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NOTE

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INTRODUCTION

As awareness of pornography's¹ harm has grown, attempts have been made to hold producers and distributors of pornography liable for the specific harms caused by their products.² In one of the most famous examples, Catharine MacKinnon and Andrea Dworkin³ proposed a model anti-pornography Ordinance ("Ordinance")⁴ that was adopted by the Minneapolis⁵ and Indianapolis City Councils.⁶ The Ordinance created a civil cause of action

1. Pornography has been defined in many ways. Under current Supreme Court jurisprudence, pornography is differentiated from obscenity, which is unprotected by the First Amendment. Some pornography is unprotected, such as child pornography, while other pornography constitutes protected speech. This Note addresses the regulation of sexually violent pornography. It does not address the regulation of non-violent erotic literature, art or sexual aids.

2. Congress, for example, has proposed the Pornography Victims Compensation Act of 1992, S. 1521, 102d Cong., 2d Sess. (1992). Massachusetts, California, Missouri and Illinois have also considered comparable bills. Illinois, however, is the only state to enact such legislation. ILL. ANN. STAT. ch. 720, para. 5/12-18.1 (Smith-Hurd 1993). See also Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 849-51 (1993) (discussing the Pornography Victims Compensation Act).

3. Catharine A. MacKinnon is a Professor of Law at the University of Michigan Law School. Her books include ONLY WORDS (1993), TOWARD A FEMINIST THEORY OF THE STATE (1989) and FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987). Andrea Dworkin's books include WOMAN HATING (1984), RIGHT-WING WOMEN (1983) and PORNOGRAPHY: MEN POSSESSING WOMEN (1981).

4. See *infra* part III for a complete discussion of the Ordinance. The Ordinance is reprinted *infra* App. A.

5. MINNEAPOLIS, MINN., CODE OF ORDINANCES RELATING TO CIVIL RIGHTS, tit. 7, chs. 139, 141 (Jan. 5, 1984).

6. INDIANAPOLIS, IND., GEN. ORDINANCE No. 24 (May 1, 1984). This ordinance was

against producers and distributors of pornography. In order to recover, plaintiffs were required to prove that they were harmed by specific pornographic materials.⁷ However, in *American Booksellers Ass'n v. Hudnut*,⁸ the United States Court of Appeals for the Seventh Circuit held that the Ordinance was unconstitutional under the First Amendment.⁹ The Supreme Court affirmed this decision in a memorandum opinion.

The proposed Federal Pornography Victims Compensation Act of 1992 was another attempt to regulate pornography.¹⁰ This Act attempted to grant people who were injured by another's viewing of obscenity or child pornography a federal cause of action against the producers and distributors of the material.¹¹ Although Congress did not pass the bill, a comparable law was passed in Illinois.¹²

amended by GEN. ORDINANCE No. 35 (June 15, 1984).

7. Andrea Dworkin, *Against the Male Flood: Censorship, Pornography and Equality*, 8 HARV. WOMEN'S L.J. 1, 24 (1985). See Ordinance, *infra* App. A § 5(1).

8. 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

9. *Hudnut*, 771 F.2d at 332-34. For further discussions of the Ordinance as well as other attempts to regulate pornography, see generally Deana Pollard, *Regulating Violent Pornography*, 43 VAND. L. REV. 125, 154-59 (1990) (proposing an ordinance that would be constitutionally valid); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 602-08 (suggesting that pornography is low-value speech and as such the harms it causes justify its regulation); Wesson, *supra* note 2, at 851-52 (defining "new hard core" pornography that falls outside of First Amendment protection so that it could be regulated, and proposing civil actions).

10. S. 1521, 102d Cong., 2d Sess. (1992). The proposed Act was originally introduced in 1991 as Subtitle C to S. 472. The pertinent section of the amended bill reads:

(a) CAUSE OF ACTION—A victim of a sex offense or a guardian, immediate family member, or estate of such a victim may bring a civil action in a United States district court or a State court against a producer, distributor, exhibitor, renter, or seller of obscene material or child pornography that affects interstate or foreign commerce to recover damages suffered as a result of the sex offense.

Id. § 4(a).

11. *Id.*

12. ILL. ANN. STAT. ch. 720, para. 5/12-18.1 (Smith-Hurd 1993). This law provides in pertinent part:

Civil Liability. (a) If any person has been convicted of any offense defined in Section 12-13 [criminal sexual assault], 12-14 [aggravated criminal sexual assault], 12-15 [criminal sexual abuse], or 12-16 [aggravated criminal sexual abuse] of this Act, a victim of such offense has a cause of action for damages against any person or entity who, by the manufacture, production, or wholesale distribution of any obscene material which was possessed or viewed by the

The Illinois statute is the only law to offer women redress, outside the workplace, for the harms of pornography.

Redress is available, however, for the harms caused by pornography posted in the workplace under Title VII of the Civil Rights Act of 1964 ("Title VII").¹³ Under Title VII, posting pornography in the workplace has been held to contribute to a "hostile working environment" in violation of a plaintiff's civil rights.¹⁴ Even pornography that is protected by the First Amendment can be regulated in the workplace to the extent that it constitutes a means of discrimination by an employer.¹⁵

Currently, Title VII, the Illinois statute, and the tort of intentional infliction of emotional distress offer women limited relief for the harms of pornography.¹⁶ While Title VII successfully offers redress to women based on a hostile working environment, MacKinnon and Dworkin unsuccessfully tried to base redress on a "hostile living environment." They failed because their Ordinance inadequately protected First Amendment rights by prescribing a specific way of thinking of women. The challenge in broadening the protection of women from the harms of sexually violent pornography, therefore, is to tailor a remedy that will both provide relief to women for their "hostile living environment" and simultaneously guarantee First Amendment rights. This Note proposes tort remedies for victims of sexually violent pornography that permit the victims to sue producers and distributors of the material. Al-

person convicted of the offense, proximately caused such person, through his or her reading or viewing of the obscene material, to commit the violation of Section 12-13, 12-14, 12-15, or 12-16. . . .

Id.

13. 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988). Title VII bars employment discrimination based on race, color, religion, sex and national origin. *Id.* § 2000e-2(a)(1). See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Ross v. Twenty-Four Collection, Inc.*, 681 F. Supp. 1547 (S.D. Fla. 1988), *aff'd*, 875 F.2d 873 (11th Cir. 1989); *Arnold v. City of Seminole*, 614 F. Supp. 853 (E.D. Okla. 1985).

14. *Robinson*, 760 F. Supp. 1486.

15. *Id.*

16. See 42 U.S.C. §§ 2000e-1 to 2000e-17 (1988); ILL. ANN. STAT. ch. 720, para. 5/12-18.1 (Smith-Hurd 1993); *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Baab v. AMR Servs. Corp.*, 811 F. Supp. 1246 (N.D. Ohio 1993); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993); *Young v. Stensrude*, 664 S.W.2d 263 (Mo. Ct. App. 1984).

though the sexually violent pornography may be protected by the First Amendment,¹⁷ application of the "secondary effects" theory would allow both the regulation of this speech and the application of tort remedies.

Part I of this Note discusses the specific harms caused by pornography, including those that occur in the workplace. Part II reviews cases brought under Title VII to rid the workplace of pornography, demonstrating an effective, though limited, remedy that women have utilized to fight pornography. Part III analyzes the MacKinnon-Dworkin Ordinance, including discussions of MacKinnon and Dworkin's theory behind the Ordinance, as well as the *Hudnut* case. This part also addresses the unconstitutionality of the Ordinance under the First Amendment. Part IV examines various ways to hold producers and distributors of sexually violent pornography liable for the resulting harms under traditional tort theories, such as intentional infliction of emotional distress, negligence and strict liability. This part also discusses a First Amendment theory on which to base these proposed tort remedies. This Note concludes that permitting tort actions will protect sexually violent pornography to the extent required under the First Amendment but will nevertheless force producers and distributors of sexually violent pornography to compensate victims for the harms perpetrated against them.

I. RECOGNIZING THE HARMS OF PORNOGRAPHY

Pornography harms women from all walks of life.¹⁸ Women are coerced and brutalized into making pornography,¹⁹ women are forced to act out these violent scenes in their bedrooms,²⁰ women in the workplace are subjected to it,²¹ and women are the victims

17. If the material is obscene there would be no First Amendment objections to suing under the proposed tort remedies. See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining obscenity).

18. Pornography also harms men and children. This Note will focus on the harms to women because the primary victims of sexually violent pornography are women.

19. See *infra* part I.A.

20. See *infra* notes 37-39, 50-52, 56-59 and accompanying text.

21. See *infra* notes 53-55, 61-69 and accompanying text.

of the increased sexual violence it causes.²² The harms of sexually violent pornography are slowly being recognized by the judicial system,²³ as well as federal and state legislatures.²⁴

A. Harms Suffered by Women Used to Produce Pornography

Numerous men and women testified before the 1986 Attorney General's Commission on Pornography (the "1986 Commission")²⁵ about the harms inflicted on the women who appear in pornographic movies and magazines.²⁶ For example, a man who claimed to have been involved in the making of over 100 pornographic films testified that female participants were forced to perform anal sex while crying out in pain.²⁷ Another woman who testified described how women were tortured and "suffered permanent physical injuries to answer publisher demands for photographs depicting sado-masochistic abuse."²⁸

Linda Marchiano,²⁹ a pornography star, described the torture she experienced, stating that she was "forced through physical, mental,

22. See *infra* part I.B.

23. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 329 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (stating that "[w]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, [and] battery and rape on the streets"); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991) (concluding that the presence of nude pictures in the workplace creates and contributes to a sexually hostile working environment); *Arnold v. City of Seminole*, 614 F. Supp. 853, 858, 867 (E.D. Okla. 1985) (concluding that the plaintiff's physical and mental problems were a direct result of the sexual harassment she experienced at work, which included the posting of pictures of nude women).

