Equal Protection in the World of Art and Obscenity: The Art Photographer’s Latent Struggle with Obscenity Standards in Contemporary America

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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 the artistic medium has on the tendency of courts and audiences to find a particular work obscene.1 More 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 to be obscene than a sexually explicit painting or sculpture? If so, the art photographer would be more restricted in producing sexually explicit work than the traditional painter or sculptor. This varied standard, though invisible on paper, is ultimately harmful to the photographer as artist, the advancement of photography as art, and the public audience that will not be able to experience this art. In the realm of obscenity law, courts and audiences alike 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 problematic literal medium of expression.

Part I of this article describes the initial hurdles that all visual art forms, including photography, face 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

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 M. Adler, Note, 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).

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:
particular relevance is the “serious artistic value” prong of the Miller test and the problems inherent in determining who is to judge as well as how one might judge whether a work, particularly a photograph that may be construed to have a non-artistic function, possesses “serious artistic value.”

Part II 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 and parties to disputes have demonstrated a bias against photography based on its visual and mechanical nature. This biased approach to photography in other areas of the law translates into the tendency of courts to view photography differently within the scope of obscenity law. Part III expands upon the obstacles inherent in 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” for purposes of the Miller test.

Further exploring the complexity of photography as an artistic medium, Part IV focuses on the effect of photography as a means of capturing objective truth. Because a photograph is perceived as more real than a painting or sculpture, courts and audiences are more likely to find provocative photographs to be 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 easily perceived as “obscene” than other forms of art. Finally, Part V anticipates the need to apply effectively an equal standard for what constitutes obscenity across all art forms in recognition of photography’s value as an artistic medium.

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 the applicable state law; and c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted) (internal quotation marks omitted).

3. Id. at 24.
4. Id.
5. Id.
6. Id.
I. VISUAL ART AND THE MILLER TEST: INITIAL HURDLES TO FIRST AMENDMENT PROTECTION

The Supreme Court has long held that certain content, such as obscenity, does not fall within the scope of absolute First Amendment protection. Because material such as obscene sexual content falls outside the realm of protected speech, legislatures can enact statutes that either limit or ban such obscene content. The question, therefore, becomes which works are obscene and which works are not obscene, and the answer dictates whether the particular work can be censored in some manner. In Miller v. California, the Supreme Court ruled that 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 the applicable state law; and c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

As a starting point, photography faces two challenges with respect to First Amendment protection. First, it is a visual art and the visual arts arguably garner less First Amendment protection than verbal speech. Second, it is difficult to determine when photography exhibits serious artistic value for purposes of Miller’s third prong. Additionally, under Miller it is unclear when a work of art has serious artistic value and who should make that determination. Furthermore, contemporary artistic movements such as the Post-Modernist movement often deliberately seek to defy the notion that an

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7. E.g., Roth v. United States, 354 U.S. 476, 484 (1957) (verifying the rejection of obscenity in the history of the First Amendment and defining it as "utterly without redeeming social importance").
8. Cf. Miller, 413 U.S. at 21-25 (reaffirming the Roth decision and outlining a three-pronged test for defining obscenity based on contemporary community standards).
9. Id. at 24 (citations omitted) (internal quotation marks omitted).
10. See Adler, Art of Censorship, supra note 1 (identifying this problem for art as part of the larger problem of greater First Amendment protection over verbal as opposed to visual speech).
11. See generally Christine Haight Farley, Judging Art, 79 Tul. L. Rev. 805 (2005) (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 “exhaustive” philosophical query of what “art” is).
artistic work must possess conventional artistic value. These initial obstacles arise even before a consideration of how photography differs from other art forms, and they only serve to heighten the burden on art photographers' freedom of expression. Although these challenges are not specific to photography as an artistic medium, artistic photography is a critical example of a form of expression that faces both challenges.

A. The Power of the Image

Visual imagery can evoke powerful emotions and reactions that render it distinct from (or simply unparalleled by) other forms of expression. The adage that a picture is worth a thousand 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." With respect to the First Amendment, the question has been raised as to whether it makes sense that art, with "its force beyond words, its power and its irrationality," is protected at all, given that the underlying rationale of the First Amendment is to foster a marketplace of rational ideas. Additionally, there exists the argument that visual images are somehow dangerous given their power over human emotion and behavior. 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.

Photography as an art form may in fact represent the epitome of the power of images, particularly because a photograph is perceived as capturing and revealing an objective truth to which individuals

12. Adler, Death of Obscenity Law, supra note 1, at 1359.
13. W. Va. Bd. of Educ. 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, at 213-17 (illustrating the value of visual images in part through discussion of the Supreme Court's flag and flag burning cases).
15. Id.
16. Id. at 211-13.
17. Id. at 213.
more easily relate.\textsuperscript{18} It follows that offensive, powerful, or provocative photographs might be considered more “dangerous” images, which, applying Professor Adler’s analysis, would warrant greater censorship.\textsuperscript{19} Yet even when disregarding the nature and effect of photography specifically, the mere fact that it is a visual, rather than a textual, form of expression places it on lower footing with respect to First Amendment protection.\textsuperscript{20} Indeed, modern obscenity litigation has focused \textit{exclusively} on visual rather than textual material.\textsuperscript{21} Furthermore, anti-pornography writing, namely that of Catharine MacKinnon, suggests that pornographic photography is more harmful and degrading to women than textual pornography.\textsuperscript{22} Considering these assertions on the power of visual imagery, photography, by nature of its being visual rather than textual, faces an initial obstacle to surviving obscenity litigation.

