MAKING A WOMAN'S SAFETY MORE IMPORTANT THAN PEEP SHOWS: A REVIEW OF THE PORNOGRAPHY VICTIMS' COMPENSATION ACT

INTRODUCTION

The book *Columbie Cuts Up*, features photographs of a woman wielding a large kitchen knife, cutting and wounding her genital area and then using a scissors to cut her breasts.[1] The magazine article, *The Joy of Rape: How To, Why To, Where To*, glorifies rape and includes an appendix on "How to Get Away With It."[2] In the pornographic film *Snuff*, the protagonist stabs a pregnant woman and butchers another woman so badly that the viewer sees body parts strewn about. The murderer holds the victim's entrails above her and screams in sexual ecstasy.[3]

In 1991 over 106,000 women made forcible rape charges,[4] an in-

1. Teresa Hommel, *Images of Women in Pornography and Media*, 8 N.Y.U. REV. L. & SOC. CHANGE 207, 212 (1978-79).

2. Tom Gerety, *Pornography and Violence*, 40 U. PITT. L. REV. 627, 628 (1979).

3. Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 5 (1974). When this movie was distributed throughout the United States, the producers advertised it as a "record of real torture." In New York, the marquee stated: "The film that could only be made in South America . . . where life is CHEAP!" *Id.* (quoting Leah Fritz, *Pornography as Gynocidal Propaganda*, 8 N.Y.U. REV. L. & SOC. CHANGE 219, 219 (1978-79)).

4. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 23 (1991). In 1991, 106,593 women filed forcible rape charges; approximately 83 out of every 100,000 women were victims of such offenses. *Id.* at 23-24. Of course this figure does not account for rapes that went unreported.

crease of over thirteen percent in the last four years.[5] Juveniles, persons under eighteen years of age, raped approximately one quarter of the victims.[6] In that same year, husbands, boyfriends, and lovers were responsible for the deaths of 1,330 women.[7] In countless studies researchers conclude that depictions of sexual violence against women have a strong effect on viewers and that viewing such material leads to actual violence against women.[8] In response to these studies, United States senators drafted the Pornography Victims' Compensation Act of 1991 (PVCA).[9] This Act allows a victim of a sexual crime to receive damages from the pornography industry when the pornographic material read by the offender substantially caused the crime.[10]

This Recent Development addresses some of the issues and controversies surrounding the PVCA. Part I discusses the evolution of obscenity law, emphasizing municipalities' anti-pornography ordinances. Part II focuses on the PVCA itself. Part III addresses the arguments in support of the ordinance, and Part IV analyzes the criticisms against implementing the PVCA. Finally, Part V concludes that a woman's right to live in safety should outweigh a publisher's First Amendment[11] right to print material that degrades and subordinates women.

I. OBSCENITY AND THE FIRST AMENDMENT

The First Amendment does not protect sexually explicit materials that fall within the purview of the United States Supreme Court's definition of obscenity.[12] Although the Court's desire to remove obscene material from First Amendment protection has remained constant

5. *Id.*

6. *Id.* at 279. Juveniles raped 21.9 of every 100,000 women in 1991. *Id.*

7. *Id.* at 19, tbl. 2.11.

8. *See infra* notes 93-103 and accompanying text for a description of these studies.

9. S. 1521, 102d Cong., 2d Sess. (1991).

10. For a discussion regarding the Pornography Victims' Compensation Act of 1991, see *infra* notes 67-87 and accompanying text.

11. The relevant portion of the First Amendment concerns a person's freedom of speech; "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

12. Although there are many definitions of obscenity, this article will employ only one for the sake of clarity. The Supreme Court defines obscenity as "sexually explicit material which, taken as a whole, appeals to the prurient interest, offends local community standards, and lacks serious redeeming value." Miller v. California, 413 U.S. 15, 24 (1973). Under Supreme Court precedent, obscenity is more egregious than pornography and thus deserves less First Amendment protection. *Id.*

throughout the years,[13] the definition of obscenity continues to change. In order to understand the current judicial stance on obscenity, and the likelihood that the Supreme Court will find the PVCA constitutional, it is necessary to understand the evolution of obscenity precedent.