24. See *supra* note 2.

25. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, U.S. DEPT. OF JUSTICE, FINAL REPORT (1986) [hereinafter FINAL REPORT]. There have been two official reports on pornography in the United States, one in 1986, the FINAL REPORT, and one in 1970, PRESIDENT'S COMMISSION ON OBSCENITY & PORNOGRAPHY (1970) [hereinafter PRESIDENT'S REPORT]. The 1986 Commission held hearings in various cities and also considered testimony from the hearings in Minneapolis regarding the MacKinnon-Dworkin Anti-pornography Ordinance.

26. FINAL REPORT, *supra* note 25, at 767.

27. *Id.* at 773-74 (citing Los Angeles Hearing, Vol. I 81).

28. *Id.* at 787-88.

29. Marchiano is known to pornography viewers as Linda Lovelace, the character she portrayed in the pornographic movie *Deep Throat*.

and sexual abuse . . . often at gun point" to perform during the filming of *Deep Throat*.³⁰ For example, she was "beaten . . . kicked . . . and bounced off of walls" while others watched without offering help.³¹ Another woman, who was forced into prostitution and the production of pornography, testified that the pornographers would ignore her tears as they positioned her body to mimic the women in pornographic pictures.³² Still another woman testified that on the night her stepfather filmed her for a pornographic movie, he tortured her both physically and sexually because she "did not perform adequately enough to be convincing."³³ The 1986 Commission concluded that pornography harms the women who are coerced into making it.³⁴ However, the negative effects of pornography are not limited solely to the women participating in the production of pornography, but are felt by women throughout society.³⁵

B. *The Effects of Pornography on Other Women*

One of the most harmful effects of pornography is "a general increase in sexual violence directed against women."³⁶ A women's shelter wrote to the 1986 Commission about a woman who was forced to act out scenes from her husband's pornographic magazines.³⁷ She was stripped, bound, gagged and then raped by a german shepherd.³⁸ Another woman reported that she had been raped

30. FINAL REPORT, *supra* note 25, at 794-95 (citing Public Hearings before Minneapolis City Council, 2d Sess. 45-47 (Dec. 1983)).

31. *Id.* at 787 (citing Public Hearings before Minneapolis City Council, 1st Sess. 47, 49 (Dec. 1983)).

32. *Id.* at 784-85 (citing Washington, D.C., Hearing, Vol. I 179-82).

33. *Id.* at 787 (citing Washington, D.C., Hearing, Vol. II 262).

34. *Id.* at 1005. Coercion itself is a problem, and people who force women into performing sexual acts are also subject, when applicable, to assault, battery and rape laws.

35. See Angela A. Liston, *Pornography and the First Amendment: The Feminist Balance*, 27 ARIZ. L. REV. 415, 421-24 (1985).

36. Sunstein, *supra* note 9, at 597; see also Liston, *supra* note 35, at 422 (discussing the negative effects of exposure to pornography).

37. FINAL REPORT, *supra* note 25, at 790-91 (citing Letter from Donna Dunn's Women's Shelter, Rochester, to the 1986 Commission).

38. *Id.*

repeatedly by a man who told her that if she did not recreate the depictions in his pornographic magazines he would "beat and kill her."³⁹

In the United States, the mass circulation of pornography is closely correlated with incidences of reported rapes.⁴⁰ In a series of studies, Edward Donnerstein, a professor of Communications at the University of California at Santa Barbara, found that violent pornography can increase aggression against women.⁴¹ In another 1981 study, Neil M. Malamuth, a professor of Communications at the University of California at Los Angeles, and James V.P. Check, a professor of Psychology at York University in Canada, concluded that media portrayals of women had detrimental effects on men's attitudes about violence against women.⁴² The study revealed that men who were exposed to rape scenes in which the woman was portrayed as enjoying herself were more accepting of sexual aggression and wife battering.⁴³ In a 1988 study, Edward Donnerstein, writing this time with Daniel Linz, a professor of Communications at the University of California at Santa Barbara, and Steven Penrod, a professor of Psychology and Law at the University of Minnesota, found that men who viewed sexually violent films and then viewed a rape trial were much less sympathetic to the rape victim and had lower levels of rape empathy.⁴⁴

Testimony before the 1986 Commission and the 1986 Commis-

39. *Id.* at 774 (citing Minneapolis City Council, 2d Sess. 14 (Dec. 1983)).

40. See Baron & Straus, *Sexual Stratification, Pornography and Rape in the United States*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 53, 78-79 (Neil M. Malamuth & Edward Donnerstein eds., 1984).

41. Edward Donnerstein, *Its Effect on Violence Against Women*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* (Neil M. Malamuth & Edward Donnerstein eds., 1984); see Pollard, *supra* note 9, at 130. *But see* Pollard, *supra* note 9, at 127 (noting disputes about the exact findings of the research); Wesson, *supra* note 2, at 866-67 (noting that Daniel Linz and Edward Donnerstein clarified their views, stating that it is the violence of the materials rather than the sexual explicitness that makes it dangerous).

42. James V.P. Check & Neil M. Malamuth, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 *J. RES. PERSONALITY* 436 (1981).

43. *Id.*

44. Edward Donnerstein et al., *Long Term Exposure to Violent and Sexually Degrading Depictions of Women*, 55(5) *J. PERSONALITY & SOC. PSYCHOL.* 758 (1988).

sion's conclusions offer further insight into the influence of pornography on its viewers. One man, who had kidnapped, sexually abused and murdered five boys, wrote that "[p]ornography wasn't the only negative influence in [his] life but its effect . . . was devastating."⁴⁵ He "lost all sense of decency and respect for humanity and life."⁴⁶ Six adolescent boys, who used a pornographic magazine's pictorial outlay which depicted a rape scene, gang-raped a young girl in the woods near their housing development.⁴⁷

The 1986 Commission stated:

In evaluating the results for sexually violent material, it appears that exposure to such materials (1) leads to a greater acceptance of rape myths and violence against women; (2) have [sic] more pronounced effects when the victim is shown enjoying the use of force or violence; (3) is arousing for rapists and for some males in the general population; and (4) has resulted in sexual aggression against women in the laboratory.⁴⁸

They concluded that "[i]t is clear that the conclusion of 'no negative effects' advanced by the 1970 Commission is no longer tenable."⁴⁹

The testimony of many women before the 1986 Commission revealed how they were forced to recreate scenes from pornographic magazines and movies. One woman testified that from the age of three, her father kept an easel by his bed on which he would pin pornographic scenes from magazines.⁵⁰ He would tell her that this was what she was going to learn that day.⁵¹ Another woman testi-

45. FINAL REPORT, *supra* note 25, at 794 (citing Anonymous Letter to the 1986 Commission).

46. *Id.*

47. *Id.* at 777 (citing Pornography speech presented to the National Women Judges Conference, Oct. 12, 1986, submitted to the 1986 Commission).

48. *Id.* at 1005. See generally, Pollard, *supra* note 9, at 133-35. The "rape myth" referred to in the text describes the myth that women who are raped either enjoy it or ask for it. Eric Hoffman, *Feminism, Pornography and Law*, 133 U. PA. L. REV. 497, 512 (1985).

49. FINAL REPORT, *supra* note 25, at 1031.

50. *Id.* at 782 (citing Chicago Hearing, Vol. II 95).

51. *Id.*

fied that her husband had forced her to perform violent sexual acts while he leafed through his pornographic pictures.⁵² The Pornographic Resource Center was called by a woman in May of 1984 to report that her employer had called her into his office, forced her to the floor, ripped her dress and forced a gun into her vagina.⁵³ A pornographic picture on the employer's lunchroom wall showed a woman sucking a gun.⁵⁴ Finally, a woman testified that a man told her "he'd seen far out stuff in movies, and that it would be fun to mentally and physically torture a woman."⁵⁵

Prostitutes testifying before the 1986 Commission described how customers had coerced them into acting out pornographic scenes or depictions.⁵⁶ A former prostitute testified that a customer had "held up a porn magazine with a picture of a beaten woman and said, 'I want you to look like that. I want you to hurt.'"⁵⁷ He then beat her and burned her with a cigarette.⁵⁸ Another former prostitute testified that she and her friends learned how to perform by "men exposing us to pornography and us [sic] trying to mimic what we saw."⁵⁹

Pornography harms women further by conditioning men to view women as sexual objects.⁶⁰ For example, displaying pornography in the workplace increases the sexual harassment of women and

52. *Id.* at 779 (citing Washington, D.C., Hearing, Vol. I 125).

53. *Id.* at 827 (citing Testimony to Women Against Pornography, Feb. 1985).

54. *Id.*

55. *Id.* at 776 (citing Minneapolis City Council, 1st Sess. 65, 67 (Dec. 1983)).

56. *Id.* at 789, 798 (citing Public Hearings before Minneapolis City Council, 2nd Sess. 70, 77, 79 (Dec. 1983)); *id.* at 793 (citing Washington D.C., Hearing, Vol. II 312A-1).

57. *Id.* at 789 (citing Public Hearings before Minneapolis City Council, 2d Sess. 77 (Dec. 1983)).

58. *Id.*

59. *Id.* at 798 (citing Public Hearings before Minneapolis City Council, 2d Sess. 70); see also Marianne Wesson, *Sex, Lies and Videotape: The Pornographer as Censor*, 66 WASH. L. REV. 913, 918 (1991) (discussing women coerced to emulate pornographic poses).

