5-1-2014

Sex Is Less Offensive Than Violence: A Call To Update Obscenity Jurisprudence

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SEX IS LESS OFFENSIVE THAN VIOLENCE:

A CALL TO UPDATE OBSCENITY JURISPRUDENCE

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I. INTRODUCTION

This paper addresses the gender bias presented by the disparate treatment of sex and violence under current obscenity jurisprudence. Part II examines the legal evolution of obscenity law and identifies the ways in which sex and violence are handled differently. Specifically, I note that sexual works may readily be regulated as obscenity, while violent works unequivocally may not. Part III explains that this disparate treatment is the result of entrenched gender bias about the way men and women "should" react to sex and violence, and notes the hypocrisy of failing to apply the same reasoning to assessments of violent versus sexual material. In this part, I describe the prevailing notions of masculinity and femininity, as they have been identified by sociological and legal scholars. I then explain the three principal ways in which obscenity can be seen as a manifestation of gender bias, all of which rely on the identified sexual stereotypes.

II. THE STATE OF OBSCENITY

A. The "Inherent Morality" Standard

Material is currently pronounced obscene if it: (1) appeals to the prurient interest, as determined by the average person applying community standards; (2) portrays sexual conduct in a patently offensive way, as defined by applicable state law; and (3) lacks serious literary, artistic, political, or scientific value.[1] As it stands, then, the current constitutional test for obscenity looks solely to whether the content of a particular work sufficiently comports with the prevailing moral standards of the community in which it is sold. Notably, there is no reference made to whether a potentially obscene work gives rise to immoral behavior or, indeed, whether it causes any legally

[1] Miller v. California, 413 U.S. 15, 25 (1973).

cognizable harm at all. As one scholar writes:

> [A]n obscenity prosecution does not require that anyone actually be offended by the material itself. Many obscenity prosecutions, particularly at the federal level, are initiated after elaborate investigations by law enforcement officers who actively seek out material that, but for the investigation, would probably be seen only by willing customers. Thus, although obscenity can be judged only with reference to a community standard, obscenity is a quality that inheres in the material itself. Material is obscene, and therefore subject to prosecution, solely because it has the *potential* to offend.[2]

A work's standalone moral character is dispositive of its legal status as obscenity. As such, this standard may appropriately be called an "inherent morality" standard.[3]

In First Amendment jurisprudence, obscenity is the only category of unprotected speech that is held to the "inherent morality" standard. That is, obscenity is the only speech excluded from the First Amendment solely because of an inherent characteristic—offensiveness—where all other categories of unprotected speech incorporate within their constitutional definitions some kind of tangible social harm.[4] While in practice, offending community standards may give rise to social harms, those identified within the obscenity line of cases are characterized as "secondary effects" of obscenity; social harms are not the primary concern that obscenity laws are designed to handle.[5] Instead, obscenity law addresses only the "moral harm"[6] that may fall

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[2] James Peterson, Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender, 1998 WIS. L. REV. 625, 635 (1998).

[3] *See* Sen. Orrin G. Hatch, Fighting the Pornification of America by Enforcing Obscenity Laws, 23 STAN. L. & POL'Y REV. 1, 4 (2012) (describing evolution of American obscenity law from English common law standard focused on *social effect* of works to Constitutional standard concerned with *content* of works).

[4] *Compare Miller* obscenity test *with* tests for other categories of unprotected speech: Brandenburg v. Ohio, 395 U.S. 444 (1969) (*Incitement* causes imminent unlawful acts); Chaplinsky v. New Hampshire, 315 U.S. 586 (1942) (*Fighting words* cause imminent violence/illegal acts); Beauharnais v. Illinois, 343 U.S. 250 (1952) (*Defamation* causes personal injury); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (*Fraudulent or deceptive commercial speech* speech itself violates laws); Masses Publ'g v. Patten, 244 F. 535 (1917) (*Speech "integral to criminal conduct"* enabled commission of conspiracy to commit espionage).

[5] *See, e.g.*, Young v. American Mini-Theatres, 42 U.S. 50 (1976) (discussing secondary effects of pornography).

[6] Bret Boyce, Obscenity and Community Standards, 33 YALE J. INT'L. L. 299, 324 (2008) ("Thus, although the Court does allude to the (empirically unproven) possibility that obscenity might incite physical harm, the primary state interest that the Court invokes is the possibility of moral harm: damage to the 'quality of life'; injury to 'the

upon the consumer of obscene material as a result of its lackluster "inherent morality."

Obscenity is also anomalous in First Amendment jurisprudence because it may be regulated in contravention of the fundamental constitutional principle that speech may not be suppressed merely because it is unpopular or offensive to the community. The Supreme Court has expressly held that "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for *according* it constitutional protection."[7] Yet offensiveness is the exact reason given for the suppression of obscenity: "Obscene materials have been denied the protection of the First Amendment because their content is so offensive to contemporary moral standards."[8] Thus, while offensiveness is typically a reason for according constitutional protection, for obscenity it is the constitutional basis for suppression.

Finally, obscenity is an anomaly because it seeks to suppress a particular topic of speech. All other unprotected categories are left unprotected because of the effect that they have on the recipient(s), with no reference made to the matter being discussed.[9] For example, "fighting words" are outside First Amendment protection because "by their very utterance, [they] inflict injury or tend to incite an immediate breach of the peace."[10] This constitutional definition is not concerned with the topic at hand; fighting words are fighting words whether they concern religion, politics, or what the listener had for breakfast. It is the fact that the listener would be "invited to fisticuffs" that renders fighting words unprotected. In contrast, obscenity laws may

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development of the human personality,' 'family life,' and 'the community as a whole'; and the corruption of 'a decent society.'").

[7] FCC v. Pacifica Found., 438 U.S. 726, 745 (1978).

[8] *Id.*

[9] *See supra*, text accompanying note 2.

[10] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

only suppress speech about sex.[11] A closer look at the evolution of constitutional obscenity jurisprudence illuminates why sex receives this "special" treatment.[12]

B. Sex and Violence Under the "Inherent Morality" Standard

The inherent morality standard singles out sexual speech as the only topic deserving of the obscenity moniker.[13] Because the definition of obscenity requires the presence of sexual elements, works with sexual elements are necessarily susceptible to overregulation and outright ban under color of obscenity law. Works with sexual elements are thus categorically afforded less protection than other works, and the Supreme Court has even intimated that non-obscene sexual works may permissibly be given lesser protection than non-sexual works.[14]

In contrast, it has been exceedingly difficult for states to regulate violent works (or works which may offend community mores on other grounds, such as those that are sacrilegious or disgusting), even where such works have been empirically shown to increase violent thoughts and acts in consumers.[15] Laws regulating violent speech are presumptively invalid,[16] even where they track the same language as valid laws regulating sexual speech and were adopted under the same rationale.[17] As discussed in Part III below, this disparate treatment is the result of entrenched gender bias.

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[11] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011) ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'").
[12] *See* Part II.B, *infra*.
[13] *See Brown*, 131 S. Ct. at 2734 ("Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of 'sexual conduct.'")
[14] KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 862–67 (2007) (discussing the multitude of separate obscenity tests developed by individual justices from 1957 through 1973, which on the whole tended to agree that sexually explicit, non-obscene material "should occupy a subordinate position as 'lower value' speech.").
[15] *See, e.g.*, U.S. v. Stevens, 130 S. Ct. 1577 (2010).
[16] Presumptively invalid laws are evaluated under strict scrutiny inquiry, and will be struck down unless passed to further a compelling government interest and narrowly tailored to achieve that interest.
[17] *See Stevens*, 130 S. Ct. at 1579-81 (describing 18 U.S.C. 48, the Congressional Act against animal cruelty, as being based on *Miller*'s obscenity standard, and adopted under the same rationale as was accepted to proscribe child pornography).

1. Regulation of Sexual Expression

To justify regulating solely speech about sex, the inherent morality standard relies on an "historical consensus" rationale. The first obscenity law was passed in 1711 in the Massachusetts Bay colony, which made it an offense to write, print or publish "any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship."[18] However, that law dealt principally with profanity, not sexual material. The first reported obscenity case was decided over a century later, in 1815.[19] In 1821, the first obscenity legislation dealing with sexual material was passed.[20] However, the current definition of obscenity is originally derived from a famous 1868 English case, *Regina v. Hicklin*.[21] Under *Hicklin*, material that tended to "deprave and corrupt those whose minds are open to such immoral influences" was deemed obscene and could be banned.[22] The United States Supreme Court, however, disapproved of *Hicklin*'s Victorian prudery; *i.e.*, that its reference point was "the effect of an isolated excerpt upon particularly susceptible persons" rather than the general consuming public.[23] The *Hicklin* standard was thus broadened upon the Court's first annunciation of a constitutional obscenity standard in 1957. In *Roth v. United States*, the Court held that material was deemed obscene by determining "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[24] The *Roth* Court reasoned that "[i]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social

[18] Acts and Laws of Massachusetts Bay 219, 222 (1714).
[19] Commonwealth of Pennsylvania v. Sharpless, 1815 WL 1297 (Dec. 1, 1815).
[20] Conn. Stat. Laws 165 (1821).
[21] Roth v. United States, 354 U.S. 476, 488-89 (1957).
[22] R. v. Hicklin, L.R. 3 (Q.B.) 360, 371 (1868).
[23] *Roth*, 354 U.S. at 489.
[24] *Id.*

importance."[25] In other words, the *Roth* Court deemed material appealing to the prurient interest "no-value" speech, and averred such speech has always been excluded from First Amendment protection. As the standard thus shifted from the common law to constitutional law, the test for judging obscenity shifted from its social effect to its contents.[26]

However, the *Roth* obscenity standard, with its ambiguous references to "contemporary community standards" and "appeals to the prurient interest" proved nearly impossible for the courts to interpret with any regularity.[27] Indeed, as one scholar observed, "[b]etween 1957 and 1973, the Court issued thirteen decisions on the issue of obscenity. Those thirteen decisions produced fifty-five separate opinions."[28] Regardless, after sixteen years "during which [the] Court struggled with the intractable obscenity problem,"[29] despite "considerable vacillation over the proper definition of obscenity,"[30] and notwithstanding Justice Stewart's oft-quoted aphorism ("I know it when I see it"),[31] the Court put an end to such haphazard results by essentially adopting the *Roth* test wholesale in the paradigm obscenity case of *Miller v. California*.[32]

Under the *Miller* test, material is obscene if it: (1) appeals to the prurient interest, as determined by the average person applying community standards; (2) portrays sexual conduct in a patently offensive way, as defined by applicable state law; and (3) lacks serious literary, artistic, political, or scientific value.[33] The 1973 *Miller* test remains, essentially unchanged, the

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[25] *Id.*
[26] Hatch, *supra* note 3, at 4.
[27] *See* Boyce, *supra* note 6 (discussing evolution of obscenity law).
[28] Peterson, *supra* note 2, at 629.
[29] New York v. Ferber, 458 U.S. 747, 754 (1982) (quoting Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., concurring in part and dissenting in part)).
[30] *Id.*
[31] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (referring to the category of "hard-core" pornography).
[32] 413 U.S. 15 (1973).
[33] *Id.*

operative constitutional standard for determining obscenity today.[34]

Two later obscenity cases merit brief discussion: the 1968 case of *Ginsberg v. New York*,[35] in which the Court held that non-obscene sexual material could be considered obscenity as applied to minors, and the 1982 case of *New York v. Ferber*,[36] in which the Court established that child pornography is outside the First Amendment. *Ginsberg* involved a New York statute criminalizing the "knowing sale to a minor (a) of any picture which depicts nudity and which is harmful to minors or (b) any magazine which contains such pictures and which, taken as a whole, is harmful to minors."[37] "Harmful to minors" was then defined by applying the three *Miller* factors as "to minors."[38] The Court upheld the petitioner's conviction for selling "girlie magazines"[39] to a sixteen year old, holding that

> [m]aterial which is protected for distribution to adults is not necessarily constitutionally protected from restriction upon its dissemination to children. In other words, the concept of obscenity or of unprotected matter may vary according to the group to whom the questionable material is directed or from whom it is quarantined.[40]

The Court presented two rationales for its holding, stating that the Constitution has long been interpreted to recognize parents' interest in directing the upbringing of their children, and that the state has a justifiable interest in the well-being of its minors.[41] Generally, then, the *Ginsberg* Court merely reaffirmed its reasoning that speech about sex may be outside the First Amendment

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[34] *See, e.g.*, U.S. v. Stevens, 130 S. Ct. 1577 (2010).
[35] 390 U.S. 629 (1968).
[36] New York v. Ferber, 458 U.S. 747, 751 (1982).
[37] *Ginsberg*, 390 U.S. at 631–32 (quotation marks omitted).
[38] *Id.* ("'Harmful to minors' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it: (i) predominantly appeals to the prurient, shameful or morbid interest of minors, and (ii) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (iii) is utterly without redeeming social importance for minors.").
[39] *Id.*
[40] *Id.* at 636 (quoting Bookcase, Inc. v. Broderick, 218 N.E.2d 668, 671 (N.Y. 1966)).
[41] *See id.*

when it lacks "social value" and is offensive to the community. The novelty was that the *Ginsberg* holding established that the constitutional definition of any "unprotected matter may vary" according to the intended audience.