A. *Obscenity Laws*

American obscenity law dates back to 1711 when Massachusetts drafted a colonial statute prohibiting any filthy, obscene, or profane story.[14] In 1873, Congress passed the first national anti-obscenity statute, popularly known as the Comstock Act.[15] With little precedent on obscenity, the Supreme Court often employed England's *Hicklin*[16] test in Comstock Act cases, even though the test had an unusable definition of obscenity.[17]

In the first half of the twentieth century, several states rejected the *Hicklin* test and called for a new standard.[18] In *Chaplinsky v. New*

13. Although the PVCA title includes "pornography," the Act only specifically affects obscenity and child pornography. Thus, a discussion of Supreme Court precedent regarding obscenity is relevant.

14. The law prohibited "composing, writing, printing, or publishing of any filthy, obscene or profane story, pamphlets, libel or mock sermon." Ancient Charter, Colony Laws and Province Laws of Massachusetts Bay (1814), *quoted in* Martha Alschuler, *Origins of the Law of Obscenity*, 2 TECHNICAL REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 65, 75 (1971).

15. Ch. CCLVII, 17 Stat. 598 (1943) (codified as amended at 18 U.S.C. §§ 1460-69 (1988 & Supp. II)). Before Congress enacted the Comstock Act, obscenity prosecutions were based on common law. *See* Commonwealth v. Sharpless, 2 Serg. & Rawle 91 (Pa. 1815); Commonwealth v. Holmes, 17 Mass. 335 (1821). In *Holmes*, the court determined that although John Cleland's writing of *Fanny Hill* was a criminal act, the defendant could not use the First Amendment as a defense. *Holmes*, 17 Mass. at 336-39, *cited in* William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1479 (1987). It was not until 1966 that Cleland's book regained its First Amendment protection. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966) (holding that the First Amendment protects the language of Cleland's book *Fanny Hill*).

16. The Queen v. Hicklin, 3 L.R.-Q.B. 360 (1868).

17. The *Hicklin* test looked at the offending passage alone and questioned if the passage had a tendency to "deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." *Id.* at 371. For a discussion on the usefulness of the *Hicklin* test, see LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 658 (1978).

18. In 1913 Judge Learned Hand criticized the *Hicklin* test and proposed the "community standards" test in United States v. Kennerly, 209 F. 119, 121 (S.D.N.Y. 1913). The Supreme Court ultimately adopted this test in Miller v. California, 413 U.S. 15, 24

Hampshire,[19] the Supreme Court gave its first indication of how it would view obscenity in the modern era.[20] While the Court did not define obscenity, it stated that, along with libel and fighting words, the First Amendment does not protect obscenity because it is neither essential to expressing ideas nor of any redeeming social value.[21] In dictum, the Court reviewed First Amendment doctrine and determined that obscenity did not advance any of the three values necessary for speech to be protected.[22]

In *Roth v. United States*,[23] the Supreme Court finally had the opportunity to define obscenity and hold that it was unprotected under the First Amendment. In *Roth*, a New York bookseller was convicted under a federal obscenity statute for sending obscene materials through

(1973). *See infra* notes 34-44 and accompanying text for a complete discussion of *Miller*.

The lack of a useful test did not stop the state courts from finding material obscene. They relied on common law definitions. *See* Commonwealth v. Isenstadt, 62 N.E.2d 840, 843-45 (1945) (acknowledging the "uselessness" of the *Hicklin* test, but finding a literary work obscene based on common-law definitions). *See also* Commonwealth v. Friede, 171 N.E. 472 (1930) (finding Theodore Dreiser's *An American Tragedy* to be obscene); People v. Dial Press, 48 N.Y.S.2d 480 (Mag. Ct. 1929) (finding D.H. Lawrence's *Lady Chatterly's Lover* to be obscene); People v. Seltzer, 203 N.Y.S. 809 (Sup. Ct. 1924) (finding Radcyffe Call's *The Well of Loneliness* to be obscene).

19. 315 U.S. 568 (1942).