60. See ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); Hoffman, *supra* note 48; Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984); Catharine A. MacKinnon, *Pornography, Civil Rights and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Sunstein, *supra* note 9; Morrison Torrey, *We Get the Message—Pornography in the Workplace*, 22 SW. U. L. REV. 53 (1992).

inevitably reinforces their subordinate status in general.⁶¹ Women working in the presence of pornography are subjected to the enduring stereotype of women as sexual objects. Women exposed to pornography in the workplace realize that their superiors view them as mere body parts, which in turn perpetuates their feelings of self-doubt.⁶² Dr. Susan Fiske, an expert witness in *Robinson v. Jacksonville Shipyards, Inc.*,⁶³ stated that "when a superior categorizes a female employee based on her sex, that superior evaluates her in terms of characteristics that comport with stereotypes assigned to women rather than in terms of her job skills and performance."⁶⁴

Women who are sexually harassed at work suffer from a myriad of emotional, psychological, social and economic harms.⁶⁵ They often receive poor evaluations, undeserved reprimands and increased workloads.⁶⁶ Many witnesses at the hearings before the 1986 Commission stated that they had experienced financial difficulties due to the cost of the medical and mental assistance required for the injuries they suffered as a result of viewing pornography in the workplace.⁶⁷

Women who report harassment to their superiors may meet

61. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991) (referring to the expert testimony of Dr. Susan Fiske, professor of Psychology at the University of Massachusetts in Amherst and an expert in the field of stereotyping).

62. *Id.* (referring to the testimony of Dr. Susan Fiske).

63. 760 F. Supp. 1486. *Robinson*, a female employee, sued her employer, Jacksonville Shipyards, Inc., for sex discrimination under Title VII of the 1964 Civil Rights Act. *Id.* Her complaint focused on the posting of pornography in the workplace. *Id.* The United States District Court for the Middle District of Florida held that this constituted a hostile working environment under Title VII and *Robinson* won her case. *Id.* The case is important because it was the first time a court had so held. See *infra* notes 82-89 and accompanying text for a further discussion of the case.

64. *Robinson*, 760 F. Supp. at 1502.

65. See Susan M. Mathews, *Title VII and Sexual Harassment: Beyond Damages Control*, 3 *YALE J.L. & FEMINISM* 299, 307-08 (1991); see also *Robinson*, 760 F. Supp. at 1525.

66. Sharon W. Walsh, *Confronting Sexual Harassment at Work*, *WASH. POST*, July 21, 1986 (Business), at 1, 16; see generally Mathews, *supra* note 65, at 308.

67. FINAL REPORT, *supra* note 25, at 827-28 (citing Houston Hearing, Vol. II, Anonymous, 178Q1-4).

with additional harassment or a lack of sensitivity to the issue.⁶⁸ One woman testified to the 1986 Commission that her superior encouraged her to calm down and just ignore the harassment.⁶⁹ This is evidence of the lack of seriousness and sensitivity toward sexual harassment in the workplace. It also demonstrates that women who suffer the harms of pornography lack adequate means to redress these harms.

The foregoing cases, research studies and testimony before the 1986 Commission indicate that there is a causal connection between sexually violent pornography and the resulting harms to women. Women are forced into making pornography.⁷⁰ They are victimized by it at work, making their workplace a sexually hostile working environment,⁷¹ and they are brutalized by men who force them to mimic it.⁷² Studies have shown that exposure to pornography can cause detrimental effects.⁷³ Although not everyone exposed to pornography is adversely affected, the foregoing accounts illustrate that pornography can be devastating and that many women are in need of protection.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Women have successfully sued under Title VII, based on the creation of a hostile working environment, to rid the workplace of pornography.⁷⁴ This approach, however, has a limited reach be-

68. See, e.g., *Robinson*, 760 F. Supp. at 1510-12.

69. FINAL REPORT, *supra* note 25, at 835 (citing Public Hearings before Minneapolis City Council, Vol. II 88 (Dec. 1983)).

70. See *supra* part I.A.

71. See *supra* notes 53-55, 61-69 and accompanying text.

72. See *supra* notes 37-39, 50-52, 56-59 and accompanying text.

73. See *supra* notes 40-44 and accompanying text.

74. See *supra* note 13 and accompanying text for a definition of Title VII. The relevant part of Title VII reads: "It shall be unlawful employment practice for an employer—(1) to . . . discharge any individual . . . because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1) (1988). Pornography is prohibited in the workplace in order to prevent a sexually hostile working environment, a harm the government has the power to prevent. Title VII is readily accepted under the First Amendment because most people assume the work environment can be regulated. In *R.A.V. v. City of St. Paul*, the Supreme Court indicated its acceptance of Title VII as valid under the First Amendment,

cause it is applicable only to the work environment and does not extend liability to producers and distributors of pornography.

The United States Supreme Court, in *Meritor Savings Bank v. Vinson*,⁷⁵ held that creating a "hostile work environment" is a form of harassment that violates Title VII.⁷⁶ In *Meritor*, Vinson, a female bank employee, brought a sexual harassment suit against the Meritor Savings Bank under Title VII.⁷⁷ She alleged that her superior made unwelcome sexual advances but that she eventually agreed to have sexual relations with him out of fear of losing her job.⁷⁸ In its decision, the Court focused on whether the advances were unwelcome and not whether Vinson voluntarily entered into sexual relations with her superior.⁷⁹ The Court found that repeated unwelcome sexual advances created a hostile working environment which was sufficient for a violation of Title VII.⁸⁰ According to the Court, there are five elements required for a cause of action against an employer: (1) the plaintiff must belong to a protected category; (2) the plaintiff must be subject to unwelcome sexual harassment; (3) the harassment must be based upon sex; (4) the harassment must affect a term, privilege or condition of employment; and (5) the employer must be liable under the theory of *respondeat superior*.⁸¹

In *Robinson v. Jacksonville Shipyards, Inc.*,⁸² the United States District Court for the Middle District of Florida held that Robinson had satisfied all of the necessary elements for a claim of sexual discrimination based upon the existence of a hostile work environment under Title VII.⁸³ The shipyard where Robinson worked was

insisting that the holding in *R.A.V.* does not encompass Title VII. 112 S. Ct. 2538, 2546-47 (1992).

75. 477 U.S. 57 (1986).

76. *Id.* at 66-70.

77. *Id.* at 60.

78. *Id.*

79. *Id.* at 68.

80. *Id.* at 66-70.

81. *Id.* at 66-69.

82. 760 F. Supp. 1486 (M.D. Fla. 1991).

83. *Id.* at 1539. Prior to *Robinson*, the United States Court of Appeals for the Sixth Circuit, in *Rabidue v. Osceola Refining Co.*, held that a co-employee's display of obsceni-

extensively decorated with pictures of nude and partially nude women in the form of magazines, plaques and calendars circulated as advertising by tool supply companies.⁸⁴ Management condoned the posting of the pornography and often displayed the materials openly in its offices.⁸⁵ Robinson was subjected to depictions of women that ranged from a dart board with a nipple as the bull's eye to a drawing of a woman with fluid coming from her genital area.⁸⁶ In addition to having to view these displays, Robinson also suffered severe verbal sexual harassment.⁸⁷ The district court concluded that the presence of nude and partially nude pictures of women sexualized the work environment to the detriment of all female employees.⁸⁸ Robinson, therefore, prevailed on her claim of hostile work environment harassment based on the posting of pornography.⁸⁹

In *Arnold v. City of Seminole*, Arnold, a female police officer, brought a Title VII action against the city alleging sexual harassment.⁹⁰ Arnold claimed that her superior had stated repeatedly that he did not believe in female police officers, and that fellow officers posted pornographic pictures with her name on them.⁹¹ These pornographic pictures included nude pictures of women with their

ty, coupled with sexually oriented posters, *did not* result in a hostile working environment. 805 F.2d 611, 622, 627 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987). The court stated that the "sexually oriented poster displays had a *de minimis* effect on the plaintiff's work environment when considered in the context of a society that *condones* and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands. . . ." *Id.* at 622. Judge Keith dissented from the majority on this point, stating that "[s]ociety' in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture." *Id.* at 627 (Keith, J., dissenting).

84. *Robinson*, 760 F. Supp. at 1493.

85. *Id.* at 1494.

86. *Id.* at 1497.

87. *Id.* at 1498.

88. *Id.* at 1505. At least one commentator has argued for the expansion of this result beyond the workplace. Wesson, *supra* note 59, at 927.

89. *Robinson*, 760 F. Supp. at 1505. See generally Wesson, *supra* note 59, at 927 (suggesting that if pornography can be banned from the workplace in the interest of equality it should be excludable from other public places for the same reason).

90. 614 F. Supp. 853 (E.D. Okla. 1985).

91. *Id.* at 858.

genitals exposed, a man and a woman engaging in a sexual act, and a depiction of a man having sex with a goat which had the plaintiff's name written across it.⁹² The District Court for the Eastern District of Oklahoma held that Arnold made out a prima facie case of sexual harassment under Title VII.⁹³

Pornography in the workplace arguably causes more harm than pornography sold on the street because pornography displayed at work affects the way women are treated by their colleagues and superiors. Unlike a newsstand selling pornographic material where women can cross the street if they are offended, women at work cannot escape the pornography. Furthermore, many women at work are a captive and unwilling audience, and often the pornography is directed specifically at the female employees. Many women who are subjected to pornography in the workplace cannot afford to quit their jobs to search for a better work atmosphere. Because they depend on their jobs for income to support themselves and their families, often they must endure all types of hostile working environments.

