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MEDUSA: A GLIMPSE OF THE WOMAN IN FIRST AMENDMENT LAW

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Recommended Citation

Adler, Amy M., "MEDUSA: A GLIMPSE OF THE WOMAN IN FIRST AMENDMENT LAW" (2009). *New York University Public Law and Legal Theory Working Papers*. Paper 134.
http://lsr.nellco.org/nyu_plltwp/134

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**MEDUSA: A GLIMPSE OF THE WOMAN IN FIRST AMENDMENT
LAW**

Amy Adler¹

¹ Professor of Law, NYU School of Law. I am grateful to Kerry Abrams, Ed Baker, Anne Coughlin, Anne Dailey, Ariela Gross, Katherine Franke, Suzanne Goldberg, Abner Greene, Bruce Hay, Rahm Stauffer, and Nomi Stolzenberg for helpful conversations about this piece, comments on earlier drafts, or both. I am also grateful to the audiences at the USC Center for Law, History, and Culture and Columbia Law School Colloquium on Gender and Sexuality where I presented earlier drafts of this Essay. I also thank the audience at the Law and Society panel on Law and Psychoanalysis, where I gave a talk that became the basis for this article. Special thanks are due to my fellow panelists, Anne Dailey, Ravit Reichman and Nomi Stolzenberg for their work and their insights. Nicole Field provided outstanding research assistance.

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“Neither death nor woman’s sex can be faced directly.”

--SARA KOFMAN, *THE ENIGMA OF WOMAN*²

“What if the ‘object’ started to speak?”

-- LUCE IRIGARAY, *SPECULUM OF THE OTHER WOMAN*³

INTRODUCTION

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

I suggest that one way to understand this puzzle can be found in the ancient myth of Medusa, the monster Freud interpreted as standing for the castrated female genitals.⁴ A direct confrontation with Medusa’s stare was deadly. But Perseus slayed Medusa by outsmarting her: he looked at her

²SARA KOFMAN, *THE ENIGMA OF WOMAN* 20 (Catherine Porter, trans. 1985).

³ Luce Irigaray, *Speculum of the Other Woman* 135 (Gillian C. Gill, trans., 1985).

⁴*See infra* Part II.A.

only in the reflection of his shield, thereby transforming her into the passive object of his gaze. I interpret Perseus's shield as a precursor of pornographic film. In my view, live erotic performance, in which the dancer interacts with the audience and claims her own role as a First Amendment speaker, conjures up some of the threat of the unmediated stare of Medusa. In contrast, pornographic film, like Perseus's shield, tames the monstrous threat of the woman's direct stare. Ultimately, I read the Court's puzzling distinction as bound up in anxieties about castration, the female gaze, and the possibility of female agency and speech that the gaze symbolizes.

My goal in this article is to show how longstanding, indeed mythic, cultural assumptions about gender, sexuality and representation penetrate the Court's doctrinal analysis. This piece builds on two previous lines of articles. In the first, I explored the influence of sexuality and gender on our understanding of "speech."⁵ In the second, I argued that unstated assumptions and anxieties about the nature of representation itself shape

⁵See Amy Adler, *Symptomatic Cases: Hysteria in the Supreme Court's Nude Dancing Decisions*, 64 AM. IMAGO 297 (2007); Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108 (2005).

free speech decisions.⁶ In this article, issues of sexuality and representation merge, just as they do in the myth of Medusa. As my reading of the myth will show, the figure of Medusa conflates two kinds of dread: dread of the female body and dread of unmediated visual spectacle. As I will suggest, anxieties about both realms inform the Court's treatment of live versus filmed erotic speech.

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

⁶ Amy Adler, *The Thirty-Ninth Annual Edward G. Donley Memorial Lectures: The Art Of Censorship*, 103 W. VA. L. REV. 205 (2000) (exploring divergent First Amendment treatment of verbal versus visual forms of representation); Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921 (2001) (exploring merger of representation and reality in child pornography law and in feminist anti-pornography theory).

culture, yet in surprising ways, culture also governs free speech law.

I. DIFFERENTIAL TREATMENT OF NUDE DANCING AND PORNOGRAPHY

A. *The Puzzle*

A few stray remarks about pornography by Justices Rehnquist and Souter in the case of *Barnes v. Glen Theatre*⁷ signal an unexplored conundrum in First Amendment law. In *Barnes*, female strippers brought a free speech challenge to a law which required them to wear pasties and G-strings, rather than permit them to strip down to total nudity.⁸ The dancers claimed that their striptease⁹ was a form of constitutionally protected

⁷ 501 U.S. 560 (1991).

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

⁹ The district court in *Barnes* gave the following description of the dances:

[A] female, fully clothed initially... dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance.

Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988).

speech.¹⁰

The Supreme Court's first hurdle in *Barnes* was to determine whether a woman's nude, dancing body was "speech"—expressive conduct¹¹—or whether it was mere conduct and thus outside of the First Amendment's reach.¹² The Court's answer was strange: This was

¹⁰ *Barnes*, 501 U.S. at 562-63.

¹¹ It is well settled that the First Amendment's protections extend to nonverbal "expressive conduct" or "symbolic speech." The Court has defined "expressive conduct" as conduct that is "sufficiently imbued with elements of communication to fall within the scope of the First . . . Amendment[]." *Spence v. Washington*, 418 U.S. 405, 409 (1974). For further discussion of *Spence*, see *infra* note 13.

¹² Oddly, neither the *Barnes* nor the *Pap's* Court ever invokes the "*Spence* test"; the *Spence* Court developed a formula to determine when nonverbal activity qualifies as expressive conduct, thus bringing it within First Amendment protection. *See Spence*, 418 U.S. at 410-11 ("An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). Although the opinions in *Barnes* and *Pap's* do not rely on *Spence*, what little analysis the Court offers in those cases about the expressive value of nude dancing loosely tracks the principles set forth in *Spence*. For example, Justice Souter's analysis in *Barnes* seems to draw on *Spence* principles when he writes:

Not all dancing is entitled to First Amendment protection as expressive activity. . . . But dancing as a performance directed to an actual or hypothetical audience gives expression at least to generalized emotion or feeling, and where the dancer is nude or nearly so the feeling expressed, in the absence of some contrary clue, is eroticism, carrying an endorsement of erotic experience.

Barnes, 501 U.S. at 581 (Souter, J., concurring in judgment).

Courts have sometimes upheld restrictions on erotic dance as proper bans on lewd conduct or prostitution rather than as improper bans on expressive conduct. *See, e.g., People v. Hill*, 776 N.E.2d 828 (Ill. App. Ct. 2002) (upholding prostitution provision that prohibits dance involving physical contact with patron through clothing as neither vague nor overbroad); *State v. Conforti*, 688 So. 2d 350 (Fla. Dist. Ct. App. 1997) (holding that sex acts performed by dancers on each

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

other to music are not expressive conduct and may be prohibited as lewd conduct). *But see* *Ways v. City of Lincoln*, 274 F.3d 514 (8th Cir. 2001) (striking down ban on sexual contact in commercial establishment without arts exception as overbroad).

¹³ *Barnes*, 501 U.S. at 566.

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

¹⁵ See generally, Amy Adler, *Symptomatic Cases: Hysteria in the Supreme Court's Nude Dancing Decisions*, 64 AM. IMAGO 297 (2007) (analyzing the Court's relegation of the nude dancer to an insignificant margin of speech). In interpret the Court's relegation of the nude dancer to the margin of free speech as reflecting the discourse of hysteria that in my view pervades the nude dancing opinions.

The Court's interpretation of the speech status of the dancers' bodies was constrained by several previous cases in which it had suggested that dancing could be speech. See *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) (invalidating ordinance which banned all live entertainment, including nude dancing); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (upholding preliminary injunction to prevent enforcement of prohibition on topless dancing); *California v. LaRue*, 409 U.S. 109 (1972) (upholding state ban on nude dancing in establishments licensed to sell liquor). All of the previous opinions acknowledged that nude dancing had some First Amendment value. *Schad*, 452 U.S. at 66 (“nude dancing is not without its First Amendment protections”); *Doran*, 422 U.S. at 932 (“Although the customary ‘barroom’ type of nude dancing may involve only the barest minimum of protected expression,” . . . nude dancing “might be entitled to First and Fourteenth Amendment protection under some circumstances.”); *LaRue*, 409 U.S. at 118 (“at least some [types of dancing] are within the limits of the constitutional protection of freedom of expression”). Other than citing these

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

precedents, the *Barnes* Court did not explain its curious assignment of nude dancing to the margins or outer perimeter of the First Amendment.

