious artistic value,” or because there is evidence that courts treat photography differently in a variety of areas outside of obscenity law, but perhaps most intuitively because a photograph is perceived as capturing something inherently more real. The objectivity of photography and its “fidelity to appearances”⁸⁴ relates back to the earlier discussion on the marginalization of photography as art. While that discussion focused on the effects that the ease of taking a photograph and the multi-functionality of photography had on the third prong of *Miller*,⁸⁵ the discussion at hand focuses on the first two prongs of *Miller* those relating to the “prurient interest” and whether the work exhibits sexual conduct in a “patently offensive” way. I argue here that the myth of photographic realism leads to a higher likelihood that a sexually explicit photograph will be deemed to satisfy these two prongs of *Miller*. This analysis thereby completes the proposition that

⁸⁴ SONTAG, *supra* note 36, at 126.

⁸⁵ See discussion *supra* Part II.

photography's inherent nature has a restrictive effect with respect to each element of the *Miller* obscenity test .

Photography's dependence on machinery was only part of the reason critics scoffed at its value as art. The other part of the reason for the marginalization of photography dealt with the assertion that a photograph simply reflected reality and was therefore not an expression of personality or human soul.⁸⁶ In this sense, it was inferior to painting and other traditional forms of art, and artists and critics were quick to lament the permeation of the new invention into the field of art.⁸⁷ A photograph merely re-presented nature, and its verisimilitude made it transparent and less worthy of artistic acclaim.⁸⁸ Deemed "the pencil of nature,"⁸⁹ photography was seen as deplorably plagiaristic of reality: a photograph's sole merit was its accuracy, nothing more.⁹⁰

It is precisely this understanding of photography's ability to capture reality and offer an exact duplication of a real object or scene that makes a sexually explicit photograph more readily offensive. In the eyes of the viewer, photography is the one medium that can accomplish this duplication of reality, and for this, it has a dangerously

⁸⁶ See, e.g., MARIEN, *supra* note 38, at 58-59 (quoting the critic Ruskin as writing that photographs "supersede no single quality nor use of fine art" because they have so much in common with nature and in turn reflect no "human labor regulated by human design," which he labeled the definition of art); WARD, *supra* note 37, at 3 (considering how the immense "sense of reality *behind* the photograph" causes people to perceive photographs as "invisible windows with no intrinsic character").

⁸⁷ See *id.* at 58 (noting Ruskin's early adoration of photography but subsequent disdain of it in its relation to art, when he expressed that when it came to art, he wished photography "had never been discovered"); Farley, *supra* note 36, at 417 (framing French painter Paul Delaroche's exclamation in response to photography's invention: "From this day, painting is dead!" as evidence of his and other artists' unspoken fear of the new medium).

⁸⁸ See generally JOHN TAGG, *FOUNDATIONS OF DISPUTE: ART HISTORY, CULTURAL POLITICS, AND THE DISCURSIVE FIELD* 125 (University of Minnesota Press 1992) (analyzing that the "conception of the photograph as a mechanized, automatic product evokes not futuristic fantasy, but the contempt of the Romantic theory of culture, which sees art as the elite and manly expression of a given human spirit").

⁸⁹ WILLIAM H.F. TALBOT, *THE PENCIL OF NATURE* (Da Capo Press 1968)(1846).

⁹⁰ See Farley, *supra* note 36, at 396, 416-19 (explaining how photography was initially understood and the origins of artists' reactions to photography upon its invention).

powerful effect.⁹¹ As American commentator Susan Sontag writes: “Photography furnishes evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.”⁹²

This perception and understanding of photography was what justified the Supreme Court’s continued support of *Ferber* in its limitation of child pornography laws to actual photographs or videos of real children. The objectivity of a photograph makes the subject more real to the viewer, and the mental association of the final product to the subject invokes a specific reaction. In the realm of child pornography, that reaction generally reflects disgust. But the same line of reasoning transfers to the realm of obscenity. Depictions of sexual conduct between individuals or the “lewd exhibition of the genitals”⁹³ through *photography* has a higher tendency of offending because it was an actual person in that photograph, committing that act. When the viewer completes the inevitable mental processing of the image and conceptualizes its close relation to real life, it becomes that much more “hard core.” This only builds upon and deepens the earlier assertion regarding photography’s initial obstacle to First Amendment protection as a visual image.⁹⁴

The perception that photography blatantly duplicates reality thus proves to be a double-edged sword: it hinders its consideration as possessing “serious artistic value” for purposes of falling outside the realm of obscenity and into the realm of works meriting

⁹¹ See, e.g., WARD, *supra* note 37, at 2-3 (emphasizing that because of photography’s ability to render detail and the perception that it records reality, people are so caught up with the subject matter of a photograph so as not to pay attention to the technical or artistic nature of the photograph); Thierry de Duve, *Time Exposure and Snapshot: The Photograph as Paradox*, 5 PHOTOGRAPHY 113, 119 (Summer 1978) (analyzing photography as a distinct art form and how its inherent characteristics render it “traumatic” to the viewer).