Robinson and *Arnold* further demonstrate that it is often difficult for women to perform their responsibilities while being exposed to these degrading pictures. Also, these displays of pornography often influence their superiors' perceptions of women.⁹⁴ It is not difficult to perceive that women may be evaluated differently than their male counterparts if their superiors are constantly exposed to pictures of naked women during the work day.⁹⁵ These displays not only undermine women's credibility and self-esteem, but they also send the message that they are not wanted in the workplace.⁹⁶

92. *Id.*

93. *Id.* at 869.

94. See *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1502-05 (M.D. Fla. 1991); see also *Torrey*, *supra* note 60, at 84.

95. *Torrey*, *supra* note 60, at 83-84.

96. *Id.* at 84.

III. AN HISTORICAL OVERVIEW OF THE MACKINNON-DWORKIN ANTI-PORNOGRAPHY ORDINANCE

A. *The Theory Behind The MacKinnon-Dworkin Anti-pornography Ordinance*

Catharine MacKinnon and Andrea Dworkin attempted to address the harms caused by pornography by drafting a model anti-pornography Ordinance that provided women with a broad cause of action against producers and distributors of pornography.⁹⁷ Pornography, according to MacKinnon and Dworkin, perpetuates women's subordinate status in society.⁹⁸ They therefore proposed the model Ordinance as a civil rights measure⁹⁹ to address the existing inequalities between men and women.¹⁰⁰ MacKinnon and Dworkin argue that women cannot respond to pornography in the marketplace of ideas because pornography silences women, and therefore, the only way for women to have equal treatment in the debate and in society at large is by regulating pornography.¹⁰¹ Dworkin describes pornography as an "identifiable system of sexual exploitation that hurts women as a class by creating inequality and abuse,"¹⁰² and she believes that "[e]quality for women requires material remedies for pornography, whether pornography is central to the inequality of women or only one cause of it."¹⁰³ MacKinnon

97. For the complete text of the model Ordinance, see *infra* App. A. The MacKinnon-Dworkin Ordinance was first proposed as an amendment to the Minneapolis Code of Ordinances Relating to Civil Rights. Dworkin, *supra* note 7, at 13 (ed. note). The Minneapolis City Council passed the amendment on December 30, 1983, but the Mayor of Minneapolis, Donald Fraser, vetoed it. *Id.* The Ordinance was then amended, but Mayor Fraser vetoed the amended Ordinance as well. *Id.* However, the Indianapolis City Council passed a similar Ordinance on April 23, 1984, and Mayor William Hudnut signed it into law. *Id.*

98. Dworkin, *supra* note 7, at 22.

99. *Id.*

100. MacKinnon, *Not A Moral Issue*, *supra* note 60, at 326; see generally DWORKIN, *supra* note 60; MACKINNON, ONLY WORDS, *supra* note 3; MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 60, at 21; Pollard, *supra* note 9, at 125-26.

101. Dworkin, *supra* note 7, at 17-19. See also MacKinnon, *Not a Moral Issue*, *supra* note 60, at 337-40; Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 809 (1991). For a general discussion of the arguments on both sides of MacKinnon and Dworkin's point of view, see Wesson, *supra* note 2.

102. Dworkin, *supra* note 7, at 9.

103. *Id.* at 22.

describes pornography as a “central mechanism of sexual subordination.”¹⁰⁴ In her essay, *Against the Male Flood*, Dworkin stated that “[t]he civil rights law would allow women to advance equality by removing this concrete discrimination and hurting economically those who make, sell, distribute or exhibit [pornography].”¹⁰⁵

The goal of the Ordinance was to focus on the harms of pornography from a woman’s point of view.¹⁰⁶ According to MacKinnon and Dworkin, an ordinance based on obscenity¹⁰⁷ is misdirected because obscenity is concerned with prurient interests rather than the harms pornography causes women.¹⁰⁸ To emphasize their ideas, the Ordinance’s statement of policy begins: “Pornography is sex discrimination.”¹⁰⁹ The Ordinance defines pornography in part as the “graphic sexually explicit subordination of women, whether in pictures and/or in words”¹¹⁰

Not all feminists, however, support “anti-pornography” remedies.¹¹¹ For example, Nadine Strossen, a Professor of Law at New York Law School and a founding member of Feminists for Free Expression, outlines a feminist argument opposing a ban on pornography¹¹² and proposes that women’s rights are disserved by censoring pornography.¹¹³ She argues that restrictions on pornogra-

104. MacKinnon, *Not A Moral Issue*, *supra* note 60, at 331.

105. Dworkin, *supra* note 7, at 23.

106. *Id.* at 22.

107. See *Miller v. California*, 413 U.S. 15, 24 (1973) (stating that for a publication to be obscene it must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and must on the whole have no serious literary, artistic, political, or scientific value). See *infra* part III.B. for a further discussion of obscenity.

108. Dworkin, *supra* note 7, at 9. Furthermore, Dworkin has stated that pornography “is physical injury and physical humiliation and physical pain: to the women against whom it is used after it is made; to the women used to make it.” *Id.* at 11.

109. *Id.* at 24.

110. *Id.* For the complete definition of pornography, as defined in the Ordinance, see *infra* App. A § 2.

111. See generally Liston, *supra* note 35, at 416; Pollard, *supra* note 9, at 137-38; Wesson, *supra* note 2, at 847-48.

112. Nadine Strossen, *A Feminist Critique of “The” Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993).

113. See *id.* at 1140-72 (outlining ten ways in which censorship of pornography “would adversely affect women’s rights and interests”).

phy, such as the anti-pornography Ordinance, would ban many works that are "valuable to feminists,"¹¹⁴ such as respected works of art and literature, as well as "overtly feminist scholarly material designed to address the same concerns prompting the [Ordinance]."¹¹⁵ Such restrictions would also perpetuate "demeaning stereotypes about women,"¹¹⁶ such as "sex is degrading to women, but not to men"¹¹⁷ and that "women are victims, not sexual actors."¹¹⁸ Strossen further points out that the Ordinance would "distract from constructive approaches to countering anti-female discrimination and violence,"¹¹⁹ such as the Family and Medical Leave Act, government funded day care, and legislation to lift the gag rule on discussions concerning abortion.¹²⁰ Strossen's objections to the model Ordinance pale, however, under an approach centered on the use of tort remedies: sexually violent pornography would not be banned but compensation would be provided by the producers and distributors of the sexually violent pornography for the harm it produces.

B. *American Booksellers Ass'n v. Hudnut*

Indianapolis adopted a law similar to MacKinnon and Dworkin's model anti-pornography Ordinance. It was this law that was successfully challenged on First Amendment grounds by the American Booksellers Association and civil liberties groups in *American Booksellers Ass'n v. Hudnut*.¹²¹

The United States Court of Appeals for the Seventh Circuit held

114. *Id.* at 1141-42 (discussing the Amici Curiae Briefs of the American Civil Liberties Union, the Indiana Civil Liberties Union, and the American Civil Liberties Union of Illinois [hereinafter the ACLU Amici Curiae brief], and *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986)). See also Wesson, *supra* note 59, at 914.

115. Strossen, *supra* note 112, at 1141 (quoting the ACLU Amici Curiae Brief at 8a).

116. *Id.* at 1147.

117. *Id.* (quoting Lisa Duggan et al., *False Promises: Feminist Antipornography Legislation in the U.S.*, in *WOMEN AGAINST CENSORSHIP* 142-43 (Varda Burstyn ed., 1985)). See also Wesson, *supra* note 59, at 921.

118. Strossen, *supra* note 112, at 1147.

119. *Id.* at 1153.

120. See *id.* at 1141-61.

121. 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

that the definition of pornography in the Ordinance was unconstitutional because it permitted only one acceptable view of women, thereby prohibiting speech that is protected by the First Amendment.¹²² The fatal infirmity of the Ordinance under the First Amendment was its definition of pornography.¹²³ The definition expressed the only "approved" view of women, making the statute viewpoint-based¹²⁴ and therefore an improper proscription of protected speech.¹²⁵ The court also stated that the definition of pornography in the Ordinance did not fall within the definition of obscenity as set forth in *Miller v. California*.¹²⁶ The Seventh Circuit declined to discuss other problems with the Ordinance that were addressed by the district court, such as the prior restraint on speech and the overbreadth of the definition of pornography.¹²⁷

The court of appeals might have found the Ordinance constitutional if the definition of pornography proscribed only unprotected speech, namely obscenity, as set out in *Miller*.¹²⁸ MacKinnon and Dworkin, however, did not base their Ordinance on the definition of obscenity because this would restrict pornographic speech on the basis of a moral wrong instead of restricting it on the basis of the harm it does to women.¹²⁹ To MacKinnon and Dworkin, obscenity law presents pornography as a moral issue, whereas they view pornography as an issue of harm and equality.¹³⁰

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

123. *Id.* at 332.

124. *Id.* at 328.

125. *Id.* at 332.

126. *Id.* at 324-25. See *supra* note 107 (defining obscenity under *Miller*).

127. *Id.* at 332.

128. *Id.* at 324-25. See also Liston, *supra* note 35; Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REF. 255 (1987-1988); Martin Karo & Marcia McBrian, Note, *The Lessons of Miller and Hudnut: On Proposing a Pornography Ordinance That Passes Constitutional Muster*, 23 U. MICH. J.L. REF. 179 (1989).