20. This decision exemplifies the Court's reluctance to broaden the scope of First Amendment protections. In fact, *Chaplinsky* was not an obscenity case. The case involved a Jehovah's Witness who created a disturbance with a speech denouncing organized religion and subsequently screamed profanities to a city marshall. *Id.* at 569-70. The Court upheld Chaplinsky's guilty plea holding that the First Amendment did not protect insulting or fighting words.

21. *Id.* at 572.

22. *Id.* For speech to gain First Amendment protection, it must have at least one of three values. It must (1) seek the truth in the marketplace of ideas; (2) contribute to the necessary political dialogue in a democratic society; or (3) facilitate self-fulfillment in our society. *See* Layman, *supra* note 15, at 1479-80. *See also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that obscenity should be regulated in the marketplace of ideas); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 15-16 (1948) (advocating speech protection for political freedom in democratic society); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (arguing that freedom of expression promotes mature decisions and development of rational thought).

23. 354 U.S. 476 (1957).

the mail.[24] Writing for the majority,[25] Justice Brennan held that the First Amendment was intended to protect the interchange of ideas in a political community,[26] and that the history of the First Amendment showed a near unanimous belief that obscenity fully lacks redeeming social value.[27] The Court defined obscenity as material whose dominant theme appeals to the prurient interest of the average person when applying contemporary community standards.[28] By finding that the First Amendment does not protect obscene speech, the Court avoided considering whether obscenity caused a harm or created a "clear and present danger."[29] Relying on *Beauharnais v. Illinois*,[30] Justice Bren-

24. *Id.* at 480. The Supreme Court attached and reviewed *Roth* with the case Alberts v. California. In *Alberts*, the defendant was charged under a similar California anti-obscenity statute. In both cases, the Supreme Court reviewed the statutes themselves "on their faces and in a vacuum" to determine if they violated the freedom of expression; the obscenity of the actual material involved was not at issue. *Id.* *See also* William B. Lockhart & Robert C. McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 25 (1960).

25. In both cases, Justice Brennan wrote for a five person majority. Chief Justice Warren concurred in both cases. Justices Douglas and Black dissented in both cases. Justice Harlan dissented in *Roth* but concurred with the results in *Alberts*.

26. *Roth*, 354 U.S. at 484. For an in-depth discussion on the value of the First Amendment as a protector of political speech in a democratic society, see MEIKLEJOHN, *supra* note 22, at 15-19, 24-27, 39.

27. *Roth*, 354 U.S. at 484-85 (citing state and congressional obscenity laws since 1842). In his opinion, Brennan relied heavily on the *Chaplinsky* decision. *Id.* at 485.

28. *Id.* at 489. This test departed from previous obscenity definitions in a number of ways. First, it defined obscenity from the view of an "average person" rather than from the view of a person of high susceptibility. In addition, this test looked at the work as a whole rather than looking solely at an isolated passage, as in the Court's previous tests. This test, however, is similar to the English *Hicklin* test for it deals with obscenity as a crime against morality; thus, it is more of a sin than a crime. Layman, *supra* note 15, at 1481-82. It clearly did not discuss the issue of obscenity as a precursor to rape and violence.

29. Justice Holmes introduced the "clear and present danger" test in Schenck v. United States, 249 U.S. 47 (1919). In *Schenck* Holmes stated that: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." *Id.* at 52 (emphasis added). The test is most often used in cases where words may incite illegal action. *See* TRIBE, *supra* note 17, at 841-44 for a more thorough discussion on the "clear and present danger" test.

Application of the clear and present danger test in obscenity cases enables trial courts to look beyond the actual definition of obscenity and examine the potential harm of obscene speech. *See* Layman, *supra* note 15, at 1480 n.39. Many have argued that the clear and present danger test is a way to prevent the violence that occurs because of pornography and obscenity. *See* PHILIP NOBILE & ERIC D. NADLER, UNITED STATES OF AMERICA V. SEX: HOW THE MEESE COMMISSION LIED ABOUT PORNOGRAPHY 35 (1986) (noting that Surgeon General C. Everett Koop called pornography a "clear and

nan found that if the First Amendment does not protect a category of speech, it is unnecessary to consider its potential harm or danger.[31]