⁹² SONTAG, *supra* note 36, at 5.

⁹³ See *Miller v. California*, 413 U.S. 15, 25 (1973) (providing examples of what a state statute could define as “sexual conduct” for purposes of the second prong of the test).

⁹⁴ See *supra* Part I.A.

First Amendment protection, and it also makes a photograph more real for purposes of satisfying the other two prongs of the *Millett* test. Even if a sexually explicit photograph is considered “aesthetic” or in some other way deserving of distinction as art, the question remains whether it is *serious* art, and the problem remains that an average viewer naturally associates sexual connotations with the mere image of a nude⁹⁵ – thereby opening up the possibility that the work is obscene. In sum, photography’s mechanically truthful nature is detrimental to the freedom of sexually explicit art photographers with respect to each element of the obscenity consideration.

The effect of photography’s objective nature and its connection to the individual subject of (i.e. person in) the photograph were previously relevant in the discussions on the right of privacy and child pornography.⁹⁶ In the realm of obscenity, the realness of a photograph and its attachment to the subject being photographed make the work more striking, shocking, realistic, and resultantly more “patently offensive.” Moreover, to the “average person” applying “contemporary community standards,” these distinct characteristics – ones that simply cannot exist in painting, drawing, or sculpture in the way they do in photography – render the work more likely to appeal to the “prurient interest.” As Sontag further writes:

“While a painting, even one that meets photographic standards of resemblance, is never more than the stating of an interpretation, a photograph is never less than the registering of an emanation... – a material vestige of its subject in a way that no painting can be.”⁹⁷

⁹⁵ See ARTHUR GOLDSMITH, *THE NUDE IN PHOTOGRAPHY* (Ridge Press/Playboy Press 1975) (suggesting that successful nude photographs can satisfy both aesthetic *and* sexual appetites simultaneously); LOU JACOBS JR., *EXPRESSIVE PHOTOGRAPHY* 193 (Goodyear Publishing Company, Inc. 1979) (cautioning both the amateur and professional photographer of the natural association of the nude to sexuality and the need to deal with this reality).

⁹⁶ See *supra* Part III.B-C, pp. 22, 24-26.

⁹⁷ SONTAG, *supra* note 36, at 154. Granted, paintings of the realist movement such as Edouard Manet’s “Olympia” and Gustave Courbet’s “L’origine du Monde” were shocking in their day, though it is arguable still that these paintings were not so literal to the viewer as a photograph would be.

The impact of photography's inherently objective qualities on the satisfaction of the elements of obscenity are not only evident in modern discourses on photography as well as certain case law,⁹⁸ but also in our culture of consumption. After all, modern popular pornography exists primarily in the form of photography or film. One would venture to say that consumers of pornography prefer photographs to drawings or paintings. The latter are less satisfying because they don't seem as realistic, or as tied to a real person. To the consumer of pornography, a sexual fantasy, though fantasy, still requires an element of reality. This preference makes the line between sexually explicit photography as art and sexually explicit photography as pornography evermore blurred. It is a dilemma that plagues the art photographer to a far greater extent than the painter or other more traditional artist.⁹⁹

The notion of photographic realism, however, is somewhat a myth, given both photography's historical development as a fine art and its close relationship with

⁹⁸ Compare *Miller v. United States*, 431 F.2d 655 (9th Cir. 1970) (finding a forty-eight-page publication featuring nude photographs of the same female model obscene), and *People v. Gonzales*, 107 N.Y.S.2d 968 (1951) (ruling that the mailed works in question had no redeeming artistic value because they were not even "good" photographs), with *City of St. George v. Turner*, 813 P.2d 1188 (Utah 1991) (deciding that spray-painted drawings representing genitalia were too amorphous, abstract, and "crudely rendered" to be patently offensive or to appeal to the prurient interest).

