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## Regulating Violent Pornography

Deana Pollard

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# Regulating Violent Pornography

Deana Pollard\*

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## I. INTRODUCTION

In recent years the regulation of pornography has received much attention. Traditionally, conservatives have scorned pornography of all types on the basis that pornography is immoral. More recently, some feminists have attacked pornography from a civil rights perspective, claiming that pornography is the sexually explicit subordination of

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women that leads to discrimination against women in all aspects of life.<sup>1</sup> Nonetheless, the first amendment currently protects all forms of pornography from regulation unless the material is deemed "obscene."<sup>2</sup>

Researchers, however, have shown that certain types of pornography, such as violent, sexually explicit materials, specifically harm women.<sup>3</sup> The proven relationship between violent pornography and aggression of men toward women evidences a need for regulation, but constitutional barriers to censorship under first amendment analysis are great. In spite of the evidence that violent pornography harms women, courts have held unconstitutional the most recently proposed anti-pornography ordinances.

The problem with the prototype of these proposed ordinances, drafted by feminists Catherine MacKinnon and Andrea Dworkin,<sup>4</sup> is the ordinance's broad attack on all forms of pornography on the basis that pornography subordinates women. The Seventh Circuit premised the constitutional failure of the ordinance on the ordinance's viewpoint basis for prohibiting pornography. Specifically, the Seventh Circuit held that viewpoint discrimination is constitutionally intolerable, and female inferiority is a protected viewpoint.<sup>5</sup> Additionally, although the Seventh Circuit did not decide these issues, the ordinance is alarmingly overbroad and vague.<sup>6</sup>

In order for an antipornography statute to survive first amendment scrutiny, it must be drafted in view of the constitutional obstacles that have caused previous proposals to fail. To survive overbreadth challenges an antipornography statute must propose a regulatory scheme to prevent proven harms, yet be narrowly tailored to prohibit only those materials that cause the harms. It meticulously must avoid regulating materials on the basis of viewpoint. A proposal also must be drafted in the most specific terms possible in order to avoid the implications of vagueness. In attempting to accomplish too much, the MacKinnon Ordinance ultimately accomplished nothing because the court adjudged it unconstitutional. A proposed statute necessarily must do less to withstand such constitutional scrutiny. Nonetheless, a narrow proposal that is executed is infinitely more efficacious than any proposal that fails to

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1. See generally C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

2. See *Miller v. California*, 413 U.S. 15 (1973). For the relationship between pornography and obscenity, see *infra* notes 93-96 and accompanying text.

3. See *infra* notes 7-51 and accompanying text.

4. Throughout this Article, I will refer to this prototype as the "MacKinnon Ordinance."

5. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

6. The district court found that the ordinance was vague and established a prior restraint, but that it was unnecessary to consider overbreadth as the ordinance was found to be unconstitutional on its face. *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1337-41 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985).

pass constitutional muster.

This Article is divided into five major sections. Part II explores the need for regulation in the area of pornography. Part III examines the constitutional hurdles that impede the regulation of pornography. Part IV addresses the reasons for the failure of the MacKinnon Ordinance. Part V presents an alternative ordinance. Finally, Part VI analyzes the ability of the proposed ordinance to survive constitutional challenges while effectively regulating violent pornography.

## II. THE NEED FOR REGULATION

The 1986 Attorney General's Commission on Pornography (the Commission) concluded that a causal relationship exists between the exposure of individuals to certain forms of pornography and several harmful effects, including increased violence toward women.<sup>7</sup> Critics assert that the conclusions drawn by the Commission are unfounded, and accuse the Commission's members of having preconceived opinions regarding pornography and of making conclusions in spite of insufficient or skewed evidence.<sup>8</sup> Nonetheless, most critics agree that the research evidence adequately supports at least some of the Commission's conclusions.

Social scientists Daniel Linz, Steven Penrod, and Edward Donnerstein criticize the Commission's conclusions, which are based in part on this trio's own sociological studies. The scientists analyze "gaps" between their scientific facts and the Commission's findings.<sup>9</sup> They maintain that many of the Commission's recommendations are incongruent with the research findings.<sup>10</sup> Most importantly, they claim that the Commission failed to confine the harms related to pornography to the appropriate forms of pornography. While the Commission recommended greater restrictions on all sexually explicit materials, the research demonstrated that sexually violent materials, not sexually explicit materials, are causally related to the identified harms.<sup>11</sup>

For example, the Commission recommended that state legislatures amend the definition of obscenity to conform with the more expansive

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7. ATT'Y GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEP'T OF JUSTICE, FINAL REPORT 322-49 (1986) [hereinafter FINAL REPORT].

8. See, e.g., Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1600-03 (1988); Linz, Penrod & Donnerstein, *The Attorney General's Commission on Pornography: The Gaps Between the "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713; West, *The Feminist-Conservative Anti-Pornography Alliance and the 1986 Attorney General's Commission on Pornography Report*, 1987 AM. B. FOUND. RES. J. 681, 685.

9. Linz, Penrod & Donnerstein, *supra* note 8.

10. *Id.* at 713.

11. *Id.*

definition enunciated in *Miller v. California*.<sup>12</sup> Further, the Commission advised states to amend their obscenity statutes to change the misdemeanor status for secondary offenses to felony status,<sup>13</sup> and to require judges to impose substantial periods of incarceration for convictions.<sup>14</sup> In addition, the Commission recommended that United States attorneys,<sup>15</sup> state and local prosecutors,<sup>16</sup> and the Federal Communications Commission<sup>17</sup> utilize all available statutes and regulatory powers against cable and satellite television programmers. Congress was urged to enact legislation prohibiting the transmission of obscene material through the telephone or similar common carriers (e.g., "dial-a-porn").<sup>18</sup> The Commission also recommended a federal task force consisting of federal agents and special assistant United States attorneys to aid current United States attorneys in prosecuting and investigating obscenity cases.<sup>19</sup> Other recommendations included using RICO,<sup>20</sup> public health laws,<sup>21</sup> tax laws,<sup>22</sup> alcoholic beverage control laws,<sup>23</sup> and existing criminal laws<sup>24</sup> to control obscenity. Thus, the researchers claim that the Commission's recommendations were substantially overinclusive because they sought stricter control of all forms of sexually explicit material, not just violent pornography.<sup>25</sup>

In light of the distinction between violent and nonviolent pornography, the question arose whether the sexual context is relevant at all: perhaps the violence in and of itself is the culprit. Linz and Donnerstein, however, undermined this proposition when they examined the relative contributions of the aggressive and sexual components of violent pornography in a pair of studies.<sup>26</sup> In one of these studies, male college students were angered by either a male or female confederate

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12. FINAL REPORT, *supra* note 7, at 491; see also *Miller v. California*, 413 U.S. 15, 24 (1973). The Court in *Miller* adopted a new three part inquiry that asked whether: (1) under contemporary community standards, the average person would find that the work "appeals to the prurient interest"; (2) the work describes or depicts sexual conduct in a "patently offensive way"; and (3) the work lacks "serious literary, artistic, political, or scientific value." *Id.*

13. FINAL REPORT, *supra* note 7, at 495.

14. *Id.* at 561.

15. *Id.* at 520.

16. *Id.* at 530.

17. *Id.* at 573.

18. *Id.* at 485-86.

19. *Id.* at 509.

20. *Id.* at 515.

21. *Id.* at 559.

22. *Id.* at 548-49.

23. *Id.* at 532.

24. *Id.* at 523. Such criminal laws would include pandering.

25. Linz, Penrod & Donnerstein, *supra* note 8, at 713.

26. *Id.* at 720 (citing E. Donnerstein, L. Berkowitz & D. Linz, *Role of Aggressive and Sexual Images in Violent Pornography* (Univ. of Wis., Madison, 1986) (unpublished manuscript)).

and then were shown one of four types of films: sexually violent, sexually explicit and nonviolent, aggressive toward women but nonsexual, and neutral. After viewing the films, the male subjects were given the opportunity to aggress against male or female confederates of the experiment.<sup>27</sup> The results showed that the male subjects who viewed the film that was both aggressive and sexually explicit demonstrated the highest level of aggression against the female confederate. The aggressive-only film produced more aggression against the woman than did the sexually explicit but nonviolent film. In fact, the experiment revealed no difference between the levels of aggression against the female target in comparing subjects who watched the sex-only film with those who saw the neutral film.<sup>28</sup> Thus, the Commission would have made a more sensible recommendation had it focused on regulating all violent materials, sexual and nonsexual, rather than all sexually explicit material, violent and nonviolent. According to the research results, the Commission made both overinclusive and underinclusive recommendations.

Furthermore, the effects of violent pornography appear not to vary with the extent of sexual explicitness so long as the violence is presented in an "undeniably sexual context."<sup>29</sup> This finding further illustrates the Commission's inaccuracy in focusing primarily on the sexual aspect of pornography.<sup>30</sup> The fairest conclusion to draw from the study about the sexual context of material is that it is relevant because the sexual context has a synergistic effect with violence that results in the greatest likelihood of harm.