129. Dworkin, *supra* note 7, at 9. There are also conservatives who side with feminists such as MacKinnon and Dworkin. For a complete discussion of the feminist, liberal and conservative views regarding the suppression of pornography, see Hoffman, *supra* note 48, at 510-18; Wesson, *supra* note 2, at 921-24. See also Liston, *supra* note 35, at 416-17.

130. Dworkin, *supra* note 7, at 9. See *supra* notes 106-110 and accompanying text.

Despite the particular problems of the MacKinnon-Dworkin Ordinance,¹³¹ the underlying tort action approach of the Ordinance has merit. In *Hudnut*, the Seventh Circuit stated that the section of the Ordinance creating remedies for harms attributable to pornography was salvageable and that "[t]he First Amendment does not prohibit redress of all injuries caused by speech."¹³²

C. *Butler v. Her Majesty the Queen*

The Supreme Court of Canada, in *Butler v. Her Majesty the Queen*, recently upheld an anti-pornography law similar to the MacKinnon-Dworkin Ordinance rejected in *Hudnut*.¹³³ In *Butler*, the owner of a hard-core pornography video and magazine store was prosecuted under laws prohibiting the manufacture, sale or distribution of obscene materials.¹³⁴ Section 163(8) of Canada's Criminal Code defines "obscene" as "any publication[,] a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence."¹³⁵ Mr. Butler's defense was that the materials were protected by the freedom of expression provision in the Canadian Charter of Rights and Freedoms.¹³⁶

The Supreme Court of Canada held that while the definition of obscenity did limit the freedom of expression provision in the Canadian Charter of Rights and Freedoms, this limitation was justifiable because of the *harms women were subjected to by pornography*.¹³⁷ The court's rationale for restricting the freedom of expres-

131. See *supra* notes 122-127 and accompanying text.

132. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 333 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

133. *Butler v. Her Majesty the Queen*, 89 D.R.L.4th 449 (Can. 1992).

134. *Id.* at 454.

135. Criminal Code, R.S.C., ch. C-34, § 163(8) (1985) (Can.).

136. *Butler*, 89 D.R.L.4th at 453.

137. *Id.* at 480 (emphasis added). See also Tamar Lewin, *Canada Court Says Pornography Harms Women*, N.Y. TIMES, Feb. 28, 1992, at B7. See generally Marie-France Major, *Obscene Comparisons: Canadian and American Attitudes Toward Pornography Regulation*, 19 J. CONTEMP. L. 51 (1993). But see Jodi A. Kleinick, Comment, *Suppressing Violent and Degrading Pornography to "Prevent Harm" in Canada: Butler v. Her Majesty the Queen*, 19 BROOK. J. INT'L L. 627 (1993).

sion appeared to be the “growing concern that the sexual exploitation of women and children, depicted in publications and films can, in certain circumstances, lead to ‘abject and servile victimization.’”¹³⁸

In *Butler* the Canadian court, like the *Hudnut* court, acknowledged the fundamental harm caused to women and society by these materials. Catharine MacKinnon, in response to the Canadian court decision stated, “[t]his makes Canada the first place in the world that says what is obscene is what harms women, not what offends our values.”¹³⁹

IV. TORT THEORIES TO BE USED IN HOLDING PRODUCERS AND DISTRIBUTORS LIABLE FOR THE HARMS OF SEXUALLY VIOLENT PORNOGRAPHY

The growing recognition that pornography harms women has paved the way for using tort actions against producers and distributors of sexually violent pornography. At least one circuit judge¹⁴⁰ has suggested a method of redressing those harms by stating that “state regulation [of pornography] by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not broader than necessary to accomplish its purpose.”¹⁴¹ The intentional infliction of emotional distress has already provided women with a remedy for their injuries.¹⁴² Other tort bases for liability, such as strict liability and negligence, should be made available to victims of sexually violent pornography.¹⁴³

Traditional tort objectives would be served by employing the

138. *Butler*, 89 D.L.R.4th at 479 (quoting *Regina v. Red Hot Video Ltd.*, 18 C.C.C.3d 1, 8 (1985)).

139. Lewin, *supra* note 137, at B7.

140. The Hon. Edith H. Jones, United States Court of Appeals, Fifth Circuit.

141. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., concurring and dissenting).

142. *See infra* part IV.B. These actions, however, do not provide a cause of action against producers and distributors of the materials.

143. Other authors have addressed this point. *See generally* Patricia G. Barnes, *A Pragmatic Compromise in the Pornography Debate*, 1 TEMP. POL. & CIV. RTS. L. REV. 117 (1992); Wesson, *supra* note 2; Elise M. Whitaker, Note, *Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849 (1993).

proposed tort theories. One recognized aim of tort law is to make victims whole by providing compensation for losses which they suffer.¹⁴⁴ Another goal of tort law is to allocate these losses to those who are best equipped to prevent the harm.¹⁴⁵ Judge Edith Jones of the United States Court of Appeals for the Fifth Circuit has stated that "allowing damage recovery for tort victims imposes on its purveyors a responsibility which is insurable, much like a manufacturer's responsibility to warn against careless use of its different products."¹⁴⁶ Instead of prohibiting speech, tort remedies in these cases would only increase the cost of the creation and distribution of such pornography which could be distributed through the market place by higher prices. The increase in price would cover the costs of either insurance or judgments against the purveyors.¹⁴⁷

Third-party liability schemes, which are analogous to tort remedies, have been proposed by Congress and a few state legislatures to provide redress for women who are harmed by pornography.¹⁴⁸ Only one of these bills, however, has been enacted into law.¹⁴⁹ A

144. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971).

145. *Id.*

146. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., concurring and dissenting). Judge Jones appears to be alluding to a market theory of apportioning the costs of liability to the appropriate parties.

147. *See Wesson supra* note 2, at 859-60. Both general liability insurance and product liability insurance exists. If an insurance company could not cover this type of liability, however, the producers and distributors could self-insure by raising the cost of their products to ensure that they have the money to defend themselves from such suits. *See generally* Stanley Ingber, *Rethinking Intangible Injuries: A Focus of Remedy*, 73 CAL. L. REV. 772, 790-93, 825 (1985); Pollard, *supra* note 9, at 133; Wesson, *supra* note 2, at 859-60.

148. *See supra* note 2. *See generally* Jane M. Whicher, *Constitutional and Policy Implications of "Pornography Victim" Compensation Schemes: A Look at the Potential Impact of Statutorily-Created Third Party Liability Schemes*, 40 FED. B. NEWS & J. (Federal Bar Ass'n) 360 (1993). This same type of theory has also been proposed by Professor Jonathan B. Mintz. Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 CATH. U. L. REV. 617 (1992). However, Professor Mintz limits his discussion of strict liability for commercial intellect to "products whose injury-producing characteristics are based upon words or ideas, rather than tangible attributes," such as the pictures which are the focus of this Note. *Id.* at 620.

149. ILL. ANN. STAT. ch. 720, para. 5/12-18.1 (Smith-Hurd 1993).

tort remedy, however, hinges on proving causation and on proving sufficient regard for First Amendment considerations.¹⁵⁰ Additionally, the plaintiff must show a sufficiently direct connection between the pornographic image and the act that harmed the plaintiff. In the case of pornographic pictures or movies, the more similar the act committed is to the depiction from which it was allegedly taken,¹⁵¹ the easier it will be to prove causation. It would be even more helpful for the perpetrator to testify that he received the idea from the pornography and copied it. Without direct similarity or the perpetrator's testimony, these tort theories are difficult to use.¹⁵²

A. *First Amendment Analysis of the Proposed Tort Theories*

The most common objection to holding producers and distributors of sexually violent pornography liable under the proposed tort remedies is that such liability prohibits speech presumably protected by the First Amendment. The courts have consistently denied recovery, in media speech tort cases, to plaintiffs who have not met the standard for incitement set out in *Brandenburg v. Ohio*.¹⁵³ However, the *Brandenburg* test should not apply to the proposed tort cases involving sexually violent pornography. Judge Jones' opinion, in *Herceg*, presents a way of categorizing speech along a spectrum that has private concern and public concern as its endpoints.¹⁵⁴ She advocates that speech could then be regulated based

150. See Wesson, *supra* note 2, at 863-65.

151. W. PAGE KEETON ET. AL., PROSSER & KEETON ON THE LAW OF TORTS 263 (5th ed. 1984).

152. Wesson, *supra* note 59, at 917-19; see also *Delaware v. Pennell*, 1989 WL 112557 (Del. Super. Ct. 1989) (discussing the relevance of the defendant's pornographic video tapes which depicted nipple mutilation of the same type from which the decedents suffered).

153. 395 U.S. 444 (1969). The Supreme Court, in *Brandenburg v. Ohio*, stated that speech could be proscribed if it met the following test (the *Brandenburg* test), which requires that the speech be "directed to inciting or producing imminent lawless action and is likely to produce such action." *Id.* at 447. See, e.g., *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987) (boy hangs himself while imitating auto-erotic asphyxiation technique in magazine); *Zamara v. CBS*, 480 F. Supp. 199 (S.D. Fla. 1979) (three networks sued for desensitizing youngster to violence); *Olivia N. v. NBC*, 178 Cal. Rptr. 888 (Cal. Ct. App. 1981) (movie depicting gang rape imitated by viewers).

154. Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting From*

on where it resided along this spectrum, much as defamation liability is already allocated.¹⁵⁵ The speech involved in the media tort cases, such as *Olivia N. v. NBC*,¹⁵⁶ was creative and would fall above the level of sexually violent pornography on Judge Jones' continuum,¹⁵⁷ thereby requiring more First Amendment protection (e.g. the application of *Brandenburg*), than sexually violent pornography.