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

In light of my analysis in this piece, it may be interesting to consider that the speech in *Young* was pornographic film, as opposed to the live performance in *Barnes*.

¹⁶ 501 U.S. at 565.

¹⁷ *See Barnes*, 501 U.S. at 563.

¹⁸ The three-judge plurality, in an opinion written by Chief Justice Rehnquist and joined by Justices O’Connor and Kennedy, analyzed nude dancing as expressive conduct under the four-part test established in *United States v. O’Brien*, 391 U.S. 367 (1968). The well-known *O’Brien* test applies when the government seeks to impose a content-neutral regulation on expressive conduct; it governs situations in which “‘speech’ and ‘nonspeech’ elements combine[] in the same course of conduct” and the government’s interest in regulating the latter justifies incidental burdens on the former. *Id.* at 376. To satisfy the test, a government regulation: 1)

Twice in the case, the Justices refer to pornographic film. Justice Rehnquist observes that one of the plaintiff dancers in the case, Gayle Ann Marie Sutro, “in addition to her [striptease] performances at the Glen Theatre...can be seen in a pornographic movie at a nearby theater.”¹⁹ In his concurring opinion, Justice Souter emphasizes the significance of this fact to his reasoning.²⁰ It is as if Ms. Sutro’s pornographic movie somehow consoles the Justice. Although Justice Souter admits, with some worry, that

must be “within the constitutional power of the Government;” 2) must further “an important or substantial governmental interest;” 3) must be “unrelated to the suppression of free expression;” (thus satisfying the demand of content-neutrality) and 4) cannot create an incidental restriction on First Amendment freedoms “greater than is essential to the furtherance of that interest.” *Id.* at 377. Applying the *O’Brien* test, Justice Rehnquist reasoned that the Indiana statute’s purpose lay in “protecting societal order and morality” by preventing the evil of public nudity. *Barnes*, 501 U.S. at 568. Because the statute, Rehnquist argued, was not aimed at expression, it did not violate the First Amendment. *Id.* at 569.

Justice Souter voted with the majority but wrote separately. Although he agreed with most of the plurality’s application of the *O’Brien* test, Justice Souter preferred to characterize the governmental interest not as the protection of morality, but as the prevention of tangible “secondary effects” associated with nude dancing.

The majority’s fifth vote came from Justice Scalia, who argued that the regulation at issue did not specifically target expressive conduct, and that therefore the First Amendment did not apply to the case at all. *See Barnes*, 501 U.S. at 572 (Scalia, J., concurring).

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

¹⁹ *Barnes*, 501 U.S. at 563.

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

the ruling he votes for will interfere with Ms. Sutro's expression in her live performance, it seems to comfort the Justice that Ms. Sutro still has an alternative outlet for her erotic speech: the film allows her to appear completely nude without a G-string to get in her way.²¹ Thus, Justice Souter emphasizes that Ms. Sutro, in her film, can still express her "erotic message by representational means."²² As they refer to Ms. Sutro's "pornographic movie . . . playing nearby without any interference from the authorities,"²³ it is as if the Court all but directs the interested viewer to the "nearby theater" to find the film.²⁴

Here is the conundrum in these remarks: Why would Ms. Sutro's performance in a pornographic movie be less problematic from a First Amendment perspective than her live performance at the Glen Theatre?²⁵ Why was her film "playing nearby without any interference from the authorities" while her performance at the Glen Theatre was constrained?

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 563 (plurality opinion).

²⁵ Certainly, prosecutorial discretion plays a role in explaining why some pornographic films are not prosecuted even though they are potentially obscene. But for the reasons I describe, *infra*, I think the fact that her movie was playing "without any interference from the authorities" is probably not attributable to prosecutorial discretion. Rather, I think that it is consistent with a more general pattern in First Amendment jurisprudence.

Surely the pornographic film was more graphic than her live performance. Pornographic films almost invariably include not only nudity, unadorned by G-strings, but sex acts; by comparison, the sexual content of nude dancing seems tame. Yet if the dancers at the Glen Theatre were simply to *film* themselves stripping to nudity, rather than performing live, their speech would be fully protected. Indeed, in *Erzoznik v. Jacksonville*,²⁶ the Supreme Court explicitly protected nudity in film. The Court offered films such protection even when the nudity in them was potentially distracting to passersby, as it was in the drive-in movies at issue in that case. In fact, the dancers at Glen Theatre would have been free to film themselves doing far more graphic acts than merely stripping to nudity. Apparently they could have engaged in explicit sex and been undisturbed by the government, once again so long as they were filmed, and thus engaging in expression by “representational means” as Justice Souter puts it.²⁷

There are, of course, limits on the freedom granted to pornographic films. One significant limit was established in *City of Renton v. Playtime*

²⁶ 422 U.S. 205, 208-12 (1975).

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

Theatres,²⁸ which held that the government may constitutionally use zoning laws to restrict the location of the venue for pornographic speech. As critics and dissenters have argued, the practical effect of zoning could be to severely restrict if not eliminate altogether the availability of speech in certain areas.²⁹ But it is important to remember that no matter how draconian a zoning law might be in effect, from a constitutional perspective it is quite a different thing to zone speech than to ban it outright.³⁰ Unlike most pornographic film, nude dancing can be banned entirely.³¹

The second significant limit on pornographic film is of course obscenity law, which, depending on the facts, could permit the outright

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

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

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

³¹ Again, the Court disagreed about whether the G-string and pasties rule was a

criminal prosecution of such movies.³² As I have recently documented, however, obscenity law is of quite limited significance for the vast majority of pornographic films.³³ The doctrine fell into relative disuse in the 1990s. Although the Bush Justice Department began to stage a comeback for obscenity law, dramatically increasing the number of prosecutions in recent years,³⁴ I still conclude that the new war on obscenity is a losing one.³⁵ At

ban.

³² *Miller v. California*, 413 U.S. 15, 24 (1973). The so-called "Miller test" asks three questions in determining whether a given work should be labeled "obscene" and thus without constitutional protection:

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

(b) whether the work depicts or describes, in a patently offensive way, sexual conduct ...; and

(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

For my most recent criticism of *Miller*, see Amy Adler, *The Folly of Defining Art*, in *THE NEW GATEKEEPERS: EMERGING CHALLENGES TO FREE EXPRESSION IN THE ARTS PIN* (2004).

³³ Amy Adler, *All Porn All the Time*, 31 N.Y.U. J. OF L. & SOCIAL CHANGE 695 (2007).

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

the moment, obscenity law does pose a threat to the most extreme end of the hard-core pornography market, which has so far been the government's near-exclusive target in its new wave of obscenity prosecutions.³⁶ We shouldn't entirely discount the potential chilling effect of the doctrine to all pornography producers, especially given the Justice department's ramped up approach. But it is clear that except for the hardest of hard-core fringes, pornographic film in the U.S. enjoys practical First Amendment freedom.³⁷

³⁵ I concluded, "[I]n the government's escalating war on pornography, pornography has already won. *Id.* at xx.

³⁶ *Id.* at xx. For example, one of the most high profile recent targets was Extreme Associates, a website that billed itself (possibly truthfully based on descriptions I have read) as the "Hardest Hard Core on the Web." Jake Tapper, Politics of Porn: Justice Department Launches Long-Anticipated War on Obscenity, News Blog, Aug. 29, 2003, <http://stevegilliard.blogspot.com/2003/08/politics-of-porn-justice-department.html>. United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 591, 593 (W.D. Pa. 2005), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 126 S.Ct. 2048 (2006).