Because the most compelling research regards materials that are both sexually explicit and violent, any legislative action should focus on these materials. Linz and Donnerstein concede that direct extrapolation of experimental findings in laboratory studies to situations outside the laboratory is problematic for several reasons: 1) laboratory subjects may not perceive themselves as inflicting harm when experimenters ask them to perform artificial forms of aggression against confederates; 2) violence is not sanctioned outside the laboratory, but inside the laboratory aggression is condoned, even encouraged; 3) the studies examine subjects from a very narrow segment of the population (*i.e.*, college students); 4) the "experimenter demand effect" may take place, wherein subjects attempt to guess and then confirm the experimenter's hypothesis; 5) usually only studies that obtain positive results are published;

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27. Generally, aggression is measured in terms of the subjects' willingness to administer electrical shocks or other forms of "punishment" to a female victim; the type of punishment used in this particular study was not indicated. See Linz, Penrod & Donnerstein, *supra* note 8, at 719, 720.

28. *Id.* at 720.

29. *Id.* at 721.

30. *Id.*

and 6) no one has yet developed either an acceptable operational definition of aggression or of what actually constitutes violence in the media.<sup>31</sup>

Ultimately the researchers endorsed the Commission's finding that the laboratory studies showed "a 'causal relationship' between exposure to sexually violent pornography and negative changes in certain attitudes toward and perceptions of women, as well as increased aggression toward women."<sup>32</sup> This finding identifies two types of harm caused by violent pornography: Harmful social conditioning and violent acts resulting from viewing violent pornography. A third category of harm considered below but not addressed by the social scientists is the coerced participation inherent in pornography production.

#### A. *Social Conditioning*

In the typical study, men first are exposed to depictions of female victims who appear to be enjoying or reacting in a positive fashion to mistreatment. The research then asks the male subjects to report on their attitudes and beliefs about rape victims or to administer electrical shocks or other forms of punishment to female victims. The results of these studies indicate four harmful effects of viewing violent pornography on men's perceptions of women: 1) changes in the perception of a rape victim (*e.g.*, seeing her as less injured and more responsible for her assault); 2) changes in the perception of a rapist (*e.g.*, viewing him as less responsible for his actions and as deserving less punishment); 3) greater acceptance of certain rape myths (*e.g.*, that women like and crave rape); and 4) more aggressive behavior toward a female target than control subjects.<sup>33</sup> These results are the same whether the film depicts the victim as enjoying or abhorring the experience.<sup>34</sup>

The Surgeon General made similar conclusions regarding violent pornography. Specifically, the Surgeon General found that pornography which portrays sexual aggression as pleasurable for the victim increases the acceptance of the use of coercion in sexual relations, and that in turn, such acceptance appears to be related to sexual aggression.<sup>35</sup>

First, as the Surgeon General's determinations indicate, attitude dictates behavior to a large extent; the changes in attitude produced by viewing violent pornography ultimately lead to greater violence toward women. Thus, attitude changes cannot be divorced from the physical

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31. *Id.* at 722.

32. *Id.* at 719.

33. *Id.*

34. *Id.*

35. E. MULVEY & J. HAUGAARD, REPORT OF THE SURGEON GENERAL'S WORKSHOP ON PORNOGRAPHY AND PUBLIC HEALTH (1986), *cited in* Linz, Penrod & Donnerstein, *supra* note 8, at 722 n.18.

acts those attitudes produce and should not be considered separately in an analysis of the harm pornography causes. When men develop attitudes of acceptance toward violent sexual aggression, women are inevitably harmed.

Second, whether or not these attitude changes lead to acts sanctioned by criminal law, they are harmful to women. Many acts of abuse do not rise to the level of criminal violations. For example, men who view violent pornography may accept and perhaps condone other men's violence toward women even in circumstances in which the viewers themselves do not engage in violence. This tendency may lead not only to men "egging" others on to engage in violent acts toward women, but even to more insidious harm to women, such as male judges, prosecutors, and jurors consciously or subconsciously going easier on accused sex offenders.

Finally, women may be subjected to verbal abuse and similar manifestations of the belief that women deserve or secretly desire to be raped.<sup>36</sup> As one woman put it, "street harassment is seen as flattery," and unlike more egregious acts against women, men are not caught and chastised for it.<sup>37</sup> Therefore, with regard to the social conditioning aspect of the harmful effects of violent pornography, the criminal law is insufficient. Regulation is needed to protect women from the harms resulting from violent pornography whether or not they rise to the level of criminal violations.

### B. Violent Acts

The second major harm resulting from viewing violent pornography is actual criminal activity. The Commission, the Surgeon General, and the researchers themselves concluded that exposure of male subjects to violent pornography caused an increased willingness to aggress against females, at least under laboratory conditions.<sup>38</sup> Critics of the studies claim that the proof is insufficient. They point out that the occurrence of rape predates the existence of any form of mass communication. Further, they argue that much of the violence reported could have occurred in the absence of pornography, and that most consumers of pornography never commit crimes.<sup>39</sup> Critics also contend that subjects may respond differently in a laboratory setting than in the real world, so that the studies' results may not indicate anything about real world crimes.

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36. Linz, Penrod & Donnerstein, *supra* note 8, at 720.

37. Letter from Angela Marney to the editors of *Off Our Back*, reprinted in *OFF OUR BACK*, Feb. 1985, at 26, 27.

38. See *supra* notes 7-35 and accompanying text.

39. See generally Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.



Therefore, critics argue, violent pornography cannot be considered the sole or necessary cause of violent sex crimes.<sup>40</sup>

The question, however, is not whether scientists have absolute proof of the effects of these materials, but whether the link that they have proven is adequate to take action in an effort to stop the harm that the researchers believe violent pornography causes. Regarding the argument that laboratory studies may not indicate any truths about the real world, it seems at least as likely that the studies do bear a relationship to real events. Intuitively, it would seem that increased aggressive attitudes would not dissipate upon moving from the laboratory to the real world. Moreover, if we take this criticism to its logical extreme, no laboratory studies ever could prove anything about the outside world by virtue of their being conducted in an artificial environment. Yet, policy decisions often are made even in situations in which no empirical proof is possible.<sup>41</sup> Because the question here relates to mental state and motive, clearer evidence is not possible given the current state of technology. In light of our inability to read minds, this final extrapolative step is not an unreasonable evidentiary imperfection; the evidence is certainly sufficient for a policy conclusion.

Because laboratory evidence and even reports from victims<sup>42</sup> cannot precisely tell us the nature and extent of the causal link between violent pornography and the identified harms, inevitably a risk exists that regulation is not needed and poses an unnecessary impediment to free speech. The risk of uncertainty must be balanced against the risk of allowing violent pornography to continue to endanger women.

If pornography does not cause harm to women, regulation could infringe on some people's first amendment rights and cause them to lose revenue from pornography production. At worst, however, the evi-

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40. In fact, some research has found a decrease in sex related crimes with increased availability of pornography, indicating a cathartic effect. See COMM'N ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, 272-73 (1970). Two important qualifications of this research, however, should be noted. First, the study, which found that the number of reported sex crimes decreased during a period when pornography became increasingly available to the general public, was conducted in Denmark between 1958 and 1969. In the United States between 1960 and 1969, police reports showed that both the availability of pornography and incidents of sex offenses increased. *Id.* at 269. Thus, the results of studies conducted in Denmark cannot be taken as true for the United States, particularly when research conducted in the United States during the same period contradicted the research in Denmark. Second, the study in Denmark concentrated on the effects of erotica, not violent pornography. More recent research has shown that violent pornography is much more likely to lead to aggressiveness than sexually explicit, nonviolent films. See *supra* notes 26-32 and accompanying text.

41. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court stated: "Nothing in the Constitution prohibits a State from reaching such a conclusion [that exploitation of sex debases and distorts the development of human personality and community welfare] and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Id.* at 63.

42. See *infra* notes 44-51 and accompanying text.

dence linking violent pornography with harm to women is merely uncertain, and uncertainty about the nature and extent of the causal link should not lead to inaction. In the context of carcinogens, the government undertakes regulation in the absence of proof of precise causality even when the regulation is extremely costly.<sup>43</sup> Although courts generally scrutinize government infringement of first amendment rights more closely than government interference of economic relations, the point remains the same: inaction has costs of its own.

Ultimately, the problem requires an allocation of costs to determine who should bear the costs of uncertainty in the context of violent pornography and assault against women. Big businesses often are held responsible for the harms they cause society, and it seems less pernicious to require the people who have chosen to produce violent pornography to bear the costs of uncertainty instead of the women who are hurt by it and who often have absolutely no choice in the matter, such as in circumstances of rape.

### C. Coerced Participation in Pornography

The Commission found:

Efficient as it is, the normal recruiting process for pornographic models is apparently not fully adequate to meet producers' needs. It is an unpleasant, controversial, but in our view well established fact, that at least some performers have been physically coerced into appearing in sexually-explicit material, while others have been forced to engage in sexual activity during performances that they had not agreed to beforehand.<sup>44</sup>

The Commission based this finding on the testimony of several pornography models who claimed that pornography is not consensually produced. These models claimed that they were forced into making pornographic films by threats of violence or death, and then forced to keep silent because the products depicted clear evidence of their willingness to perform.