The Court has characterized its holding in *Ginsberg* as merely "sustain[ing] state power to exclude material [already] defined as obscenity"[42] and "simply adjust[ing] the definition of obscenity to social realities,"[43] rather than establishing a new category of unprotected speech. Of course, whether historically non-obscene material could be "defined as obscenity" was the precise issue determined by the Court in *Ginsberg*; the Court's characterization was thus dispositive. That is, by stating that the magazines at issue were within a sub-category of obscenity (obscenity as to minors), the law at issue was presumed a valid content-based restriction on material wholly outside of the First Amendment and was thus upheld under a rational basis test.[44] If the *Ginsberg* Court had considered themselves creating a new category of unprotected speech (obscenity as to minors), it would have had to apply the strict scrutiny test required in all cases involving content-based restrictions on protected speech.

In *New York v. Ferber*,[45] the Court identified—allegedly for the last time[46]—a new category of speech wholly outside the First Amendment: child pornography. New York had passed a law making it a felony "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise . . . a sexual performance by a child . . . which includes sexual conduct by a child less

[42] *Ginsberg*, 390 U.S. at 641 (emphasis added).
[43] Video Software Dealers Ass'n v. Schwarzenegger, 556 F.3d 950, 959 (9th Cir. 2009).
[44] *Id.*
[45] New York v. Ferber, 458 U.S. 747 (1982).
[46] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011) (No new categories of speech may be excluded from the First Amendment "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription[.]").

than sixteen years of age."[47] The Supreme Court upheld the statute, generically concluding that "[w]hen a definable class of material . . . bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment."[48] The Court reasoned that the state's interest in preventing sexual abuse of the children forced to make pornographic videos, together with the patently criminal nature of the underlying conduct and the inability of law enforcement to combat the underlying crime without targeting commercial distribution of the videos, "overwhelmingly outweighed" the *de minimus*, if any, social value child pornography offered.[49] The Court further concluded that it was "not rare"[50] in Supreme Court jurisprudence to allow a content-based classification when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[51] Finally, the Court took care to distinguish child pornography from obscenity:

> The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for the purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.[52]

In distinguishing unprotected child pornography from "other depictions of [non-obscene] sexual

[47] *Ferber*, 458 U.S. at 751.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 763; *see also* New York Times v. Sullivan, 376 U.S. 254 (1964), Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and Beauharnais v. Illinois, 343 U.S. 250 (1952).
[51] *Ferber*, 458 U.S. at 763 (citing Young v. Am. Mini-Theaters, 427 U.S. 50 (1976)).
[52] *Id.* at 764–65.

conduct . . . which do not involve live performances," the Court made clear that it was choosing to categorically exclude live performance-based child pornography because the ancillary and corollary harms to children outweighed the value of its expression. Thus, *Ferber* instructs that while obscenity is solely concerned with addressing moral harm, other sexual expression may be permissibly excluded from the First Amendment on the grounds that the resulting social harms outweigh its social value.

2. Why Offensiveness vis-à-vis Sex Is Not Unconstitutionally Vague

Notably, the standard for obscenity was criticized from the outset. In *Roth*, a dissenting Justice Douglas attacked the standard for singling out sex as the only topic of discussion punishable for merely being discussed, its reliance on majority rule, and its condemnation of thoughts without acts.[53] Justice Douglas disapproved that the standard made "the legality of a publication turn on the purity of thought which a book or a tract instills in the mind of the reader," and imposed punishment "for thoughts provoked, not for overt acts nor antisocial conduct."[54] He found the reliance on community standards inapposite to established First Amendment jurisprudence, observing that such a standard "would not be an acceptable one if religion, economics, politics or philosophy were involved."[55] Why should it be acceptable where the topic is sex? The answer must be inferred from context, as the Court provided none.[56]

Apparently, it was accepted fact in 1957 that there existed a general consensus on what was "normal" sexual conduct and what was "offensive" sexual conduct. In *Roth,* the Court dismissed concerns that the new obscenity standard was unconstitutionally vague, holding that

[53] Roth v. United States, 354 U.S. 476, 509-10 (1957) (Douglas, J., dissenting).
[54] *Id.*
[55] *Id.* at 512.
[56] *See* Boyce, *supra* note 6 ("What is most striking about U.S. obscenity jurisprudence is that the Court has made little effort to supply a rationale for the community standards test.").

"the language conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices*. These words . . . give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries fairly to administer the law."[57] The Court likewise quoted *Roth*'s "common understanding and practices" language in concluding that the test enunciated in *Miller* "provide[d] fair notice" of what was illegal.[58] And the Court again relied on that language in *Hamling v. United States*,[59] when it concluded that a pre-*Miller* obscenity law was not unconstitutionally vague.[60] Thus, the current law of obscenity depends for its meaning, and ultimately its constitutionality, on the existence of a "common understanding" regarding what depictions of sexual conduct meet the elements of the obscenity standard. As discussed in Part Two, *infra*, the "common understanding" necessary to interpreting *Miller* incorporates long-standing biases about gender roles and proper sexual expression.

Despite running contrary to First Amendment principles, reliance on an *assumed* "common understanding" of what is offensive sexual conduct is permitted to stand as a test for constitutionality for one reason: tradition. The Supreme Court finally articulated a reason for treating sex differently than other potentially offensive subjects in 2011, holding that speech about sexual conduct may be suppressed *because we have traditionally suppressed it*.[61] Even more shocking—particularly in light of *Miller*'s reference to "*contemporary* community standards"—the Court has unequivocally stated that no new topics may be added to the definition of obscenity nor may new categories of speech may be excluded from the First

[57] *Roth*, 354 U.S. at 491 (majority opinion) (emphasis added).
[58] Miller v. California, 413 U.S. 15, 27 & n.10.
[59] 418 U.S. 87 (1974).
[60] *Id.* at 110–11.
[61] U.S. v. Stevens, 130 S. Ct. 1577, 1584 (2010) ("[T]he First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.")

Amendment, unless such speech has a well-established history of being suppressed.[62] As a result, states are compelled to advance outdated, historic notions of morality solely because they are historic, and are further disallowed from adopting new standards that reflect contemporary notions of morality, despite that the constitutional law as articulated in *Miller* requires as much.

3. Regulation of Violent Expression

In general, the Supreme Court has refused to extend its concept of obscenity to include violent works, and has further refused to find violent expression outside the First Amendment on *any* grounds.[63] Two recent decisions in particular highlight the hypocrisy of holding speech about sex and violence to different standards, despite that the justifications for excluding sexual speech from the First Amendment are directly applicable to violent speech, and that violent speech often comports with the inherent morality standard.

In the handful of Supreme Court cases addressing the propriety of state regulation of violent speech, one trends stands out: the Court consistently strikes down violent speech regulations on the grounds of overbreadth or vagueness.[64] In so ruling, the Court reasons that no community could possibly come to a consensus on when violent speech is too offensive, and therefore that laws regulating violent speech which track the *Miller* obscenity language could never "give men adequate notice of the conduct proscribed."[65] The Court adopts this non-consensus view about violent speech even where the state legislation at issue was passed by

[62] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2734 (2011) (No new categories of speech may be excluded from the First Amendment "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription[.]").
[63] *Id.* (rejecting attempts to analogize violent speech to obscenity, child pornography, speech integral to criminal conduct, and attempts to carve out a new category of unprotected speech).
[64] *See, e.g.*, *Winters, Stevens, Entm't Merch*.
[65] *See, e.g.*, U.S. v. Stevens, 130 S. Ct. 1577 (2010).

popular vote,[66] while unabashedly holding that "common understanding and practices" about sex protect the *Miller* standard from unconstitutional vagueness.[67]

In the first case, *United States v. Stevens*, the respondent made a facial challenge to a Congressional Act regulating animal crush videos ("Section 48"). Section 48 criminalized the commercial creation, sale, or possession of any depiction of "animal cruelty," defined where a living animal was "intentionally maimed, mutilated, tortured, wounded, or killed."[68] In a nod to *Miller*'s standard, Section 48 covered only those depictions of conduct that were illegal pursuant to federal or state statute (a reference to *Miller*'s reliance on "community standards" and "applicable state law" to define the contours of offensiveness), but exempted from coverage any depiction with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[69] These facts provided an excellent stepping stone for the Court to hold violent material within the obscenity definition, because crush videos—which "depict women slowly crushing animals to death with their bare feet or while wearing high heeled shoes, sometimes while talking to the animals in a kind of dominatrix patter over the cries and squeals of the animals, obviously in great pain."[70]—"appeal to persons with a very specific sexual fetish who find them sexually arousing or otherwise exciting."[71] That is, the videos, while violent, also appealed to the prurient interest in sex. However, the Court did not even mention prurience in *Stevens* and ultimately struck down Section 48 for overbreadth.[72]

First, the Court stated that Section 48 was presumptively invalid because it regulated

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[66] *See, e.g.*, *Entm't Merch.*, 131 S. Ct. at 2729 (holding that there can be no consensus on what violence is offensive even where the statute at issue, Cal. Civ.Code Ann. §§ 1746–1746.5 (West 2009), was passed by popular vote).
[67] *See* Hamling v. U.S., 418 U.S. 87, 110–11 (1974).
[68] *Stevens*, 130 S. Ct. at 1583.
[69] *Id.*
[70] *Id.* (citing H.R.Rep. No. 106–397, p. 2 (1999)).
[71] *Id.*
[72] *Id.*

expression based on its violent content, and violent expression is not a traditional category of unprotected speech.[73] The Government argued that violent expression *should* be categorically excluded from the First Amendment, based on the Court's well-established "no-value speech" rationale.[74] The Court responded that lack of social value has *never* been "the basis" for categorical exclusion, and thus cannot be grounds for carving out a new category of unprotected speech.[75] It stated that any prior discussion of the low social value of unprotected speech was merely a *description* of that speech, not justification for removing its protection.[76]

Here, the *Stevens* Court is just wrong. While accurately stating that descriptions of the excluded categories as low-value "do not set forth a test that may be applied as a general matter"[77] and that categorical exclusion "has not been on the basis of a simple cost-benefit analysis,"[78] the *Stevens* Court conflated "basis" and "test" for its own ends. Yes, a cost-benefit test has never been the constitutional standard for excluding an entire category of speech from the First Amendment. But it does not follow that a social cost-benefit analysis has not been at the heart of the justification for *every* categorical exclusion.

In arguing that low social value has never been the basis for exclusion, the *Stevens* Court regurgitated oft-quoted[79] language from *Chaplinsky v. New Hampshire*[80] but mischaracterized its context as description rather than justification. The *Chaplinsky* Court described unprotected

[73] *Stevens*, 130 U.S. at 1585.
[74] *Id.* (The Government contended that "depictions of *illegal* acts of animal cruelty that are made, sold, or possessed [solely] for commercial gain necessarily lack expressive value, and may accordingly be regulated as *unprotected* speech.").
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Stevens*, 130 S. Ct. at 1585.
[79] *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952), New York Times v. Sullivan, 376 U.S. 254 (1964); Brandenburg v. Ohio, 395 U.S. 444, 450 (1969); Beauharnais v. Illinois, 343 U.S. 250 (1952); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976), U.S. v. Stevens, 130 S. Ct. 1577 (2010).
[80] 315 U.S. 568 (1942).

speech as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," but then reasoned that they are categorically excluded because "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[81] Similarly, the *Roth* Court unequivocally stated that obscenity is permissibly removed from First Amendment protection because it is "no-value" speech.[82] The reasoning behind excluding incitement, defamation, commercial fraud, and speech integral to criminal conduct is self-evident: the First Amendment does not protect speech with such low social value that it is by definition a crime or the proximate cause of a crime. Finally, the Court has described its First Amendment jurisprudence as *frequently* being based on a social cost-benefit analysis, when stating in *Ferber* that it was "not rare"[83] for the Court to allow a content-based classification when "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required."[84] It appears that the *Stevens* Court took great pains to characterize its precedential justifications as descriptions in order to avoid the conclusion that speech with no social value has historically been excluded from the First Amendment on that "basis" (though perhaps not by that "test").

After refusing to find a new category of unprotected speech for lack of historical precedent, the *Stevens* Court next dismissed the Government's attempts to analogize regulation of crush videos to existing unprotected categories. The obvious analog is obscenity; Section 48 criminalized (1) commercial depictions of "animal cruelty," as defined therein; (2) where those

[81] *Id.* at 572.
[82] Roth v. United States, 354 U.S. 476, 484 (1957) ("[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance.").
[83] *Ferber*, 458 U.S. at 763 (citing Young v. Am. Mini-Theaters, 427 U.S. 50 (1976), New York Times v. Sullivan, 376 U.S. 254 (1964), Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and Beauharnais v. Illinois, 343 U.S. 250 (1952)).
[84] *Id.*

depictions are illegal pursuant to federal or state statute; and (3) where the depictions lack "serious religious, political, scientific, educational, journalistic, historical, or artistic value."[85] Replacing sexual conduct with animal cruelty, then, Section 48 mirrors *Miller* with few changes. The first *Miller* prong is satisfied by Section 48 in the case of crush videos, though the Court did not so much as mention their prurient nature.[86] By requiring the underlying conduct be illegal under state or federal law, Section 48 follows *Miller*'s second prong. That is, it is axiomatic that only those acts which are offensive to social mores beyond question are made illegal.[87] Finally, Section 48's exceptions clause was an expansion of *Miller*'s: it exempted material with serious religious, educational, journalistic, or historical value, in addition to that with serious literary, artistic, political, or scientific value.[88]

Despite tracking the constitutionally-approved *Miller* standard, the Court found all three of Section 48's prongs unconstitutionally broad. First, the Court held the definition of depictions of "animal cruelty" too broad because it included the "intentional killing . . . or wounding" of animals, which can be done humanely.[89] The Court rejected that "killing or wounding" should be construed together with the requirements that the underlying conduct to be cruel and illegal, because neither term was facially ambiguous (an apparent pre-requisite for construing statutes as a whole).[90] This is inapposite to its interpretation of *Miller*; *i.e.*, those displays of sexual conduct (one element of *Miller*) which not appeal to the prurient interest (a separate element of *Miller*) do not fall within the definition of obscenity because *Miller*'s elements are read together.