Another significant new use for obscenity law has arisen as prosecutors have begun to use obscenity law to target purely textual material that, had they been photographs or films, would have constituted child pornography. See United States v. Whorley (4th Cir., Dec. 18, 2008); Adler, *All Porn All the Time*, *supra* note xx, at 708-710 (and sources cited therein). These prosecutions represent a departure from the pattern of obscenity prosecutions; prior to this trend, for at least the last twenty years, prosecutors did not bring obscenity cases against purely textual materials. *Id.*

³⁷ Adler, *All Porn All the Time*, *supra* note 33. See also Eugene Volokh, *Obscenity Crackdown--What Will the Next Step Be?*, TECHKNOWLEDGE, Apr. 12, 2004, <http://www.cato.org/tech/tk/040412-tk.html> (arguing that we are unable to censor porn at least within current constitutional confines). Cf. Judge Kozinski's recent speech, declaring obscenity law and pornography regulation "obsolete" in the face of technological proliferation, *quoted at* <http://tushnet.blogspot.com/2008/04/first-amendment-is-dead-long-live.html>.

Not so for live sexual performance. Indeed, the peculiar contrast between live and filmed sexual performance recurred when the Court, nine years after *Barnes*, returned to the troubled subject of nude dancing. The Court's 2000 decision in *City of Erie v. Pap's A.M.*³⁸ considered a nude dancing case with almost identical facts to *Barnes v. Glen Theatre*.³⁹ As in *Barnes*, the Court agreed that while nude dancing is expressive conduct, "it

³⁸ *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

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

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

falls only within the outer ambit of the First Amendment's protection."⁴⁰ Again as in *Barnes*, a plurality of the Court found that it was constitutional to require dancers to wear pasties and G-strings.⁴¹

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

was only the secondary effects of the speech, not the speech itself.

⁴⁰*Pap's A.M.*, 529 U.S. at 289.

⁴¹*See id.* at 289 (“[G]overnment restrictions on public nudity such as the ordinance at issue here should be evaluated under the framework set forth in *O’Brien* for content-neutral restrictions on symbolic speech.”). Note however, the introduction of the secondary effects doctrine into the mix. On the incoherence of this doctrinal merger, see Justice Stevens’ dissent, *supra* note xx. Once the secondary effects doctrine merged into this line of cases, it became harder, in my view, for the Court to differentiate between nude dancing and film, even as it appeared to assume a distinction.

Once again, Justice Scalia wrote a concurring opinion (joined this time by Justice Thomas) in which he insisted, as he had in *Barnes*, that the First Amendment did not apply to the case at all.

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

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

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

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

ed., Supp. III)).

⁴⁴ 30 F. Supp. 2d 702, 707 (Del. 1998).

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

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

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

Supreme Court declared that “**basic speech principles** are at stake in this case.”⁴⁸

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

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

⁴⁸ *Playboy*, 529 U.S. at 826. The Court treated erotic live performance and pornography differently on two levels: both the level of First Amendment “coverage” and of First Amendment “protection.” Fred Schauer has used these terms to denote the distinction between free speech coverage—i.e. whether the purported material in fact qualifies as speech so as to invoke the First Amendment in the first place, and its “protection”—i.e. whether material that qualifies as speech under the First Amendment should be protected by that amendment, or if other factors should prevail to allow the government to ban the speech. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89 (1982). In the nude dancing cases, the issues seem to merge: the speech was marginal rather

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

Let us suppose a hypothetical extreme example of what is commonly referred to as hard-core pornography. Imagine a motion

than “basic” to the First Amendment’s coverage; it was also not protected.

⁴⁹ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 181 (1982) 178-88). See also Frederick Schauer, *Speech and “Speech” – Obscenity and “Obscenity”*: An Exercise in the Interpretation of Constitutional Language, 67 *GEO. L. J.* 899 (1979).

I disagree, as others have, with Schauer’s assertion that pornography is not speech; I do so primarily because Schauer relies on what I find to be an untenable distinction between cognition and sexual excitement, between mind and body. For criticism of Schauer’s argument that pornography is not “speech”, see Andrew Koppelman, *Is Pornography Speech*, 14 *Legal Theory* 71, xx (2008); see also MARTIN REDISH, *FREEDOM OF EXPRESSION* 75 (1984); David Cole, *Playing By Pornography’s Rules: The Regulation of Sexual Expression*, 143 *U. PA. L. REV.* 111, 124-31 (1994); Simon Roberts, *The Obscenity Exception: Abusing the First Amendment*, 10 *CARDOZO L. REV.* 677, 711-13 (1989); Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 *MICH. L. REV.* 1564, 1594 (1988).

picture of ten minutes' duration whose entire content consists of a close-up colour depiction of the sexual organs of a male and a female who are engaged in sexual intercourse. The film contains no variety, no dialogue, no music, no attempt at artistic depiction, not even any view of the faces of the participants. The film is shown to paying customers who, observing the film, either reach orgasm instantly or are led to masturbate while the film is being shown.

I wish to argue that any definition of "speech" that included this film in this setting is being bizarrely literal or formalistic. **There are virtually no differences [between the film] and the sex act itself.**⁵⁰

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

Judge Posner, who wrote an extensive opinion in the *Barnes* case when it was in the Seventh Circuit, also concluded that mediation was irrelevant to the speech status of erotic material. Yet in direct contrast to Schauer, who viewed the similarities between sexual acts and films of those

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

⁵¹ *Id.* at 182.

acts as evidence that both should be *excluded* from First Amendment coverage, Judge Posner viewed the similarity between filmed and live sexual performance as evidence that both might be *included* within the First Amendment's coverage. He wrote,

[T]he "line" between live performances and performances on paper, videotape, or compact disc, is a blur. . . . Normally, although not always, the medium in which experience is encoded is irrelevant to its expressive character and social consequences. The pitter-patter of raindrops does not become expressive activity by being recorded, and a recording of Beethoven's Ninth Symphony is not entitled to more constitutional protection than the live performance from which the recording was made.⁵²

Even though they come to conflicting outcomes, Judge Posner and Professor Schauer both see the question of whether speech is live or mediated as a red herring.⁵³ In contrast, Judge Easterbrook draws a sharp distinction between live and recorded speech. To him the fact that material has "been committed to parchment (or canvas, or celluloid, or vinyl, or today pitted aluminum on plastic)" is likely to give it speech status.⁵⁴ (Note

⁵² Miller v. South Bend, 904 F.2d 1081, 1099 (1990) (Posner, J., concurring). The primary exception that Posner cited was the realm of child pornography. I address the distinction in child pornography law between an act and the representation of that act in Amy Adler, *Inverting the First Amendment*, *supra* note 7.

⁵³ This is so at least in the realm of sexual expression. Schauer's views on mediation, from what I can discern, are limited to the case of sexual expression.

⁵⁴ Miller v. South Bend, 904 F.2d 1081, 1121 (1990) (Easterbrook, J.,

that Judge Posner expressly disagrees. As noted above, he wrote, “The pitter-patter of raindrops does not become expressive activity by being recorded.”) To Easterbrook, things not so “committed” are conduct and therefore not deserving of the First Amendment’s protection except in certain circumscribed cases.⁵⁵ Thus, in Easterbrook’s view, the distinction between pornography and nude dancing is clear: they occupy opposite sides of the First Amendment line between speech and conduct.⁵⁶

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

There is certainly more room to analyze these questions from a doctrinal

dissenting). Nonetheless, the fact of mediation is not conclusive. Judge Easterbrook also dwells on other distinctions, particularly between high and low, to determine whether an utterance is speech. Thus he distinguishes between “Tolstoy’s *Anna Karenina*” and “the scratching of an illiterate” or between a Rembrandt painting and “a bucket of paint hurled at a canvas.” *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1125 (7th Cir. 1990) (en banc) (Easterbrook, J., dissenting).

⁵⁵ This means primarily when they rise to the level of expressive conduct. This is itself an extremely difficult test. *See Spence v. Washington*, 418 U.S. 405, 409 (1974). As I have previously noted, Judge Easterbrook’s views on this test seem deeply bound up in class distinctions.