Although the *Roth* definition was unsatisfactory to many legal scholars and judges,[32] it took another sixteen years[33] for the Supreme Court to articulate the modern definition of obscenity. In *Miller v. California*,[34] writing for a majority,[35] Justice Burger[36] announced a three step test to determine if material was obscene: (a) would the average person, using contemporary community standards, find the material as a whole appealing to prurient interests,[37] (b) does the work describe or

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present danger to American public health" in a hearing before the Attorney General's Commission on Pornography); Thomas A. McWalters III, Note, *An Attempt to Regulate Pornography Through Civil Rights Legislation: Is it Constitutional?*, 16 U. TOL. L. REV. 231, 313 (1984) (calling clear and present danger analysis the "avant garde of obscenity law").

30. 343 U.S. 250 (1952).

31. *Id.* at 266. *Beauharnais* involved a statute prohibiting the exhibition of libelous information in public arenas. Because the Supreme Court found the speech libelous, and thus not protected under *Chaplinsky*, the Court held that the trial court properly declined to require the jury to consider if the speech presented a "clear and present danger." *Id.* Justice Frankfurter reasoned that "no one would contend that obscene speech, for example, may be punished only upon a showing of such [clear and present danger] circumstances." *Id.*

32. Justice Brennan, the author of *Roth*, stated that the Court had never defined obscenity in a meaningful way. Paris Adult Theater I v. Slaton, 413 U.S. 49, 73-74 (1973) (Brennan, J., dissenting). Perhaps the confusion over a definition of obscenity is best understood by looking at Justice Stewart's famous remark: "I know it when I see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

33. For a complete discussion on the Supreme Court precedent that led up to *Miller*, see McWalters, *supra* note 29, at 234-45.

34. 413 U.S. 15 (1973). Miller was convicted under California's obscenity law for mass mailing unsolicited pictorial advertising brochures depicting men and women involved in group sex. *Id.* at 16-18.

35. In the sixteen years preceding *Miller*, the Court was unable to reach a sufficient consensus in any case to have a majority ruling. *See* A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney Gen., 383 U.S. 413 (1966) (plurality creating a three part test by relying a great deal on *Roth* and adding a requirement that the material must be utterly without redeeming social value); *see also* United States v. One Reel of Film, 360 F. Supp. 1067, 1069-70 (D. Mass. 1973) (applying the *Roth-Memoirs* tests to the film "Deep Throat," finding it obscene).

36. Chief Justice Burger wrote for the majority and Justices Blackmun, Powell, Rehnquist, and White joined him. Justice Brennan, the author of the majority opinion in *Roth* and the plurality opinion in *Memoirs*, dissented.

37. *Miller*, 413 U.S. at 24 (citing *Roth*, 354 U.S. at 487 n.20 (defining "prurient" as "material having a tendency to excite lustful thoughts . . . a shameful or morbid interest in nudity, sex or excretion, and . . . go[ing] substantially beyond customary limits of candor in description or representation of such matters.")).

depict sexual conduct in a patently offensive way; and (c) does the work, taken as a whole, lack serious literary, artistic, political, or scientific value.[38] The Court established that the relevant community standards are local not national,[39] and limited obscenity to descriptions or depictions of patently offensive, "hard core" sexual conduct, thereby removing mere nudity from the obscenity category.[40]

The third element of the *Miller* test, though clearly different from *Roth*, was not new to obscenity precedent. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*,[41] a plurality of the Court stated that material was obscene only if it was *utterly* without redeeming social value.[42] *Miller* relaxed this standard and held that the material must only lack *serious* social value.[43] This distinction protected material that, while lacking "serious" value, was not utterly lacking in social value.[44]

B. *Antipornography Laws*

Upset by the vagueness of the *Miller* test, the City of Minneapolis,

38. *Miller*, 413 U.S. at 24.