Second, the Court asserted that a lack of consensus as to what constitutes a depiction of

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[85] *Id.*
[86] *See generally* United States v. Stevens, 130 S. Ct. 1577 (2010).
[87] *Miller* itself proves this, because state law "defines" what is patently offensive.
[88] *Stevens*, 130 S. Ct. at 1583.
[89] *Id.* at 1585 (using the humane slaughter of livestock as an example).
[90] *Id.*

"cruelty" rendered illegality an unconstitutionally broad reference point. The Court averred that "although there may be 'a broad societal consensus' against cruelty to animals . . . there is substantial disagreement on what types of conduct are properly regarded as cruel."[91] As proof of non-consensus, the Court contrasted hunting regulations in several states,[92] ignoring that the educational and historical value of hunting depictions would exempt them from Section 48 and that all 50 states have laws criminalizing (and therefore defining) animal cruelty. Why, then, didn't the Court contrast animal cruelty laws rather than hunting laws to show non-consensus? I believe that the Court wanted to garner as much support for its conclusion as possible, and in light of the venerable position hunting holds in this nation's psyche, arguing that hunting would be adversely affected by Section 48 would do just that.[93] A blanket assertion of non-consensus as to what is "cruel" is unreasonable when resulting from comparison of irrelevant hunting statutes; irresponsible when made in the face of available data appropriate to assessing a consensus about cruelty; and hypocritical when compared to the *constitutionally-sanctioned presumption* of a consensus regarding what sexual conduct is prurient and offensive.

Finally, the Court found the exceptions clause too broad. In short, the *Stevens* Court rejected the *Miller* standard of "serious" social value as unreasonably high for non-sexual material, despite its constitutionality when applied to sexual material: "In *Miller* we held that serious value shields depictions of sex from regulation as obscenity. . . . We did not, however, determine that serious value could be used as a general precondition to protecting *other* types of speech in the first place."[94] Again, the *Stevens* Court contorts language in its favor: despite that Section 48's exceptions clause is just that—a list of exceptions to the statute, akin to *Miller*'s

[91] *Id.* at 1589.
[92] *Id.*
[93] *See* Part III.A.1, *infra* (discussing influence of hegemonic masculinity on the nation's psyche).
[94] *Id.* at 1591 (emphasis in original).

exceptions—the Court incorrectly characterizes it as a "general precondition to protecti[on]" to weaken the analogy to obscenity.

The second case, *Brown v. Entertainment Merchant's Association*,[95] was handed down one year after *Stevens*. In *Brown*, the Supreme Court struck down a California law that limited minors' access to violent video games on two main grounds. First, the law was a content-based restriction on speech which was neither a "simple adjustment" to an existing category of unprotected speech, nor merited establishing a new unprotected category.[96] Thus, it was subject to strict scrutiny. Second, the Court held that the state's purported interest in preventing psychological harm to minors caused by playing violent video was not supported by empirical data.[97] Moreover, even if the law did prevent some such harm, it both under- and over-inclusive and hence not narrowly tailored enough to pass strict scrutiny analysis.[98]

The California law forbid the sale or rental of a "violent video game" to a minor without the consent of a parent or other guardian, covering only games in which a player's "range of options" included "killing, maiming, dismembering, or sexually assaulting an image of a human being."[99] Furthermore, the ban was limited to depictions of violence which (i) "appeal[] to a deviant or morbid interest of minors," as found by a "reasonable person, considering the game as a whole"; (ii) are "patently offensive to prevailing standards in the community" for minors; and (iii) prevent the game as a whole from having "serious literary, artistic, political, or scientific value for minors."[100] The only differences, then, between the California law and *Miller*'s obscenity standard is the replacement of "prurient interest" with "deviant or morbid interest," the

[95] 130 S. Ct. 2729 (2011).
[96] *Id.* at 2735.
[97] *Id.* at 2738.
[98] *Id.* at 2738–41.
[99] Cal. Civ. Code § 1746 (West 2009).
[100] *Id.* § 1746(d)(1)(A).

replacement of "contemporary community standards" with a "reasonable person" standard, and the addition of language limiting the inquiry "as to minors." Of course, the law also did not specifically target sexual conduct; indeed, that the law attempted to prevent non-sexual harm to minors was its downfall.

Unlike *Ginsberg*, the Court said, the regulation on violent video games "does not adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children."[101] The statute that was upheld in *Ginsberg* was, the Court emphasizes, "a prohibition on the sale to minors of *sexual* material that would be *obscene* from the perspective of a child."[102] In other words, the *Brown* Court held that rational legislative judgments about what materials cause moral harm to minors will be upheld if regulating *sexual* materials, because the regulation of sexual materials is grounded in traditional obscenity jurisprudence.[103] And just as the Court rejected the attempt in *Stevens* to "shoehorn" speech about animal cruelty into the category of the "obscene," it rejected California's "attempt to make violent-speech regulation look like obscenity regulation":[104]

> Our cases have been clear that the obscenity exception to the First Amendment does not cover whatever a legislature finds shocking, but only depictions of "sexual conduct" . . . Our opinion in *Winters* made clear that violence is not part of the obscenity that the Constitution permits to be regulated.[105]

Notably, the *Brown* Court unambiguously interpreted *Winters* to stand for the proposition that all violent speech constitutes "no indecency or obscenity heretofore known to the law."[106] This reading is flawed. That *Winters* quote was not intended to say that violent speech can never be

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[101] *Brown*, 131 S. Ct. at 2735.
[102] *Id.*
[103] *Id.* at 2736 (citing Erznoznik v. Jacksonville, 422 U.S. 205, 213-14 (1975)).
[104] *Id.*
[105] *Id.*
[106] *Brown*, 131 S. Ct. at 2735.

regulated in the absence of precedent, nor that violent speech is never obscene, but rather to explain that a lack of precedent rendered that particular statute unconstitutionally vague.[107] Specifically, the *Winters* Court found that the language criminalizing the sale of violent stories only where such stories were "so massed [*i.e.*, compiled] as to incite to crime" could not give notice of the illegal behavior because that phrase had "no technical or common law meaning. Nor can the meaning be gained from the section as a whole or the Article of the Penal Law under which it appears."[108] Thus, if the statute had defined its terms or articulated what quantity of violent stories was considered sufficient to "incite to crime," the *Winters* Court may have upheld its constitutionality despite its regulation of violent expression.

However, the *Brown* Court interpreted *Winters* together with *Stevens* to hold that historical precedent is a prerequisite for carving out new categories of unprotected speech; a legislative social cost-benefit analysis is insufficient.[109] The Court in *Brown* stated that "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the judgment [of] the American people," embodied in the First Amendment, "that the benefits of its restrictions on the Government outweigh the costs."[110] The *Brown* Court stated that it might entertain the creation of a new exception for "violent-as-to-minors" speech "if there were a long-standing tradition in

[107] Winters v. New York, 333 U.S. 507, 513–14 (1948). The full quote reads: "No intent or purpose is required [by the statute]—no indecency or obscenity in any sense heretofore known to the law. 'So massed as to incite to crime' can become meaningful only by concrete instances. This one example is not enough." In other words, the statute in *Winters* was too vague because juries would be forced to entertain the intractable inquiry of determining when and whether a book had "massed" a sufficient quantity of violent stories such that it *might* incite the reader to commit future crimes.
[108] *Id.*
[109] *Brown*, 131 S. Ct. at 2734 ("New categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.").
[110] *Id.* (quotation marks omitted).

this country of specially restricting children's access to depictions of violence."[111] Pedantically citing to Grimm's Fairy Tales, Saturday morning cartoons, and Homer's Odyssey, the Court held that there is no such tradition.[112] As a result, California's law regulating the sale of violent video games to minors was held a run-of-the-mill "restriction on the content of protected speech" and was struck down under the full weight of a strict scrutiny analysis.[113]

4. Why Violent Expression Cannot Be Regulated Without Sex

First, it is worth noting that the Supreme Court was following a clear trend in refusing to find violent speech outside the First Amendment in *Stevens* and *Brown*. Nearly all the federal courts have refused in recent years to find violent but non-sexual speech obscene. The United States Court of Appeals for the Eighth Circuit, in declaring unconstitutional a Missouri statute that prohibited the rental or sale of violent movies to minors, held that obscenity only includes expressions of a sexual nature, and that material containing violence, but not sex, is not obscene.[114] The Second Circuit refused to recognize as obscene trading cards that depict "heinous crime."[115] The Sixth Circuit would not expand its obscenity jurisprudence to include violent rather than sexually explicit content in video games, movies, and Internet websites.[116] The Seventh Circuit declared that obscene speech and speech that conveys violence "are distinct categories of objectionable depiction."[117] But if both categories constitute "objectionable depictions," why is only sexual speech undeserving of First Amendment protection?

The Supreme Court, through *Stevens* and *Brown*, has sent a clear message: violent

[111] *Id.*
[112] *Id.*
[113] *Brown*, 131 S. Ct. at 2736.
[114] Video Software Dealers Ass'n v. Webster, 968 F.2d 684, 687–88 (8th Cir. 1992).
[115] Eclipse Enters., Inc. v. Gulotta, 134 F.3d 63, 64, 67 (2d Cir. 1997).
[116] James v. Meow Media, Inc., 300 F.3d 683, 687, 698 (6th Cir. 2002).
[117] Am. Amusement Mach. v. Kendrick, 244 F.3d 572, 574 (7th Cir. 2001).

expression cannot be regulated. While obscenity was removed from the First Amendment because of the moral harm it causes,[118] moral harm alone can never again be grounds for exclusion. By additionally requiring a tradition of suppression to establish new unprotected categories,[119] the Court is functionally preventing the formation of any new categories of speech. States must defend their regulations by analogy to existing categories of unprotected speech because the Court is openly loath to find new ones. Yet analogies to existing obscenity doctrine are not successful unless the regulated speech is sexual.[120] Unless a legislature comes forward with data showing a history of suppressing depictions of violence, the Supreme Court has shown that it will apply the strictest scrutiny to regulation of violent speech.[121] In Part III, I submit that the history and tradition requirement is pre-textual, and that the Court's hesitance to exclude violent speech from the First Amendment stems from a refusal to offend the prevailing notion of masculinity in America.

III. OBSCENITY JURISPRUDENCE REPRESENTS A GENDERED POLICY.

The disparate treatment of sex and violence under current obscenity jurisprudence can be seen as a manifestation of gender bias in at least four different ways. First, *Miller*'s reliance on community standards to define what material is offensive to the point of obscene necessarily incorporates outdated, if still widely accepted, gender stereotypes regarding "proper" sexual conduct. Second, by limiting obscenity to expression about sex, the Supreme Court has codified into constitutional law the idea that sex—in particular, female sexuality—is too immoral and

[118] Roth v. United States, 346 U.S. 476, 483 (1957).
[119] See *Brown*, 131 S. Ct. at 2736.
[120] *Compare* Ginsberg v. New York, 390 U.S. 629 (1968) (holding that non-obscene sexual speech is outside the First Amendment when it would be offensive to the point of obscene "as applied to minors") *with* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729 (2011) (holding that non-obscene violent speech is protected by the First Amendment even where it is patently offensive, appeals to deviant interest, and lacks social value "as to minors").
[121] *See, e.g.*, United States v. Stevens, 131 S. Ct. 1577, 1585 (2010) (failing to apply the canon of *noscitur a sociis* to properly construe Section 48, instead finding the statute unconstitutionally broad).

offensive a topic for public discourse. Third, and conversely, by expressly refusing to regulate violent expression, the Court furthers a male-centric, normative message that violence is not taboo but acceptable in public discourse, and ignores social harms which uniquely befall women. It is helpful to begin by identifying the normative stereotypes which pervade all four forms of gender bias before discussing each in turn.

A. Prevailing Gender Stereotypes

For millennia, dominant social groups have used gender stereotypes to control subordinate groups by exerting normative pressure to conform to a chosen, typically unattainable ideal.[122] In America, men are the dominant social group. Subsequently, men control the normative view of what it means to be masculine or feminine, including the degree to which sexuality and violence are considered acceptable and attractive. Exploration of these stereotypes is necessary for understanding how obscenity laws permit men to retain their control, and how that control leads to the continued subordination of women.