⁵⁶ Although he acknowledges that this line is notorious within First Amendment law for its blurriness, he nonetheless asserts that in this case, it is clear.

perspective. My goal in this piece, however, is not to resolve this doctrinal puzzle, but instead to diagnose its origin. In my view, cultural anxieties, not merely doctrinal factors, explain the Court's disparate First Amendment treatment of the live versus the filmed female body. In particular, I suggest that deep-seated, indeed mythic, anxieties about female sexuality, corporeality, and subjectivity map almost perfectly onto the Court's analysis. Thus, rather than viewing the perplexing distinction between filmed and live performance through a doctrinal lens, I turn to a cultural, psychoanalytic lens to shed light on this puzzle. In my view, the legal assumptions about the speech status of the nude female body can be fully understood only when placed within a broader context: the highly charged terrain of female sexuality.

II. MEDUSA

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

I have previously written about the nude dancing cases from a psychoanalytic perspective.⁵⁷ One central argument I made was that the

⁵⁷ See Amy Adler, *Symptomatic Cases: Hysteria in the Supreme Court's Nude Dancing Decisions*, 64 AM. IMAGO 297 (2007); Amy Adler, *Girls! Girls! Girls! The Supreme Court Confronts the G-String*, 80 N.Y.U. L. REV. 1108

nude dancing cases were parables of castration anxiety and fetishism. I argued that the terrible danger that the Court attributed to nude dancing, a danger the Court viewed as “solved” by the laughably useless device of the G-string, could be understood as the danger of castration anxiety provoked by the sight of the women’s bared vaginas. In this narrative, the Court’s absurd⁵⁸ assertion that a G-string would solve the danger of crime, disease, and violence it attributed to nude dancing makes sense: the G-string acts as a Freudian fetish, warding off violent fantasies of castration.

One of Freud’s central texts on castration anxiety was his influential and elliptical essay, “Notes on Medusa’s Head.”⁵⁹ Freud famously interpreted the monster Medusa’s decapitated head as “a representation of

(2005).

⁵⁸ Even the Justices in the majority acknowledged the frailty of their own reasoning. The dissenting Justices were more blunt: In the *Pap’s* case, Justice Stevens wrote that the Court’s analysis “required nothing short of a titanic surrender to the implausible” *Pap’s A.M.*, 529 U.S. at 323. Justice Souter accused the Court of abandoning “common sense” *Id.* at 313, n.2. And even though he voted with the majority in both cases, Justice Scalia couldn’t refrain from writing, “I am highly skeptical, to tell the truth,” of the rationality of the legislative solution that the court labored to uphold. *Id.* at 310 (Scalia, J., concurring). One august judge wrote that this line of cases “cannot be taken seriously” (Posner 2002, 741-42).

⁵⁹ SIGMUND FREUD, *Medusa’s Head*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 273, 274 (James Strachey et al. eds., James Strachey trans., 1955) (1922) [hereinafter FREUD, *Medusa’s Head*].

the [castrated] female genitals.”⁶⁰

Here I return to Freud’s account of Medusa to unlock the First Amendment puzzle I described earlier: the disparate First Amendment treatment of the live versus filmed female body. I focus on two things: First, I explore a central theme in Freud’s essay, the theme of visibility, and its connection to sexual panic. Second, I consider a pivotal episode of the myth that Freud leaves out, the slaying of Medusa by Perseus.

Clearly for Freud, castration anxiety is bound up in visibility.⁶¹ Although the text of his essay on Medusa’s head is very brief, just over one page, Freud refers to the link between castration and sight three separate times in the piece. He begins the essay by writing that, “The terror of Medusa is ...a terror of castration that is linked to the **sight** of something.”⁶² He continues, again invoking the word “sight”: “Numerous analyses have made us familiar with the occasion for this: it occurs when a boy, who has

⁶⁰ *Id.* at xx. See also SANDOR FERENCZI, ON THE SYMBOLISM OF THE HEAD OF MEDUSA (1923) reprinted in THE MEDUSA READER 86 (Marjorie Garber and Nancy Vickers, eds. 2003) [hereinafter TMR] (also interpreting Medusa’s head as standing for the petrifying sight of the castrated female genitals).

⁶¹ Similarly, Laplanche claims that perception and castration are ineluctably linked, and linked by way of the child’s narcissism. NEIL HERTZ, *Medusa’s Head: Male Hysteria under Political Pressure*, in THE END OF THE LINE: ESSAYS ON PSYCHOANALYSIS AND THE SUBLIME 161, 167 (1985).

⁶² FREUD, *Medusa’s Head*, *supra* note 60, at xx (emphasis added).

hitherto been unwilling to believe the threat of castration, catches **sight** of the female genitals, probably those of an adult, surrounded by hair, and essentially those of his mother.”⁶³ And finally, Freud emphasizes the visual at the end of the brief essay, writing: “the **sight** of Medusa’s head makes the spectator stiff with terror, turns him to stone.”⁶⁴

Freud’s emphasis on the importance of vision in the Medusa myth is consistent with a great deal of scholarship about the myth. As I discuss in Part C, the myth (in part because of Freud’s influence) has frequently been interpreted as a myth about visibility. But curiously Freud’s analysis leaves out the central episode of the myth—the visual trick that Perseus uses to slay Medusa. In my view, Perseus’s role deepens and complicates the Freudian emphasis on vision in the Medusa myth. Indeed, as I will argue

⁶³ FREUD, *Medusa’s Head*, *supra* note 60, at 273 (emphasis added). See also SIGMUND FREUD, *The Dissolution of the Oedipus Complex*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 173, 175–76 (James Strachey et al. eds., James Strachey trans., 1961) (1924) (referring to development of castration anxiety as “deferred effect”); SIGMUND FREUD, *Some Psychological Consequences of the Anatomical Distinction Between the Sexes*, in 19 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 248, 252 (James Strachey et al. eds., James Strachey trans., 1961) (1925) (offering retroactive interpretation of castration anxiety). On the connection between visibility and Freud’s theory, see Thomas Albrecht, *Apotropaic Reading: Freud’s “Medusa’s Head,”* LITERATURE & PSYCHOL., 1999 NO. 4, at 1 (discussing visibility and play between presence and absence in Freudian theory of castration).

⁶⁴ *Medusa’s Head*, *supra* note 60, at xx.

below, I view the myth as a narrative about the gendered struggle for possession of the “gaze.” At stake in this struggle are questions of power, sexuality, agency and speech. Using Freud’s essay as a starting point, then, in Part B, I turn directly to the myth to set forth the basis for my reading.

B. The Medusa Myth

The Medusa myth has been told and retold since antiquity. Early written accounts appear in Homer, Hesiod, Pindar, Euripides, Ovid and others.⁶⁵ Medusa has continued to obsess modern thinkers, figuring not only in the works of theorists, ranging from Marx to Freud, Nietzsche, and Sartre, among others, but also appearing frequently in the works of poets,⁶⁶ artists⁶⁷ and even advertisers.⁶⁸

Although the myth has a dizzying array of variations, here are some

⁶⁵ *Introduction* to TMR, *supra* note xx, at xx.

⁶⁶ Romantics such as Goethe and Shelley were particularly under Medusa’s spell. *Id.*

⁶⁷ For a few particularly famous examples, see the two sculptures of Perseus holding Medusa’s severed head, one by Cellini (1545-540) and one by Canova (1804-06); see also the painting “The Head of Medusa” by Peter Paul Rubens (c. 1618).

⁶⁸ TMR, *supra* note xx, at 276-77; *see also id.*, figures 28-29, which document the use of Medusa’s head as the logo for the house of Versace and the use of Medusa and Perseus as motifs in some of Versace’s most prominent advertising campaigns shot by famed photographer Bruce Weber. For a superb compendium of the extraordinary range of uses to which the Medusa myth has been put, *see generally*

of the basics of the story:⁶⁹ Medusa was one of three Gorgon sisters and the only mortal one. When she angered Athena, the goddess punished Medusa by transforming the once beautiful Gorgon into a hideous monster with snakes for hair; Medusa's deadly stare now turned men⁷⁰ to stone.⁷¹ Indeed,

TMR.