Moreover, under the "secondary effects" theory, speech is permissibly regulated but not prohibited.¹⁵⁸ The United States Supreme Court applied this theory in *City of Renton v. Playtime Theatres, Inc.*,¹⁵⁹ which involved a statute prohibiting adult motion picture theatres from being located within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or

Media Speech: A Comprehensive First Amendment Approach, 34 ARIZ. L. REV. 231, 267 (1992).

155. *Id.* at 265-69. Sims analyzes Judge Jones' analogy between tort liability for the harm caused by media speech and defamation cases. *Id.* at 265. The innovation in Judge Jones' analogy between *Herceg* and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), is that different types of speech would be subject to different levels of protection based on whether the speech was a matter "of public concern" or "private concern." Sims, *supra* note 154, at 267. However, Judge Jones stated that "[m]easured by this standard *Hustler* in general . . . deserve[s] limited only [sic] First Amendment protection" and she condones subjecting such material to tort suits. *Herceg*, 814 F.2d at 1028-29. As Sims points out, there would remain the problem of determining where upon the "concern spectrum" the pornography was located. Sims, *supra* note 154, at 269.

156. 178 Cal. Rptr. 888 (the speech involved was a television movie that depicted a gang rape that the defendants re-created).

157. Sims, *supra* note 154, at 267.

158. The "secondary effects" theory can be justified under the standard set forth by the United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367 (1968). The Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court further established a test (the *O'Brien* test) which requires: (1) a government interest that is of sufficient importance; (2) a regulation that is within the constitutional power of the Government; (3) that the restriction further the government interest; (4) the government interest be unrelated to the "suppression of free expression;" and (5) the incidental restriction on alleged First Amendment freedoms be no greater "than is essential to the furtherance of that interest." *Id.* at 376-77. This is usually referred to as "intermediate level scrutiny."

159. 475 U.S. 41 (1986).

school.¹⁶⁰ The Court found that the statute did not regulate the content of the movie's speech,¹⁶¹ and held that the statute was constitutional under the First Amendment because it was aimed at the secondary effects of the speech, such as crime rates and property values, and not at the content of the speech.¹⁶²

The proposed tort remedies address the secondary effects of sexually violent pornography, namely, the harms caused to women rather than the message of the speech (e.g. sexual arousal). Judge Jones, again in *Herceg*, stated that a tort remedy for victims who were abused or killed because of a specific piece of pornography "would be unlikely to 'chill' the pornography industry any more than unfavorable zoning ordinances or the threat of obscenity prosecution has done."¹⁶³

The secondary effect of adult theatres addressed in *Renton* was the creation of an atmosphere of crime and violence, which the state may regulate. The creation of a tort remedy for harms caused by sexually violent pornography does not rely on an *a priori* definition of sexually violent pornography. Actions based on these theories, therefore, would not fail under the First Amendment, as did the MacKinnon-Dworkin Ordinance.¹⁶⁴ The proposed torts would also provide a remedy, narrowly tailored to a specific harm of a specific victim.

B. *Intentional Infliction of Emotional Distress*

Women have successfully used the tort of intentional infliction of emotional distress to combat the harms of pornography, and these cases best demonstrate how the proposed tort remedies would operate. Women in the workplace, as well as one woman outside

160. *Id.* at 43.

161. *Id.* at 48.

162. *Id.*

163. *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1029 (5th Cir. 1987) (Jones, J., concurring and dissenting) (footnotes omitted). With the recognition of these harms by the courts there is potential for an increase in this type of case. However, Judge Jones disagrees with this argument and points out that only one lawsuit was filed in regard to the particular article addressed in the *Herceg* case. *Id.* at 1026, 1029.

164. *See supra* part III.B.

of the workplace, have sued for the intentional infliction of emotional distress based on the viewing of pornography.¹⁶⁵ Many women who sue under Title VII also sue their employer for the intentional infliction of emotional distress.¹⁶⁶ The Restatement (Second) of Torts § 46(1) concludes that “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another” is liable for the intentional infliction of emotional distress.¹⁶⁷

In *Young v. Stensrude*,¹⁶⁸ Ms. Young alleged that five male colleagues showed a pornographic movie in her presence.¹⁶⁹ She was called into a business meeting by the director of the Medical Center where she expected to conduct business with her colleagues.¹⁷⁰ During the meeting, the defendants showed the movie *Deep Throat* after representing to Ms. Young that the movie was educational.¹⁷¹ The Missouri Court of Appeals held that Ms. Young’s case presented a cause of action for the intentional infliction of emotional distress.¹⁷² The court stated that the showing of a pornographic movie to an unsuspecting woman in front of five men could rise to the level of extreme and outrageous conduct which is required to prove a cause of action for the intentional infliction of emotional distress.¹⁷³

In *Andrews v. City of Philadelphia*,¹⁷⁴ two female police officers in Philadelphia filed a sexual discrimination claim under Title VII for a hostile work environment.¹⁷⁵ They also sued for the in-

165. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Young v. Stensrude*, 664 S.W.2d 263 (Mo. Ct. App. 1984); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993). See *infra* notes 168-195 and accompanying text for an in-depth discussion of these cases.

166. See *Andrews*, 895 F.2d at 1471; *Young*, 664 S.W.2d at 264-65.

167. RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965).

168. 664 S.W.2d 263.

169. *Id.* at 265.

170. *Id.*

171. *Id.*

172. *Id.* at 266.

173. *Id.* at 265.

174. *Kelsey-Andrews v. City of Philadelphia*, 713 F. Supp. 760 (E.D. Pa. 1989), *aff’d in part, vacated and remanded in part sub. nom.* *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

175. 895 F.2d at 1471.

tentional infliction of emotional distress.¹⁷⁶ The plaintiffs, Priscilla Andrews and Debra Conn, were assigned to the Accident Investigation Division ("AID") in 1986, but the women worked in separate squads.¹⁷⁷ Each was the only woman in her squad.¹⁷⁸ The two were subjected to abusive, obscene and offensive treatment, such as, being addressed by obscenities, having their personal property vandalized, being asked questions concerning whom they slept with to get assigned to AID, and having sexual devices and pornographic magazines placed in their desk drawers.¹⁷⁹ There also was evidence that pornography was displayed on the inside of a locker that was often kept open.¹⁸⁰

The jury ruled in favor of both women on their intentional infliction of emotional distress claims.¹⁸¹ The district court, however, overturned these findings and granted the city's motion for a judgment n.o.v.¹⁸² The district court ruled that the actions of the defendants did not rise to the level of outrageousness required by Pennsylvania law.¹⁸³ The United States Court of Appeals for the Third Circuit stated that in Pennsylvania, the intentional infliction of emotional distress is not proven by sexual harassment alone.¹⁸⁴ Sexual harassment claims in Pennsylvania require an element of retaliation in order to rise to the level of outrageous conduct, which neither plaintiff had alleged in this case.¹⁸⁵ While the merits of the Pennsylvania requirement are dubious, the case demonstrates that the intentional infliction of emotional distress cases based on sexual harassment are viable.

176. *Id.*

177. *Id.* at 1471-72.

178. *Id.* at 1472.

179. *Id.* at 1472-75.

180. *Id.* at 1472.

181. *Id.* at 1471-72.

182. *Kelsey-Andrews v. City of Philadelphia*, 713 F. Supp 760, 774 (E.D. Pa. 1989), *aff'd in part, vacated and remanded in part sub nom. Andrews v. City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990).

183. Pennsylvania law requires an element of retaliation for sexual harassment to rise to the level of extreme and outrageous conduct. *Andrews*, 895 F.2d at 1487.

184. *Id.*

185. *Id.*

In *Twyman v. Twyman*,¹⁸⁶ a woman sued her husband for intentional infliction of emotional distress in a divorce action.¹⁸⁷ Ms. Twyman alleged that her husband had pursued sadomasochistic bondage activities with her, alleging that it was the only way their marriage could be saved,¹⁸⁸ even though he knew that such activity frightened her because she had been raped at knifepoint.¹⁸⁹ When their ten-year-old son discovered the husband's bondage magazine collection and showed it to his mother, she experienced "utter despair" because the magazines made her realize that bondage included acts worse than she had imagined.¹⁹⁰ The Texas Supreme Court recognized the tort of intentional infliction of emotional distress for the first time, holding that this tort cause of action could be brought in a divorce proceeding.¹⁹¹

After recognizing the tort of intentional infliction of emotional distress, Justice Hecht of the Supreme Court of Texas stated in his concurring opinion that the struggle for the recognition of this tort was not a struggle for the acknowledgement of women's rights, but the recognition of "either a condescending and patronizing view of women, or a development of the law without particular regard for gender."¹⁹² Justice Rose Spector, in her dissent, argued that recognizing the tort of intentional infliction of emotional distress does not present a patronizing view of women.¹⁹³ Justice Spector asserted that the tort was developed primarily to compensate women for injuries inflicted by men, and that men therefore have had a strong interest in marginalizing such claims.¹⁹⁴ She stated that "[t]he law has often failed to compensate women for recurring harms—serious though they may be in the lives of women—for which there is no

186. 790 S.W.2d 819 (Tex. App. 1990), *rev'd*, 855 S.W.2d 619 (Tex. 1993).

187. 855 S.W.2d at 620.

188. *Id.* at 620 n.1.

189. *Id.*

190. *Twyman*, 790 S.W.2d at 820.

191. *Twyman*, 855 S.W.2d at 624. The case has been remanded to determine if Ms. Twyman's claim satisfied the elements of the tort. *Id.* at 626.