Gender stereotypes, as with all stereotypes, are contextual and idealized.[123] Descriptive stereotypes describe how an individual is presumed to act based on a particular trait,[124] as when all blondes are presumed to be stupid. Prescriptive stereotypes describe how an individual *should* act based on that trait,[125] as when a new mother is sent home early from work because "her place is at home with her child."[126] Prescriptive gender stereotypes exert the normative

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[122] *See* David S. Cohen, Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 HARV. J. L. & GENDER 509, 512 (2010).
[123] *Id.*
[124] Joan C. Williams, The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense, 7 EMP. RTS. & EMP. POL'Y J. 401, 406 (2003).
[125] *Id.*
[126] *See* Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502, 503 (Va. 1997); *see also* American Bar Association Commission on Women in the Profession, Fair Measure: Toward Effective Attorney Evaluation, 17–18 (2d ed. 2008) (discussing new parents who both worked at the same law firm; the wife was sent home early "on the

pressure that functions to control, and ultimately subordinate, women, and are hence discussed below.

1. American concept of masculinity

A singular ideal of masculinity is called "hegemonic masculinity."[127] That is, although individuals "experience different forms of masculinity within particular contexts, one form of masculinity often exerts the most [social] pressure to conform to it. 'Hegemonic' masculinity is that masculinity and it works to subordinate both women and non-hegemonically masculine men."[128] In other words, "hegemonic masculinity is the currently most honored way of being a man."[129] In America, it is the "white heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control—particularly economic, political, and military institutions—[who] produce [the] hegemonic masculinity that is glorified throughout the culture."[130] The American prescription of the ideal man includes three central characteristics: masculine men are decidedly non-feminine, overtly heterosexual, and have a propensity for physical violence or aggression.[131]

The first characteristic, "not feminine," makes sense. Indeed, most gender theorists acknowledge the simple fact that the dominant notion of being masculine means "doing things that cannot and *should not* be done by women."[132] Ultimately, masculinity requires men to

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assumption that she had a baby to care for," while the husband was kept later than ever, "on the assumption that he had a family to support.").

[127] Cohen, *supra* note 122, at 520.

[128] *Id.* at 522.

[129] *Id.*

[130] Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 783 (2000). Author's Note: Moving forward, when I discuss men as the dominant social group, I am referring to the men who fall within hegemonic masculinity; *i.e.*, those white men who occupy positions of control).

[131] Cohen, *supra* note 122, at 525.

[132] *See* Ellen Jordan, Fighting Boys and Fantasy Play: The Construction of Masculinity in the Early Years of School, 7 GENDER & EDUC. 69, 75 (1995) (emphasis added) (discussing various theorists' views).

"make it clear—eternally, compulsively, decidedly—that they are not 'like' women."[133] This characteristic is used to control and subordinate women because men seeking to reach the masculine ideal "reserve many socially important activities for men, [and] believe that women are unable to do many of the 'important' things that contribute to society."[134] There are countless historic examples of men reserving socially important functions for themselves; notable among them are the rights to vote, enter contracts, and own property, as well as the traditional distinction between "women's work" (domestic work done in the home, which necessarily makes lesser contributions to society) and "men's work" (all work outside the home, which necessarily makes greater contributions to society).[135] A contemporary example is seen in the divergent standards for attractiveness between the sexes. Masculine men do not wear makeup, shoes, or clothes that are meant to "improve" their attractiveness; the attractiveness of masculine men is determined by their natural features.[136] In contrast, feminine women wear makeup to improve their facial features, bras to keep their breasts at teen-height, heels to make their legs longer and butts perkier, shapewear to keep their silhouettes smooth and hourglass-shaped, and style their long hair to comply with attractiveness standards set by men.[137] Women

[133] Cohen, *supra* note 122, at 525.
[134] *Id.* (quotation marks omitted).
[135] *See generally* Vicki Schultz, Life's Work, 100 COLUM. L. REV. 1881, 1883-1886 (2000) (distinguishing between traditional women's work and men's work and arguing the former should be better compensated by society); Joan C. Williams, The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense, 7 EMP. RTS. & EMP. POL'Y J. 401 (2003) (noting the wide gap in societal value and compensation given to jobs filled by women or requiring feminine traits).
[136] Mary Anne Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 YALE L.J. 1, 3 (1995) (distinguishing between masculine and effeminate men on many bases, including wearing makeup).
[137] *See e.g.*, Jespersen v. Harrah's Operating Company, 444 F.3d 1104, 1110 (9th Cir. 2006) (en banc) (upholding under Title VII employee appearance policy with mandatory makeup and hair styling requirements for women but not men because such rules did not impose unequal burdens on the sexes); *see also* Joan Williams, Do Women Need Special Treatment? Do Feminists Need Equality?, 9 J. CONTEMP. LEGAL ISSUES 279, 285–96 (1998).

who buck this standard are not only seen as unattractive, but unprofessional as well.[138]

In addition to reserving socially important activities for men, legal codification of male "otherness" also subordinates women vis-à-vis the natural tendency to treat "otherness" with skepticism and distrust.[139] The limitations on women's participation in the military provide an important illustration. Being able to defend one's country with arms has historically been linked with fulfilling core duties of American citizenship, yet women are excluded from participation in ground combat and draft registration.[140] This exclusion sends the message that, literally, men are full citizens in their military eligibility as compared to women.[141] Exclusion also affords men more opportunities for leadership than women because of their ability to fully participate.[142] A Special Operations sergeant testified that female exclusion is necessary because "the warrior mentality will crumble if women are placed in combat positions . . . . There needs to be that belief that 'I can do this because nobody else can.'"[143] In sum, central to the notion of what it means to be masculine is the ability to do things that are socially valued and equally unfeminine.

Second, the masculine ideal requires that men be visibly heterosexual. Catharine MacKinnon has argued that compulsory heterosexuality is an important part of hegemonic masculinity because it "keeps women sexually for men and men sexually inviolable."[144] Michael Kimmel submits that "homophobia and sexism go hand in hand" because when "men fear that

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[138] *See Jesperson*, 444 F.3d at 1110; *see also* Kimberly A. Yuracko, Trait Discrimination as Sex Discrimination: An Argument Against Neutrality, 83 TEX. L. REV. 167, 199–-204 (2004) (discussing the advantages and disadvantages of "trait neutrality" in appearance-based gender discrimination).
[139] Williams, *supra* note 135, at 401
[140] Cohen, *supra* note 122, at 527; Women can also be excluded from units that must live with ground combat units, positions for which providing separate living arrangements is too expensive, special operations forces missions or long-range reconnaissance, and units whose physical requirements would exclude the vast majority of women.
[141] *Id.*
[142] *Id.*
[143] Valorie K. Vojdik, Beyond Stereotyping in Equal Protection Doctrine: Reframing the Exclusion of Women From Combat, 57 ALA. L. REV. 303, 343 (2005).
[144] Catharine A. MacKinnon, The Road Not Taken: Sex Equality in Lawrence v. Texas, 65 OHIO ST. L.J. 1081, 1087 (2004).

they will be perceived as gay by other men and thus 'not a real man,' [they] will exaggerate all the traditional rules of masculinity, including sexual predation with women."[145] Indeed, men who do not sufficiently exhibit their heterosexuality, regardless of their actual sexual orientation, may find themselves victims of persecution and even violence from "more masculine" men.[146] Assumed heterosexuality is rampant in society[147] and the law is no exception. For example, assumed heterosexuality is one of the basic reasons behind the sex segregation of prisons, because men as presumed heterosexuals will necessarily seek out sex with women, either consensually or non-consensually.[148] It also plays an important role in laws that prohibit men from conducting searches of women or from being guards in women's prisons.[149] Legal philosopher Richard A. Wasserstrom has written that even sex-segregated bathrooms use presumptive heterosexuality to further the dominance of men: "The case against [sex-segregated bathrooms] now would rest on the ground that they are, perhaps, one small part of that scheme of sex-role differentiation which uses the mystery of sexual anatomy, among other things, to maintain the primacy of heterosexual sexual attraction [that is] central to patriarchy."[150]

But perhaps the most prominent characteristic of masculinity is the propensity for physical aggression. Physical aggression is likely the most prominent characteristic of masculinity because it was the principal reason for man's initial ability to literally dominate

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[145] Michael S. Kimmel, Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity, *in* THEORIZING MASCULINITIES 119, 133 (Harry Brod & Michael Kaufman eds., 1994).
[146] *See, e.g.*, Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).
[147] *See* Cohen, *supra* note 122, at 529; examples may also be found in the mandatory sex-segregation of health clubs, spas, school locker rooms; novelty gifts and cards for men almost invariably feature scantily clad women.
[148] *Id.*
[149] *Id.*
[150] Richard A. Wasserstrom, Racism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 UCLA L. REV. 581, 594 (1977) (quotation omitted).

women,[151] and instantiates the power and control men retain.[152] While we are tens of thousands of years past our caveman days (itself an insidious manifestation of the masculine stereotype), men who are the biggest and strongest are still given the highest status in American society.[153] For example, the multiple millions of dollars and ludicrous amount of attention we pay professional athletes—notably, only male athletes—for their feats of athleticism is an excellent demonstration. Another is the fact that no President of the United States has ever been under six feet tall, even when such a height was extremely above average in the Eighteenth century (this, rather than overt assumptions of incompetence, may better explain why we have never had a female president).[154] Boundless examples aside, scholars agree that "physical dominance, aggressiveness, and the use of violence to maintain male power constitute a central feature in the definitions of hegemonic masculinity."[155]

Commentators have also argued that requiring both heterosexuality and physical aggression to be considered masculine places men in a double bind: in order to be true men, they must not be homosexual; yet many paths toward masculinity—such as sport, battle, and mentorship—involve just the sort of close, emotionally intense, and physically-oriented

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[151] R.G. D'Andrade,. Sex Difference and Cultural Institutions, *in* THE DEVELOPMENT OF SEX DIFFERENCES 174–-204 (E. Maccoby ed., 1977).

[152]Nancy Levit, Feminism for Men: Legal Ideology and the Construction of Maleness, 43 UCLA L. REV. 1037, 1056 (1996) (discussing how scholars have "direct[ed] attention toward the ways in which legal doctrines and constructs may reinscribe stereotypes of male aggression").

[153] Studies have not only found mens' height to be the primary criterion in mate-selection and the primary predictor of career success, but that men will self-report their height as taller than they are if they feel the need to make up for a perceived lack of masculinity. *See* Anthony F. Bogaert, Catherine C. Fawcett, Luanne K. Jamieson, Attractiveness, Body Size, Masculine Sex Roles and 2D:4D Ratios in Men, 47 PERSONALITY AND INDIVIDUAL DIFFERENCES 273, 273–78 (2009); Anthony F. Bogaert and Donald R. McCreary, Masculinity and the Distortion of Self-Reported Height in Men, 65 SEX ROLES 8, 548-556 (2011).

[154] See Larry Cata Backer, Gendering the President Male: Executive Authority: Beyond Rule of Law Constitutionalism in the American Context, 25 FLA. INT'L U. L. REV. 341 (2008) (criticizing masculinity in popular discussion of the rule of law).

[155] Frank Rudy Cooper, "Who's the Man?": Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 689 (2009); see also Patricia Hill Collins, A Telling Difference: Dominance, Strength, and Black Masculinities, 39 U.C. DAVIS L. REV. 853 (2006); Ann C. McGinley, Harassing "Girls" at the Hard Rock, 2007 U. ILL. L. REV. 1229 (2008).

relationships that subject men to the suspicion that they are homosexual.[156] As Angela Harris describes it, "the instability of masculine identity under these circumstances makes insecure men easily manipulable (anxious and eager to prove their masculinity) and potentially violent (for not only status but also personal identity itself is at stake)."[157] Thus, any natural propensity in men for violence is culturally exacerbated in America because this double bind creates constant doubt about a man's gender identity, resulting in a cultural requirement that men constantly *prove* their manhood—to women and especially to other men—in order to be accepted as men.