39. *Id.* at 31-34. This vests more power in the jury and limits the ability for appellate review. Yet, the definition of "local" is still under consideration. Does it mean the state, county, or the city? *See* Note, *Community Standards, Class Actions, and Obscenity Under* Miller v. California, 88 HARV. L. REV. 1838, 1845-46 (1957). It is interesting to note that a local standard applies to a work's appeal to prurient interests, but a national standard applies to the search for serious literary, artistic, political, or scientific value. *See* Smith v. United States, 431 U.S. 291, 301 (1977) (applying local standards to "prurient" interests, but national standards to social value). *See also* Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (holding that under the *Miller* test, juries may not apply local standards in deciding social value, but may apply local standards regarding appealing to prurient interests).

40. *Miller*, 413 U.S. at 25. To assist lower courts in deciding future obscenity cases, the Court provided two examples of what a statute could define as obscene: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; or (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." *Id.*

41. 383 U.S. 413 (1966).

42. *Id.* at 418.

43. *Miller*, 413 U.S. at 24-25.

44. *See* Layman, *supra* note 15, at 1484. Some argue that this distinction is a form of class discrimination. Under the *Miller* test, obscenity for the cultured, educated, and artistic elite is protected, whereas the more "blue-collar" vulgar obscenity would be banned. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 499-500 (1970) ("the impact of obscenity laws falls primarily . . . upon particular groups in our society who happen not to prefer or be able to afford elite pornography").

Minnesota hired Professors Catherine MacKinnon and Andrea Dworkin to draft an antipornography ordinance that would restrict more than mere obscenity.[45] The ordinance was designed to attach to a civil rights law. Although the mayor of Minneapolis vetoed the proposed ordinance and an attempt to override it failed,[46] it was revived in Indianapolis, Indiana, and the mayor immediately signed it.[47] On the day the mayor signed the antipornography ordinance[48] those opposing the ordinance filed suit in federal court seeking an injunction against its enforcement.[49]

In *American Booksellers Association v. Hudnut*,[50] the Supreme Court

45. The City of Minneapolis had drafted other bills in the past to curtail the extent of pornography in their city. As a response to Young v. American Mini Theaters, 427 U.S. 50 (1976), the Minneapolis City Council passed a zoning ordinance to limit the concentration of adult bookstores, movie theaters, and massage parlors. McWalters, *supra* note 29, at 272-73. In Alexander v. City of Minneapolis, 531 F. Supp. 1162, 1173 (D. Minn. 1982), the federal district court declared a zoning ordinance unconstitutional, reasoning that the ordinance restricted citizens' access to speech more than the zoning ordinance in *Young*.

46. Layman, *supra* note 15, at 1498. The city council amended the ordinance, hoping that with an amendment the mayor would sign it. The changes were minor, however, and the mayor vetoed the second draft as well.

47. *Id.*

48. INDIANAPOLIS, IND. CODE § 16 (1984). The ordinance adopted a feminists' definition of pornography and described it as "the graphic sexually explicit subordination of women, whether in pictures or in words," and specified that pornography must also include "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 make these conditions sexual; or
(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.

Id. § 16-3(g) (4)-(7). The ordinance protects women and children equally. Moreover, the ordinance outlaws trafficking in pornography, coercing a person into a pornographic performance, forcing pornography on a person, and assaulting or physically attacking a person due to pornography. *Id.* § 16-3(q).

49. Jim Mellowitz, *Bias-Based Smut Ban Faces Test*, NAT'L L.J., May 14, 1984, at 3.

50. 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

affirmed, without comment, the Seventh Circuit's holding that the Indianapolis ordinance was facially unconstitutional under the First Amendment.[51] Judge Easterbrook of the Seventh Circuit found that the ordinance was unconstitutional because its definition of pornography[52] was content based.[53] Judge Easterbrook relied on the time-honored Supreme Court precedent holding that regulations of speech must be content-neutral; a court cannot determine that one perspective is correct and silence the rest.[54] The *Hudnut* defendants[55] argued that pornography was "low value speech" and thus undeserving of First Amendment protection.[56] The Seventh Circuit disagreed and deter-

51. 475 U.S. at 1001.

52. For the ordinance's definition of pornography, see *supra* note 48.

53. *Hudnut*, 771 F.2d at 325.