⁶⁹ There are numerous variations of the Medusa myth. The primary texts include Apollodorus' *The Library*, Ovid's *Metamorphosis*, and Lucan's *Pharsalia*. See APOLLODORUS, *THE LIBRARY* 153-161 (James Frazier trans., G.P. Putnam's Sons, 1921); OVID, *METAMORPHOSES* 111-120 (Mary M. Innes, Penguin Classics 2007) (1955); LUCAN, *PHARSALIA* (Robert Graves trans., Penguin Books, 1957). I have drawn from them as well as other variations in this account. Many versions also attempt to explain the myth through a rational or a Christian perspective. See, e.g., PALAEPHATUS, *ON UNBELIEVABLE TALES* 62-64 (Jacob Stern trans., Bolchazy-Carducci Publishers, 1996) (rational explanation of Medusa as African queen) and LEON EBREO, *THE PHILOSOPHY OF LOVE* (F. Friedberg-Seeley & Jean H. Barnes trans., The Soncino Press 1937) (Medusa as theological allegory).

⁷⁰ It seems that Medusa's deadly gaze may have worked only on men. As critic John Freccero observed, "whatever the horror the Medusa represents to the male imagination, it is in some sense a female horror. In mythology, the Medusa was said to be powerless against women, for it was her feminine *beauty* that constituted the mortal threat to her admirers." John Freccero, *On Dante's Medusa*, in *MEDUSA: THE LETTER AND THE SPIRIT* (1972). Furthermore, there do not appear to be any tales of Medusa turning a woman to stone. See JEAN-PIERRE VERNANT, *MORTALS AND IMMORTALS* 132 n.48 (Thomas Curley & Froma I. Zeitlin trans., Princeton University Press 1991) (1985). Some variations of the myth suggest that women were safe from the threat of turning to stone. See John Freccero, *Medusa: The Letter and the Spirit*, 2 *Yearb'k Ital. Stud.* 1, 7 (1972).

However, many versions of the story suggest wider power. See, e.g., APOLLODORUS, *supra* note xx, at 157 ("they turned to stone such as beheld them"); LUCAN, *supra* note xx, at 252 ("No creature can stand her gaze"). A painting by Sir Edward Burne-Jones also depicts Perseus showing Andromeda the head of Medusa in a pool of water, hinting that she would indeed turn to stone if she viewed it directly. SIR EDWARD BURNE-JONES, *THE BALEFUL HEAD* (1886-1887).

Of course, many versions that specify her power over men may simply use the word "men" to suggest humankind rather than to distinguish between the sexes. See, e.g., OVID, *supra* note xx, at 115 ("he saw statues of men and beasts, whom

in several accounts, the stony bodies of men who had dared to approach her surround Medusa's home.

Perseus, the half-mortal son of Zeus, set out to slay Medusa. But how can you kill a monster whom you cannot look at directly, whose gaze is deadly?⁷² Perseus outsmarted Medusa by looking at her in the reflection of his shield. He backed up on her and beheaded her using her reflection to

the sight of the Gorgon had changed...into stone") or Francis Bacon, *Perseus, or War* ("the mere sight of her turned **men** to stone") (emphasis added).

⁷¹ Athena did so in retaliation for Medusa's sexual encounter with the sea god Poseidon in Athena's temple. In some versions of the story, Poseidon raped Medusa; in others, their liaison was consensual. Medusa's and Poseidon's unborn babies sprung to life upon her murder by Perseus. They were Chrysaor and Pegasus who become the winged horse of the muses.

⁷² I have followed the version of the story in which Medusa's stare possesses the power to petrify anyone she gazes upon. But many versions suggest that it is not Medusa's stare, but rather the mere sight of her by an onlooker that petrifies. In one tale, Perseus's enemy Kepheus was unaffected by the severed Medusa head because he was blind. See JOHN MALALAS, *THE CHRONICLE OF JOHN MALALAS* (Elizabeth Jeffreys et. al. eds., Australian Association for Byzantine Studies, 1986) (6th c.) See also DANTE ALIGHIERI, *INFERNO*, reprinted in TMR, *supra* note xx, at 52 (covering his eyes with two pairs of hands not to look upon the Medusa should she appear). (Other versions suggest that, at the least, Medusa must return the gaze of the onlooker for him to be killed. For example, some narratives describe onlookers who gazed at Medusa safely while she slept and was thus unable to gaze back.)

Any of these versions of the myth are consistent with my analysis below, although the version that attributes the power to Medusa's gaze fits best with my reading. In the alternate version, in which the sight of Medusa by another is what kills, Medusa does not go so far as to assert her own stare and thus appropriate the "male gaze." Nonetheless, she still *thwarts* the male gaze, punishing with death any man who dares to gaze at her and treat her as the traditional "object to be looked at." See *infra* notes xx and accompanying text.

guide him.⁷³ This use of her mediated image was the optical trick that allowed Perseus to slay Medusa by avoiding her deadly gaze.⁷⁴

Although capturing her reflection was the major ploy Perseus used to kill Medusa, there were other significant details to his plot. Aided by gods and nymphs, Perseus gathered a variety of tools in addition to the polished metal shield that Athena had given him. He also wore a helmet of invisibility from Hades⁷⁵ and winged sandals. He carried an unbreakable sword, and a *kibisis*, or magic wallet in which to hide the Medusa head.⁷⁶ In preparation for his attack, Perseus visited the Graeae, or Gray sisters.⁷⁷

⁷³ Although it has become central to our modern day understanding of the myth, it appears that the mirror concept was not present in the myth before the fourth century B.C.E. JEAN-PIERRE VERNANT, *supra* note XX, at 147.

⁷⁴ In an alternate version of the myth, Medusa appears to kill herself with her petrifying powers. *See e.g.*, Craig Owens, *The Medusa Effect or, The Specular Ruse*, ART IN AM. 1 (January 1984) ("Medusa sees herself and is immediately turned to stone"). One oddity of this reading: if Medusa's reflected gaze does turn her to stone, her subsequent beheading by Perseus seems hard to explain.

⁷⁵ *See e.g.*, Hesiod, "and the temples of the lord Perseus were hooded over by the war-cap of Hades, which confers terrible darkness." HESIOD, THE SHIELD OF HERAKLES, (c. 700 B.C) (Richard Lattimore, trans.) *reprinted in TMR, supra* note xx, at 11.

⁷⁶ Perseus's list of tools varies, but often includes the helmet of invisibility, winged sandals, a sword, a *kibisis* and Athena's shield. His method of acquisition also varies: alternatively given to him by the gods themselves or through the nymphs that the Graeae lead him to once he has stolen their eye. *Compare* APOLLODORUS, *supra* note XX, at 157, *with* Francis Bacon, *Perseus, or War in 6 THE WORKS* (James Spedding et. al. eds., Garret Press, 1968) (1609).

⁷⁷ Sometimes there are three Graeae, mirroring the three Gorgons. *See* APOLLODORUS, *supra* note XX, at 155. Occasionally, there are only two. *See* HESIOD, THEOGONY AND WORKS AND DAYS 11 (M.L. West trans., Oxford

These elder sisters of the Gorgons shared one eye between them, passing it back and forth. Perseus stole the eye, holding it hostage until the Graeae agreed to aid him in his search for Medusa.⁷⁸

After decapitating Medusa, Perseus brandished her severed head to turn his enemies to stone.⁷⁹ Even in death, Medusa's gaze still had terrible power, although this power was no longer hers to control. He later gave her head to Athena, the virgin goddess, who pinned it to her shield and exploited its apotropaic character—its ability to repel sexual desire.⁸⁰

University Press 1999) (naming only Pempredo and Enyo, not Dino).

⁷⁸ Occasionally, the eye is said to belong to the Gorgons themselves, not the Graeae. See COLUCCIO SALUTATI, *ON THE LABORS OF HERCULES* (B. L. Ullmam ed., Lesley E. Lundeen trans., 1998) (1951) (the eye belongs to the three Gorgon sisters); see also PALAEPHATUS, *supra* note XX, at 62-63 (describing the Eye as an advisor to the three sister queens).

Upon her death, Medusa's unborn babies, fathered by Poseidon, sprang to life. They were Chrysaor and Pegasus, who became the winged horse of the muses.