For example, one model testified:

It was clear to me that . . . all of the women I met were systematically coerced into prostitution and pornography in the same way a prisoner of war is systematically imprisoned, tortured and starved into compliance by his captors. The difference is that prisoners of war are not held responsible for coerced statements and acts but when a girl or woman is coerced in this very manner into prostitution and for use in pornography, she is held responsible.<sup>45</sup>

Another model testified that it was not unusual for the pimp to

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43. Sunstein, *supra* note 39, at 601.

44. FINAL REPORT, *supra* note 7, at 865-66.

45. *Id.* at 809-10.

force girls into pornography by threatening them with death.<sup>46</sup> Once the girls or women appeared in pornographic material, the material could be used to force future participation. For example, women are told that if they fail to continue to perform, tapes and photographs of prior performances will be shown to parents, friends, and the authorities.<sup>47</sup>

Obviously, limits exist for testimonial evidence in the pornography context. Primarily, the women testifying may lack complete credibility. Shame or guilt may cause women to want to believe, or at least try to make others believe, that they are not responsible for their behavior. The Commission's report itself contained a section titled "Feelings of Shame and Guilt,"<sup>48</sup> which contained testimony of women who said that their involvement with pornography later caused them severe depression, some to the point of attempted suicide.<sup>49</sup> On the other hand, the testimony of law enforcement officers, victim counselling agencies, and sex counselors reinforced women's testimony that pornography is coercive in some circumstances.<sup>50</sup> Regarding violent pornography, one law enforcement officer stated:

I have talked to models and I have seen films where it [is] quite obvious that the model[s] had no idea as to what they were getting into. Part of [a sadism and masochism] film, when they start torturing the victim, tying them, whipping them and putting cigarettes out on their bod[ies], is the showing of pain . . . .

Obviously we are not dealing with people that can act, . . . [so the] pain is very real.<sup>51</sup>

In spite of the limitations inherent in this sort of testimony, the evidence altogether deserves some recognition.

Regulation is needed to protect women from coerced participation in the production of violent pornography. The economic incentive to those who produce violent pornography is great enough that nothing short of regulation will impede the proliferation of these materials.<sup>52</sup> Only regulation provides the necessary means of avoiding the harmful social attitudes and violence toward women caused by violent pornography, as well as the means of eliminating coerced participation by women in the production of violent pornography.

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46. *Id.* at 810.

47. See MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 32-38 (1985).

48. FINAL REPORT, *supra* note 7, at 805-08.

49. *Id.* at 799-801.

50. *Id.* at 866-68.

51. *Id.* at 868.

52. See MacKinnon, *supra* note 47, at 31 (stating that pornography is an \$8 billion a year industry); see also *New York v. Ferber*, 458 U.S. 747, 748 n.1 (1982) (noting the profitability of child pornography).

### III. OVERCOMING CONSTITUTIONAL BARRIERS

Government regulation of communication immediately evokes first amendment concerns. The first amendment protects freedom of "speech," speech being accorded special protection by virtue of its capability of enhancing self-government, self-actualization, and the discovery of truth through the marketplace of ideas. Whether the first amendment need be implicated at all in this discussion depends on whether courts consider violent pornography to be speech for first amendment purposes.

Even if violent pornography falls under the ambit of the first amendment, government regulation of such material is not necessarily unconstitutional. The Supreme Court has recognized several exceptions to the first amendment's prohibition against abridging speech,<sup>53</sup> and violent pornography may fit either into an existing exception or may warrant judicial recognition of a new exception.

#### A. *Violent Pornography Constitutes Speech for First Amendment Purposes*

Some commentators argue that pornography in general has no communicative value and therefore is not protected by the first amendment; it is nonspeech. Professor Frederick Schauer, a member of the 1986 Commission, is a leading proponent of this concept. Schauer argues that speech for first amendment purposes is defined by "the idea of cognitive content, of mental effect, of a communication designed to appeal to the intellectual process," and that pornography does not meet this definition because it is "designed to produce a purely physical effect."<sup>54</sup> Schauer thus adopts the Platonic-Aristotelian conception that the human mind has two competing aspects: the mind is subject to passions yet capable of intellectual reasoning. Schauer applies this passion-reason dichotomy to the definition of speech for first amendment purposes.

Schauer's approach presents difficult problems in line drawing because it attempts to distinguish between passion and reason. Schauer maintains that speech includes the artistic, emotive, and propositional. He asserts, however, that speech does not include material that produces a purely physical reaction because such material contains "no essential part of any exposition of ideas."<sup>55</sup> Schauer argues that because pornography goes straight to the genitals without passing through

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53. See *infra* notes 67-105 and accompanying text.

54. Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 *Geo. L.J.* 899, 922 (1979) (footnote omitted).

55. *Id.* at 923 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

intellectual processes it is better characterized as sex than speech.<sup>56</sup> Yet, he maintains that even erotic art or music, which appeals to the passions and has a physically arousing effect, is protected by the first amendment because it also produces intellectual effect. Schauer explains: "The first amendment prohibition of regulation of commingled intellectual and physical effects is not intended to protect the physical but to safeguard the intellectual content."<sup>57</sup>

Even assuming that pornography expresses no ideas, Schauer offers an unworkable method of analysis because of two serious problems. First, because the question of whether pornographic material has intellectual content is impossible to answer definitively, the Schauer analysis potentially would allow courts, in the guise of a judicial determination that the material is void of ideas, to censor materials that do express ideas. Ideas do not necessarily belong to the materials themselves but often are a product of the combination of stimulating materials and an individual's insight. Considering the amorphous nature of ideas, the intellectual value of pornography must be left to the eye of the beholder. Otherwise, Schauer's argument could lead to the suppression of protected ideas.

For example, a judge might consider a piecemeal conglomerate of unrelated video pictures set to music in a music video to express no ideas and therefore not to implicate free speech concerns. More specifically, a judge could decide that incoherent words and images do not communicate any message or ideology, and therefore that the concerns for protecting ideas do not apply. Music video viewers, however, often have insight regarding the artist's life or even the video producer's peculiar artistic form that gives the incoherent images meaning. The indefinite nature of the question of cognitive content in a piece of art demonstrates the first amendment dangers involved in allowing a judge, or jury unrepresented by teenage music video connoisseurs, to determine whether or not the art has intellectual value.

Second, if intellectual content is safeguarded when commingled with purely physical reaction, this protection would provide a loophole for producers of violent pornography. A rule that the first amendment does not protect materials causing purely physical responses could be avoided by pornographers adding some bit of intellectual content to their products. Then the question inevitably would turn on whether the physical aspects of the pornographic material were sufficiently predominant over the intellectual so as to render the whole product nonspeech. This line drawing question would be as difficult and dangerous to an-

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56. *Id.* at 922-26.

57. *Id.* at 924.

swer as the question whether the content was purely physical.

Ultimately, pornography, even violent pornography, does express certain ideas that deserve first amendment scrutiny. The fact that Schauer says pornography does not deserve first amendment scrutiny demonstrates the danger inherent in his analysis. Pornography generally endorses the concept of sex that is uninhibited and without commitment, of sex just for pleasure. Traditionally our society has expressed an intolerance toward such ideas about sex, but according to Holmes's "marketplace of ideas" method, competition of ideas brings about truth by popular acceptance in the open market.<sup>58</sup> It would be antithetical to marketplace analysis to allow censorship of unpopular ideas; restrictions on the open debate provided by the free market of ideas would seriously undermine our ability to determine truth. Regarding violent pornography, it would be impossible for those of us who do not engage in sado-masochistic or other violent practices to determine whether we are missing something desirable if we never considered such conduct.

Catharine MacKinnon's argument in favor of regulating pornography implicitly maintains that pornography is speech. MacKinnon focuses on the sexually explicit degradation and subordination of women which pornography perpetuates and argues that pornography is a civil rights violation. Thus, she argues that pornography expresses the idea that women are inferior and should be subordinated in violation of women's civil rights.<sup>59</sup> This approach does not preclude the characterization of pornography as a bad idea, but under the first amendment, good, bad, and even vile ideas are protected.<sup>60</sup> MacKinnon's characterization of pornography causes pornography regulation to require first amendment scrutiny, because it would be impossible for her to argue that pornography is nonspeech after condemning its communicative content.