Just as this stereotype did not arise in a vacuum, neither is its perpetuation completely unfounded; it is unquestionable that men on the whole tend to commit violent and aggressive acts more than women.[158] Indeed, "gender has consistently been advanced by criminologists as the strongest predictor of criminal involvement."[159] Notably, while women do commit crimes and other violent acts, they are significantly less likely to do so to prove their femininity the way men do so to prove their masculinity.[160] Harris writes,

> Ordinarily law-abiding and peaceful men may find themselves committing violent criminal acts when (in public settings) their manhood is threatened by conflict with other men or when (in private settings) women threaten to reveal them as sexually inadequate, fail to submit to their patriarchal authority, or threaten to leave them. In these situations, the potential loss of masculinity brings shame and humiliation, and the man who finds these emotions intolerable may turn them into rage and act violently in expression of that rage.[161]

The law plays a significant role in reinforcing the stereotype that masculine men have a

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[156] Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 787 (2000) (citing Eve Kosofsky Sedgwick, Epistemology of the Closet 185 (1990)).
[157] *Id.*
[158] *See* JAMES W. MESSERSCHMIDT, MASCULINITIES AND CRIME: CRITIQUE AND RECONCEPTUALIZATION OF THEORY 1 (1993) ("It is no secret who commits the vast majority of crime. Arrest, self-report and victimization data all reflect that men and boys both perpetrate more conventional crimes and the more serious of these crimes than do women and girls. Men also have a virtual monopoly on the commission of syndicated, corporate, and political crime.").
[159] *Id.*
[160] *See* Harris, *supra* note 156,, at 788.
[161] *Id.* at 787.

propensity for violence. That women are disallowed from combat positions in the military sends the message that men are uniquely suited for fighting. Men are often prohibited from acting as guards to women prisoners because "men are sexual predators."[162] Yet, in *Dothard v. Rawlinson*, [163] the Supreme Court held that women could be barred from serving as prison guards to male inmates on the exact same grounds. In the eyes of the law, then, men are the aggressors whether they are guards or inmates. Statutory rape laws presume the sexual predation of men on young women.[164] Murder is mitigated to manslaughter when committed in the "heat of passion," which both accepts and excuses that men may react violently to unmanageable emotions.[165] The doctrines of incitement and fighting words similarly rely on the assumption that men will readily react to certain words with physical violence. Naturally, the words that most often fall under the definition of fighting words are those that threaten the listener's masculinity.[166] Even where the law does not facially project this stereotype, its implementation picks up the slack. For example, research suggests that police are twice as likely to arrest male perpetrators of domestic violence than female perpetrators.[167] This stereotypical female-victim/male-aggressor dichotomy pathologizes female violence and normalizes male violence,

[162] *See* Jami Anderson, Bodily Privacy, Toilets, and Sex Discrimination: The Problem of 'Manhood' in a Women's Prison, *in* LADIES AND GENTS: PUBLIC TOILETS AND GENDER 90-101 (Olga Gershenson & Barbara Penner eds., 2009).
[163] 433 U.S. 321 (1977).
[164] Michelle Oberman, Turning Girls into Women: Reevaluating Modern Statutory Rape Law, 85 J. CRIM. L. & CRIMINOLOGY 15, 70 (1994).
[165] Of course, women also get murder charges mitigated to manslaughter if committed in the heat of passion. However, this situation arises much less frequently for women, who thus do not receive the benefit of such mitigation equally with men. The reluctance of many courts to accept battered women's syndrome as a viable theory of mitigation serves to underscore how the law accepts and excuses men's violence because it comports with the generally accepted theory of masculinity, but refuses to accept the ways in which violence manifest in women, who instead must be punished most severely for breaching the accepted (male) standard of feminine behavior.
[166] *See generally* Katie Rose Guest Pryal, The Rhetoric of Sissy-Slogans: How Denigrating the Feminine Perpetuates the Terror Wars, 15 J. GENDER RACE & JUST. 503 (2012).
[167] *See* Amanda J. Schmesser, Real Men May Not Cry, But They Are Victims of Domestic Violence: Bias in the Application of Domestic Violence Laws, 58 SYRACUSE L. REV. 171, 175–76 (2007).

thus reinforcing hegemonic masculinity.[168] In sum, the American ideal of masculinity requires men to be decisively non-feminine, visibly heterosexual, and ready, willing, and able to be violent. The law perpetuates these stereotypes when it incorporates gender norms into legal standards.

2. American concept of femininity

The American construct of femininity can be seen as the converse of American masculinity. Hegemonic femininity and masculinity are mirror images of one another because men, as the dominant social group, defined both; women have never defined for themselves what is ideally feminine in Western society.[169] Thus, if the masculine ideal is defined by a distinction from that which is feminine, a requirement of explicit heterosexual overtures, and a propensity for violence, ideal femininity is conversely defined by a distinction from masculinity, a cabining of overt sexuality, and a propensity for docility and nurturance.

The first trait imperative to hegemonic femininity is non-masculinity. Having decided that overt sexuality and violent tendencies define manhood, men socially proscribed these traits for women.[170] Hence, feminine women do not display an appetite for sex or aggression. It is unsurprising that non-masculinity requires passivity; dominant social groups select self-serving and unattainable standards for subordinate groups in order to control them.[171] The more unsustainable the standard, the more effectively it controls the group attempting—and failing—

[168] Jamie R. Abrams, The Collateral Consequences of Masculinizing Violence, 16 WM. & MARY J. WOMEN & L. 703, 730 (2010).
[169] *See* Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 TEX. L. REV. 1097, 1115 (1994) (describing the American hegemonic femininity as an "ideology of men"); *see also* LINDA NOCHLIN, WOMEN, ART, AND POWER, 1–2 (1988) (describing how art perpetually represents women as sexual objects available for and presented to the male gaze).
[170] *See* David S. Cohen, Keeping Men "Men" and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity, 33 HARV. J. L. & GENDER 509, 512 (2010).
[171] April Fallon, Culture in the Mirror: Sociocultural Determinants of Body Image 80, *in* BODY IMAGE, DEVELOPMENT, DEVIANCE, AND CHANGE (Thomas F. Cash & Thomas Pruzinsky eds., 1990).

to meet it.[172] As Catherine MacKinnon writes:

> The discovery that the female archetype is the feminine stereotype exposed "woman" as a [male] social construction. Contemporary industrial society's version of her is docile, soft, passive, nurturant, vulnerable, weak, narcissistic, childlike, incompetent, masochistic, and domestic . . . . Women who resist or fail [to meet this standard] are considered less female, lesser women. Women who comply or succeed are elevated as models, tokenized if they succeed on male terms or portrayed as [having] consent[ed] to their "natural place" and dismissed if they complain.[173]

MacKinnon further submits that, when taken in context, "every element of the female gender role is revealed as, in fact, sexual."[174] According to MacKinnon, men sexually prefer those women who are completely void of sexual autonomy, and set the ideal feminine archetype accordingly.[175] I submit that MacKinnon's view is correct, but incomplete. The female gender role was carved by male sexual preferences, but the subservience and passivity requirements are at least as much about retaining social control as about sex. That is, even if all men preferred sexually aggressive women, idealizing that trait would encourage women to be both overtly sexual and overtly aggressive. This is inapposite to the hegemonic masculinity requirement that men—and men only—are overtly sexual and aggressive. Thus, under hegemonic femininity, women are considered masculine, and therefore unattractive, if they openly display either sexuality or aggression.[176]

The Supreme Court's leading decision on gender stereotype-based discrimination demonstrates how hegemonic femininity proscribes aggression and requires nurturance of

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[172] *Id.*; *see also* Nancy Etcoff & Susie Orbach, The Real Truth About Beauty: A Global Report (2004), *available at* http:// www.campaignforrealbeauty.com/uploadedfiles/dove_white_paper_final.pdf (showing that a full eighty percent of women agree that contemporary beauty standards are impossible to achieve naturally, and showing the average model weighs 23% less than the average woman).
[173] CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 110 (Cambridge Univ. Press 1989).
[174] *Id.*
[175] *Id.*
[176] *See* Diana Burgess & Eugene Borgida, Who Women Are, Who Women Should Be: Descriptive and Prescriptive Gender Stereotyping in Sex Discrimination, 5 PSYCHOL. PUB. POL'Y & L. 665, 670 (1999) (describing the "great deal of research" leading to the identification of these four traits as stereotypically feminine).

women. In *Price Waterhouse v. Hopkins*,[177] plaintiff Hopkins was denied partnership at her accounting firm despite billing more hours and bringing in more business than any other candidate.[178] Clients had given her high ratings and described her as "extremely competent, intelligent, strong and forthright, very productive, energetic and creative . . . decisive[], and . . . a stimulating conversationalist."[179] Opposition to her partnership was based solely on a perceived lack of warmth and "interpersonal skills," rather than objective job performance.[180] In her evaluations, partners wrote that Hopkins was "overbearing, arrogant, [and] abrasive," and "overly aggressive, unduly harsh, [and] difficult to work with."[181] In the words of the Court, "one partner described her as 'macho'; another suggested that she 'overcompensated for being a woman'; a third advised her to take 'a course in charm school.'"[182] Several of the male candidates were also characterized as abrasive and overbearing, though "no one suggested charm school for them."[183] Despite Hopkins' "work-related competence (or perhaps because of it), she was seen as behaving in ways that are considered inappropriate for women."[184] Although Hopkins prevailed after seven years, most of the judges deemed hers a "close case" of discrimination.[185]

The non-masculinity requirement proscribes more than just aggression for women. A study of male and female leaders shows that women who act *authoritatively* will be viewed as masculine—and subsequently scorned—despite that such a trait is desirable in a leader:

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[177] 490 U.S. 228 (1989).
[178] *Id.* at 235.
[179] *Id.* (quotation marks omitted).
[180] *Id.*
[181] *Id.*
[182] *Hopkins*, 490 U.S. at 235.
[183] Deborah L. Rhode, The Subtle Side of Sexism, 16 COLUM. J. GENDER & L. 613, 623 (2007) (citing several lower court opinions); Martha Chamallas, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins, 15 VT. L. REV. 89, 97 (1990) (same).
[184] Burgess & Borgida, *supra* note 176, at 670.
[185] *Id.* (citing several lower court opinions from the *Hopkins* litigation).

> [F]emale leaders were devalued relative to men when they behaved in an autocratic and directive manner and when they worked in male-dominated fields (e.g., in the military, as athletic coaches). By contrast, women who led in a participatory or democratic style were evaluated as positively as their male counterparts. Thus, the devaluation of female leaders was restricted to incidents in which women behaved in ways that were stereotypically masculine, behaviors that may have disrupted "traditional patterns of gender deference." . . . Such women may be particularly vulnerable to having their interpersonal abilities and personality derogated, although their work-related, instrumental strengths may be acknowledged.[186]

Additionally, the study revealed that men have a greater tendency to hold traditional prescriptive beliefs that women "should not act like men"; they will scorn a woman who bucks the feminine ideal more quickly and more severely than will other women.[187]

The second trait imperative to femininity, concerning female sexuality, is two-fold: its descriptive component sees women as inherently, dangerously sexual;[188] its prescriptive component requires constant restraint of this unbridled sexuality.[189] This ideology portrays non-procreative sex as sinful and women as beholden to their sexual impulses—and therefore in perpetual need of societal control.[190] Women are thus socially categorized by whether they cave to their sexual natures; there are "bad" girls whose sexuality tempts men to sin, depravity, and squalor, and "good" girls who tolerate sex for procreation but do not engage in it for self-fulfillment, let alone outside of male-prescribed parameters.[191] The "good/bad girl" division is manifested in a multitude of female stereotypes: a woman is either madonna or whore, virgin or

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[186] *Id.* (citing Eagly, A. H., Makhijani, M. G., & Klonsky, B. G, Gender and the evaluation of leaders: A meta-analysis, PSYCHOLOGICAL BULLETIN, 111 (1992)).
[187] *Id.* at 681.
[188] Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 TEX. L. REV. 1097, 1115 (1994).
[189] Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women's Sexuality, 56 EMORY L.J. 1235, 1250 (2007).
[190] *Id.*
[191] Women who fall from the pedestal of bodily purity have long been thought—whether consciously or otherwise—to deserve whatever violence and domination they get. *See* HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 23 (1992) (arguing that the misconception of rape as a sexual rather than a violent crime results in the characterization of a rape victim as either a "vamp" who "by her looks, behavior or generally loose morality, drove [her attacker] to such extremes of lust that he was compelled to commit the crime," or a "virgin," the innocent victim now sullied by a "depraved and perverted monster who is now a martyr to the flaws of society").

vamp, helpless schoolgirl or lust-crazed dominatrix. Even the Supreme Court has characterized this dichotomy as "one of the most insidious of the old myths about women[;] that women, wittingly or not, are seductive sexual objects [or] . . . placed upon a pedestal[.]"[192]

While hegemonic masculinity requires men to display their heterosexuality to the point of conspicuousness, the open display of sexuality by women is considered "profoundly dangerous to men and to civilization."[193] Woman's sinful sexuality constantly tempts men not merely toward immorality, but "away from the business of creating and maintaining civilization, from pursuit of science, of government, of war, of commerce, and of invention. If women are not supervised and controlled, if their unruly sexuality is not repressed and regulated (for it cannot be tamed), civilization itself will fall."[194]

This ideology is reflected in the societal and legal treatment of women throughout history. American women seeking sexual autonomy have been publicly branded, stoned, sequestered, institutionalized as insane, jailed as prostitutes, burned as witches, and driven to suicide by persecution.[195] While male adulterers "did not deserve" death for their transgression, a wronged husband may have been entitled to exact such a punishment on his unfaithful wife.[196] Statutory rape laws arose not merely out of a paternalistic concern to protect young women from

[192] Dothard v. Rawlinson, 433 U.S. 321, 345 (1977) (Marshall, J. concurring and dissenting in part).
[193] Meyer, *supra* note 188, at 1104.
[194] Id. (citing SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 73 (Joan Riviere trans., The Hogarth Press 1955) (1930) (describing women as tempting men with libidinal satisfaction and thus detracting from culture-supporting activities)).
[195] *See* ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA (1992) (detailing Sanger's prosecution for attempting to distribute contraceptives and birth control information); Barbara Ehrenreich & Deidre English, Witches, Midwives, and Nurses: A History Of Genius Women Healers 10–12 (1973) (discussing expressions of female sexuality that subjected women to persecution as witches); EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY 19 (1992) (describing persecution of late 19th- and early 20th-century feminists).
[196] Jeremy D. Weinstein, Adultery, Law and the State: A History, 38 HASTINGS L.J. 195, 227–28 (1986) (describing this 17th and 18th century practice as an "historical paradox").

exploitation, but at least as much from the desire to "control their burgeoning sexuality."[197] Married women could not be trusted with such basic freedoms as the right to own property, to vote, to sign contracts, or to have custody of children,[198] both because women were deemed to lack the intellectual capacity to contribute, and because their sex-driven impulses would "misguide, deceive, or drain mankind and keep him from his weighty accomplishments."[199] Nineteenth- and twentieth-century women were punished for seeking freer sexual expression in dress, dating, dance, and domestic life, as well as fighting against sexual double standards that created "fallen" women out of girls raped, seduced, or simply sexually active.[200] Social "purity" movements have been periodically "necessary" to ensure that all sexual expression by women was stamped out.[201]

Although Western women have gained many social and political rights previously denied them, the sin-sex nexus[202] continues to limit women's full social and legal participation.[203] The hegemonic femininity requirement that women cabin their sexuality results in the repression of their sexual autonomy. When the law steps in to regulate female sexuality in ways it does not (and I submit will never) regulate male sexuality, it is reflecting hegemonic femininity in a way

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198 *See* KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 2–16 (1993) (detailing legal precedents for subordination of women in these ways).