\textbf{B. The Problem of “Serious Artistic Value”}

The second general obstacle photography faces by nature of being an “art” relates to the third prong of the \textit{Miller} test. Even if a work of art satisfies the first two prongs of the test, the work is not deemed obscene under \textit{Miller} unless it also lacks “serious artistic value.”\textsuperscript{23} But what exactly is art, and who gets to decide what it is? If art is a means of self-expression and a critical medium for creative development, new ideas and progress, then art’s sole constant may indeed be change. As a result, a single true and accurate definition of art would be ever-fleeting.\textsuperscript{24} 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.\textsuperscript{25} It is therefore meant to be open to

\begin{itemize}
\item \textsuperscript{18} See infra Part IV.
\item \textsuperscript{19} See Adler, \textit{Art of Censorship}, supra note 1, at 210.
\item \textsuperscript{20} Id.; cf. Rudolf Arnheim, \textit{The Images of Pictures and Words}, 2 \textit{WORD & IMAGE} 306, 306-07 (1986) (discussing the power of images to dominate an experience that is both visual and verbal because images are transmitted directly, while speech is an “indirect medium”).
\item \textsuperscript{21} Adler, \textit{Art of Censorship}, supra note 1, at 210.
\item \textsuperscript{23} Miller v. California, 413 U.S. 15, 24 (1973).
\item \textsuperscript{24} See, e.g., Newman, supra note 1, at 156-58 (criticizing the Supreme Court’s First Amendment framework for obscenity determinations as insufficiently protective of controversial Contemporary art which challenges current social norms).
\item \textsuperscript{25} See Adler, \textit{Art of Censorship}, supra note 1, at 213; see also Renee Linton, \textit{The Artistic Voice: Is it in Danger of Being Silenced?}, 32 \textit{CAL. W. L. REV.} 195, 195 (1995)
\end{itemize}
interpretation depending on each individual’s own emotional reaction.\textsuperscript{26} Furthermore, not all art is intended to be aesthetic or even fully interpretable.\textsuperscript{27} Post-Modern art, for example, derives its value from defying past standards and expanding beyond the traditional boundaries of art, often attempting deliberately to shock and blatantly offend audiences.\textsuperscript{28} Perhaps most importantly for purposes of current obscenity law, not all art has serious artistic value.\textsuperscript{29} 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 \textit{Miller} with the idea that some legitimate art may, by its very character, purposely lack serious artistic value in the conventional sense.

The “serious artistic value” standard arguably becomes even more problematic when applied to photography. To the extent that photography was not historically considered an “art” and is still seen today as having multiple “non-artistic” functions,\textsuperscript{30} it is harder to prove that provocative photographs teetering on the “art/non-art” divide have serious artistic value. In this sense, the art photographer not only is restricted by the same challenges regarding serious artistic value that confront all other artists, but additionally is restricted by the medium of photography itself.

Yet this difficulty in defining and judging art constitutes only half of the problem with the serious artistic value standard. The other half of this looming issue concerns the questions of \textit{who} should determine whether a work is “art,” and if determined to be “art,” whether or not it possesses serious artistic value. Justice Oliver Wendell Holmes’s famous quote in the 1903 case of \textit{Bleistein v.} (supporting government funding of the arts and making the opening statement that “[g]ood art moves your emotions or makes you think,” though emphasizing that “good” art encompasses “disliked” art and that all art “deserves both our attention and our protection” (quoting Julie Ann Alagna, 1991 Legislation, Reports and Debates Over Federally Funded Art: Arts Community Left with an “Indecent” Compromise, 48 WASH. & LEE L. REV. 1545, 1545 (1991))).

26. \textit{Cf.} Linton, \textit{supra} note 25, 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.” (quoting Alagna, \textit{supra} note 25, at 1545)).

27. \textit{Id.} This statement was derived from the quote in the previous footnote, that not all art must be “liked or beautiful.”

28. \textit{See} Adler, \textit{Death of Obscenity Law, supra} note 1, at 1369-75 (denouncing the \textit{Miller} test as inadequate for protecting Post-Modern art such as the works of Karen Finley, Annie Sprinkle, Robert Mapplethorpe and Richard Kern, all of which seek to rebel against traditional notions of art and therefore often shock, offend or insult the common public).

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

30. \textit{See infra} Part III.
Donaldson Lithographing Co., that “it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations,” reveals the sentiment that it is not the role of judges to evaluate the legitimacy of art or to make aesthetic determinations. That is, it is not up to judges to determine what is and is not “art.” Courts, however, are not always apt to pay heed to Holmes’s admonition. 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 constitutional protection.

Judges are not the only art viewers who may allow their own preconceived notions affect a case’s outcome; the jury also acts as a critical audience. In *Pope v. Illinois*, the Supreme Court announced a reasonable person standard for *Miller’s* third prong. In determining whether a work has serious artistic value, a jury should ask itself how a reasonable person would evaluate the work as a whole rather than inquiring into what an average person in a given community would think. While expert testimony may be used to help the trier of fact make this determination, it is not required and the opinion of art

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31. 188 U.S. 239, 251 (1903).
32. Id. Justice Holmes added: “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.” Id.
33. See, e.g., Leibovitz v. Paramount Pictures Corp., 137 F.3d 109, 111 n.1 (2d Cir. 1999) (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, 658 (9th Cir. 1970) (ruling a photographic magazine obscene because the pictures contained in it reflected no attempt at artistic composition), vacated, Miller v. United States, 413 U.S. 913 (1973); People v. Gonzales, 107 N.Y.S.2d 968, 970 (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).
35. Id. at 500-01.
36. See, e.g., Luke Records, Inc. v. Navarro, 960 F.2d 134, 137 (11th Cir. 1992) (noting expert testimony as to the serious artistic value of the lyrics of the song in question); United States v. Ten Erotic Paintings, 432 F.2d 420, 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 (N.Y.), Oct. 23, 1990, at 111-12 (reporting on the famous trial involving Robert Mapplethorpe’s controversial works and the effectiveness of expert testimony in convincing the jury to acquit the Contemporary Art Center and its director).
experts and critics is not necessarily determinative under *Pope*’s reasonable person standard. Critics of the *Pope* majority warn that the reasonable person standard exacerbates the difficulties that lie in the “serious artistic value” prong. 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 than would an art critic. 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 serious artistic value, the *Pope* standard subjects controversial art to more popular, and often more limiting, concepts of art and artistic value.