Furthermore, Robin West points out that some women find por-

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58. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (stating that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"); see also Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

59. C. MACKINNON, *supra* note 1, at 3-4.

60. There can be no doubt that the first amendment protects even vile ideas in light of the Skokie controversy. In 1977 the village of Skokie, a northern Chicago suburb, had a population of 70,000, of whom 40,000 were Jewish and 5000 were survivors of Nazi concentration camps during World War II. In March 1977 the National Socialist Party of America announced its intention to hold a march. The marchers would wear uniforms similar to those worn by members of the Nazi Party under Hitler, and would wear swastika armbands. In response, Skokie enacted a series of ordinances designed to block the march, e.g., requiring applicants for parade permits to procure \$300,000 in public liability insurance and \$50,000 in property damage insurance. All the ordinances were held to violate the first amendment. See *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *aff'g* 477 F. Supp. 676 (N.D. Ill. 1978), *stay denied*, 436 U.S. 953 (1978).

nography valuable because it is liberating.<sup>61</sup> Pornography attacks "stifling and oppressive societal denial of female sexuality,"<sup>62</sup> and allows women to grow sexually as it "becomes a site of feminist exploration into what it has to say about desire, what kind of fantasies it mobilizes, and how it structures diverse sexualities."<sup>63</sup> Because pornography does not "tie women's sexuality to reproduction, to domesticated couples, or exclusively to men,"<sup>64</sup> it offers other possibilities for women. Women who consume pornography seek and discover ideas in the material,<sup>65</sup> thereby improving their sex lives and sexual identifications. Although West focuses on sexually explicit materials, not violent materials, the analysis is the same if we allow the possibility that a person might find fulfillment in watching violent sex.

The merits, however, of the ideas expressed by violent pornography are not at issue here. It is enough to observe that even violent pornography expresses ideas, and that this expressive content precludes its characterization as nonspeech and brings it within first amendment analysis.

### B. *Violent Pornography Can Be Regulated*

Although most people probably do not find violent sex or female subordination attractive, the fact remains that violent pornography is a form of speech. Similarly, antisemitism repulses most people, yet the marketplace of ideas tolerates it because it is an idea.<sup>66</sup> Suppressing repugnant views would be a mistake under marketplace analysis: the marketplace is a truthfinding organism, and serves to expose truly repugnant ideas. Thus, all speech warrants initial first amendment scrutiny.

The conclusion, however, that violent pornography is speech under the first amendment does not prohibit its regulation. Legislatures can regulate speech when it falls under an exception to the first amendment. This subsection will consider two existing exceptions to first amendment protection as possible justifications for regulating violent pornography: incitement of illegal activity and obscenity. Creating a new exception for violent pornography also will be discussed.

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61. West, *supra* note 8, at 690.

62. *Id.* at 692.

63. *Id.* at 692 (quoting Gordon, *Variety: The Pleasure in Looking*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 189, 191 (C. Vance ed. 1984)).

64. *Id.* at 691.

65. *Id.* at 693.

66. *See supra* note 60.

### 1. Incitement of Illegal Activity

The Supreme Court has held that it is constitutionally permissible in certain circumstances to prohibit speech that advocates lawless action. Although this justification for suppression has been considered by the Court since the early 1900s, the Court announced its current and most exacting constitutional test for the regulation of such speech in the 1969 case of *Brandenburg v. Ohio*.<sup>67</sup> Under *Brandenburg* the government may regulate the advocacy of illegal acts only "where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."<sup>68</sup> This current standard has two separate requirements: 1) the advocacy must intend to produce the lawless action, and 2) there must be a likelihood of imminent harm.

Violent pornography should fall within this exception to the first amendment because it has been shown to cause aggression toward women. If violent pornography were to be deemed a form of incitement of illegal activity, courts would apply the *Brandenburg* test in the context of violent pornography. The first *Brandenburg* requirement may appear to mandate that producers of violent pornography actively advocate the harms associated with the material, that they intentionally produced the materials for the purpose of causing the harmful acts. If the courts constitutionally required this subjective standard, it would be virtually impossible to regulate violent pornography under this exception. Most pornography producers probably are driven by an economic incentive and operate without a specific intent to harm women.

While some courts adopt this subjective standard of intent,<sup>69</sup> others adopt a foreseeability standard.<sup>70</sup> Under the foreseeability standard, courts would hold producers to have intended the foreseeable results of their materials. This standard is akin to the "average reasonable person" standard in tort law and allows violent pornography to fall under the exception of incitement to illegality. Because producers of violent pornography know or should know of the harms caused by violent pornography,<sup>71</sup> and they still produce it, they can be held to have intended

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67. 395 U.S. 444 (1969) (per curiam).

68. *Id.* at 447.

69. *See, e.g.,* NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Goldfarb v. Service Motor Freight, Inc., 438 F. Supp. 18 (N.D.N.Y. 1977); Shapiro v. Roudebush, 413 F. Supp. 1177 (D. Mass. 1976).

70. *See, e.g.,* United States v. White, 769 F.2d 511 (8th Cir. 1985); Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978); Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970).

71. Considering the publicity the pornography industry has received over the last several years, particularly the findings of the 1986 Attorney General's Commission on Pornography, producers would be hard pressed to argue they were unaware of the harms associated with violent pornography. Moreover, producers of violent pornography should be expected to know of the



the harms caused by the pornography. Although the *Brandenburg* case more clearly presented the intent requirement, unless the Supreme Court definitively resolves the courts' split on the intent issue in favor of requiring subjective intent, the *Brandenburg* test will not impede the regulation of violent pornography on grounds that it incites crime.

The second *Brandenburg* requirement is that there be a likelihood of imminent harm. "Likelihood" and "imminence" are inherently vague terms, and because the Court has yet to rule in favor of state regulation on this issue, it is necessary to distinguish violent pornography from cases in which the Court has not found a likelihood of imminent harm.

In *Brandenburg* the Court held unconstitutional an Ohio statute that "by its own words and as applied, purport[ed] to punish *mere advocacy* and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action."<sup>72</sup> The appellant was a Ku Klux Klan leader who had invited a reporter to a Klan rally where derogatory statements were made about blacks and Jews. One Klan speaker said, "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."<sup>73</sup> In a separate speech another Klan member said, "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengance [sic] taken."<sup>74</sup> In determining whether these speeches deserved constitutional protection, the Court stated, "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."<sup>75</sup> In other words, the Court found a distinction between "mere advocacy" and incitement to crime.

Violent pornography presents a better case for a court to find incitement to imminent harm than the facts of *Brandenburg*. In *Brandenburg* the political rhetoric regarding resorting to violence is tempered by the Klan speaker's own words about taking vengeance. The language "[I]f [the government] continues . . . it is possible . . ." indicates that the threat is unlikely to occur at all, let alone imminently. Political speech is notoriously replete with emotion and false threats,<sup>76</sup> but the harms associated with violent pornography have oc-

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harms associated with the material.

72. *Brandenburg*, 395 U.S. at 449 (emphasis added).

73. *Id.* at 447.

74. *Id.* at 446.

75. *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297-98 (1961)).

76. See *Claiborne Hardware Co.*, 458 U.S. at 928. In the context of a racially heated boycott the Court stated that "advocate[s] must be free to stimulate [their] audience[s] with spontaneous

curred many times and are virtually certain to continue. It is not necessary to show that a particular producer's film caused a particular harm in order to justify regulating violent pornography. Rather, when certain actions have a known propensity to cause harm, an actor can be held liable without a showing of actual harm. For example, speeding is known to increase the likelihood of car collisions, and drivers are punished for this dangerous behavior whether or not their particular sprees cause collisions. Violent pornography, like speeding, is intrinsically dangerous, and legislatures may regulate it on the basis of its known propensity for harm without a showing of particular harm.

The harm from violent pornography is also imminent, considering that some men read from pornographic magazines while they commit sex crimes, or force women to engage in acts they just learned about through viewing a pornographic film.<sup>77</sup> The government in *Brandenburg* failed to identify actual harms likely to occur given that no scientific data exists that associates listening to Ku Klux Klan speeches with kidnapping and sending blacks to Africa or Jews to Israel. On the other hand, researchers agree that a causal effect links the viewing of violent pornography with the sex crimes that are rampant in American society.<sup>78</sup> Unlike the political speeches given in *Brandenburg*, violent pornography does not merely express ideas but actually causes harm, a reality confirmed by scientific data.<sup>79</sup> Therefore, the imminence of harm is more certain from violent pornography than from the political ramblings of a Ku Klux Klan leader.

In *Hess v. Indiana*<sup>80</sup> the Court reversed a conviction of an unruly person who shouted, "We'll take the . . . street later" during an antiwar demonstration. The Court found the likelihood and imminence of harm in the situation insufficient to meet *Brandenburg* requirements: "[A]t worst, [the statement] amounted to nothing more than advocacy of illegal action at some indefinite future time."<sup>81</sup> The government produced no clear evidence that the speech would have caused actual harm.

In *NAACP v. Claiborne Hardware Co.*<sup>82</sup> the Court reversed a state court decision that held an NAACP sponsored boycott of white merchants unlawful and held the organizers of the boycott liable to the merchants for damages resulting from customers' fear of patronizing

and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech." *Id.*

77. See West, *supra* note 8, at 686-90.

78. See *supra* notes 7-51 and accompanying text.

79. See *supra* notes 26-30 and accompanying text.

80. 414 U.S. 105, 107 (1973). The defendant may have shouted, "We'll take the . . . street again." *Id.*

81. *Id.* at 108.