⁷⁹ See story of Atlas.

⁸⁰ As I note above, the Medusa head does not lose of all of its power, since both Perseus and Athena use it to turn their enemies to stone. See, e.g., OVID, *supra* note xx, at 121. But the power no longer belongs to Medusa. She is tamed, her image "controlled...directed according to the disparate religious, military, and aesthetic strategies required." JEAN-PIERRE VERNANT, *supra* note XX, at 141.

Depictions of Medusa's head became the Greek symbol of terror and persisted as a common motif, repeatedly used to adorn shields, armor, and paintings.

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

In this Part, building on the Freudian reading, I re-interpret the Medusa myth as a story about representation and sexuality. The myth becomes a story about the capacity of representation to blunt the petrifying threat posed by the live, powerful female body. Ultimately, this reading offers a new way to approach the Supreme Court's differing treatment of the female body depending on whether it is live or filmed.

In this interpretation, Perseus's shield serves as a precursor of film.⁸¹ When Perseus captures Medusa's image in his shield, he uses a

⁸¹ In my research, I have discovered a few scholars who briefly equated Perseus's shield with the film screen. See SIEGFRIED KRACAUER, *THEORY OF FILM* 304-306 (Princeton University Press, 1997) (1960) (discussing imagery of the Holocaust and suggesting that we can only see horror when mitigated by the screen). For a feminist interpretation, see TERESA DE LAURETIS, *Desire in Narrative*, in ALICE DOESN'T 103, 107-11, 134-37 (1984) (equating, in passing, Perseus's shield with movie screen because "not only does that shield protect Perseus from Medusa's evil look, but later on, after her death (in his further adventures), it serves as frame and surface on which her head is pinned to petrify his enemies"); Stanley Cavell, *On Makavejev on Bergman*, 6 *CRITICAL INQUIRY* 305, 327, 329 (1979) (claiming the director is Perseus and the shield acts as woman acts because it creates a distance only felt through lack). Some articles touch briefly on the similar idea of the photograph as Perseus's shield. See Mier Wigoder, *The Story of the Head: The Suicide-Bomber, the Medusa and the Aesthetics of Horror in Photography*, 20 *THIRD TEXT* 449, 452-54 (2006) (applying Kracauer's ideas, as well as others, to portraits of suicide bombers); Jan Jagodzinski, *Women's Bodies of Performative Excess: Miming, Feigning, Refusing*,

proto-photographic,⁸² cinematic technique. The screen destroys Medusa's power and threat; Perseus is now free to look at her without her looking back at him. He thereby transforms Medusa from an unmediated live monster into the passive object of his gaze, trapped within the pictorial space of his shield.

Other elements of the myth reinforce my reading. To prepare himself for slaying Medusa, Perseus steals an eye, emphasizing his position as viewer, not viewed. And Perseus's helmet of invisibility further deepens the filmic analogy. Appollodorus wrote of Perseus's helmet, "Wearing [the helmet], he saw whom he pleased, but was not seen by others."⁸³ Invisible, Perseus sees without being seen, gazing with triumphant abandon at the formerly powerful, now neutered woman, reduced to nothing but an image.

and Rejecting the Phallus, 8 J. FOR THE PSYCHO. OF CULTURE & SOC. 23, 24 (2003) (exploring female bodybuilding magazines).

⁸² See Craig Owens, *The Medusa Effect or, The Specular Ruse*, ART IN AM., Jan. 1984, at 97, reprinted in BEYOND RECOGNITION 191, 196 (1996). Owens calls this "proto-photographic" effect the center of the myth itself, describing how Perseus uses the gaze (first an eye, then a mirror reflection) to transform Medusa into a petrified, powerless image. While Owens focuses on the version of the myth in which Medusa turns herself to stone by seeing her reflected gaze, the analogy fits with other accounts of Medusa's death. In every version, including Owens's, Perseus transforms Medusa into an image, whether it is a three-dimensional sculpture or a two-dimensional reflection. Further, after the episode, Medusa is repeatedly used as an image to adorn shields, armor, and paintings.

⁸³ APOLLODORUS, reprinted in TMR, *supra* note xx, at 24. The curious device of the kibisis, the magic wallet that conceals Medusa's severed head,

Perseus has become the ultimate voyeur—the ultimate moviegoer.⁸⁴

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

“The woman as subject of the gaze is clearly an impossible sign.”

Mary Anne Doane, *Film and the Masquerade*⁸⁵

“No creature can stand her gaze.”

LUCAN, *PHARSALIA* (c. 61-65)

“Representations of female sexuality . . . present an objectified body that is sexualized for male pleasure, particularly as the object of the male gaze.”

JACQUELINE ROSE, *SEXUALITY IN THE FIELD OF VISION*, 1986.

Laura Mulvey’s seminal work on psychoanalytic feminist film theory can help us unpack the significance of Medusa’s transformation from

continues the myth’s trope of vision and concealment.

⁸⁴ On this common theme of the moviegoer as voyeur, *see e.g.*, STANLEY CAVELL, *THE WORLD VIEWED: REFLECTIONS ON THE ONTOLOGY OF FILM* (1971).

⁸⁵ *Reprinted in* THE FEMINISM AND VISUAL CULTURE READER 60, 68

live monster to cinematic image. In her now canonical essay, *Visual Pleasure and Narrative Cinema*,⁸⁶ Mulvey set forth her thesis that cultural portrayals of the sexes consistently depict women as object, not subject, of the gaze. Dwelling on the connection between the woman's object status and the castration anxiety that she provokes, Mulvey writes that "the woman as icon . . . always threatens to evoke the [castration] anxiety it originally signified." Thus for Mulvey, "Woman's desire is subjugated to her image as bearer of the bleeding wound."⁸⁷ Mulvey posits that in cultural representations, particularly film, women connote "to-be-looked-at-ness"⁸⁸ and that men occupy the position of "the bearer of the look" and

(Amelia Jones, ed., 2001).

⁸⁶ LAURA MULVEY, *Visual Pleasure and Narrative Cinema*, reprinted in LAURA MULVEY, *VISUAL AND OTHER PLEASURES* 14 (1989).

⁸⁷ *Id.* at 14.

⁸⁸ *Id.* at 19. Mulvey's position was so influential that examples of its impact are too numerous to cite. For one particularly prominent and influential example of its use, see LINDA WILLIAMS: *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 45 (2d ed. 1999). For criticism of Mulvey, as well as her own revision of her views, see TERESA DE LAURETIS, *ALICE DOESN'T: FEMINISM, SEMIOTICS, CINEMA* (1984); Mary Ann Doane, *Film and the Masquerade: Theorizing the Female Spectator*, *SCREEN*, Sept.-Oct. 1982, at 74-87; Laura Mulvey, *Afterthoughts on 'Visual Pleasure and Narrative Cinema' Inspired by *Duel in the Sun**, in *FRAMEWORK* 15-17, 12-15 (1981). The problem with Mulvey's initial formulation was the rigidity with which it positioned gender identification. Recent work establishing the cross identification available to the viewer of a scene offers a helpful corrective to Mulvey's pioneering thesis. On cross identification, see e.g., Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess* in *FEMINISM AND PORNOGRAPHY* (Drucilla Cornell, ed. 2000). For a criticism of Mulvey along these lines, see e.g., JUDITH

therefore of power.⁸⁹ Observing the way in which cinema casts women into a passive object status for the active male⁹⁰ viewer, Mulvey writes:

“[W]oman then stands in a patriarchal culture as a signifier for the male other, bound by a symbolic order in which man can live out his fantasies and obsession through linguistic command by imposing them on the silent image of woman still tied to her place as bearer, not maker, of meaning.”⁹¹

Building on Freud and Mulvey, we can now recast the struggle between Medusa and Perseus as a struggle over possession of “the gaze.” Medusa dared to look. With her deadly stare, she dared to occupy the male position of bearer of the gaze. And in true gender outlaw fashion, she feminized men: she punished with death—and with feminized, object status—any man who dared to gaze at her, and thus to cast her in the traditional role of object-to-be-looked-at. Stephen Heath invokes the

HALBERSTAM, FEMALE MASCULINITY 178-79 (1998).