All of this suggests that current First Amendment jurisprudence and standards of obscenity render the preconceived notions and popular perceptions of art by the public extremely relevant to the analysis. This is particularly important for the discussion regarding artistic photography’s distinct impact on audiences and how it results in a greater likelihood that a provocative photograph will be considered obscene. Sexually explicit artistic photography must therefore grapple with a variety of issues that affect photography as well as the category of visual arts as a whole: the inherent power of visual imagery, the requirement that it meet the problematic “serious artistic value” prong of *Miller*, and the influence of public views on art versus that of experts. Photography, as a subset of the visual arts, is therefore disadvantaged from the start. These overarching obstacles are only the beginning of the rocky road that art

37. 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).

38. 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).

39. Id.


41. The subjective “four-corners” test evaluates specific criteria such as space, composition, design, color, harmony, and form and balance, while the objective “Dickey” analysis 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. *See Conboy*, 596 N.W.2d at 314 (discussing the expert witness’s consideration of the two analyses used by art experts).

42. *See Newman, supra* note 1, at 151 (denouncing courts’ belief that ordinary and reasonable men and women are best able 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”).

43. *See infra* Parts III and IV.
photographers must travel in their struggle for equal treatment under the First Amendment. These obstacles also lay the foundation for the more medium-specific explanations of why sexually explicit photography may more readily be found to be obscene that the following sections explore.

II. 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 expressly indicated that photography shall be treated as a lesser art that is more likely to be considered obscene, certain areas of the law outside of obscenity suggest an overall legal bias against photography. These legal areas help to reveal the general approach to photography taken by lawmakers and courts as being distinct from other vehicles for expression. Evidence of bias in copyright, privacy and child pornography law demonstrates the likelihood that this distinct approach to photography extends from those realms into obscenity jurisprudence. Such evidence also supports 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.* Although best known for its determinations about the originality standard central to copyright law, what is most important and relevant to the current analysis is that the case specifically resolved the issue of whether a photograph could be deemed to be the original product of an author (which would make it eligible for copyright protection). The details of *Burrow-Giles* highlight photography’s troubled development as an art form. Citing photography’s mechanical nature and the charge that a photograph is merely the product of a soulless machine, the alleged

44. 111 U.S. 53 (1884).
45. Id. at 60; see Christine Haight Farley, *The Lingering Effects of Copyright’s Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 386 (2004). 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. Farley, *supra*, at 402.
infringer argued that the work was not that of an author and that it therefore failed the basic requirement for copyright protection.46 This argument essentially tracks the historical criticisms of photography as an artistic medium that became the foundation of its struggle for establishment as “art.”47

The mere fact that 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.48 While the Court ultimately ruled that the work, the famous photographic portrait of Oscar Wilde, was indeed the work of an author rather than a machine, it used a different approach from that which it would have used to find authorship in a painting or other form of art.49 The necessity of taking the “human trace”50 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 belief (or at least constructive acknowledgment) that photography’s inherent differences somehow had to be accommodated in order to reach the most appropriate decision. This accommodation under copyright law is dangerous in its relation to obscenity law. If photography is treated differently under copyright law, it might be afforded similar accommodation under the First Amendment; yet a varied approach would likely work to the disadvantage of sexually explicit photography, particularly given the common perception of photography as being starkly objective.51

Another important copyright case involving a photograph, *Gross v. Seligman*,52 further demonstrates that, despite the general

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46. *Burrow-Giles*, 111 U.S. at 56; see Farley, *supra* note 45, at 402-03.
47. See *Burrow-Giles*, 111 U.S. at 58-59 (acknowledging the defense’s contrasting of engravings, paintings, and prints from photographs in that the former media “embody the intellectual conception of its author, in which there is novelty, invention, originality,” while the latter is merely the mechanical reproduction of an object, in which there is no originality or novelty); see also *supra* note 45.
48. See *id.* at 58-59, 61.
49. See Farley, *supra* note 45, 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 involved in producing the work or innovation required to create the work, but rather had to focus on the “human trace” in photography).
50. *Id.* at 427.
51. 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).
52. 212 F. 930 (2d Cir. 1914).
acceptance that photography warrants copyright protection, there persists an underlying bias against it. This is evidenced by the 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 photographic portrait and then later used the same model in a similar pose for a photographic portrait under a different title. The court ruled that the production of the second work was an infringement on the copyright of the first because there was strong indication that the artist used his talents not to produce another portrait, but rather to duplicate the original.

While the *Gross* opinion begins with a reference to *Burrow-Giles* and suggests that the court is treating the photographic work in the same way it would have treated a painting, the fact that the case involved a photograph still seems significant. Given the historic criticism of photographs as being merely products of a machine and copies of reality, it is conceivable that if the court believed that photographs were easier to replicate than paintings, it may have had a dislike for the actions of the original photographer. In other words, 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 may explain why the court avoided 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 different result based on the fair use doctrine, though the court did not address this issue.