192. *Id.* at 640 (Hecht, J., concurring and dissenting).

193. *Id.* at 642-43 (Spector, J., dissenting).

194. *Id.* at 642 (Spector, J., dissenting).

precise male analogue."¹⁹⁵

The cases outlined above demonstrate how the tort of intentional infliction of emotional distress has been used to combat the harms of pornography. In a similar fashion, more tort remedies should be made available to victims of pornography. Additional tort theories that might be used are strict liability and negligence.

C. Negligence

Based on current First Amendment jurisprudence, it should be possible to use negligence actions as a basis for holding distributors and manufacturers of sexually violent pornography liable for the damages.¹⁹⁶ In a cause of action for negligence, the plaintiff has the burden of proving: (1) a legal duty that requires the defendant to conform to a certain standard of conduct to avoid unreasonable risks to others; (2) a breach of this duty; (3) a sufficiently close causal connection between the defendant's conduct and the harm suffered; and (4) actual damage.¹⁹⁷

The defendant's duty and proximate cause both turn on the notion of foreseeability. A plaintiff must establish that the harm caused by the defendant's actions was foreseeable.¹⁹⁸ As society more readily accepts that pornography has detrimental affects,¹⁹⁹ there is an increase in the expectation that harm will result from sexually violent pornography. Canada has already recognized this problem²⁰⁰ and although the U.S. has not yet accepted this connec-

195. *Id.* at 642-43 (Spector, J., dissenting) (quoting Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814 (1990)). See also Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989).

196. The Supreme Court permits recovery based on negligence in defamation actions brought by private individuals. See, e.g., *Gertz v. Welch*, 418 U.S. 323 (1974). The Court is likely to permit such an action under the proposed tort remedies where the restriction is indirect so long as the necessary elements for liability are met.

197. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

198. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 43, at 281 (5th ed. 1984).

199. See *supra* part I.

200. See *supra* notes 133-139 and accompanying text.

tion, it is moving closer.

It is foreseeable that people will react to and be influenced by what they read.²⁰¹ Pornography has played a part in many crimes. For example, Ted Bundy, suspected of killing over fifty women, described in his last interview his addiction to sexually violent pornography and the influence it had on his criminal behavior.²⁰² Moreover, the 1986 Commission offers further proof that people reenact scenes from pornographic books and movies.²⁰³

The defendant's duty in this type of situation does not arise through a preexisting connection of the parties, such as a contractual relationship between the parties. Rather, the duty arises from the foreseeability of the crime.²⁰⁴ Whether or not a duty exists is an "expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."²⁰⁵ Given the potentially high degree of foreseeability of the harm and the regulable nature of this speech, courts could impose a duty to take reasonable precautions to avoid creating this risk of harm to others.²⁰⁶

An intervening act by a third party may cut off proximate cause, in this case from the producer or distributor, unless the defendant's "negligent conduct . . . creates or increases the foreseeable risk of harm though the intervening of another force, and it is a substantial factor in causing the harm, [in which case] such intervention is not a superseding cause."²⁰⁷ Considering the growing literature on crimes based on pornography involving third parties, proving the increase in the likelihood of harm through the interven-

201. See Whitaker, *supra* note 143, at 880-82 (discussing how advertisers rely on consumers' reaction to the media, as well as other cases where defendants have testified that they reenacted what they saw and heard in movies and songs).

202. Mark Nichols, *A Killer's Final Hour*, *MACLEAN'S*, Feb. 6, 1989, at 54.

203. See FINAL REPORT, *supra* note 25; see also *supra* notes 32-33, 37-39, 50-52, 55-59 and accompanying text.

204. See Whitaker, *supra* note 143, at 882-87 (for a more in-depth look at the concept of "duty").

205. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 325-26 (4th ed. 1971).

206. See Wesson, *supra* note 2; Whitaker, *supra* note 143.

207. *RESTATEMENT (SECOND) OF TORTS* § 442A (1965).

ing force of a third party should be easier.²⁰⁸

To satisfy the requirements of negligence a plaintiff must also prove cause in fact. A victim who has a claim must prove a causal connection between the producer's or distributor's product and the actual harm suffered. This is necessary to assuage a court's worries that numerous plaintiffs would bring suit against every piece of pornography that offended them.²⁰⁹ The burden of showing such a causal link should be high. The plaintiff must prove to the jury that the third party would not have committed the crime "but for" the pornography.²¹⁰

The negligence standard also requires proof that the defendant breached his duty.²¹¹ The plaintiff must prove that the defendant's conduct did not meet that of a "reasonable man of ordinary prudence," the paradigm on which the "breach" element is based.²¹²

The last prong requires that the plaintiff suffer actual damage. Again, this requirement ensures that women will not sue producers and distributors because they are offended by magazines at a newsstand. However, "[v]ictims of sex crimes can easily establish that they suffered serious and devastating injuries."²¹³

D. *Two Theories of Strict Liability*

1. *Abnormally Dangerous Activities*

Strict liability should also provide relief for women harmed by sexually violent pornography. Under a theory of strict liability for abnormally dangerous activities, liability is imposed on "[o]ne who carries on an abnormally dangerous activity."²¹⁴ The liability is limited, however, to the possibility of the harm which makes the

208. See *supra* part I, discussing research reports and the FINAL REPORT; see also notes 2, 3, 25, 59 and accompanying text.

209. This was one of the defects of the MacKinnon-Dworkin anti-pornography Ordinance because of the second and third causes of action. See *infra* Appendix A.

210. KEETON, *supra* note 198, § 32, at 174.

211. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

212. KEETON, *supra* note 198, § 41, at 266.

213. Whitaker, *supra* note 143, at 898.

214. RESTATEMENT (SECOND) OF TORTS § 519 (1965).

activity abnormally dangerous. The underlying theory of strict liability is that those who engage in certain dangerous activities do so at their own risk and are liable for any resulting damages.²¹⁵

The Restatement (Second) of Torts § 520 sets forth six factors to be considered in determining whether an activity is "abnormally dangerous."²¹⁶ They are:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others; (b) likelihood that the harm that results from it will be great; (c) inability to eliminate the risk by the exercise of reasonable care; (d) extent to which the activity is not a matter of common usage; (e) inappropriateness of the activity to the place where it is carried on; and (f) extent to which its value to the community is outweighed by its dangerous attributes.²¹⁷

The Maryland Court of Appeals in *Kelley v. R.G. Industries*²¹⁸ carved out a new exception to strict liability in order to hold manufacturers of "Saturday Night Specials" liable to third parties injured by these weapons.²¹⁹ The court stated that the common law is "subject to judicial modification"²²⁰ which permits "new actions and remedies where we have concluded that such course was justified."²²¹ The court stated that imposing strict liability on the manufacturers of "Saturday Night Specials" would not be contrary to public policy as set forth by the Maryland Legislature.²²² Therefore, the court recognized a "separate, limited area of strict liability for the manufacturers . . . of 'Saturday Night Specials'" based on the presumption that the manufacturer of such a product knows or ought to know that the chief use of the product is for criminal activity.²²³

215. *Id.* cmt. d.

216. *Id.* § 520.

217. *Id.*

218. 497 A.2d 1143 (Md. 1985).

219. *Id.* at 1159.

220. *Id.* at 1150-51.

221. *Id.* at 1151.

222. *Id.* at 1153.

223. *Id.* at 1159.

In order to employ a strict liability theory to prosecute producers and distributors of sexually violent pornography, an exception would have to be made, premised on an analysis similar to that in *Kelley*.²²⁴ The underlying public policy theory in *Kelley* was based on Congressional Acts, hearings, reports, and the Maryland Legislative Acts.²²⁵ These materials found that problems with the misuse of "Saturday Night Specials" in crimes and violence in the United States had been documented by the Senate Judiciary Subcommittee²²⁶ and that they were the predominant firearms used in crimes.²²⁷ The 1986 Commission's Report provides a similar basis on which to fashion an exception to strict liability for producers and distributors of sexually violent pornography,²²⁸ concluding that pornography leads to greater violence towards women.²²⁹

By its definition, strict liability requires a high degree of risk of harm to a victim and a likelihood that the resulting harm will be great.²³⁰ Studies by psychologists and communication experts indicate that violent pornography increases aggression against women.²³¹ The mass circulation of pornography is also closely correlated with the incidence of reported rapes.²³² Furthermore, the 1986 Commission stated that exposure to sexually violent material leads to greater violence against women.²³³

The third consideration requires that even due care on the defendant's part would not eliminate the risk of harm.²³⁴ The Restatement comment about this third consideration states that when reasonable precautions cannot make the activity entirely safe, the danger of the activity should be regarded as abnormal.²³⁵ There

224. *Id.*

225. *See id.* at 1151-59.

226. *Id.* at 1156 (citing S. REP. NO. 1097, 90th Cong., 2d Sess. 76-80 (1968)).

227. *Id.* at 1157 (citing 118 CONG. REC. 21, 27,030 (1972) (statement of Sen. Bayh, Subcommittee Chairman)).

228. *See* FINAL REPORT, *supra* note 25.

229. *Id.* at 1005.

230. RESTATEMENT (SECOND) OF TORTS § 520 (1965).

231. *See supra* notes 40-44 and accompanying text.

232. *See supra* note 40.

233. FINAL REPORT, *supra* note 25, at 1005.

234. RESTATEMENT (SECOND) OF TORTS § 520 (1965).

235. *Id.* cmt. h.

does not appear to be a reasonable way that pornographers could exercise due care in making their products that would lessen or eliminate the harm to its victims. It is impossible to determine in advance which buyers of sexually violent pornography will use the pornography as a source of acting out their fantasies on a woman and which buyers will use the pornography only for sexual stimulation.