54. The Seventh Circuit relied on extensive Supreme Court precedent protecting the political speech of several "unpopular" organizations. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting racist advocacy by the Ku Klux Klan); De Jonge v. Oregon, 299 U.S. 353 (1937) (protecting Communists' right to speak and seek office); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

In Kingsley Int'l Pictures Corp. v. Regents of N.Y.U., 360 U.S. 684 (1959), the Supreme Court struck down a law denying licenses to movies presenting adultery in a favorable light. The Court held that the First Amendment "guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax." *Id.* at 689. Lawrence Tribe interprets this to mean that the First Amendment would similarly protect the opinion that "women were meant to be dominated by men" and that "[African-Americans] are meant to be dominated by [European-Americans]." TRIBE, *supra* note 17, at 925. For a complete discussion on content-neutrality in First Amendment doctrine, see *id.* at 794-944.

Some argue that protecting pornography implies that one perspective is correct. "In the feminist account current noninterference with individual liberties is not really content neutral; rather, it is an endorsement of the status quo . . . [which] itself is a male construct that inhibits the equality of women." Eric Hoffman, Comment, *Feminism, Pornography, and Law*, 133 U. PA. L. REV. 497, 531 (1985), *cited in* Martin Karo & Marcia McBrian, *The Lessons of* Miller *and* Hudnut: *On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REF. 179, 195 n.99 (1989).

55. The defendant in *Hudnut* was the City of Indianapolis. The plaintiffs were trade associations of booksellers, publishers and distributors, supporters of First Amendment rights, and other interested parties.

56. *Hudnut*, 771 F.2d at 331. At the original trial, the defendants argued that the ordinance regulated conduct and not speech because dissemination of pornography is subordination of women as an act. American Booksellers v. Hudnut, 598 F. Supp. 1316, 1330-31 (S.D. Ind. 1984). The defendants further argued that if the court found the ordinance to restrict speech it must review the ordinance under the reasoning of New York v. Ferber, 458 U.S. 747 (1982), not as an obscenity regulation under the *Miller* test. *Hudnut*, 598 F. Supp. at 1332. For a full discussion on the defendants' arguments in *Hudnut*, see Marilyn J. Maag, Comment, *The Indianapolis Pornography*

mined that the ordinance impermissibly established what would be an approved view of women and regulated all depictions of women that did not comport with this view.[57]

The Seventh Circuit noted several other problems with the Indianapolis ordinance. By using the *Miller* test to determine if the ordinance met the requirements of an obscenity regulation,[58] the court found that the ordinance (1) made no reference to prurient interests, (2) demanded attention to particular depictions instead of viewing the material as a whole, and (3) did not allow exceptions for works with literary, artistic, political, or social value.[59] Furthermore, the court took issue with the provision allowing an individual to bring a lawsuit without showing specific injury.[60]

Although the Seventh Circuit found the ordinance unconstitutional, it did not dismiss all of the defendants' arguments. Indianapolis argued that pornography affects thoughts — it socializes men into believing that women are submissive and it permits them to treat women accordingly.[61] The court accepted this premise[62] noting that words and images affect the subconscious and may alter accepted truths.[63] Yet, instead of concluding with a call to rid our society of such dangerous images, the court used this premise to demonstrate the power of

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Ordinance: Does the Right to Free Speech Outweigh Pornography's Harm to Women, 54 U. CIN. L. REV. 249, 258-60 (1985).

57. 771 F.2d at 328. The court went on to say that the ordinance "is thought control. It establishes an 'approved' view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not." *Id.*

58. *Id.* at 331. For an explanation of the *Miller* test, see *supra* notes 34-44 and accompanying text.

59. *Id.* Catherine MacKinnon, one of the authors of the ordinance, replied to this arguing: "if a woman is subjected why should it matter that the work has other value?" Catherine MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985).

60. *Hudnut*, 771 F.2d at 326.

61. *Id.* at 325.

62. *Id.* In a footnote, the court goes on to quote Catherine MacKinnon:

> Pornography's world of equality is a harmonious and balanced place. . . . All the ways men love to take and violate women, women love to be taken and violated. . . . [Pornography] eroticizes hierarchy, it sexualizes inequality. . . . [Pornography] institutionalizes the sexuality of male supremacy, fusing the erotization of dominance and submission with the social construction of male and female.