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53. See id. at 931.
54. Id.
55. Id.
56. Id. ("If the copyrighted picture were produced with colors on canvas, and were then copyrighted and sold by the 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.").
58. See, e.g., Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992). The fair use doctrine has been developed as a defense to copyright infringement and allows works such as parodies to survive copyright infringement claims. Courts consider four elements when evaluating whether a work may be protected under the fair use doctrine: "(1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and
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 legal help as possible given the complexity of the area, despite the law’s attempt to define it. Photographers are also advised that the safest defense to copyright lawsuits “is to introduce as many variations as are artistically feasible in a photograph.” But could this be harder to achieve 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 obtaining copyright protection illustrate the distinctiveness of photography as an art form, which proves problematic beyond any single area of the law and likely transfers into the area of obscenity.

B. Invasion of Privacy and the Release

Another area of the law that suggests a different approach to photography is that involving privacy. In the early days of photography, when the medium met its harshest and most widespread criticism, critics scorned photography as being “predatory with respect to people.” 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 masses. Together, these general sentiments laid 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 follows that 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 in the late 1800s and early 1900s, an era that was ultimately made possible by the advent of photography and its widespread use.\(^\text{65}\)

The nation’s first privacy law, embodied in sections fifty and fifty-one of the New York Civil Rights Law,\(^\text{66}\) 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.\(^\text{67}\)

Although New York’s privacy statute does not differentiate between different artistic media,\(^\text{68}\) case law revealing the exceptions to the statute shed light on the distinct approach to photography under privacy law. Of particular relevance is the newsworthiness exception to New York privacy law – that is, if the image is editorial or newsworthy, it serves the public interest and falls outside the scope of the privacy statute.\(^\text{69}\) Because of its prevalent use in areas such as journalism and the assumption that a photograph can provide the most direct representation of an event or object of reality, photography is more likely than other media to fall under this newsworthiness exception. In this regard, photography deserves differential treatment in the eyes of privacy law. Of course, this favorable differential treatment does nothing to advance the category of artistic photography, but rather protects only journalistic photography. Whether these two types of photography should overlap and receive

\(^{65}\) See DU VERNET, supra note 62, 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 & 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).

\(^{66}\) N.Y. CIV. RIGHTS LAW §§ 50, 51 (2005).

\(^{67}\) DU VERNET, supra note 62, at 66-67 (discussing Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. 1902)).

\(^{68}\) N.Y. CIV. RIGHTS LAW § 50.

\(^{69}\) See, e.g., Stephano v. News Group Publ’ns, Inc., 474 N.E.2d 580 (N.Y. 1984); Arrington v. N.Y. Times, 434 N.E.2d 1319 (N.Y. 1982); Dallesandro v. Henry Hold & Co., 166 N.Y.S.2d 805 (N.Y. App. Div. 1957); see DU VERNET, supra note 62, at 67 (advising the professional photographer that although courts provide for a newsworthiness exception, there are strict restrictions on the manner of obtaining photographs).
the same protection is a separate issue beyond the scope of this article. Nevertheless, the newsworthiness exception in the law on privacy rights is but one area that illustrates the law’s response to the nature of photography as a medium.

Another relevant aspect of the intersection of photography and privacy law that suggests a distinct approach to photography on the part of plaintiffs involves the New York Supreme Court case between Erno Nussenzweig, a Hasidic Jewish man, and the internationally-acclaimed photographer Philip-Lorca diCorcia.70 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.71 Nussenzweig sued pursuant to sections fifty and fifty-one of the New York Civil Rights Law, which apply to use of name or likeness regardless of artistic medium, and ultimately lost in court.72 One can argue, however, that the fact that this dispute involved a photograph, rather than a painting or other art form, was critical to the dispute’s formation in the first place.

To start with, if this were a painted portrait, the subject would have likely posed for it, and therefore have been 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 technological capabilities of photography allowed him to capture the image from a distance. Furthermore, Nussenzweig’s argument that he suffered “severe mental anguish, emotional distress, humiliation and embarrassment”73 may have seemed 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,74 have prompted Nussenzweig to sue in the first place? Such a conjecture would be much in line with the way early critics of photography found the

70. See David Hafetz, What’s a Picture Worth? He Wants $1.6 Mil, N.Y. POST, June 26, 2005, at 23.
71. Id.
73. Hafetz, supra note 70 (quoting Nussenzweig’s complaint).
74. See discussion infra Part IV.
medium so “predatory.” 75 In the end, Nussenzweig lost his case because the court deemed that the privacy statute did not apply to the photograph because it was a work of art. 76 However, one might still wonder whether this outcome was a result of the fact that the work in question was by a world-renowned photographer — and therefore a respected artist whose primary goal was expression rather than profit — and if it was that single consideration that tipped the scale in favor of diCorcia. Given that photography historically has experienced hurdles to being perceived as art, it may very well be that a lesser-known artist might not have been able to overcome these hurdles in order to achieve the same legal outcome.

Courts struggle in their approach to photographs taken in public places because the photographer is capturing what is already open to public view. 77 The general consensus now is that there are situations in which privacy laws apply even in public. 78 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. 79 This is done through the release. 80 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. The use of the release is prevalent in the profession of photography, 81 but to the extent that it is required for art photographers like diCorcia, it is not always 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

75. SONTAG, supra note 63, at 115.
76. Nussenzweig, No. 108446/05, slip op. 50171(U) at *7.
77. 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); see DU VERNET, supra note 62, 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).
78. See DU VERNET, supra note 62, at 67-68.
79. See CAVALLO & KAHAN, supra note 60, at 46.
80. See id.
81. See, e.g., id. 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); DU VERNET, supra note 62, 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).
surrounding the specific connection between photography and obscenity frames the issue with respect to child pornography rather than general artistic photography.\textsuperscript{82} Indeed, child pornography is perhaps the one area in which it is least disputed that certain photographs are inappropriate, harmful, offensive, and illegal.\textsuperscript{83}

It is important to note, however, that child pornography laws constitute a set of laws distinct from obscenity law. While child pornography laws seek mainly to protect the subject, obscenity laws primarily 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.\textsuperscript{84} In another sense, child pornography laws are more expansive than obscenity laws in that the \textit{Miller} standard, including the third “value” prong, is completely irrelevant to the determination of whether something constitutes child pornography.\textsuperscript{85} Child pornography can therefore be banned even if it is not defined as obscene under \textit{Miller}.\textsuperscript{86}

In \textit{New York v. Ferber}, the Supreme Court stated that the \textit{Miller} standard is not a “satisfactory solution to the child pornography problem” because “a work which . . . contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography.”\textsuperscript{87} The Court further emphasized that child


\textsuperscript{83} See Cisneros, supra note 82, 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 note 82, 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”).