82. 458 U.S. 886 (1982).

the merchants' businesses. The fear was grounded in part in a statement made by an NAACP official during a public speech to several hundred people. The speaker said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."<sup>83</sup> The Court stated: "[M]ere advocacy of the use of force or violence does not remove speech from the protection of the [f]irst [a]mendment. . . . The emotionally charged rhetoric of [the speaker] did not transcend the bounds of protected speech set forth in *Brandenburg*."<sup>84</sup>

Violent pornography is distinguishable from these two cases in the same way that it is distinguishable from *Brandenburg*. Research evidence concludes that violent pornography incites harm, and harm from violent pornography has happened, is happening, almost certainly will continue to happen, and is therefore far from speculative. One other important distinction between these cases utilizing the *Brandenburg* test and violent pornography should be considered. In *Brandenburg*, *Hess*, and *Claiborne*, the Court decided the issues in the context of political speech. The Supreme Court repeatedly has stressed the need for "wide-open" and "robust" political debate in a self-governing society.<sup>85</sup> On the hierarchy of speech, political speech ranks at the very top.<sup>86</sup> On the other hand, violent pornography cannot seriously be deemed to enhance the democratic process; its first amendment value is more questionable. When the Court determines an expression at issue not to have significant first amendment value, as in obscenity cases, the Court requires the State to demonstrate only an arguable correlation between that expression and the occurrence of harm to justify a legislative determination that the expression causes harm.<sup>87</sup>

For example, in *Paris Adult Theatre I v. Slaton*<sup>88</sup> the Court held in the context of obscenity that "[a]lthough there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature . . . could quite reasonably determine that such a connection does or might exist."<sup>89</sup> Similarly, with regard to allowing the Atlanta City Council to disperse adult theatres, the Court required only a "fac-

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83. *Id.* at 902.

84. *Id.* at 927, 928.

85. *See, e.g.,* *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

86. *Carey v. Brown*, 447 U.S. 455, 467 (1980).

87. *See Note, Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 476-78 (1984) (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (plurality decision); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

88. 413 U.S. 49 (1973).

89. *Id.* at 60-61.

tual basis" for the City Council's conclusion that the presence of adult theatres caused neighborhood deterioration.<sup>90</sup> Even if the evidence of harm is not absolute, it may suffice in view of the context and nature of the speech.

## 2. Obscenity

The Supreme Court has had considerable trouble defining obscenity and its boundaries. Since 1815 when a Pennsylvania court decided the first reported American case involving censorship of pornography,<sup>91</sup> one constant has emerged. The Court has held consistently that obscenity, however it may be defined, is outside of the first amendment's protection.<sup>92</sup>

Under the obscenity exception only those materials the Court deems obscene under its test for obscenity are without first amendment protection. The first amendment protects many sexually explicit and pornographic materials. If, however, sexually explicit material meets specific criteria required for the Court to deem it obscene, the first amendment does not protect the material. Currently, courts define obscenity by reference to a three prong test articulated in *Miller v. California*.<sup>93</sup> The *Miller* test asks whether: 1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; 2) the work depicts or describes in a patently offensive way the sexual conduct specifically defined by applicable state law; and 3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>94</sup> By failing to meet the requirements under any one of these prongs, pornographic material will be deemed not obscene, and therefore worthy of first amendment protection.

Many materials could be banned under the obscenity exception that presently are not banned. Considering the underlying policy justifications for regulating obscenity, the Court has articulated the test for obscenity in a more restrictive fashion than the exception warrants. In light of the underlying justifications for the obscenity exception,<sup>95</sup> it

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90. *Id.* (citing *Young*, 427 U.S. at 71).

91. See *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91 (Pa. 1815) (holding that an offense that tends to the corruption of morals, such as the exhibition of an obscene drawing, is indictable at common law).

92. See Note, *Child Pornography: Ban the Speech and Spare the Child?*—*New York v. Ferber*, 32 DE PAUL L. REV. 685, 699-700 (1983) (citing *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Mishkin v. New York*, 383 U.S. 502 (1966); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Roth v. United States*, 354 U.S. 476 (1957)).

93. 413 U.S. 15 (1973).

94. *Id.* at 24.

95. For discussion of these justifications, see *infra* notes 96-102 and accompanying text.

should encompass all violent pornography. The argument here is not that courts should deem violent pornography obscene under the *Miller* test. Rather, evaluation reveals that the same justifications for not according first amendment protection to obscenity apply with equal force to violent pornography.

Throughout the Court's history of obscenity adjudication, three primary justifications have undergirded the Court's decisions. First, obscenity is utterly without redeeming social value. "All ideas having even the slightest redeeming social importance— . . . even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties . . . . But implicit in the history of the [f]irst [a]mendment is the rejection of obscenity as utterly without redeeming social importance."<sup>96</sup> Second, obscenity increases the likelihood of sexual violence. The Court has held:

[T]here are legitimate state interests at stake in stemming the tide of commercialized obscenity . . . . These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the *public safety* itself. . . . [T]here is at least an arguable correlation between obscene material and crime.<sup>97</sup>

Third, obscenity degrades society's moral values. The Court has said that just as good literature enriches society's moral values, obscenity debases them.<sup>98</sup> In addition the Court has stated:

The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.<sup>99</sup>

Violent pornography meets each of these historical policy justifications for regulating obscenity. First, although "utterly without redeeming social value" is no longer the standard,<sup>100</sup> violent pornography cannot be considered more valuable than obscenity. The Court has said that obscenity lacks socially redeeming value.<sup>101</sup> It does not follow that sexually explicit violence contains more social value than sexually explicit material that appeals to the prurient interest or is patently offensive.

Second, the empirical data indicates that the form of sexually explicit material which presents the greatest likelihood of causing sexual

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96. *Roth v. United States*, 354 U.S. 476, 484 (1957) (footnote omitted).

97. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-58 (1973) (emphasis added).

98. *See id.* at 63.

99. *Id.*

100. *See supra* note 93 and accompanying text.

101. *See supra* note 96.

violence is violent pornography. The evidence is much weaker with regard to sexually explicit, nonviolent material.<sup>102</sup> If the possibility of increased sexual violence provides a justification for regulating obscenity, it provides an even greater justification for regulating violent pornography.

Third, violent pornography degrades women far more than obscene material. As noted above, studies reveal that exposure to violent pornography leads men to develop personality traits inconsistent with a healthy family and community.<sup>103</sup> Even obscenity's crass exploitation of sex seems less degrading and morally perverse than the perception of women as deserving or enjoying sexual abuse, the result of violent pornography.

On a normative level the harms of violent pornography present a more urgent need for regulation than the application of a judicial test that bases its condemnation of materials on whether they appeal to the prurient interest.<sup>104</sup> According to the Court, prurient interest is a shameful or morbid interest in sex, as contrasted with a normal or healthy interest.<sup>105</sup> Even the most all consuming interest in sex seems less harmful to society than the harms associated with violent pornography. With its preoccupation with prurience, the Court appears to attempt to regulate morality. The Court endorses a Puritanical conception of sex, deeming excessive interest in sex as harmful to society. Certainly the harm of violent pornography's appeal to violence toward others provides a sounder basis for regulation than any materials that appeal to the prurient interest.

The fundamental reasons underlying the obscenity exception apply to violent pornography with equal or greater force than to material that excites lust or lewdness. Therefore, all violent pornography should be included within the obscenity exception.

### 3. Creating a New Exception

If the Court declines to recognize that either the incitement of illegal activity or obscenity exceptions to the first amendment encompasses violent pornography, the Court could create a new exception for violent pornography. The Court most recently adopted a new exception involving pornography in *New York v. Ferber*.<sup>106</sup>

In *Ferber* the Court excepted child pornography from the protec-

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102. See *supra* notes 7-32 and accompanying text.

103. See *supra* notes 26-30 and accompanying text. Such traits include decreased sympathy toward women and increased acceptance of physical coercion.

104. See generally Sunstein, *supra* note 39.

105. *Brockett v. Spokane Arcades*, 472 U.S. 491, 499 (1985).

106. 458 U.S. 747 (1982).

tion of the first amendment. The Court provided five reasons for its decision. First, the state has a compelling interest in the physical and psychological well-being of children.<sup>107</sup> Second, the distribution of child pornography is related intrinsically to the sexual abuse of children. The process of making the material sexually exploits children; the sexual exploitation is inextricable from the material itself, and the material is evidence that the harm has occurred.<sup>108</sup> Third, the advertisement and sale of child pornography are economically motivated and thus are an integral part of such materials' production.<sup>109</sup> Fourth, the Court considered it "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."<sup>110</sup> Finally, it is appropriate to except an entire classification of materials from first amendment protection 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."<sup>111</sup>

The Court did not need to create a new exception in order to hold that the first amendment does not protect child pornography. The Court could have reached its conclusion that the government can suppress child pornography by using the same rationale it uses in obscenity cases. A modification of the definition of obscenity to include material appealing to the prurient interests of pedophiles would leave most child pornography unprotected by the first amendment.<sup>112</sup>

Instead, the Court created a new exception because it could not regulate all child pornography under the obscenity definition given that all child pornography may not be adjudged obscene. The Court created a broad new exception in order to give the government greater power to control child pornography and its inherent harms. With this action, the Court demonstrated a willingness to provide a new exception when existing first amendment exceptions could not control the harms from a particular type of material. Similarly, the Court should create a new exception covering all violent pornography because existing exceptions allow some violent pornography to escape regulation and thereby deny the government adequate leverage to control the harms violent pornography causes.