⁸⁹ Mulvey, *supra* note xx at 20.

⁹⁰ I should stress that “male” designates a subject position, not necessarily a material one. Lacan, of obvious importance to Mulvey, wrote, “One must take up a position as a man or a woman. Such a position is by no means identical with one’s biological sexual characteristics, nor is it a position of which one can be very confident.” JACQUES LACAN, THE SEMINAR OF JACQUES LACAN, BOOK I: FREUD’S PAPERS ON TECHNIQUE 1, 6 (Jacques-Alain Miller, ed., John Forrester & Sylvana Tomaselli, trans. 1988) . See also Jacqueline Rose, *Introduction II* in JACQUES LACAN, FEMININITY 49 (“All speaking beings must line themselves up on one side or other of this division [between man and woman], but anyone can cross over and inscribe themselves on the opposite side from that to which they are anatomically destined.”).

⁹¹ Mulvey, *supra* note xx, at 15.

Medusa myth to emblemize the danger when the gendered rules of looking are violated: “If the woman looks, the spectacle provokes, castration is in the air, the Medusa’s head is not far off; thus she must not look.”⁹²

Medusa’s gaze thus signifies her masculine aspirations. After all, she oversaw what Palaephatus described as a “kingdom in the hands of women.”⁹³ Siculus wrote that Medusa’s role as female ruler was part of what provoked Perseus to kill her, “for it was a thing intolerable to him . . . to suffer any nation to be governed any longer by women.”⁹⁴ In this sense, we may picture Perseus as waging a battle for gender conformity. It is no wonder that some writers have said that Perseus stood for “manliness” itself.⁹⁵

On this analysis, we can see that Perseus’s usurpation of the power of the look restores sexual order. By wresting away the gaze from her and appropriating it for himself, Perseus returns Medusa – and the male subject – to their rightful places. The cinematic shield neuters her masculine gaze

⁹² Stephen Heath, *Difference*, (1978) reprinted in TMR, *supra* note xx, at 163.

⁹³ PALAEPHATUS, ON UNBELIEVABLE TALES 62-64 (Jacob Stern trans., Bolchazy-Carducci Publishers, 1996).

⁹⁴ DIODORUS SICULUS, *The Gorgons and the Amazons in Africa* in The Historical Library (c.60-30 B.C.E.), reprinted in TMR, *supra* note xx, at 25, 29

⁹⁵ Fulgentius, *Terror and Manliness*, in Fulgentius the Mythographer (Leslie G.

and reduce her to nothing more than an impotent image. And in addition, Perseus's capture of the eye, his helmet of invisibility, his triumphant display of Medusa's severed head further emphasize his role as viewer and Medusa's role as object-to-be-looked at. She now occupies her rightful place as Mulvey's "bearer not maker of meaning,"⁹⁶ an object of language rather than its subject.

Mulvey posited that filmic portrayals of women typically defeat castration anxiety through two alternate avenues: either through "voyeuristic scopophilia" or through fetishism.⁹⁷ According to Mulvey, voyeuristic scopophilia involves subjecting the woman to a voyeuristic gaze as a means of punishing her and unmasking her true castrated status. In contrast, the fetishistic solution involves "complete disavowal of castration by the substitution of a fetish object or by turning the represented figure [of woman] itself into a fetish so that it becomes reassuring rather than dangerous."⁹⁸

Whitbread trans., Ohio State University Press, 1971) (5th-6th c.)

⁹⁶ Mulvey, *supra* note 87.

⁹⁷ *Id.* Mulvey used the films of Sternberg and particularly his work with Marlene Dietrich to illustrate the scopophilic/fetishistic strategy. The second strategy that filmmakers use to combat castration anxiety, according to Mulvey, is a punitive kind of voyeurism. She looks at the work of Hitchcock as an exemplar of this strategy.

⁹⁸ Mulvey, *supra* note 87. Perseus's beheading of Medusa is the ultimate

Both avenues are present in my reading. As I have already suggested in my moviegoer account, Perseus becomes a voyeur, the film viewer Mulvey posits.⁹⁹ Furthermore, as Mulvey would predict, his voyeuristic gaze is punitive: Subjecting Medusa to the gaze is essential to beheading and thus symbolically castrating her.¹⁰⁰

But my reading suggests a fetishistic solution as well in which cinema itself becomes the fetish that removes the threat associated with looking at the woman's body. Mimicking the structure of the fetish, the screen is the place where the woman is both present and absent.¹⁰¹ As Freud explains, "[T]he fetish is a substitute for the woman's (the mother's) penis that the little boy once believed in and—for reasons familiar to us—does not want to give up."¹⁰² By focusing on a compensatory object, the

punishment: a symbolic castration.

⁹⁹ MARJORIE GARBER, *Macbeth: The Male Medusa*, in SHAKESPEARE'S GHOST WRITERS: LITERATURE AS UNCANNY CAUSALITY 87, 111 (1987) ("the Medusa head incorporates the elements of sexual gazing (scopophilia) and its concomitant punishment, castration").

¹⁰⁰ On the symbolic connection between beheading and castration, see e.g., Linda Hutcheon & Michael Hutcheon, *Staging the Female Body: Richard Strauss's Salome*, in SIREN SONGS: REPRESENTATIONS OF GENDER AND SEXUALITY IN OPERA 204 (Mary Ann Smart ed., 2000).

¹⁰¹ SIGMUND FREUD, *Fetishism*, in 21 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (1886-1899).

¹⁰²*Id.* at 152–53. The fetish allows the subject to maintain, despite evidence to the contrary, that castration is not a danger to him and, in fact, that it has not even befallen the woman. *Id.* For a discussion of the logic of disavowal that informs the

male viewer of female sexual organs masters the threat of castration posed by the very sight of her body.¹⁰³ The reflected image of Medusa in Perseus's shield becomes this compensatory object.¹⁰⁴ In this reflected space, the body becomes bearable rather than menacing. Perseus thus triumphs over the sight of the castrated woman by employing the fetishistic logic of substitution.

Just as mediation allows Perseus to tame Medusa's monstrous sexuality, so does pornographic cinema tame the threat of the live sexual female body. In contrast to cinema, the live stripper can interact with her customer. Even as he gazes at her, she returns his look. Indeed, she frequently positions the male spectator as object of her gaze.¹⁰⁵ Unlike the

fetish, see also Freud's essay, *The Splitting of the Ego*, in which he writes: "The boy did not simply contradict his perceptions and hallucinate a penis where there is none to be seen; he effected no more than a displacement of value--he transferred the importance of the penis to another part of the body..." SIGMUND FREUD, *The Splitting of the Ego* in 23 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (1886-1899)

¹⁰³ In this way, the fetish "remains a token of triumph over the threat of castration and a protection against it." *Id.* Yet even this triumph is incomplete. The fetish is a triumph over not only castration and the woman who signifies this threat, but over homosexuality as well. According to Freud, the fetish "saves the fetishist from becoming a homosexual, by endowing women with the characteristic which makes them tolerable as sexual objects." *Id.*

¹⁰⁴ See my analysis of the G-string as fetish in Adler, *Girls! Girls! Girls!*, *supra* note xx.

¹⁰⁵ For an analysis of the stripper's interactive relationship with her viewers, in which she can position them as "objects of her gaze", see KATHERINE LIEPE-

live stripper who looks back at her customer, the woman captured in pornography is deprived of her gaze, her agency, and her ability to interact with the viewer. And as the next section will show, most significantly, she is deprived of speech. Ultimately, what she lacks is subjectivity itself.

III. MEDUSA AND SPEECH

“The woman is a threat to the man’s speaking position.”

--Drucilla Cornell¹⁰⁶

“Woman is the ‘ruin of representation.’”—

-- Michelle Montrelay, *Inquiry into Femininity*¹⁰⁷

LEVINSON, *STRIP SHOW: PERFORMANCES OF GENDER AND DESIRE* (2002). See also Anna McCarthy description of the network of gazes at issue in striptease:

“Rather than the singular stare of the audience member toward the performer, the theatrical context of striptease involved a network of looks in which the visual was not always pleasurable. To begin with, audience members were themselves objects of scrutiny from theater management; during periods of close municipal and civic supervision, theaters adopted extensive surveillance techniques to police audience behaviors.”