\textsuperscript{84} 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 supra Part I.A; Adler, \textit{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).

\textsuperscript{85} Cf. \textit{New York v. Ferber}, 458 U.S. 747, 760-61 (1982) (“The \textit{Miller} standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.”).

\textsuperscript{86} Id.

\textsuperscript{87} Id. at 761 (stating also that the \textit{Miller} test “bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of a work”).
pornography laws should be limited exclusively to photographs and live performances or visual reproductions of live performances, noting that the “distribution of descriptions or other depictions of sexual conduct [of children], not otherwise obscene . . . retains First Amendment protection.”88 The rationale was that it is only in photography and film that there would be a true exploitation of the child, since the resulting photograph or video reveals that there was an actual child used in the work itself, whereas with other mediums, there may have been no actual child involved.89 This is a prime example of an area where the law clearly distinguishes between photography and other forms of art.

The need to approach photography differently than other forms of media in the area of child pornography also presents itself clearly in the more recent Supreme Court case of Ashcroft v. Free Speech Coalition.90 The issue in this case was whether “virtual child” pornography, involving completely fictional subjects where no actual child was used in the production process, was criminal under child pornography laws.91 The Court stated that the government could not criminalize such activity because it did not constitute sexual abuse of any child.92 While Congress, in direct response to the Court’s decision, proposed new legislation in an attempt to proscribe virtual child pornography,93 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.94

The comparison of the Court’s responses to virtual child pornography and pornography involving actual children is analogous to the distinction between a photograph and a painting. A painting that does not involve a child model, but rather a child conjured up by the artist’s imagination, is “virtual.” Only a photograph of a child

88. Id. at 764-65.
89. Cf. Cisneros, supra note 82, at ¶ 1 (noting the parallel rationale for “virtual child” pornography).
91. Id. at 239.
92. 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”).
93. See Farhangian, supra note 82, at 242-43, 272-76 (addressing the constitutionality of Congress’s recent attempts to ban virtual child pornography through the Child Obscenity Pornography Prevention Act (COPPA) of 2002 and 2003 and the Prosecutor Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act).
model without dispute uses a real-life subject. Therefore, under child pornography laws, a sexually explicit photograph depicting a minor is considered criminal, whereas an alternative art form with a more tenuous relationship to the minor subject is not. 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 pieces of the puzzle illustrating the artistic photographer’s struggle with contemporary obscenity standards.

D. Summary of Apparent Legal Biases Against Photography Outside of Obscenity

As this article has shown, photography is initially disadvantaged because it is a visual art and confronts the same obstacles that other visual arts such as painting and sculpture face with respect to First Amendment protection. However, it appears that courts hold a special bias against photography as a distinct visual art in areas such as copyright, privacy, and child pornography. Given this distinct approach to photography in other areas of the law, it is imaginable that this same bias might transfer to obscenity law. If courts and audiences treat photography differently in copyright cases, privacy cases, and child pornography cases, they very well may take a distinct approach to photography in obscenity cases as well. This projection is strengthened by photography’s distinct characteristics and its marginalization in art history as examined in the sections below.

III. PHOTOGRAPHY’S 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 both because it is a visual art and because evidence of discrimination against photography exists in other areas of the law, photography faces an added layer of obstacles to equal free speech protection. The difficulties that lie in determining what constitutes art, and more specifically, what does and does not have serious artistic value, are heightened by two factors intrinsic to photography itself: the fact that photography serves multiple non-artistic functions, and its marginalization by critics of the medium due to the historic perception that a photograph is the
“plastic verification of a fact”\textsuperscript{95} and a mere product of a machine and chemical process.\textsuperscript{96}

A photograph is very often used outside of the world of art for a wide variety of purposes such as advertising, criminal evidence, journalism, and science, to name a few.\textsuperscript{97} An average person may merely take a photograph in order to record memories and special moments. These photographs 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.\textsuperscript{98} Its historical development simply did not take shape in such a way.\textsuperscript{99} In contrast, an oil painting, no matter how displeasing or avant-garde, is still a piece of art. It enjoys a reputation as a traditional form of “art” that photography does not.

This is not to say that more traditional kinds of art, such as paintings and sculpture, have no function outside of the world of art. However, the development of photography and its historically standard classification as an “art-science” are surely distinct.\textsuperscript{100} If

\textsuperscript{95} Marius De Zayas, \textit{Photography and Artistic-Photography}, in \textit{CLASSIC ESSAYS ON PHOTOGRAPHY} 125, 125 (Alan Trachtenberg ed., 1980).

\textsuperscript{96} See MARIEN, \textit{supra} note 64, at 58-60.