The fourth consideration examines the extent to which the particular activity is not a matter of common usage.²³⁶ If the activity is "customarily carried on by the great mass of mankind or by many people in the community" then the activity is a matter of common usage.²³⁷ An example that is given as a common usage is driving automobiles, and one that is not common usage is blasting.²³⁸ This consideration favors the victim. There is not such a proliferation of sexually violent pornography producers and distributors that the production and distribution of sexually violent pornography could be considered common usages.

The last consideration appropriate to the present analysis is the extent to which the dangerous attributes of pornography outweigh the societal value in distributing and producing it.²³⁹ Almost any victim's story points out that the value of sexually violent pornography to society is outweighed by the harms that the victims have suffered. The value of sexually violent pornography as a sex aid or arousal mechanism cannot be said to outweigh the need for prevention of sexually violent crimes against women.

2. Strict Products Liability

Strict liability also exists under products liability laws. The Restatement (Second) of Torts § 402A explains that "[o]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for

236. *Id.* § 520.

237. *Id.*

238. *Id.*

239. *Id.*

physical harm thereby caused to the ultimate user or consumer . . .²⁴⁰ There are four basic elements to this cause of action: (1) the product was in a defective condition when it left the possession of the seller; (2) the product was unreasonably dangerous to the user; (3) the defect caused the injuries; and (4) the product was expected and did reach the consumer without a substantial change in its condition.²⁴¹

In a caveat, the Restatement provides that “[t]he Institute expresses no opinion as to whether the rules stated in this Section may not apply . . . to harm to persons other than users or consumers.”²⁴² Also, the Comments to the Restatement (Second) of Torts § 402A do not define “defective condition” apart from “unreasonably dangerous” and therefore the term “defective condition unreasonably dangerous” is used as a single term. Two tests are used by the courts to determine whether the product is unreasonably dangerous: the consumer expectation test and the risk-benefit test.

a. Consumer Expectation Test

As explained in the Restatement, the consumer expectation test considers whether the product is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.”²⁴³ The producers and distributors of pornography sell a product which is arguably “dangerous . . . beyond that which would be contemplated by the ordinary consumer.”²⁴⁴ Consider the man who wrote to the Commission to say that pornography’s effects on him were devastating.²⁴⁵ Surely most people would not purchase sexually violent pornography if they believed it would change their lives so as to leave them “completely devastated.”²⁴⁶

240. *Id.* § 402A.

241. *Id.*

242. *Id.*

243. *Id.* cmt. i.

244. *Id.*

245. FINAL REPORT, *supra* note 25, at 794 (citing an Anonymous Letter to the 1986 Commission).

246. *Id.*

b. The Risk-Benefit Test

The risk-benefit test provides a stronger theory for holding producers and distributors of sexually violent pornography liable. The premise of this test is that a product is unreasonably dangerous only if the product's risks outweigh its benefits.²⁴⁷ In addition, the plaintiff has to prove the four elements listed above. However, in some jurisdictions the manufacturer bears the burden of proving that the product's benefits outweigh the risks.²⁴⁸ A plaintiff should be able to prove that the risks of sexually violent pornography outweigh the benefits to society through the use of studies, the 1986 Commission Report and court decisions recognizing the harms of pornography.

Under the risk-benefit test the strongest argument against the use of strict liability to prosecute producers and distributors of sexually violent pornography is that the plaintiff cannot prove that the product was defective.²⁴⁹ This is where an expansion of the regular notion of the tort comes into play. If the courts would consider the product defective if its risks outweigh its benefits to society, then the plaintiff may be able to prove that the product is defective.

CONCLUSION

Sexually violent pornography presents a serious problem to women in our society. Along with other physical harms, it also degrades and dehumanizes them. The fear of what might be encompassed or censored by a ban on pornography, however, is understandable. A practical solution, therefore, is to hold producers and distributors of sexually violent pornography liable for the harms their products cause, just as we hold liable manufacturers of other abnormally dangerous or hazardous products. Producers and distributors of pornography could insure themselves against this risk and pass the costs on to consumers. This solution would pre-

247. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825 (1973).

248. *See, e.g.*, *Barker v. Lull Engineering Co.*, 573 P.2d 443, 446 (Cal. 1978).

249. Whitaker, *supra* note 143, at 885-86.

vent complete censorship, yet allow women to recover for their numerous injuries caused by sexually violent pornography.

Elizabeth Kirby Fuller

APPENDIX A
MODEL ANTI-PORNOGRAPHY LAW

SECTION 1. STATEMENT OF POLICY

Pornography is sex discrimination. It exists in [place], posing a substantial threat to the health, safety, welfare, and equality of citizens in the community. Existing [state and] federal laws are inadequate to solve these problems in [place].

Pornography is a systematic practice of exploitation and subordination based on sex that differentially harms women. The harm of pornography includes dehumanization, sexual exploitation, forced sex, forced prostitution, physical injury, and social and sexual terrorism and inferiority presented as entertainment. The bigotry and contempt it promotes, with the acts of aggression it fosters, diminish opportunities for equality of rights in employment, education, property, public accommodations and public services; create public and private harassment, persecution and denigration; promote injury and degradation such as rape, battery, child sexual abuse, and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the Constitutions and laws of the United States and [place, including state].

SECTION 2. DEFINITIONS

1. *Pornography* is the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things, or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures or positions of sexual submission, servility,

or display; or (vi) women's body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

2. The use of men, children, or transsexuals in the place of women in (1) above is pornography for purposes of this law.

SECTION 3. UNLAWFUL PRACTICES

1. *Coercion into pornography*: It shall be sex discrimination to coerce, intimidate, or fraudulently induce (hereafter, "coerce") any person, including transsexuals, into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance(s). The maker(s), seller(s), exhibitor(s), and/or distributor(s) of said pornography may be sued for damages and for an injunction, including to eliminate the product(s) of the performance(s) from the public view.

Proof of one or more of the following facts or conditions shall not, without more, negate a finding of coercion: (i) that the person is a woman; or (ii) that the person is or has been a prostitute; or (iii) that the person has attained the age of majority; or (iv) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or (v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or (vi) that the person has previously posed for sexually explicit pictures with or for anyone, including anyone involved in or related to the making of the pornography at issue; or (vii) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or (viii) that the person actually consented to a use of the performance that is changed into pornography; or (ix) that the person knew that the purpose of the acts or events in question was to make pornography; or (x) that the person showed no resistance or appeared to cooperate actively in

the photographic sessions or in the events that produced the pornography; or (xi) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or (xii) that no physical force, threats, or weapons were used in the making of the pornography; or (xiii) that the person was paid or otherwise compensated.

2. *Trafficking in pornography*: It shall be sex discrimination to produce, sell, exhibit, or distribute pornography, including through private clubs.

(i) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves but excluding special display presentations, shall not be construed to be trafficking in pornography.

(ii) Isolated passages or isolated parts shall not be actionable under this section.

(iii) Any woman has a claim hereunder as a woman acting against the subordination of women. Any man, child, or transsexual who alleges injury by pornography in the way women are injured by it also has a claim.

3. *Forcing pornography on a person*: It shall be sex discrimination to force pornography on a person, including a child or transsexual, in any place of employment, education, home, or public place. Only the perpetrator of the force or responsible institution may be sued.

4. *Assault of physical attack due to pornography*: It shall be sex discrimination to assault, physically attack, or injure any person, including child or transsexual, in a way that is directly caused by specific pornography. The perpetrator of the assault or attack may be sued for damages and enjoined where appropriate. The maker(s), distributor(s), seller(s), and/or exhibitor(s) may also be sued for damages and for an injunction against the specific pornography's further exhibition, distribution, or sale.

SECTION 4. DEFENSES

1. It shall not be a defense that the defendant in an action under this law did not know or intend that the materials were pornography or sex discrimination.

2. No damages or compensation for losses shall be recoverable under Sec. 3(2) or other than against the perpetrator of the assault or attack in Sec. 3(4) unless the defendant knew or had reason to know that the materials were pornography.

3. In actions under Sec. 3(2) or other than against the perpetrator of the assault or attack in Sec. 3(4), no damages or compensation for losses shall be recoverable against maker(s) for pornography made, against distributor(s) for pornography distributed, against seller(s) for pornography sold, or against exhibitor(s) for pornography exhibited, prior to the effective date of this law.

SECTION 5. ENFORCEMENT

1. *Civil action:* Any person aggrieved by violations of this law may enforce its provisions by means of a civil action. No criminal penalties shall attach for any violation of the provisions of this law. Relief for violation of this act may include reasonable attorney's fees.

2. *Injunction:* Any person who violates this law may be enjoined except that:

(i) In actions under Sec. 3(2), and other than against the perpetrator of the assault or attack under Sec. 3(4), no temporary or permanent injunction shall issue prior to a final judicial determination that the challenged activities constitute a violation of this law.

(ii) No temporary or permanent injunction shall extend beyond such material(s) that, having been described with reasonable specificity by the injunction, have been determined to be validly proscribed under this law.

SECTION 6. SEVERABILITY

Should any part(s) of this law be found legally invalid, the remaining part(s) remains valid. A judicial declaration that any

part(s) of this law cannot be applied validly in a particular manner or to a particular case or category of cases shall not affect the validity of that part(s) as otherwise applied, unless such other application would clearly frustrate the [legislative body's] intent in adopting this law.

SECTION 7. LIMITATION OF ACTION

Actions under this law must be filed within one year of the alleged discriminatory acts.