Id. (quoting MacKinnon, *supra* note 59, at 17-18).

63. *Hudnut*, 771 F.2d at 329.

pornography as speech.[64] The court then compared the regulation of female subordination and degradation to the regulation of communist speech, which states controlled until the early 1960s.[65] The court concluded that the United States is a supreme nation which protects speech, regardless of the potential or probable effects.[66]

II. THE PORNOGRAPHY VICTIMS' COMPENSATION ACT

Although there are many problems with the present obscenity standard, it has not been seriously challenged since its inception in 1973.[67] Yet, as a growing number of studies find that pornography encourages violence against women,[68] many organizations are becoming more and more dissatisfied with the federal government's treatment of pornography victims.[69] In an attempt to remedy this gap in federal legislation,

64. *Id.*

65. *Id.* The court's opinion refers to the Alien and Sedition Acts that prohibited speech advocating overthrow of the government and were used a great deal to convict communists during the McCarthy era. *Id.* Ultimately, these statutes were found unconstitutional as violating an individual's right to political speech. *See* Yates v. United States, 354 U.S. 298 (1957) (holding that the Sedition Acts cannot limit discussion on overthrow of government); Scales v. United States, 367 U.S. 203 (1961) (noting that mere membership in an organization devoted to overthrow the government is not sufficient for conviction under Sedition Acts).

What is interesting about this argument is that the court is equating pornography with political speech. Thus, the image of a man tying down a woman, cutting up her body and then raping her constitutes political speech. *See* Elizabeth Spahn, *On Sex and Violence*, 20 NEW ENG. L. REV. 629, 638-39 (1984-85) (arguing that pornography is not political speech); Karo & McBrian, *supra* note 54, at 200 (same).

66. *Hudnut*, 771 F.2d at 330. The exception to this rule is when speech has a "clear and present danger." *See supra* note 29 for a complete discussion on the clear and present danger test, and how it may affect antipornography ordinances.

67. In *Hudnut*, the defendants questioned the applicability of the three prong test established in *Miller*. They argued that the antipornography bill did not fall under the test itself, because the bill at issue did not deal with obscenity, but instead focused on pornography and its discrimination against women.

68. *See infra* notes 93-103 and accompanying text for a discussion on these studies.

69. The victim of a sexual assault caused by the assailant's viewing of pornographic material is not the only victim of pornography. Some commentators argue that all women are victims of pornography in that this type of material "creates and reinforces destructive male attitudes toward women . . . ." Maag, *supra* note 56, at 254-55. The attitudes of women are also conditioned by pornography. According to feminists in the field, women internalize media images, which makes them feel inferior and masochistic and act accordingly. *Id. See also* Jacobs, *supra* note 3, at 13-20; Fritz, *supra* note 3, at 221 ("Manifestly, the market for violence pornography is *created*, the appetite for it is *cultivated*."); William A. Stanmeyer, *Obscene Evils v. Obscure Truths: Some Notes on First Principles*, 7 CAP. U. L. REV. 647, 664-66 (1978) (arguing pornography warps

Senator Mitch McConnell introduced the Pornography Victims' Compensation Act[70] (PVCA) in July of 1991.[71]

There are five sections to the PVCA. The first, fourth and fifth sections discuss the name of the Act,[72] definitions,[73] and effective dates respectively.[74] The second section discusses the findings and purpose of the Act. In brief, the findings section of the PVCA states that victims of sex crimes are not able to recover damages for the harm they suffer, a reality that is contradictory to notions of justice.[75] To correct this, the PVCA provides that the commercial pornographic indus-

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moral sensibility, but stating that the long-range gradual effect on attitudes is hard to assess empirically).

The models and actors who perform in pornographic films are also victims. The majority of pornography models are runaways, drug-addicts, and prostitutes. Maag, *supra* note 56, at 255 n.39. According to Linda Lovelace's own account, she was severely beaten during the filming of the movie *Deep Throat*; throughout her pornography career she was beaten, hypnotized, raped, and threatened with knives and guns. Jacobs, *supra* note 3, at 20-23 (citing LINDA LOVELACE, ORDEAL (1980)). *See also* Laura Lederer, *Then and Now: An Interview With a Former Pornography Model*, *in* TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 57-70 (Laura Lederer ed., Morrow 1980).