\textsuperscript{97} See SONTAG, \textit{supra} note 63, at 5, 126 (introducing the early uses of photography in modern states as surveillance and proof in evidence and discussing how early debates on photography as art focused on whether it could distinguish itself from its other more “practical” functions); John Tagg, \textit{The Burden of Representation} 60, 66-67 (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); László Moholy-Nagy, \textit{Photography in Advertising}, in \textit{PHOTOGRAPHY IN THE MODERN ERA} 86, 86-93 (Christopher Phillips ed., 1989) (regarding photography as a vehicle for transforming the modern viewpoint through fields such as advertising); Albert Renger-Patzsch, \textit{Photography and Art}, in \textit{PHOTOGRAPHY IN THE MODERN ERA}, supra, at 142, 142-43 (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); Farley, \textit{supra} note 45, at 393 (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).

\textsuperscript{98} See generally John L. Ward, \textit{The Criticism of Photography as Art}, \textit{passim} (1970) (criticizing Pictorialism, a school of thought promoting the analysis of photography as traditional art, for its claim that photographs can be judged by the same standards as paintings, drawings, and prints, because the standard is not broad enough to fit all cases); Erno Kallai, \textit{Painting and Photography}, in \textit{PHOTOGRAPHY IN THE MODERN ERA}, supra note 97, at 94, 94-99 (comparing painting and photography and expressing disappointment with the mixture of art and mechanical technology).

\textsuperscript{99} See generally SONTAG, \textit{supra} note 63.

\textsuperscript{100} See, \textit{e.g.}, MARIEN, \textit{supra} note 64, at 61-66 (describing the association of photography with progress in science and technology during the invention's first decade); SONTAG, \textit{supra} note 63, 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, \textit{Hints on Art}, in \textit{CLASSIC ESSAYS ON PHOTOGRAPHY}, \textit{supra} note 95, at 99, 99 (criticizing those who define
photography has uses outside of the world of art,\textsuperscript{101} 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”\textsuperscript{102} are far-reaching and problematic in and of themselves.\textsuperscript{103} With respect to photography, the proper determination of whether a “reasonable person” would appreciate a photograph as serious art\textsuperscript{104} is further burdened by the multi-functional nature of the medium itself.

Although today photography is generally accepted as a branch of high art, historically it has been marginalized as a lesser art form compared to more traditional forms of art.\textsuperscript{105} 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 a majority of the population would recognize that even though nearly anyone can take a photograph, not anyone can be a professional art photographer. However, an artist’s sexually explicit photograph that defies aesthetic and more widely-accepted technical standards in the Post-Modernist fashion may still be denied any recognition of serious artistic value. In applying Pope’s reasonable person standard to the value prong of the obscenity test,\textsuperscript{106} the relative ease of taking a photograph comes into play. If a sexually explicit photograph does not look like “art” in the intuitive aesthetic sense, and it is much easier

\textsuperscript{101} See DU VERNET, supra note 62, at 74-109 (summarizing for the professional photographer the relevant legal issues that affect uses of photography in areas such as advertising, news, court, and professional competitions); MARIEN, supra note 64, at 45 (“The lack of any sure definition of [photography] proved to be . . . a benefit. Photography could be simultaneously . . . art and science . . . . The public experience of photographs in family life, commerce, government, war, education, science, and art became comprehensible through an open, malleable systems of ideas . . . .”).

\textsuperscript{102} Miller v. California, 413 U.S. 15, 24 (1973).

\textsuperscript{103} See supra Part I.B.


\textsuperscript{105} See generally SONTAG, supra note 63, 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); Renger-Patzsch, supra note 97, 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.”).

\textsuperscript{106} Pope, 481 U.S. at 500-01.
snap a picture rather than to paint one, 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.107

Following its invention in 1839, photography as a form of fine art was attacked for a relatively short period of time.108 However, the defenses brought forth in response lend insight into the special nature of photography, as exemplified by American commentator Susan Sontag’s observation that “[a]gainst 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.”109

Indeed, the very basis for a modern-day juror’s tendency to perceive a photograph as lacking serious artistic value replicates the early criticism that photography was a mechanical rather than artistic endeavor.110 The automatism of photography, the relative ease of taking a photograph, and its dependence on a machine made critics suspicious of its artistic value.111 As English critic John Ruskin lamented regarding the invasion of photography into the realm of art and the emergence of a modern era obsessed with speed and efficiency, “[n]ext, you will have steam organs and singers, and turn on your cathedral service.”112

Throughout the course of photography’s development in art history, practitioners themselves felt pressure to defend their work and prove its value. The influential nineteenth and twentieth-century

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107. Cf. Hess, supra note 36, at 11-12 (relaying how the defense’s art expert 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 of Robert Mapplethorpe 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 push drastically the limits of 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.

108. SONTAG, supra note 63, 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.”).

109. Id. at 126.

110. See MARIEN, supra note 64, at 45-60 (describing early criticism of photography).

111. See id. at 58-60. Photography was further marginalized in relation to other pre-existing forms of art because many of the artists who adopted photography and “jumped ship were seen as second-rate artists to begin with.” Farley, supra note 45, at 419.

112. MARIEN, supra note 64, at 59.
artistic photographer Alfred Stieglitz initially took on an additional interest in painting in part because he feared that there was not enough good photography to fill his magazine and gallery. 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 help it rise to an equal status among the arts.

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 has not enjoyed the same treatment as other forms of art as shown by its troubled history. Considering the marginalization of photography in art history and its multi-functionality, it is likely that courts and public audiences will struggle in their determination of the serious artistic value of sexually explicit photographic works to a greater degree than they would for other forms of art that do not share the same history and reputation.


There are a number of reasons that courts and audiences are more likely to find sexually explicit photographs to be obscene according to the Miller test. This may be because of its multi-functionality and historic marginalization as an art form, or because of evidence that courts treat photography differently in a number of areas outside of obscenity law. But, perhaps most intuitively, it may be because a photograph is perceived as capturing something real.