The justifications underlying the *Ferber* decision differ from the ra-

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107. *Id.* at 756.

108. *Id.* at 759.

109. *Id.* at 761.

110. *Id.* at 762-63.

111. *Id.* at 763-64.

112. See Note, *supra* note 92, at 708.

tionales behind all the other recognized first amendment exceptions. For instance, *Ferber* does not focus on the harm to society caused by the communication of the speech. Audience reaction is irrelevant to the decision.<sup>113</sup> Instead, it focuses on the harm that necessarily occurs to children in the production process.<sup>114</sup> Thus, the Court's decision indirectly deters the harms of child pornography. Producers and distributors of child pornography are criminally liable regardless of whether they participate in the production process. This approach deters distribution, which in turn deters production, and ultimately eliminates the market for the material. Once the market is dry, pornographers will cease to make child pornography, and consequently the harm to children during the production stage will end.

The *Ferber* decision makes sense because of the impracticality of always preventing a harm through existing criminal law. When the criminal law is not entirely effective to prevent a particular harm, the legal definition of the crime should be expanded to cover events inextricably tied to the harm. Particularly in a commercial context, where the market and the product are continually shaping one another, courts or legislatures appropriately can control both the market and the product through criminal sanctions because the ultimate harm is attributable to both factors. As the Court stated:

[W]ere the statutes outlawing the employment of children in these films and photographs fully effective, and [had] the constitutionality of these laws . . . not been questioned, the [f]irst [a]mendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.<sup>115</sup>

The *Ferber* analysis is not exactly on point when applied to violent pornography because the government theoretically could enforce perfectly the criminal laws regarding the sexual abuse of women without banning violent pornography. Pornographers might produce violent pornography without breaking criminal laws by obtaining the full consent of female participants, and by simulating the violence. By contrast, child pornography cannot be produced without harming children given that the definition of the crime includes the act of production itself, regardless of the child's consent.<sup>116</sup>

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113. *Ferber*, 458 U.S. at 761 (finding that the *Miller* standard is not a satisfactory solution to the problem of child pornography).

114. *Id.* at 759-61.

115. *Id.* at 762.

116. The child's consent would have no legal significance in this situation because the consent of a minor is invalid. See, e.g., MODEL PENAL CODE § 2.11(3)(b) (1962) (stating that assent does not constitute consent if "it is given by a person who by reason of youth . . . is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct").



Nonetheless, the more general principle that the Court established in *Ferber*, namely the ability of government to stop the harms inextricably linked to a particular, narrowly defined form of communication, applies to permit regulation of violent pornography. Such regulation would hinder indirectly many types of crime including assault, battery, and rape. The regulation of violent pornography on the basis of its propensity to cause aggression indirectly inhibits crimes produced by that aggression. As in *Ferber*, the regulation will affect only a narrow class of materials that are closely associated with crimes that the existing criminal law is insufficient to deter.

In sum, a great harm is inextricably bound to violent pornography, and the expressive value of violent pornography is minimal. The evil involved overwhelmingly outweighs any expressive interests, and the existing criminal law fails to deter the harm. The only realistic way to deter the crime is to eliminate the market for violent pornography. Prohibiting the production and distribution of a narrowly defined class of violent pornography provides a workable and effective deterrent against the crimes violent pornography causes.

#### IV. THE FAILURE OF THE MACKINNON ORDINANCE

The MacKinnon Ordinance's fundamental premise is that pornography promotes sex discrimination. The ordinance provides for civil actions against violators by any person claiming to have been discriminated against or any member of the board or employee of a special equal opportunity office who has reasonable cause to believe that a discriminatory violation has occurred.<sup>117</sup> The ordinance first was introduced in Minneapolis and Indianapolis. In Minneapolis the local council passed the ordinance, but the mayor vetoed it on the grounds that it violated the first amendment.<sup>118</sup> In Indianapolis the City successfully enacted the ordinance, but the law immediately met first amendment challenges. The Seventh Circuit held the ordinance unconstitutional, and the Supreme Court summarily affirmed that decision in *American Booksellers v. Hudnut*.<sup>119</sup>

The MacKinnon Ordinance cannot withstand constitutional scrutiny for three reasons. First, the definition of the harm is infirm and violates established Supreme Court precedents. Second, the statute is both constitutionally overbroad and underinclusive. Third, many of the terms and definitions under the ordinance are unconstitutionally vague.

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117. Indianapolis and Marion County, Ind. Gen. Ordinance 35, sec. 4, §§ 16-17 (June 15, 1984) [hereinafter Indianapolis Ordinance].

118. See *A Court Test for Porn*, NEWSWEEK, Aug. 13, 1984, at 40.

119. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

### A. Definition of Harm

The version of the MacKinnon Ordinance adopted in Indianapolis and considered in *Hudnut* provides:

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or words, that also includes one or more of the following:

- (1) Women are presented as sexual objects who enjoy pain or humiliation; or
- (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
- (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
- (4) Women are presented being penetrated by objects or animals; or
- (5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;
- (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.<sup>120</sup>

This ordinance defines pornography as a “discriminatory practice based on sex which denies women equal opportunities in society.”<sup>121</sup> Because the focus of the harm is the subordination of women, which is not an illegal act in and of itself, the ordinance cannot fit under the exception to the first amendment for incitement of illegality.

Even if pornography does incite men to subordinate women and view them as inferior, the view that women are inferior is not illegal. Furthermore, the description of the harm in the ordinance places the harm outside the obscenity exception to first amendment protection. The ordinance covers material that degrades women yet fails to meet the Court’s definition of obscenity.<sup>122</sup> As the Seventh Circuit in *Hudnut* stated: “The Indianapolis [O]rdinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant . . . whether the work has literary, artistic, political, or scientific value.”<sup>123</sup> The court’s opinion demonstrates that the MacKinnon Ordinance fails to restrict the material covered by the ordinance to material that is legally obscene.

The ordinance seeks to remedy harm that centers on the political viewpoint expressed by the objectionable material. MacKinnon herself stated: “The feminist critique of pornography is . . . politics, specifi-

120. Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q).

121. *Id.* at sec. 1, § 16-1(a)(2).

122. See *supra* note 94 and accompanying text.

123. *Hudnut*, 771 F.2d at 324-25.

cally politics from women's point of view . . . . Obscenity is a moral idea; pornography is a political practice."<sup>124</sup> This statement further illustrates that neither incitement of illegality nor obscenity provides an adequate exception from first amendment protection for the materials the ordinance covers. Neither exception controls political practices grounded in individual viewpoints. Only if the Supreme Court created a new exception to first amendment protection for expression that subordinates women could such expression be regulated.

Both the Seventh Circuit and the High Court proved unwilling to create such an exception. Even if pornography subordinates women, the idea that women should be subordinated and degraded is a protected idea in the marketplace of ideas. "Under the [f]irst [a]mendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be."<sup>125</sup> Even pernicious beliefs, like those of the Nazis or the Ku Klux Klan, are tolerated in the marketplace of ideas.<sup>126</sup> Thus, the pernicious idea that women are subordinate to men cannot be regulated without abridging free speech. In fact, because viewpoint regulation is constitutionally impermissible, the more reformers seek to regulate pornography on the basis that it perpetuates an unacceptable viewpoint, the less likely regulation will succeed.<sup>127</sup>

Indianapolis argued that marketplace analysis does not apply when speech is unanswerable by counterspeech. The marketplace of ideas analysis, however, is premised upon the notion that truth ultimately will prevail when speech is allowed to flow unregulated. To limit speech on the grounds that truth has not yet prevailed and is not likely to prevail because no one has countered a "false idea" implies the existence of governmental power to declare truth. Under the first amendment, "there is no such thing as a false idea," so the government may not restrict speech on the basis of its "falsity."<sup>128</sup> Tolerance of unpopular ideas is essential to the utility of the marketplace theory. The government should permit even the free dissemination of "false" viewpoints because the exposure of these ideas will demonstrate their weaknesses and aid in finding truth.

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124. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL'Y REV. 321, 323 (1984).

125. *Hudnut*, 771 F.2d at 327-28.