199 *See* BARBARA EHRENREICH & DEIDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF THE EXPERTS' ADVICE TO WOMEN 126–27 (1978) ("[T]he 'oversexed' woman was seen as a sperm-draining vampire who would leave men weak, spent, and effeminate."); *see also* HOMER, THE ODYSSEY 93–100 (Robert Fitzgerald trans., Vintage Classics 1961) (describing how the seductive sea nymph Kalypso distracts the hero Odysseus from his journey homeward).

200 Meyer, *supra* note 188, at 1104. (citing KATHY PEISS, CHEAP AMUSEMENTS: WORKING WOMEN AND LEISURE IN TURN-OF-THE-CENTURY NEW YORK 108-14 (1986) and GAYLE RUBIN, THINKING SEX: NOTES FOR A RADICAL THEORY OF THE POLITICS OF SEXUALITY, IN PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 267–69 (Carol S. Vance ed., 1984)).

201 *See* BARBARA M. HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 51–76, 139–84 (1987) (examining moral reform societies and their "purity movements").

202 Meyer, *supra* note 188, at 1104 (using the term "sin-sex nexus").

203 Kim Shayo Buchanan, Lawrence v. Geduldig: Regulating Women's Sexuality, 56 EMORY L.J. 1235, 1239–40 (2007) ("Sexual regulation has always been gendered. While the law extends a marked solicitude to the right of men to have non-marital sex without incurring unwanted reproductive consequences, it visits the legal, financial, health, and reproductive burdens of unmarried sex exclusively on women and attributes the disparate treatment to nature.").

that heartily contributes to the suppression of female sexual autonomy.

Most laws regulate female sexuality indirectly; the most direct are those that obstruct access to contraception and abortion, which leave women but not men threatened with unwanted pregnancy.[204] Scholars argue that a traditional double standard, which requires premarital chastity and marital fidelity of women but not of men, animates much abortion regulation.[205] Courts and legislatures take for granted that government intervention into women's decision-making to prevent pregnancy is a legitimate means to a legitimate societal goal.[206] While men are "not punished" for premarital sex, "'moral' considerations justify laws that impose devastating legal, social, financial, and health consequences upon women who become pregnant through 'disfavored' sex."[207] Significantly, that most abortion laws allow an abortion when the pregnancy results from rape or incest[208] reflects the legal consideration of pregnancy and parenthood as "just deserts" for women who choose to have sex. That is, only where sex is involuntary and outside male-sanctioned parameters does a woman "deserve" to be allowed an abortion; if she got pregnant while exercising sexual autonomy, she loses the privilege of choosing not to have the child. Recent trends in abortion regulation like outright bans on certain types of abortions,[209] mandatory "waiting periods,"[210] and parental or spousal notification

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[204] *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Blackmun, J., concurring) ("A state's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. . . . Th[e] assumption that women can simply be forced to accept the "natural" status and incidents of motherhood appears to rest upon a conception of women's [proper] role[.]").

[205] *See, e.g.*, Buchanan, *supra* note 189, at 1254; Anna Stubblefield, Contraceptive Risk-Taking and Norms of Chastity, 27 J. SOC. PHIL. 81 (1996); Keith Thomas, The Double Standard, 20 J. HIST. IDEAS 195 (1959).

[206] *Id.*

[207] Buchanan, *supra* note 189, at 1254.

[208] *See, e.g.*, 42 U.S.C. §1396 (prohibiting the use of federal Medicaid funds for abortion except in cases of rape, incest, or life endangerment).

[209] Gonzales v. Carhart, 550 U.S. 124 (2007).

[210] *Id.*

provisions[211] have only served to underscore the hegemonic femininity stereotype that women cannot and should not make sexual decisions for themselves.

Moreover, the law furthers hegemonic femininity by suppressing female sexual autonomy in its regulation of sexual education and information. The federal government spends hundreds of millions of dollars yearly on "abstinence-only-until-marriage" programs given to young people in public schools, churches, and community centers.[212] These programs instruct that all birth control is dangerous, condoms are ineffective in preventing pregnancy, and that HIV and other STDs can pass through a condom.[213] Kim Buchanan argues that

> [r]ather than challenging societal expectations of male sexual irresponsibility and punitive attitudes toward women who are sexually active, [abstinence-only] programs reinforce this double standard in the hope that it will force young women to stop themselves from having sex. Accordingly, these programs teach that premarital sex inevitably results in financial and emotional ruin for young women, while enhancing the reputation of young men.[214]

Likewise, "marriage promotion curricula" funded by the federal government seek to mandate the sexual behavior of young and low-income women under the Welfare Reform Act.[215] The Congressional findings supporting this legislation explicitly attribute poverty to unwed pregnancy and unwed motherhood.[216] Such federally funded programs pressure poor women—but not men—to get married as a strategy for escaping poverty, yet fail to offer any economic guidance from which women (or their prospective husbands) might learn to support themselves

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[211] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
[212] 42 U.S.C.A. § 710 (West).
[213] *See* U.S. House of Representatives, Comm. on Gov't Reform—Minority Staff, The Content of Federally Funded Abstinence-Only Education Programs 2-3 (2004), *available at* http://www.democrats.reform.house.gov/Documents/20041201102153-50247.pdf
[214] Buchanan, *supra* note 189, at 1264.
[215] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).
[216] *Id.*

and their children.[217] Similarly, if a woman wants to avoid punitive "family cap" reductions in benefits for giving birth while on welfare, she must use a method of contraception that cannot be reversed except by medical intervention.[218] If she uses a less invasive method of birth control such as oral contraceptives or condoms, she and her children will be subject to a reduction in benefits.[219] The Welfare Reform Act thus signals that sexual abstinence of women, but not of men, is more integral to ending poverty than financial education. By limiting women's access to birth control, abortions, and, most significantly, accurate information about their own health, the law suppresses female sexuality in order to comport with the prevailing stereotype of femininity.

In sum, hegemonic femininity exerts normative pressure on women to behave unlike men, cabin their sexual urges, and be passive rather than aggressive.

B. Gender Bias #1 – Insidious "Community Standards"

The constitutional obscenity standard, aka the inherent morality standard, explicitly permits and implicitly requires that these prescriptive gender stereotypes are encompassed in the definition of obscenity. That is, material is deemed obscene if it is patently offensive according to "community standards." The problem is that the community standards themselves are not *proved to* the jury as an element of the offense, but rather are *decided by* the jury.[220] Jurors are thus able—and more importantly, are required—to subsume whatever biases about "proper" sexual conduct are held in the community into the constitutional standard for obscenity.

While courts may technically admit evidence of community standards, such evidence is

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[217] *See* Katherine Boo, The Marriage Cure: A Reporter at Large, New Yorker, Aug. 18, 2003, at 105 (reporting on Oklahoma implementation of federally funded marriage-promotion programs).
[218] Buchanan, *supra* note 189, at 1258.
[219] *Id.*
[220] James Peterson, Behind the Curtain of Privacy: How Obscenity Law Inhibits the Expression of Ideas About Sex and Gender, 1998 WIS. L. REV. 625, 631 (1998)

regularly excluded.[221] Hence, the opportunity to discriminate arises because the jury is *presumed* to know the community standards. This problem is compounded by the fact that jurors are not meant to apply their own sense of offensiveness, but to apply the offensiveness standards of the mythical "average person" in their community.[222] Such guesstimating is routine in some areas of the law, as when the knowledge of a "reasonable person" is imputed to a defendant charged with negligence.[223] However, that "reasonable person" standard is designed to *limit* jurors' biases by requiring them to imagine what a less-biased (*i.e.*, more reasonable) person would do in the circumstance presented.[224] In contrast, the standard for defining community standards does not ask jurors to set aside their biases; rather, it requires that they *incorporate* into the constitutional standard not only their individual bias, but all biases known or apparent in their community.

It is imprudent to disregard the fact that people are influenced, sometimes subconsciously, by their perception of the opinions, values, and expectations of others. As Diana Burgess and Eugene Borgida write:

> [S]tereotypes are learned sociocultural representations that may continue to be held even when individuals do not personally endorse them. Even a person who holds egalitarian beliefs about what is appropriate for men and women possesses descriptive knowledge of the characteristics, roles, and behaviors that constitute gender stereotypes. Even for those who claim to endorse equal rights, liberalization of (gender) roles and the like, *stereotypic associations to gender are virtually automatic*, emerging without any obvious conscious processing when a person is confronted with a member of the category.[225]

Similarly, a study by James Fields and Howard Schuman strongly suggests that people look out

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[221] Hon. Joseph T. Clark, The "Community Standard" in the Trial of Obscenity Cases--A Mandate for Empirical Evidence in Search of the Truth, 20 OHIO N.U. L. REV. 13, 17 (1993).
[222] Smith v. United States, 431 U.S. 291, 305 (1977); Hamling v. United States, 418 U.S. 87, 104 (1974).
[223] See RESTATEMENT OF TORTS (SECOND) § 283.
[224] *Id.* cmts. b and c (discussing how the reasonable man "is never negligent" and "always considerate of the safety of others and does not look primarily to his own advantage").
[225] Burgess & Borgida, *supra* note 176, at 679 (citations and quotation marks omitted).

into the community and see their own opinions reflected back.[226] Thus, there is a strong tendency to perceive community agreement with one's self, because people impute their own opinions to the community at large. Perceived self-community agreement is exacerbated in the absence of information to the contrary,[227] as is the case in the majority of obscenity cases.[228] In addition to projecting their own views, jurors are also likely to shift their opinion of offensiveness toward what they believe is the most mainstream view of appropriate sexual conduct in an attempt to reflect a broad cross-section of their community.[229] Moreover, jury selection typically serves to aggravate, rather than mitigate, the weight of private biases.[230] For example, one manual to assist prosecutors in selecting a jury for an obscenity reads as follows:

> [A] juror with the following characteristics would be ideal: (1) a native of the community, or in the alternative, originally from a smaller town or community; (2) married people with families, especially those with daughters, granddaughters, and/or small children or grandchildren; (3) active church members; (4) at least 40 years of age; (5) active in community clubs and activities; (6) presently living in a small community; (7) little or no exposure to pornography; (8) politically conservative; (9) agreement with the state's right to enact obscenity and child pornography laws; (10) people who own their own homes rather than rent.[231]

Prosecutors would want to select these obviously conservative jurors as they are more likely to convict than those with more open-minded views on what sexual conduct is offensive.[232] While defense counsel would naturally seek to select jurors with liberal or minority views on sexuality, it is unlikely defense counsel would able to ensure they remain on the jury; attorneys can strike

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[226] James M. Fields & Howard Schuman, Public Beliefs About the Beliefs of the Public, 40 Pub. Opinion Q. 427, 427 (1976).
[227] *Id.* at 442.
[228] *See* Clark, *supra* note 221 at 30 (discussing at length the jurisprudential rejection of expert testimony and surveys to assist juries in determining community standards).
[229] *Id.*
[230] Peterson, *supra* note 220 at 642.
[231] BENJAMIN W. BULL ET AL., THE PREPARATION AND TRIAL OF AN OBSCENITY CASE: A GUIDE FOR THE PROSECUTING ATTORNEY 51–52 (2d ed. 1988).
[232] *Id.*

jurors, not prevent them from being struck and the prosecutor may have enough peremptory strikes to remove them.[233] It is easy to see, then, how effortlessly long-standing sexual stereotypes are incorporated into the constitutional definition of obscenity.

C. Gender Bias #2: Keeping Sex Taboo Enforces Negative Sexual Stereotypes

Central to the concept of obscenity is that some materials *should not* be available for public consumption. Thus, the inherent morality standard essentially asks whether the objectionable material is best left "behind the curtain of privacy which our customs draw[.]"[234] By limiting the scope of obscenity jurisprudence to speech about sex, the Supreme Court has codified into constitutional law the idea that sex—and in particular, female sexuality—is too immoral and offensive a topic for public discourse. In practice, keeping sex taboo forces juries in obscenity cases to rely on normative sexual stereotypes because the lack of public discourse precludes basing "community standards" on actual community practices. And when the prevailing sexual stereotypes consider overt female sexuality taboo, obscenity laws function to stifle women's sexual autonomy and perpetuate their subordination.