The objectivity of photography and its “fidelity to appearances” relates back to this article’s examination of 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, 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. The argument here is

115. SONTAG, supra note 63, at 126.
116. See discussion supra Part III.
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 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 that critics scoffed at its value as art. The other part consisted of the assertion that a photograph simply reflected reality and was therefore not an expression of personality or human soul on the part of the artist. Under this belief, photography was inferior to, or less artistic than, 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. A photograph merely re-presented nature, and its verisimilitude made it transparent and less worthy of artistic acclaim. Deemed “the pencil of nature,” photography was seen as deplorably plagiaristic of reality; a photograph’s sole merit was its accuracy, nothing more.

It is precisely this understanding of photography’s ability to capture reality and to offer an exact duplication of objects and scenes that informs the perception of sexually explicit photographs as obscene (or, at least, offensive). In the eyes of a viewer, photography is the one medium that can accomplish this duplication of reality and

118. Id.
119. Id.
120. See MARIEN, supra note 64, at 58-59.
121. See id. (quoting Ruskin 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 Ruskin labeled the definition of art); WARD, supra note 98, at 3 (considering how the immense “sense of reality behind the photograph” causes people to perceive photographs as “invisible windows with no intrinsic character”).
122. See MARIEN, supra note 64, 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 45, at 417 (framing French painter Paul Delaroche’s exclamation “From this day, painting is dead!” in response to photography’s invention as evidence of his and other artists’ fear of the new medium).
123. See generally JOHN TAGG, GROUNDS OF DISPUTE: ART HISTORY, CULTURAL POLITICS, AND THE DISCURSIVE FIELD 125 (1992) (analyzing that the “conception of the photograph as a mechanised, automatic product evokes not futuristic fantasy, but the contempt of a Romantic theory of culture, which sees art as the elite and manly expression of a given human spirit”).
125. See Farley, supra note 45, at 396, 416-19 (explaining how photography was initially understood and the origins of artists’ reactions to photography upon its invention).
therefore it has a dangerously powerful effect. As Sontag writes, “photography furnishes evidence. Something we hear about, but doubt, seems proven when we’re shown a photograph of it.”

This perception and understanding of photography was what justified the Supreme Court’s continued support of Ferber in its limitation of the application 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 with the subject invokes a specific reaction. In the area of child pornography, that reaction often results in 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” through photography has a higher tendency to offend because it represents an actual person committing the act. When the viewer completes the mental processing of the image and conceptualizes its close relation to life, it becomes more “hard core.” This builds upon the earlier assertion regarding photography’s initial obstacle to First Amendment protection as a visual image.

The perception that photography blatantly duplicates reality thus proves to be a double-edged sword: it hinders the photograph’s ability to possess serious artistic value in order to garner First Amendment protection, but it also makes the photograph more real for purposes of satisfying the prurient interest and patently offensive prongs of the Miller 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 that an average viewer naturally associates sexual connotations with the mere image of a nude persists. This opens up the possibility

126. See Thierry de Duve, Time Exposure and Snapshot: The Photograph as Paradox, 5 OCTOBER 113, 119-21 (1978) (analyzing photography as a distinct art form and how its inherent characteristics render it “traumatic” to the viewer); cf. WARD, supra note 98, 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).
127. SONTAG, supra note 63, at 5.
128. See supra Part II.C.
129. 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).
130. See supra Part I.A.
131. Miller, 413 U.S. at 24.
132. See ARTHUR GOLDSMITH, THE NUDE IN PHOTOGRAPHY 28-29 (1975) (suggesting that successful nude photographs can satisfy both aesthetic and sexual appetites simultaneously); LOU JACOBS JR., EXPRESSIVE PHOTOGRAPHY 193 (1979) (cautioning both
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 *Miller* obscenity standard.\(^{133}\)

The effect of photography’s objective nature and its connection to the individual subject of the photograph were relevant in the previous discussions on privacy and child pornography.\(^{134}\) Under the purview of obscenity, the realness of a photograph and its attachment to the subject make the work more likely to be perceived as realistic, shocking, striking and, as a result, more “patently offensive.”\(^{135}\) 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.”\(^{136}\) As Sontag points out, “[w]hile 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.”\(^{137}\)

The impact of photography’s inherently objective qualities on satisfying the elements of an obscenity claim is evident not only in modern discourses on photography and certain case law,\(^{138}\) but also in our culture of consumption. After all, modern popular pornography exists primarily in the form of photography or film. One could venture to say that consumers of pornography may prefer photographs to drawings or paintings. The latter are less satisfying because they do not seem as realistic. To many consumers of pornography, a sexual

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134. See supra Part II.B-C.
136. *Id.* (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).
137. SONTAG, supra note 63, at 154. Though paintings of the realist movement such as Edouard Manet’s “Olympia” and Gustave Courbet’s “L’origine du Monde” were shocking in their day, it is arguable still that these paintings were not as literal to the viewer as a photograph would be.
138. Compare *Miller v. United States*, 431 F.2d 655, 658 (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, 970 (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, 1192 (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).
fantasy still requires an element of reality. This preference makes the line between sexually explicit photography as art and sexually explicit photography as obscenity ever more blurred. It is a dilemma that plagues the art photographer to a far greater extent than the painter or other more traditional artist.