⁹⁹ See Nicola Beisel, *Morals Versus Art: Censorship, The Politics of Interpretation and the Victorian Nude*, 58 Am. Soc. Rev. 145 (Apr. 1993) (discussing the marginalization of photography by way of photographic reproductions of painted works and quoting common attitudes that the increasing popularity throughout history of colored photographs of pictures was "not altogether due to an increasing love and appreciation of art" but rather a baser desire).

The significance of the effect of photographic reproductions on the marginalization of photography is also interesting in its relation to the notion that a photograph cheapens the value of a work by making it more accessible to the masses. This cheapening makes the work more sordid and obscene. Throughout history, certain classical nude paintings were legal and classified as pure nudes rather than impure ones, but photographic reproductions of the same works were ruled obscene. American artists and critics, in line with their French counterparts, rarely recognized instances of impure paintings of a nude, further indicating the general respect a painting received as a traditional art form and the disdain of photography as a lesser art. See generally Walter Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in MODERN ART AND MODERNISM (Francis Frascina & Charles Harrison, eds., Harper & Row 1982); Beisel, *supra* at 151-52; Shayana Kadidal, *Obscenity in the Age of Mechanical Reproduction*, 44 AM. J. COMP. L. 353, 373 (Spring 1996).

technology. Historically, photographers tried to mimic the technical and artistic styles of paintings in order to earn recognition as a worthy art.¹⁰⁰ During the reign of pictorialism in the latter half of the nineteenth century, art photographers felt the need to adopt an abstract, painterly approach to their work in order to obtain legitimacy in the world of fine art. Pictorialists believed that the artistic photograph should be judged using the same principles as those used to judge other artistic media such as paintings and prints.¹⁰¹ To make photographs appear more like paintings, art photographers often manipulated images by hand, deliberately making them blurred and abstract, or applied other technical modifications such as a softer focus and backlighting to achieve a similar painting-like result.¹⁰² Early photographers of the nude made use of similar techniques, including use of veils and impersonal poses, in order to avoid sexuality in the same way paintings and sculptures traditionally mythologized and idealized the classic nude.¹⁰³

These attempts to render photography more similar to traditional forms of art, later discouraged by Purists and Photo Secessionists in a subsequent movement,¹⁰⁴ demonstrate the lengths taken by early art photographers to overcome a stigma and achieve validation. Perhaps more significantly, however, they indicate that photography

¹⁰⁰ See, e.g., Farley, *supra* note 36, at 419-24.

¹⁰¹ See NORTH, *supra* note 47, at 17.

¹⁰² Farley, *supra* note 36, at 421.

¹⁰³ LOU JACOBS JR., *supra* note 95, at 187.

¹⁰⁴ See WARD, *supra* note 37, at 17 (discussing the Purist's championing of objective realism and belief that a photograph should remain true to its medium); Renger-Patzch, *supra* note 36 (encouraging photographers to reject the abstract form of modern painters and to instead embrace the visual realism that belongs exclusively to photography); Philippe Soupault, *The Present State of Photography*, in PHOTOGRAPHY IN THE MODERN ERA 50-51 (Christopher Phillips, ed., The Metropolitan Museum of Art and Aperture 1989) (describing the abandonment of the pictorialist era of photographic experimentation for a new push towards realistic imagery); Farley, *supra* note 36, at 422 (explaining how the Photo Secessionists rallied against the Pictorialists at the turn of the century, but that the movement away from manipulative and painterly approaches was more theoretical than practical).

is not *always* literal, and that it never has been.¹⁰⁵ Never could this be more the case in today's era of digital photography. As technology continues to advance, allowing for the drastic alteration of images be it on the computer or in the darkroom, the notion that all photography is inherently a duplication of reality is simply not true. As such, modern courts and audiences should perhaps rethink their reaction to a sexually explicit photograph to the extent that it may not be so different from a painting, drawing, or other traditional medium after all.

V. LOOKING FORWARD: STRIVING FOR AN EQUAL OBSCENITY STANDARD AND THE LIMITS ON EXPANDED FREEDOM FOR THE ART PHOTOGRAPHER

In order to overcome a negative bias against the freedom of photographers with respect to producing sexually explicit photographs, one solution is for courts and audiences to be more cognizant of the myth of photographic realism. Part of that would involve a more ready realization that photographs do not always reflect reality and can be altered and recreated at the artist's whim just like a painting, virtual digital image, drawing, or sculpture. Yet this possibility lends itself to an alternative problem: the implicit requirement that a photograph somehow purposely possess an abstract or aesthetic quality.