1. Societal Function of Sexual Taboos

In her book, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo*, Mary Douglas submits that a culture will find taboo those things that challenge its fundamental conceptual categories.[235] In other words, if something profoundly troubles the self-identity of the members of the culture, the culture will find that thing "unnatural," and its presence will trigger deep disgust.[236] As the dominant social group defines these normative categories, its

[233] *Id.*
[234] Peterson, *supra* note 220, at 645 (quoting the Model Penal Code).
[235] MARY DOUGLAS, PURITY AND DANGER: AN ANALYSIS OF CONCEPTS OF POLLUTION AND TABOO, 34–36 (1966).
[236] *Id.*

members are both more likely to be offended by challenges to existing categories, and are best-situated to quash such challenges.[237] Moreover, dominant social groups naturally draw normative distinctions that are self-serving.[238]

In America, sexually explicit material is taboo because it challenges the fundamental categorization of our lives into separate spheres of private and public life.[239] That is, societal norms dictate what details about our sexuality should be known to others (*i.e.*, our public lives) and what should remain behind closed doors (*i.e.*, our private lives). Significantly, however, sexual norms vary for different groups of people. For example, heterosexual couples can hold hands and kiss in public without fear of offending social mores, while the same cannot be said for homosexual couples in many parts of this country.[240] Likewise, hegemonic masculinity and femininity instruct that men may publicly display their sexual selves, while women may not.[241] In other words, the traditional "public sex life" sphere is much larger for men than it is for women, who must cabin their sexuality or be seen as unfeminine. Hence, when any of us transgresses the normative sexual stereotypes encompassed in hegemonic masculinity and femininity, we challenge the very identity of the controlling social group. When that transgression involves an explicit public look at something hegemonic masculinity deems private—such as an unabashed exhibition of female sexual autonomy—it is called obscene.[242]

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[237] *Id.* at 4-6.
[238] *E.g.*, heterosexuals have long claimed the normalcy of heterosexuality and abnormality of homosexuality.
[239] Peterson, *supra* note 220, at 655.
[240] *Id.* at 656 ("Heterosexuals can reveal substantial portions of their erotic lives in many public and semi-public places, but gays and lesbians must keep practically all of their erotic experience out of sight, if they are concerned about giving offense by 'flaunting it.'").
[241] *See* Part III.A.2 *infra*.
[242] *See* Peterson, *supra* note 220, at 626 (discussing the obscenity conviction of performance artist and porn actress Annie Sprinkle for an all-female sex video exhibited to celebrate the publication of a university magazine of lesbian erotica).

The real-world impact of sexual taboos cannot be overstated. Theorists of sexuality long ago explained the importance of prohibition to sexual desire. Sigmund Freud wrote: "Some obstacle is necessary to swell the tide of the libido to its height; and at all periods of history, wherever natural barriers in the way of satisfaction have not sufficed, mankind has erected conventional ones in order to be able to enjoy love."[243] Georges Bataille argued that the pleasure of pornography depends on an accompanying prohibition that it appears to transgress.[244] In short, taboos are like a metaphorical car accident; the more we're told to avert our eyes, the more fascinated we become with stealing a peek. In this way, sexually explicit material gains rather than loses social significance when it is proscribed.[245] Indeed, Professor Meyer argues that the subordinating nature of pornography is due at least as much to its taboo nature, which renders its private viewing a male-only event, as to its misogynist content.[246]

More importantly, however, recent research has affirmatively proven a causal connection between legally-sanctioned taboos and actual moral beliefs of the public:

> Little is known regarding what obscenity laws do and whether the rationales put forth by policy-makers are empirically justified. If [obscenity standards] give people more room for sexually progressive expression and greater social acceptance of alternative behaviors, then more progressive community standards would make it easier to subsequently challenge restrictive obscenity regulations, leading to multiple steady states through which abrupt shifts in norms can occur. .

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[243] SIGMUND FREUD, The Most Prevalent Form of Degradation in Erotic Life, *in* 4 Collected Papers 203, 213 (Joan Riviere trans., 1959).

[244] GEORGES BATAILLE, EROTISM: DEATH & SENSUALITY 63 (Mary Dalwood trans., 1986) (1957) ("The transgression does not deny the taboo but transcends it and completes it."). Bataille also pointed out how outlets for sexual expression that appear to be subversive, such as pornography, in actuality operate as forms of repression and social control.

[245] *See, e.g.*, Donna I. Dennis, Obscenity Law and Its Consequences in Mid-Nineteenth-Century America, 16 COLUM. J. GENDER & L. 43, 43 (2007) (arguing that obscenity prosecutions promoted the proliferation of sexual works by advertising the taboo, whetting the public appetite, generating an interested audience, and spurring publishers to seek new markets and develop new genres of pornographic materials).

[246] Meyer, *supra* note 188, at 1104. ("Porn gains its meaning because of sexual "taboos" that confine viewing to secrecy; because of the predispositions of its largely male audience concerning what it ought to mean and how they ought to react to it; because it is shown in "stag" contexts—often in association with military and sports conquest; and because it is used as a ritual of male bonding, of Oedipal rebellion against the authority of mothers, of growth towards manhood, and hence is linked to exclusion and vanquishment of the female.").

> . . Using the random assignment of U.S. federal judges . . . we found that progressive obscenity standards increase progressive sexual attitudes, non-marital sexual behavior especially by men, arrests for prostitution, rape, and drug violations, [but] . . . reduc[ed] arrests for offenses against family and children. . . . To corroborate a causal channel we conduct a field experiment by assigning workers to transcribe obscenity news reports. Exposure to progressive obscenity decisions leads to more progressive sexual attitudes but not to self-reported sexual behavior. A second field experiment documents that exposure to conservative obscenity decisions leads to beliefs that premarital, extramarital, and homosexual sex are more prevalent.[247]

In short, then, obscenity jurisprudence influences the public's actual beliefs and values, illuminating the boundary between acceptable and obscene. By singling out depictions of sexual activity as the only material offensive enough to be obscene, obscenity law signals that "the sexual is sinful, and that eros—female eros in particular—is not only problematic, but also a central source of social evil."[248]

2. Suppressing Sexual Discourse Suppresses Female Sexuality

How suppressing only speech about sex eschews female sexuality can be explained in two ways. First, the "community standards" prong of the inherent morality standard ensures that a singular majoritarian (*i.e.*, male) view of sexual morality prevails over all others. Second, from its inception until current day, every development of obscenity law grew out of a conservative movement to stop the democratization and liberation of female sexuality.

First, "community standards" are meant to be the legally-sanctioned boundary between our public and private sexual lives.[249] Yet it is impossible to define a community's standards regarding a taboo subject matter without reliance on stereotypes. That is, community standards

[247] Daniel L. Chen & Susan Yeh, How Do Rights Revolutions Occur? Theory and Evidence from First Amendment Jurisprudence, 1958-2008, Columbia University Political Economy Seminar (October 2012).
[248] Meyer, *supra* note 188, at 1140.
[249] Peterson, *supra* note 220, at 655.

cannot be based on actual beliefs and practices in the absence of some community discourse. For example, a jury could easily agree on a community standard about the proper driving of a car because people generally will openly discuss their own and others' driving behavior; we know what our neighbors think is good and bad driving. In contrast, so long as sex is taboo, sexuality is not openly discussed and deliberated by the community; we know much less about what our neighbors think about the extreme sexual behavior likely to be at issue in an obscenity case. Subsequently, juries must use the normative boundaries selected by the dominant social group to inform their decision because the lack of public discourse about sex precludes basing "community standards" on actual community beliefs and practices. In this way, keeping sex taboo mandates the perpetuation of sexual stereotypes, and results in the continued suppression of female sexuality in accordance with those stereotypes.[250]

Second, obscenity law has developed reactively, as opposed to proactively. Scholars generally agree on the timeline of its development, which shows that both the legal theory and prosecution of obscenity have advanced periodically, rather than constantly.[251] Obscenity law first gained momentum around 1842, and remained a hot legal issue until the passage of the Comstock Act in 1873, which banned obscene literature from the mail.[252] A resulting climate of sexual repression prevailed until around 1913, when federal judges began to openly question the "rule as laid down, however consonant it may be with mid-Victorian morals."[253] This period lasted until around 1930, when obscenity doctrine officially broke with its Victorian past by

[250] *See* Parts III.A.1 and III.A.2 for a review of hegemonic masculinity and femininity.
[251] Donna I. Dennis, Obscenity Law and Its Consequences in Mid-Nineteenth-Century America, 16 COLUM. J. GENDER & L. 43, 43 (2007) (noting the foregoing timeline as the "conventional history of obscenity in America" among scholars).
[252] *Id.*
[253] United States v. Kennerley, 209 F. 119, 120 (N.Y. 1913) (Hand, J.)

shifting to a "reasonable person" standard, rather than *Hicklin*'s "susceptible person" standard.[254] Repression again prevailed until the late 1950's, when the United States Supreme Court's decision in *Roth v. United States*[255] loosened restrictions on the sale of sexually explicit material to adults.[256] From 1957 on, obscenity has remained a popular topic of discussion. Of note, the *Miller* standard was promulgated by the Court in 1973, when the modern feminist movement was gaining ground. Then, theorists Catharine MacKinnon and Andrea Dworkin attempted in the 1980's and 90's to suppress pornography as a violation of women's civil rights.[257] Today, controversies over the ubiquitous availability of sexually explicit images and teen sexting dominate the conversation.[258]

Significantly, each period of advancement in obscenity law corresponds with a social movement advocating freer sexual expression, particularly for women. These progressive movements are the very same that allowed women to gain civil rights previously denied them. For every sexually progressive social movement, there was a corresponding conservative backlash.[259] In short, because men have never needed social permission or encouragement to freely express their sexuality,[260] the stifling of social progress toward freer sexual expression functioned to stifle the sexuality of women only.

There was a "free love" movement in the mid-Nineteenth century—a "middle-class, bohemian cause that opposed marriage and supported sexual relationships rooted in 'passional

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[254] Obscenity Litigation, 10 AM. JUR. TRIALS 1 (Originally published in 1965).
[255] 354 U.S. 476 (1957).
[256] Dennis, *supra* note 251, at 43.
[257] *Id.*
[258] *Id.*
[259] *See, e.g.*, Dennis, *supra* note 251, at 43 (describing 19th century reform movements as reacting to "free love" movements of the day); Meyer, *supra* note 188, at 1149 (noting scholarship that attributes the dramatic increase in porn to a backlash against women's progress in the economic and political spheres, "a backlash that has occurred in previous periods of gain by women—the late 19th century, the early 20th century, and the 1950s—as well.").
[260] *See* Part III.A.1 *infra*.

attraction' rather than law."[261] Women contemporaneously gained the rights to enter contracts, execute wills, own or control property, work outside the home, and receive trade licenses.[262] At this time, a work was obscene if it had a "tendency to corrupt the morals"[263] of a person susceptible to offense at lewd materials. This vague standard prevailed throughout the Nineteenth century, and might have rendered obscenity laws "an expansive tool" for the proscription of an extremely broad range of purportedly dangerous or immoral materials.[264] Yet obscenity laws were not used to prosecute any and all materials that might be morally corruptive to a susceptible audience. Instead, Nineteenth century obscenity prosecutions typically targeted works describing "female sexual desire, knowledge, or pleasure, usually narrated by women in the first person,"[265] because such works were in contravention of the prevailing notions about the supposedly innate chastity and lack of libido in women. As Professor Donna Dennis writes,

> new middle-class norms that arose in the first half of the nineteenth century prescribed sexual purity and "passionlessness" for women. Indeed, a primary cultural achievement of the antebellum bourgeoisie was its assertion of fundamental sexual differences between men and women. By eliding sexual difference and highlighting feminine pleasure, erotic tales narrated by women flew in the face of bourgeois conventions enshrining female piety and chastity.[266]

Moreover, a work need not have been erotic to be obscene in the Nineteenth century; obscenity charges were triggered whenever there was an overt representation of feminine sexual agency. For example, sellers of *The Secrets of the Female Sex* were frequently prosecuted, despite that the book was an austere *anti*-masturbation tract.[267] Apparently, "the book's discussion of sexually aroused girls and young women, even though it dwelled on the morbid consequences of

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[261] *See* Dennis, *supra* note 251, at 43 (describing the height of the free love movement as the 1850's).
[262] *See generally* SUE DAVIS, THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON: WOMEN'S RIGHTS AND THE AMERICAN POLITICAL TRADITION, (New York Univ. Press 2009).
[263] *See, e.g.*, People v. Muller, 96 N.Y. 408, 410 (1844).
[264] Dennis, *supra* note 251, at 52.
[265] *Id.*
[266] *Id.* at 55.
[267] *Id.* at 61.

their physical explorations, ran directly afoul of the emerging legal taboo against expressions of female desire."[268]

The next period of obscenity development was the 1920's, which was similarly a time of social and legal upheaval for women in America. During this era, the Nineteenth Amendment granted women the right to vote, Alice Paul drafted the first Equal Rights Amendment, Margaret Sanger founded the American Birth Control League, and, upon being allowed some formal education, women gained recognition in male-dominated fields like politics,[269] business,[270] aviation,[271] science,[272] and literature.[273] Moreover, the Jazz Age immediately drums up images of flappers, those women who flouted traditional gender norms by cutting their hair short, wearing masculine clothes, drinking hard liquor, smoking cigarettes, and having social lives independent of men. While their mothers had devoted themselves to securing voting rights, organizing unions, and establishing settlement houses, flappers "were interested in a different form of liberation—the kind that gave them the right to enjoy *themselves* in the same ways men did[.]"[274] Outraged by the audacity of these sexually brazen women, and by the hedonism of the time generally, an anti-obscenity movement grew out of the urban centers of the time.[275] Prosecutions for obscenity rose, and literature condemning the effects of reading, seeing, or learning about sex proliferated.[276] Yet, the legal theory of obscenity saw progressive