Anna McCarthy, *The Invisible Burlesque Body of La Guardia’s New York* in *HOP ON POP: THE POLITICS AND PLEASURES OF POPULAR CULTURE* 415, 425 (Henry Jenkins, Tara McPherson, Jane Shattuck, eds. 2002) For a historical analysis of the genre of stripping and the male viewer’s subjection to the female gaze or the gaze of management, see also MORTON MINSKY AND MILT MACHLIN, *MINSKY’S BURLESQUE: A FAST AND FUNNY LOOK AT AMERICA’S BAWDIEST ERA* 141 (1986).

¹⁰⁶ Drucilla Cornell, *FEMINISM AND PORNOGRAPHY* 743 (Drucilla Cornell, ed. 2000).

¹⁰⁷ Michelle Montrelay, *Inquiry into Femininity*, 1 M/F 89 (1978).

Medusa was an uppity woman. She not only looked, she spoke. She struck men dumb¹⁰⁸ while she herself was frequently associated with eloquence.¹⁰⁹ Lucan writes that “one distant glimpse of her and you are speechless.”¹¹⁰ Salutati pictured Medusa’s eloquence as a weapon that weakened men. He wrote, “Medusa signifies oblivion, which is doubtless the art of oratory, an art which, by changing men’s desires, erases their former thoughts.”¹¹¹ In recent years, Helene Cixous idealized Medusa as an icon of a kind of feminist speech, the powerful woman who ruptured

¹⁰⁸Roland Barthes also hints at the connection between Medusa and speechlessness. See ROLAND BARTHES, ROLAND BARTHES 122-23 (Richard Howard trans., 1994) (“I am in a stunned state, dazed, cut off from the popularity of language.”).

¹⁰⁹ For a discussion of the relationship between Medusa and eloquence, see Nancy Vickers, *The blazon of sweet beauty's best: Shakespeare's Lucrece in SHAKESPEARE AND THE QUESTION OF THEORY* 95, 110 (Patricia Parker and Geoffrey Hartman eds., Methuen, 1985). Vickers also cites Plato’s Symposium to support this connection. Plato, *Symposium*, in *THE COLLECTED DIALOGUES OF PLATO* 550 (Edith Hamilton & Huntington Cairns eds., Michael Joyce trans., Princeton 1961). Medusa’s association with eloquence comes from the view that an eloquent speaker can strike her rivals dumb or can be so convincing to listeners that their minds “become stone.” *Id.* See also COLUCCIO SALUTATI, *ON THE LABORS OF HERCULES* (B. L. Ullmam ed., Lesley E. Lundeen trans., 1998) (1951).

Medusa’s association with eloquence also stems from her son, Pegasus, who was the winged horse of the Muses of artistic inspiration. See Fulgentius, in *FULGENTIUS THE MYTHOGRAPHER* (Leslie G. Whitbread trans., Ohio State University Press, 1971) (5th-6th c.) She is also associated with the music of the flute. See PINDAR, *Twelfth Pythian Ode in THE ODES OF PINDAR* 97 (Dawson W. Turner trans., Bohn 1852).

¹¹⁰ See LUCIAN, 3 WORKS OF LUCIAN OF SAMOSATA 20 (2007) (“one distant

language itself by “speaking” through her “poetic body.”¹¹²

Medusa even claimed the role of artist. Perseus approached her in what was a sculpture garden of her own making: statues of the stony bodies of her previous victims who had dared to approach her.¹¹³ Other aspects of the myth deepen her connection to the arts: she is mother of Pegasus, the winged horses of the Muses. Pindar associated Medusa with the music of the flute. The Romantics saw Medusa as a figure not only for woman, but also for art itself.¹¹⁴

When Perseus seized back the look, he also seized speech and the power to make the image rather than to be one. Appropriating Medusa’s

glimpse of her and you are speechless”).

¹¹¹ Salutati, *supra* note xx.

¹¹² Helene Cixous, *The Laugh of the Medusa*, in *NEW FRENCH FEMINISMS: AN ANTHOLOGY* 245 (Elaine Marks and Isabelle de Courtivron, eds. 1981) (1976). Medusa’s body became an exemplar of “l’écriture feminine” for Cixous, a “subversive possibility within language.” *Id.* at 257; *see also* Mary Lydon, *Re-Translating No Re-Reading No Rather: Rejoycing (With) Helene Cixous*, 87 *YALE FRENCH STUD.* 90 (1995) (discussing Cixous’ unsettling of language and in turn the masculine/feminine polarity); Peggy Kamuf, *To Give Place: Semi-Approaches to Helen Cixous*, 87 *YALE FRENCH STUD.* 68 (1995). For an important critique of Cixous, *see* TORIL MOI, *SEXUAL/TEXTUAL POLITICS* 110, 111-119 (2002) (criticizing Cixous for contradicting her Derridean agenda with a “metaphysics of presence”).

¹¹³ Owens, *supra* note XX. For an analysis of the Medusa from the point of view of her function as a producer of images, *see* Françoise Frontisi-Ducroux, *The Gorgon, Paradigm of Image Creation* (Seth Graebner, trans., 1999) *reprinted in* TMR, *supra* note xx, at 262. *See also* Ovid who writes of Perseus’s approach to Medusa’s home, “on all sides, through the fields, along the highways/He saw the forms of men and beasts, made stone/By one look at Medusa’s face.” TMR 35.

power, Perseus assumed her former role as artist. Wielding her head as a weapon, he turned his enemies into statues: After one such display, Lucan tells us that Perseus “touches the nearest bodies and finds them all marble.”¹¹⁵

And just as Medusa was uppity, so were the nude dancers in the Supreme Court cases. Women in pornography know their place. They never claim that their bodies are speech. Indeed, nowhere else in First Amendment law does the sexual woman—that ultimate object—dare to claim that she is a First Amendment speaker, a subject in language. Think, for example, of who asserts First Amendment rights in obscenity cases: producers, distributors, vendors, publishers, photographers, directors, curators. These are the First Amendment speakers, not the women whose bodies are displayed. Thus Catharine MacKinnon wrote of women’s bodies in pornography: “Pornographers use our bodies as **their language**. Anything **they say**, they have to use us to say.”¹¹⁶ The women’s bodies are just a vehicle for pornographers to speak. This silence that we expect from

¹¹⁴ *Introduction to TMR, supra* note xx, at 4.

¹¹⁵ LUCAN, PHARSALIA (Robert Graves, trans. 1957) (c. 61-65).

¹¹⁶ Catharine A. MacKinnon, Op-Ed., *Who Was Afraid of Andrea Dworkin?*, N.Y. TIMES, Apr. 16, 2005, at A13 (quoting Andrea Dworkin) (emphasis added). Indeed, MacKinnon sometimes speaks of “pornographed women”, emphasizing their passive, object status.

the sexually objectified woman normally extends to case law.

When the strippers in the nude dancing cases asked the Supreme Court to categorize their stripping as speech, the demand violated the convention of woman as object rather than subject of language. This tension helps to explain the Court's odd and unexamined creation of a new category of speech—on the “margin” of the First Amendment—in these cases. The Court was caught between the traditional understanding of the nude woman as object and the demand the nude women dancers in these cases were making: to be recognized as First Amendment speakers, active subjects in language.¹¹⁷ Suddenly the object, the very incarnation of silence, “to-be-looked-at-ness” itself, had begun to speak.

When the women in the nude dancing cases demanded that they be seen as First Amendment speakers, their claim violated not just cultural norms, but First Amendment expectations as well. Pornography, unlike nude dancing, safely returns us to the comfort of this usual state of affairs: The pornographer is the speaker and the sexualized woman is the medium for his speech. She really should keep quiet.

¹¹⁷ The possibility of female agency is at stake here. Lacan, whose work was of obvious importance to Mulvey, writes of “all those beings who take on the status of the woman—if indeed, this being takes on anything whatsoever of her fate.”

CONCLUSION

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