126. *See id.* at 328. The Court added, "One of the things that separates our society from [totalitarian governments] is our absolute right to propagate opinions that the government finds wrong or even hateful." *Id.*

127. *See, e.g., id.* (citing *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)). *See generally* Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 233-36 (1982); Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

128. *See Hudnut*, 771 F.2d at 331 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

Proponents of the MacKinnon Ordinance claim that pornography is more than an ideology; they claim that pornography is itself discrimination. As the *Hudnut* court, however, stated: "If pornography is what pornography does, so is other speech."<sup>129</sup> All of the negative effects of speech depend on mental intermediation. Pornography may affect how people see the world and how people interact socially, but action is the result of ideological beliefs, not the beliefs themselves.<sup>130</sup>

Although the ordinance is in part concerned with preventing acts of sexual violence against women, its primary focus is far broader. The ordinance targets a vast amount of material based on the ideology that the material expresses. The ordinance defines the harm in terms of the subordination of and discrimination against women, and implies that regulating sexually explicit materials will stop the harm.<sup>131</sup> This approach is faulty because discrimination against women existed long before pornography and likely will continue to exist in various forms whether or not pornography is available. Further, the approach is flawed because it establishes an approved view of women, how they may react to sexual encounters and how the sexes may interrelate. Under the ordinance only those who espouse the view approved by the ordinance may use sexual images.<sup>132</sup> The application of such a standard for permitting or prohibiting sexually explicit images epitomizes viewpoint based discrimination.

The characterization of pornography as subordinating women demonstrates that the ordinance regulates on the basis of ideological content. Such an approach diametrically opposes the first amendment and conflicts with prior Supreme Court decisions regarding pernicious beliefs. To pass constitutional muster an ordinance regulating pornography must focus on direct, empirical harms from the speech, not on indirect harms resulting from the adoption of the ideologies expressed. It is unconstitutional for the government to eradicate resultant harms such as discrimination through regulating beliefs that tend to cause or perpetuate such harms. Regulation of ideology is governmental "thought control,"<sup>133</sup> so feared by the Framers that they created the first amendment.

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129. *Id.* at 329.

130. *Id.*

131. Indianapolis Ordinance, *supra* note 117, at sec. 1.

132. *Hudnut*, 771 F.2d at 328.

133. *Id.*

### B. Overbreadth

Even if the drafters of the MacKinnon Ordinance in Indianapolis intended to deter the violence associated with some types of pornography and not to control sexual and political ideologies, the ordinance is fatally overbroad. It defines the materials subject to regulation in terms of sexual explicitness. Then the ordinance regulates all sexually explicit materials.<sup>134</sup>

The ordinance's focus on sexual explicitness poses the overbreadth problems. Researchers have found that the degree of male aggressiveness toward women after viewing three types of films decreased respectively with the following types of films: violent and sexually explicit; violent only; and sexually explicit only.<sup>135</sup> In fact, the researchers found no difference between the level of men's aggression toward women after viewing sexually explicit, nonviolent films and neutral films. This result indicates that viewing nonviolent, sexually explicit materials does not cause aggressive behavior.<sup>136</sup>

An ordinance that regulates sexually explicit, nonviolent films is overbroad if it purports to prevent aggression. Such an ordinance ignores the evidence that sexual explicitness is simply a factor that exacerbates the effect of violent materials. Furthermore, violent, nonsexual materials have a greater tendency to cause aggression than sexually explicit, nonviolent materials.<sup>137</sup> Thus, excluding violent, nonsexual materials from the scope of the ordinance is underinclusive, while including sexually explicit but nonviolent materials is overbroad. A more logical ordinance would include all violent materials rather than all sexually explicit materials. The best scheme, and the one least prone to overbreadth problems, would regulate only materials that are both violent and sexually explicit. This approach would target the materials with the greatest likelihood of causing sexual aggression and violence.

The MacKinnon Ordinance is also overbroad because it imposes sanctions on speech that the first amendment clearly protects. For example, the ordinance potentially regulates work by feminist authors who use sexually explicit passages describing rape or male domination to illustrate women's plight in society. While the writings may denounce the subordination of women through illustrations of the impropriety and undesirability of female subordination, the ordinance potentially could regulate such works on the basis of their sexual explicitness. Similarly, feminist artists may use graphic sexual images to ex-

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134. Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q).

135. See *supra* note 9 and accompanying text.

136. See *supra* note 28 and accompanying text.

137. See *supra* note 9 and accompanying text.

press beliefs that oppose discrimination against women. While the art may contain depictions of rape for the purpose of exposing rape's repulsiveness, such depictions might expose the art to prohibitions under the ordinance. The regulation of viewpoints, whether they advocate or criticize the subordination of women, is unconstitutional. Ironically, the ordinance's potential to suppress the feminist material described would be counterproductive to MacKinnon's efforts.

### C. Vagueness

The MacKinnon Ordinance does not attack only a narrow class of identifiable pornography. Instead, the statute defines pornography in terms too vague for a reasonable person to determine what speech is prohibited. Unless the ordinance provides adequate guidance for people to whom the law may apply, the ordinance may unconstitutionally chill free speech.

For example, the ordinance fails to identify what constitutes "subordination."<sup>138</sup> The term "subordination" requires a determination of what specific acts or words depict women as inferior to men in rank, power, or importance. Who should decide which acts subordinate women? If women who bring civil suits decide, the inherent subjectivity will make the definition of subordination impossible to predict, and will allow individuals to impose their views of the meaning of subordination on the public. If the judiciary decides, it necessarily would impose its own view of subordination on a diverse community. If the population at large votes on a standard for identifying subordination, the standard would impose majoritarian views on freedom of speech, an imposition antithetical to first amendment principles.<sup>139</sup>

In addition, the ordinance is vague because it fails to define what constitutes a "position of sexual servility or submission."<sup>140</sup> Would a depiction of a woman engaged in sex in the missionary position be considered submissive? If so, would it matter whether or not the woman initiated the contact? Would all depictions of sexual intercourse need to show the woman in a superior position? If so, would not this image depict men as submissive?

The ordinance also fails to indicate what kind of pornography puts women in an inferior status. Proponents of Indianapolis's version of the MacKinnon Ordinance argued that "[t]he mere existence of pornogra-

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138. See Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q).

139. Hunter & Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et. al., in American Booksellers Association v. Hudnut*, 21 UNIV. MICH. J.L. REF. 69, 108-09 (Fall 1987-Winter 1988).

140. Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q)(6).

phy in society degrades and demeans all women."<sup>141</sup> Defining pornography as material that degrades and demeans women does nothing to resolve the vagueness problem, because deciding what material "degrades" or "demeans" is as problematic as defining pornography itself.<sup>142</sup> The ordinance poses vagueness problems because a reasonable person could not decipher what images the ordinance considers degrading or demeaning to women.

Another instance in which the MacKinnon Ordinance is vague is in its prohibition of "scenarios of degradation."<sup>143</sup> Under this undefined term, perhaps a Miss America pageant depicts a "scenario of degradation." A contest that purports to honor the All-American woman yet includes both a swimsuit competition and a test of intellectual prowess based on answers to petty or superficial impromptu questions may qualify as a "scenario of degradation."<sup>144</sup>

Because a person of ordinary intelligence would be unable to distinguish between speech that is protected and speech that is prohibited under the MacKinnon Ordinance, the statute could chill protected speech. Further, because of the statute's vagueness, it could be subject to arbitrary enforcement. The MacKinnon Ordinance is legitimate in its objective to deter violence and discrimination against women. The ordinance is unconstitutional, however, because of its definition of harm, its overbreadth, and its vagueness.

#### V. A PROPOSED ALTERNATIVE ORDINANCE

The following proposal is not intended to constitute a complete draft of an ordinance. An actual ordinance would need to include legislative findings and policies in order to facilitate judicial review. Because sections of this Article already have provided an examination of scientific evidence on violent pornography and policy justifications for regulating violent pornography, it would be redundant to include those sections here. This proposal focuses on the crucial aspects of an anti-

141. Hunter & Law, *supra* note 139, at 108 (quoting Defendants' Memorandum at 10).

142. Justice Stewart commented on the difficulty of defining pornography in what has become a famous quote. Regarding "hard-core pornography," he said, "I shall not . . . attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

143. Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q)(5).

144. Although the MacKinnon Ordinance does not define "sexually explicit" and the swimsuit portion of such competition may not qualify as sexually explicit, are not these contests even more degrading and harmful to women because they are generally accepted by society? At least pornography is considered improper or sinful to many people, does not purport that the women involved were chosen on the basis of intellectual superiority, and does not enter prime time nonpay television.

pornography regulation: definitions, acts that constitute violations, and sanctions.

The proposed ordinance reads as follows:

I. Definitions.

(a) Violent pornography shall mean a film that concurrently depicts both sexual explicitness and physically violent acts between or among those engaged in the sexual activity.

(b) Sexual explicitness shall mean:

- 1) human genitals in a state of sexual stimulation or arousal,
- 2) acts of human masturbation, sexual intercourse, or sodomy, or
- 3) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast;

(c) Physically violent acts shall mean:

- 1) assault,
- 2) battery,
- 3) murder,
- 4) rape,
- 5) torture, or
- 6) coercion by physical force.

II. Violations. The following acts will be violations of this ordinance:

(a) Production. It shall be a violation to participate in any capacity in the production of violent pornography. Participation means:

- 1) filming,
- 2) directing,
- 3) acting (playing a role in the film),
- 4) coercing another to play a role in the film,
- 5) creating manuscripts for production,
- 6) editing films,
- 7) knowingly supplying the financial backing for producing the film,\*
- 8) knowingly supplying the studio or other place where the film is to be made,\* or
- 9) knowingly supplying actors for such films, such as an agent, or parent or relative of a minor;\*

(\*The standard for knowledge shall be the "reasonable person" standard, *i.e.*, the defendant knew or should have known.)