As applied to modern obscenity law, it seems that the pictorialist approach would have helped shield many sexually explicit photographs from being deemed obscene. The

¹⁰⁵ The famous war photographs of Mathew Brady and Alexander Gardner during the Civil War era further reflect the ability of the camera to reflect a modified version of reality. In order to create a story and evoke emotion with a photograph, these photographers sometimes "created" a scene by posing bodies. See ALEXANDER GARDNER, PHOTOGRAPHIC SKETCHBOOK OF THE CIVIL WAR (Dover Publications, Inc. 1957) (1865); *Does the Camera Ever Lie?*, Civil War Photographs, <http://memory.loc.gov/ammem/cwphtml/cwpcam/cwcam1.html>, (last visited December 4, 2005).

more abstract, indistinct, and unreal a work of art, the less likely it is to satisfy the first two prongs of *Miller*¹⁰⁶ On the same token, it is arguable that the more abstract, aesthetic, and painting-like a work, the more likely it is to satisfy the third prong of *Miller* and thus ensure protection by the First Amendment.¹⁰⁷ This brings into question whether photographs that are sexually explicit must somehow possess a special abstract aesthetic quality in order to be considered less offensive and more artistic. In addition to the “formalistic” opposing diagonals and “almost classical” compositions of Robert Mapplethorpe’s photographs, for example, most of his most controversial works were also shown as black and white photography, arguably making it less real, and perhaps more “artsy” than colored photography. Indeed, the historical marginalization of photography based on treatment of colored photographic reproductions focused on the notion that colored photographs might have a certain cheapening effect and also appeal to a baser, more “prurient” interest.¹⁰⁸

Does this mean that an art photographer whose work features a sexually explicit nude (or nudes) in a potentially obscene way should try extra hard to make the work look more “artistic,” perhaps by using a more classical composition, smudging and blurring outlines, using a softer focus, making it less true to reality – all the things that the pictorialist felt the need to do and that the purist advised against? Surely, a painter was never forced to use black and white paint in order to make his painting of a provocative nude more “artistic,” less “real,” and therefore less obscene.

¹⁰⁶ See *City of St. George v. Turner*, 813 P.2d 1188 (Utah 1991) (placing graffiti art outside the realm of obscenity because it was too blurry and indistinct to be patently offensive or appeal to the prurient interest).

¹⁰⁷ See Hess, *supra* note 27 (relaying the art expert’s appreciation of the formalistic lines and shadows of Mapplethorpe’s photographs as warranting the work’s “serious artistic value”).

¹⁰⁸ See *supra* note 99.

The dilemma as to whether modern-day art photographers have to make their work more “beautiful” or “artistic” in order to escape obscenity charges surfaces again in the Ninth Circuit case, *Miller v. United States*.¹⁰⁹ The court in that case emphasized how the lack of any “attempt at artistic composition either in background, surroundings or poses” justified the finding that the work was obscene.¹¹⁰ Yet, going back to the initial problem of defining art and artistic value, what does “good photography” even mean, and who best decides? And what of the Post-Modern art photographer whose purpose is to defy all classical technique and traditional standards, perhaps by deliberately taking the purist’s approach to artistic photography to an extreme? Would the product be protected art, or unprotected obscenity? These are all problems that continually limit the freedom of the photographer, particularly the photographer who chooses as part of his art to more literally exhibit sexual conduct, in producing sexually explicit photographic images for the sake of art.

CONCLUSION

Ideally, art photographers should not be further restricted merely because of inherent biases and preconceptions regarding their chosen medium. However, the power of the photographic image, the indefiniteness of what constitutes art and what warrants serious artistic value, the multitude of functions outside of art associated with photography, the historical marginalization of photography as art, the biases against the medium exhibited in distinct areas of the law, and its perceived accuracy as a vehicle for

¹⁰⁹ 431 F.2d 655 (9th Cir. 1970).

¹¹⁰ *Id.* at 658.

an objective reality – all result in a profound and perhaps inescapable impact on the art photographer.

We are not yet at a point in which we automatically reason that a photograph may not actually reflect reality, or that it is unfair that the art photographer, and not the painter or sculptor, be subjected to our prejudicial notions about the medium. Until the common juror, the judge, and the viewers and critics of artistic photography at large do embrace these nuances in the relationship between photography and obscenity, the art photographer will likely continue to struggle, to a greater extent than other artists, in the face of the nation's standards on obscenity.