[268] *Id.*
[269] Nellie Taylor Ross was the first female governor, elected in Wyoming in 1925.
[270] Florence Nightingale Graham had taken her company international in 1919, and was a bona fide "businesswoman" by the 1920's.
[271] Amelia Earhart gained notoriety during this decade.
[272] Florence Sabin became the first female member of the National Academy of Sciences in 1925.
[273] Edna St. Vincent Millay became the first woman awarded the Pulitzer Prize, in Poetry in 1923.
[274] GAIL COLLINS, AMERICA'S WOMEN: 400 YEARS OF DOLLS, DRUDGES, HELPMATES, AND HEROINES, 304 (HarperCollins 2007).
[275] *See* Emma Filstrup, Bring Out the Girls: A Legal History of Burlesque in New York City, Georgetown Law Library Collection on Gender and Legal History (2007).
[276] *Id.*

development. Dismissing the "Victorian morals" which the "susceptible person" standard[277] represented, Judge Learned Hand suggested that honest treatment of sex ought not to be proscribed, commenting that "it seems hardly likely that we are . . . content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few, or that shame will for long prevent us from adequate portrayal of some of the most serious and beautiful sides of human nature."[278] But perhaps realizing that society was not yet ready for such complete sexual honesty, he settled for arguing that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now."[279]

During World War II, the substantial population of American men who were on active military duty simultaneously created an enormous hole in the American workforce and a dramatic increase in demand for pornography. While women filled the vacant jobs, the wartime popularity of "pinups" and pornography helped usher sexual images into mainstream culture.[280] In response to the increased volume and acceptance of sexual images, as well as the showing of female autonomy in the absence of men, the fiercest conservative movement of the Twentieth century arose in the 1950's.[281] Women were encouraged to leave the workforce and return to the home, so that men returning from war could once again fill the marketplace jobs. While nearly half (47%) of women aged 18-24 were enrolled in higher education in 1920, that number

[277] *See, e.g.*, Commonwealth v. Friede 171 N.E. 472 (Mass. 1930) (An American Tragedy by Theodore Dreiser held obscene under the *Hicklin* susceptible person standard).
[278] United States v. One Book Entitled Ulysses, 72 F.2d 705, 714 (2d Cir. 1933).
[279] *Id.*
[280] Peterson, *supra* note 239, at 628 ("Following World War II, pornography began to occupy an increasingly visible position in mainstream culture[.]").
[281] *Id.* (noting that the increasingly visible position of pornography in mainstream culture "prompted renewed anti-smut campaigns").

dropped to just thirty percent by 1950.[282] Betty Friedan's *The Feminine Mystique* discusses how severely this conservatism stifled women:

> In the fifteen years after World War II, the mystique of feminine fulfillment became the cherished core of contemporary American culture. Millions of women lived their lives in the image of pretty pictures of the American suburban housewife, kissing their husbands goodbye in front of the picture window, depositing their station-wagons full of children at school, and smiling as they ran the new electric waxer over the spotless kitchen floor. Their only dream was to be perfect wives and mothers. . . . The problem was a strange stirring, a sense of dissatisfaction, a yearning that women suffered in the middle of the twentieth century in the United States. Each suburban wife struggled with it alone. As she made the beds, shopped for groceries, [and] . . . lay beside her husband at night—she was afraid to ask even of herself the silent question—Is this all?
>
> For over fifteen years there was no word of this yearning in the millions of words written about women, for women, in all the columns, books and articles by experts telling women their role was to seek fulfillment as wives and mothers. Over and over women heard in voices of tradition and of Freudian sophistication that they could desire no greater destiny than to glory in their own femininity. They were taught to pity the neurotic, unfeminine, unhappy women who wanted to be poets or physicists or presidents. They learned that truly feminine women do not want careers, higher education, political rights. . . . All they had to do was devote their lives from earliest girlhood to finding a husband and bearing children [and] a thousand expert voices applauded their femininity, their adjustment, their new maturity. [283]

Along with this conservative movement came renewed anti-smut campaigns and tightened obscenity laws.[284] But the anti-pornography campaigns of the 1950's met with greater resistance than had similar campaigns at the turn of the century,[285] and the Supreme Court in *Roth* affirmed that societal attitudes regarding "proper" sexual conduct could not be turned all the way back to Victorian mores.[286] Whatever its flaws, *Roth* was the first time the Court had placed

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[282] U.S. Dept. of Commerce, Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970.
[283] BETTY FRIEDAN, THE FEMININE MYSTIQUE, 57–58 (1963).
[284] *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA, 280–84 (1988).
[285] *Id.*
[286] Roth v. United States, 354 U.S. 476, 488-89 (1957) (expanding the definition of permissible sexual material).

constitutional limits on the suppression of sexual expression. Yet, there is no doubt that this development came only after a century of working to establish some sexual freedom for women.

Finally, the refusal to expand the scope of obscenity jurisprudence to speech other than that about sex has constitutionalized the notion that sex—and in particular, female sexuality—is unacceptable for public discourse. In practice, keeping sex taboo has mandated reliance on normative sexual stereotypes to define obscenity, because the lack of public discourse precludes basing "community standards" on the actual beliefs and practices of the community. Because the prevailing sexual stereotypes consider overt female sexuality taboo, obscenity laws function to stifle women's sexual autonomy and perpetuate their subordination.

D. Gender Bias #3: Preventing Violence From Being Taboo

There are two reasons why the Supreme Court has expressly refused to limit violent speech. First, holding that depictions or descriptions of extreme violence are offensive to the point of obscene would contravene hegemonic masculinity. Masculinity is associated with power and strength in America, and the Supreme Court, or perhaps certain of its individual members, will not take action that it feels undermines its strength and power in the eyes of the American public. Second, the Court has thus far only been able to recognize that speech which *leads to* violence, as opposed to that which *depicts* violence, is harmful, because only the former affects the men who have shaped First Amendment jurisprudence.[287]

According to hegemonic masculinity, men have a propensity for violence.[288] In keeping with the masculine stereotype, men should not find depictions or descriptions of violence

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[287] *See, e.g.*, Angela P. Harris, Gender, Violence, Race, and Criminal Justice, 52 STAN. L. REV. 777, 783 (2000) (referring to the "white heterosexual middle- and upper-class men who occupy order-giving positions in the institutions they control--particularly economic, political, and military institutions—[who] produce [the] hegemonic masculinity that is glorified throughout the culture").

[288] *See* Part III.A.1, *supra*.

offensive. Quite contrarily, violence is glorified in the realm of the masculine.[289] As Angela Harris writes, "[m]anliness is one of those ideas that is often made real with violence . . . men use violence or the threat of violence as an affirmative way of proving individual or collective masculinity, or in desperation when they perceive their masculine self-identity to be under attack."[290] Indeed, the more violent a man appears, the more "manly" he is considered.[291]

Moreover, it is axiomatic that masculinity is often considered synonymous with strength and power.[292] This is the primary reason that the Supreme Court will not recognize violent speech as obscene or otherwise outside of the First Amendment: because doing so would offend the prevailing notion of masculinity and thus make the Court look less powerful. The Court's given reason for voiding as unconstitutionally vague the California and Congressional laws that applied the inherent morality standard to violent speech was the absence of an historical consensus on what depictions of violence cross the boundary between acceptable and offensive. However, as evidenced by the fact that nearly all states have enacted or attempted some form of legislation aimed at curbing violent expression,[293] it is clear that there is some consensus that America's violent expressions have, as of late, "exceeded common limits of custom and

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[289] *See generally* Jamie R. Abrams, The Collateral Consequences of Masculinizing Violence, 16 WM. & MARY J. WOMEN & L. 703 (2010) (discussing social harms resulting from the glorification and masculinization of violence); Katie Rose Guest Pryal, The Rhetoric of Sissy-Slogans: How Denigrating the Feminine Perpetuates the Terror Wars, 15 J. GENDER RACE & JUST. 503 (2012) (discussing how the masculinization and glorification of violence harms women and leaves America in a vulnerable mindset); Steve Hall, Daubing the Drudges of Fury: Men, Violence and the Piety of the 'Hegemonic Masculinity' Thesis, 6 THEORETICAL CRIMINOLOGY 35 (2002) (arguing that hegemonic masculinity has caused under-investigation of male-on-male violence).

[290] Harris, *supra* note 287 at 783.

[291] *See* David S. Cohen, No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity, 84 Ind. L.J. 135, 186 (2009) (noting that male hierarchy, especially among boys and young men, is established by physical aggression); Tom Chiarella, *The Problem with Boys*, Esquire, July 1, 2006, at 94 (noting the violence of boys' games, which establish pecking order: "Towel Battle. Leg Wrestling. King of the Buckets. Bloody Knuckles. Human Jousting. Six-Inch Punching. Indian Wrestling. Knee Football. Hand Slapper. Rock, Paper, Scissors. Slap Boxing. Pelts . . .The point is always to make the other guy fall or hurt, bleed or flip over . . . [aka], to lose. Boys do this. They knock one another down. They hurt one another.").

[292] *See* text accompanying note 291; see also Carlin Meyer, Sex, Sin, and Women's Liberation: Against Porn-Suppression, 72 TEX. L. REV. 1097, 1105–06 (1994) ("[M]ale bodies symbolize power, athletic prowess, and self-knowledge . . . and suggest strength and power.").

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candor."[294] Therefore, I submit that the current conservative bench would rather err on the side of non-censorship than offend the dominant concept of American masculinity, lest such a move undermine the Court's public image. The Court's stance is quite unfortunate, because, as David S. Cohen points out, "when the law complies with [hegemonic] notions of how men and women should behave, desire, and feel and allows institutions to build and construct those notions, the law is furthering sex-role stereotyping of men and women. Furthermore, it perpetuates the association of power—which has been traditionally masculine—with men[.]"[295]

The second way that the refusal to cabin violent expression can be seen as gender bias is a common theme in feminist theory: that the masculine viewpoint is considered the objectively neutral viewpoint renders the law an inherently masculine structure, redressing only the harms felt by men.[296] Catherine MacKinnon wrote that male dominance is "perhaps the most pervasive and tenacious system of power in history . . . it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality."[297] And Richard Collier stated that "law is not simply equated with men's power. Law constitute[s] men's power in its purest form. . . . The law sees and treats women the way men see and treat women. Law's purported neutrality is simply a mask for the masculinity of its judgments."[298]

To illustrate this point, I pose the question: Why are fighting words proscribable while speech about violence that does not lead to immediate physical violence is not? Because in the former, *men* feel their attendant harms. That is, when men get so offended by a speaker's words

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[294] Miller v. California, 413 U.S. 15, 30 (describing the line across which material is "patently offensive").
[295] Cohen, *supra* note 294, at 186.
[296] See, e.g., Catherine MacKinnon, Feminism, Marxism, Method, and The State: Toward Feminist Jurisprudence, 8 SIGNS 635, 658 (1983); Richard Collier, Masculinities, Law, and Personal Life: Towards A New Framework for Understanding Men, Law, and Gender, 33 Harv. J. L. & Gender 431 (2010).
[297] MacKinnon, *supra* note 296, at 658.
[298] Richard Collier, Masculinities, Law, and Personal Life: Towards A New Framework for Understanding Men, Law, and Gender, 33 Harv. J. L. & Gender 431, 440 (2010).

that they would punch him, those offensive words are wholly without First Amendment protection and may be banned at law. However, since hegemonic femininity instructs that women are socially forbidden from reacting to verbal assault with physical aggression, the fighting words doctrine does not offer women protection from verbal assault as it does men. Conversely, the law does not even recognize, let alone punish, offensive speech that is directed at women in the public sphere. Street harassment is an epidemic the world over, causing women to fear assault on their moral character as well as physical person as they walk in their own neighborhoods. But because street harassment is a harm men do not feel, women are told to "simply avert their eyes."

The Court ignores vast amounts of empirical data showing at least a correlative connection, if not causal connection, between realistic depictions of violence and violent acts. The Court's willful blindness seems particularly imprudent in the face of an alarming rise in school shootings by teenaged boys who play endless hours of extremely violent video games. Further, that the Court is willing to disregard that new technologies seriously increase the ubiquity, interactivity, effectiveness, and impressionability of violent images on viewers solely to protect its appearance of power (and by extension, masculinity) is troubling.

IV. CONCLUSION

In sum, the disparate treatment of sex and violence under current obscenity jurisprudence can be seen as a manifestation of gender bias in several ways. Relying on community standards to define what material is offensive to the point of obscene necessarily incorporates insidious gender stereotypes regarding "proper" sexual conduct. These stereotypes hold that traits of sexuality and violence are the exclusive province of men. By limiting the scope of obscenity to the topic of sex, the Supreme Court constitutionalizes the notion that sexuality—female sexuality

especially—is too immoral and offensive a topic for public discourse. The refusal to regulate speech on the topic of violence according to the same standard when the same harms are present furthers the normative masculine stereotype that glorifies violence. When the law complies with hegemonic notions of how men and women should behave, it is inappropriately furthering sexual stereotypes, which function to suppress the sexuality of the men and women whose preferences may diverge from the governing norms. Legal codification of sexual stereotypes is something the law should seek to eradicate, not perpetuate.