(b) Trafficking. It shall be a violation to deal in violent pornography. Dealing means:

- 1) selling films,
- 2) buying films,
- 3) exhibiting films, or
- 4) distributing films.

III. Sanctions. The following criminal and civil actions shall apply to the foregoing violations:

(a) Criminal sanctions. It shall be a crime to violate this ordinance. Penalties shall be determined by the appropriate legislative bodies.

(b) Civil actions. A civil action is created and treble damages shall be awarded for torts such as assault, battery, and false imprisonment that occur in production of the film.

Most of the studies which found that violent pornography causes aggressiveness toward women primarily used films to present the pornographic material. In the interest of avoiding the criticism that the results of the film studies do not pertain to other mediums, the proposed statute covers only films. Furthermore, films are a particularly harmful



form of pornography because, unlike most other media, they accrue specific harms in the production process.

The ordinance covers only those films that concurrently depict both sexual explicitness and violent acts because studies have shown that this type of film evokes the greatest degree of aggression. While studies also have shown that violent, nonsexual films cause aggression, an ordinance regulating this type of film would have difficulty because of the tremendously broad impact it would have given the amount of violence depicted in regular prime time television and mainstream movies. After first regulating the most dangerous type of film and receiving feedback from this initial step, legislatures may consider regulating other types of film.

The ordinance covers all aspects of production and marketing so that violators who were involved only indirectly with the actual filming will not escape sanctions. The ordinance permits sanctions in both criminal and tort law so that the law will be enforced both publicly and privately resulting in greater potential efficacy.

## VI. THE PROPOSED ORDINANCE SURVIVES CONSTITUTIONAL SCRUTINY

The proposed ordinance aims to curb the physical harms caused by violent pornography.<sup>145</sup> As discussed above, the Court could except violent pornography from the strict first amendment prohibition against regulating speech in any of three ways: By placing violent pornography under the previously recognized exception for either incitement of illegality or obscenity, or by creating a new exception because of the unique and important harms violent pornography causes.

Even if the Court excepts violent pornography from the strict protection of free speech, the ordinance must overcome other constitutional hurdles. First, because the proposed ordinance aims at curbing actual harms that result from viewing violent pornography and not at suppressing ideological ideas, it is properly motivated. Second, the proposed ordinance survives overbreadth challenges because it regulates only the narrow class of pornography that is both sexually explicit and violent. Finally, the terms of the ordinance are understandable to a reasonable person, and thus, are not unconstitutionally vague. Therefore, the proposed ordinance satisfies constitutional scrutiny.

### A. *Propriety of Motive*

The ordinance clearly aims at stopping the type of pornography that can cause acts of physical violence against women. The studies

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145. For a discussion of the sufficiency of the evidence of the harm itself, see *supra* notes 38-43 and accompanying text.

conducted by Linz, Penrod, and Donnerstein demonstrate that films containing both sexual explicitness and violence cause male viewers to manifest the greatest degree of aggression. The ordinance aims at eliminating the crime resulting from these types of films by illegalizing the narrow class of violent pornographic films.

Unlike the MacKinnon Ordinance, the proposed ordinance focuses on neither sex discrimination nor the subordination of women. Rather than making a moral or political judgment regarding the status of women in our society, the proposed ordinance simply aims at suppressing crime. Under the ordinance, if a pornographer produces a film that includes the ordinance's requisite elements, the violator may be prosecuted or sued regardless of whether the film expressed neutral or partisan ideas. The proposed ordinance neutrally affects the marketplace of ideas.

### *B. Survives Overbreadth Challenges*

The proposed ordinance survives overbreadth analysis because it is narrowly tailored to regulate only those materials shown to have a harmful effect on the physical well-being of society's members. Empirical data proves not only that the materials regulated cause aggression, but that these materials have the highest propensity for causing aggression. While the ordinance may be somewhat underinclusive, any scheme regulating pornography that would not be somewhat underinclusive would be unconstitutionally overbroad. Provided the statute's underinclusiveness poses no equal protection problems, the underinclusiveness will not cause the statute to fail on constitutional grounds: "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."<sup>146</sup>

The ordinance may be underinclusive because it regulates only film and not the print media, thus allowing some harmful materials into the market. Regulation of films, however, is appropriate because substantial empirical evidence has been obtained using films. Further, courts and plaintiffs can pick out more easily the elements of violent pornography in films as opposed to deciphering which words or paragraphs in printed texts contain the requisite sex and violence. Finally, films implicate production harms that some printed materials, such as books, may not.

The statute also may be underinclusive because it regulates only sexually explicit violence. The studies showed that both films containing violence in an unmistakably sexual but not explicit context and vio-

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146. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949) (citing *Central Lumber Co. v. South Dakota*, 226 U.S. 157, 160 (1912)).

lence in a nonsexual context tend to cause aggression. The studies showed, however, that these films provoked a lesser degree of aggressiveness than the sexually explicit, violent films.<sup>147</sup> While we should not disregard films that result in any amount of violence, the ubiquity of violence in all forms of the media makes regulation of these forms of violence impossible. Violence, even in a sexual context, occurs in many prime time television shows, soap operas, and even cartoons. Overbreadth and vagueness problems make an effort to ban violence in the absence of sexual explicitness unworkable. Thus, while some underinclusiveness is inevitable in our current state of knowledge, the ordinance employs existing empirical data to ban films that evoke the greatest violence against women.

### C. *Not Void for Vagueness*

The proposed ordinance can also survive vagueness challenges. Section (1)(a), which defines violent pornography, mandates that both sexual explicitness and acts of violence occur simultaneously in the film. Even if a film contains both sexually explicit and violent images, the ordinance does not apply to the film if the images occur at different times. Therefore, enforcers of the ordinance and film producers should experience little confusion in determining whether the statute applies to a particular film.

The definition of sexual explicitness in section (1)(b) is identical to the definition of sexual explicitness challenged on grounds of vagueness in *Young v. American Mini Theatres, Inc.*<sup>148</sup> In *Young* the Supreme Court gave two reasons why the statute was not unconstitutionally vague. First, whether or not some uncertainty existed regarding the effect of the statute, it unquestionably applied to the respondents. The Court did not permit the respondents to challenge the statute on vagueness grounds. Second, the doctrine of vagueness only applies when the statute's deterrent effect on legitimate expression is "both real and substantial."<sup>149</sup> There is "surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance."<sup>150</sup>

Although the first part of the Court's vagueness analysis cannot be applied in the absence of a specific factual situation, the second part certainly applies to the ordinance. The concern that the ordinance inad-

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147. See *supra* notes 27-38 and accompanying text.

148. 427 U.S. 50, 53 n.4 (1976).

149. *Id.* at 58-60 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975)).

150. *Id.* at 61.

vertently would deter materials that fall outside the definition of violent pornography is not acute for such marginal material. If producers cannot decide whether depictions in their films constitute violent pornography by considering the explicitly enumerated acts that constitute the definition, their materials probably do not warrant extreme first amendment concern. Furthermore, considering the lucrative nature of pornography production, it is more likely that producers will push the law to its limits than exercise excessive care.

Section (1)(c) of the proposed ordinance defines physically violent acts. Four of the six acts listed can be understood by reference to tort law or criminal law, which explicitly define the elements needed to sustain a civil cause of action or criminal prosecution, respectively. The two examples that do not constitute a tort cause of action or crime *per se*, torture and coercion by physical force, can be understood by a reasonable person, through reference to a dictionary if necessary.<sup>151</sup>

Section (2) defines which acts constitute violations of the ordinance. All of the terms refer to specific, affirmative acts that the average person can understand. The standard for the acts requiring intent is the average reasonable person standard of tort law. By definition, all people are held to the knowledge of the average reasonable person whether or not they actually possess that level of knowledge. Judicial proceedings determine whether or not the defendant has met the standard in any particular instance, as with all tort cases involving an average reasonable person intent element.

Unlike the MacKinnon Ordinance, the proposed ordinance refers to no abstract notions like "subordination," "degradation," and "positions of sexual servility or submission."<sup>152</sup> The terms of the proposed ordinance are not vague: a reasonable person can understand their applicability, and the terms are adequately specific to prevent their selective or arbitrary application.

## VII. CONCLUSION

Violent pornography is a serious problem in our society. The aggressive behavior and acts of violence produced by violent pornography warrant government intervention. A narrowly tailored statute can and should be employed to regulate violent pornography and impede the harms it causes.

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151. Torture is defined as "the inflicting of severe pain to force information or confession, get revenge," WEBSTER'S NEW WORLD DICTIONARY 1412 (3d college ed. 1988), and coercion is defined as the act of "constraining or restraining by force," *id.* at 270.

152. Indianapolis Ordinance, *supra* note 117, at sec. 2, § 16-3(q).