The notion of photographic realism, however, is somewhat a myth, given both the development of photography into an accepted fine art and its close relationship with technology. Historically, photographers tried to mimic the technical and artistic styles of paintings in order to earn recognition as a worthy art. During the reign of Pictorialism in the latter half of the nineteenth century, art photographers felt the need to adopt an abstract, painter-like 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. 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 painting-like result. Early photographers of the nude made use of similar techniques, including use of veils and impersonal poses, in


140. See Nicola Beisel, Morals Versus Art: Censorship, The Politics of Interpretation and the Victorian Nude, 58 AM. SOC. REV. 145, 151-52 (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 to a baser desire). The significance 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. 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. This “cheapening” through reproduction renders the work sordid and obscene. American artists and critics, as with their French counterparts, rarely recognized paintings of a nude as impure, further highlighting the general respect a painting received as a traditional art form and the disdain of photography as a lesser art. See generally id.; Walter Benjamin, The Work of Art in the Age of Mechanical Reproduction, in MODERN ART AND MODERNISM 217 (Francis Frascina & Charles Harrison, eds., 1982); Shayana Kadidal, Obscenity in the Age of Mechanical Reproduction, 44 AM. J. COMP. L. 353, 373 (1996).

141. See Farley, supra note 45, at 419-25.
142. See id. at 421-22; NORTH, supra note 114, at 17.
143. See NORTH, supra note 114, at 17.
144. Farley, supra note 45, at 421.
order to avoid sexuality in the same way paintings and sculptures traditionally mythologized and idealized the classic nude.\textsuperscript{145}

These attempts to render photography more similar to traditional forms of art, later discouraged by Purists and Photo Secessionists in a subsequent movement,\textsuperscript{146} demonstrate the lengths taken by early art photographers to overcome stigma and achieve validation. Perhaps more significantly, however, the efforts of early photographers indicate that photography is not always literal and that it has never been solely literal.\textsuperscript{147} Never could this be more true than it is 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 by its nature a duplication of reality is simply not true. As such, modern courts, jurors, and audiences should question their reactions to a sexually explicit photograph to the extent that they perceive it differently than they may perceive a painting, drawing, or other traditional medium.

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, jurors, and other audiences to be more cognizant of the myth of photographic realism. Part of that knowledge 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

\textsuperscript{145} JACOBS, supra note 132, at 187.

\textsuperscript{146} See WARD, supra note 98, at 17 (discussing the Purist’s championing of objective realism and belief that “a photograph should be true to the nature of its medium”); Renger-Patzsch, supra note 97, at 142-44 (encouraging photographers to reject the abstract form of modern painters and to instead embrace the visual realism that belongs exclusively to photography); Philippe Soupault, \textit{The Present State of Photography, in Photography in the Modern Era, supra note 97, at 50, 50-51} (encouraging photographers to “forget art” and to pursue and explore photography as its own medium); Farley, supra note 45, 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 “embraced . . . more in theory than in practice”).

\textsuperscript{147} 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. See ALEXANDER GARDNER, PHOTOGRAPHIC SKETCHBOOK OF THE CIVIL WAR (Dover Publications, Inc. 1957) (1865). In order to create a story and evoke emotion with a photograph, these photographers sometimes “created” a scene by posing bodies. See \textit{Does the Camera Ever Lie?}, Civil War Photographs, http://memory.loc.gov/ammem/cwphtml/cwpcam/cwcam1.html (last visited September 21, 2006).
sculpture. Yet this revised outlook on photography 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 shielded many sexually explicit photographs from being deemed obscene. The more abstract, indistinct, and unreal a work of art is, the less likely it will satisfy the “prurient interest” and “patently offensive” prongs of Miller. Along the same line, it is arguable that the more abstract, aesthetic, and painting-like a work, the more likely it is for a jury to find that it has serious artistic value and that it thus deserves First Amendment protection. This brings into focus the question of whether photographs that are sexually explicit must somehow possess a special abstract aesthetic quality in order to be considered less offensive or obscene and more artistic. In addition to the “formalistic” opposing diagonals and “almost classical” compositions of Robert Mapplethorpe’s photographs, for example, many of his most controversial works were also shown as black and white photography, making it arguably 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.

Does this mean that an art photographer whose work features a sexually explicit subject, such as a nude, in a potentially obscene way should put forth an extra effort 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 Pictorialists felt the need to do and that the Purists advised against? Surely, a painter was never forced to use black and white paint in order to make his painting of a provocative nude appear more “artistic,” less “real,” and therefore less obscene.

148. See discussion supra Part IV.
149. See City of St. George v. Turner, 813 P.2d 1188, 1189 (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).
150. See Hess, supra note 36, at 111 (relaying the art expert’s appreciation of the formalistic lines and shadows of Mapplethorpe’s photographs as warranting the work’s serious artistic value).
151. See id.
152. See supra note 140.
153. See discussion supra Part IV.
The dilemma as to whether modern-day art photographers have to make their work more “beautiful” or “artistic” in order to escape obscenity charges surfaced in classic form again in the Ninth Circuit case *Miller v. United States*.\(^{154}\) In this case, the court emphasized that the lack of any “attempt at artistic composition either in background, surroundings or poses” justified finding that the work was obscene.\(^{155}\) Yet, going back to the initial problems of defining art and artistic value, what does “good photography”\(^{156}\) really mean, and who decides? And, again, 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 or her art to exhibit more literally sexual conduct, in producing sexually explicit photographic images for the sake of art.

VI. CONCLUSION

Ideally, art photographers should not be restricted in their freedom of speech 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 an objective reality all result in a profound and seemingly inescapable impact on the art photographer.

Audiences are not yet at a point in which they automatically assume 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 prejudicial notions about the medium. While there are no easy practical solutions, continued art education and increased public awareness of artistic media and the movements associated with them may induce audiences to view all art more openly. Despite efforts to fix and define what is and is not obscene through a rigid legal rubric in the form of the *Miller* test, obscenity prosecutions, from a realistic

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154. 431 F.2d 655, 655 (9th Cir. 1970).
155. *Id.* at 658.
standpoint, are still intrinsically linked to contemporary societal views and norms. Until the judge, the juror, the public viewers, and critics of artistic photography embrace the critical 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 inadequate standards on obscenity.