70. S. 1521, 102d Cong., 2d Sess. (1991).

71. Senator Mitch McConnell is a Republican from Kentucky. Initially, three other Republican senators co-sponsored the bill with Senator McConnell: Senator Grassley from Iowa, Senator Thurmond from South Carolina, and Senator Packwood from Oregon. Between the date of the introduction and July 2, 1992, eleven more senators signed on to the bill. Of the eleven additions, nine were Republicans and two were Democrats. The nine Republicans are: Senators Hatch from Utah, Spector from Pennsylvania, Stevens from Arkansas, McCain from Arizona, Coats from Indiana, Gorton from Washington, Durenburger from Minnesota, Smith from New Hampshire, and D'Amato from New York. The only two Democrats to sign on to the PVCA are: Senator Heflin from Alabama, and Senator DeConcini from Arizona. LEXIS, Bill Tracking Report, 1991 S. 1521 (October 1992).

72. S. 1521 § 1.

73. *Id.* § 4.

74. *Id.* § 5.

75. Specifically, the Act finds that:

(1) it is a tradition of Anglo-American jurisprudence that victims should be made whole by the ability to recover damages for the harm caused them attributable to the misconduct of others;

(2) the body of American tort law is deficient at the Federal level in that it omits the victims of sex crimes from even the possibility of recovering damages from potential tort feasors whose actions can be shown to have had a reasonably foreseeable nexus with the harm caused to the victim; and

(3) the deficiency in Federal law has a disproportionate impact on women; therefore the Congress declares it is imperative to correct this deficiency.

S. 1521 § 2(a).

tries[76] are liable for all damages resulting from a sexual offense foreseeably caused by the assailant's viewing of obscene material or child pornography.[77]

The third section of the PVCA discusses the cause of action. That is, under what circumstances an individual may file suit under the Act.[78] The PVCA allows a victim to bring a civil action against a commercial industry involved in pornography when: (1) the individual is a victim of a sexual assault; (2) the material was obscene or constitutes child pornography; (3) the material was a substantial cause of the offense; and (4) the defendant should have reasonably foreseen that the material would create an "unreasonable risk" of such a crime.[79] The sponsors of the Act viewed this cause of action as entirely separate from the crime itself. Thus, it is not necessary that the crime be proven, or even prosecuted.[80]

The Act defines a sexual assault as rape, sexual abuse, sexual murder,[81] or any other forcible sex crime prohibited by the particular state.[82] The victim has the obligation to prove the above four elements by a preponderance of the evidence[83] in order to receive damages

76. Such industries include "commercial producers, commercial distributors, commercial exhibitors, and sellers of obscene material or child pornography." *Id.* § 2(b).

77. *Id.*

78. *Id.* § 3.

79. S. 1521 § 3(b)(1)-(5). As this is a federal bill, the PVCA requires litigants to seek relief in the appropriate United States district court. *Id.* § 3(a).

80. *Id.* § 3(a)(1). The statute of limitations is triggered, however, if there is a conviction for the sexual offense. If no criminal conviction exists, a civil case under the PVCA must be filed within two years after the commission of the offense. If the assailant is convicted of the offense, then the civil action must be filed within a year of the conviction, or two years after the criminal offense, whichever is first. *Id.* § 3(e).

81. According to the PVCA, "sexual murder" is "a murder in conjunction with a rape, sexual assault, act of sexual abuse or other sexual crime." S. 1521 § 4(3).

82. *Id.* § 3(a)(1). The Act also gives standing to the estate or immediate family survivors of a victim if the victim passed away, as well as to the guardian of the victim if she is a minor. *Id.* § 3(a)(2)-(3).

83. "Preponderance of the evidence" is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." BLACK'S LAW DICTIONARY 1182 (6th ed. 1990) Thus, the evidence the victim produces at trial must make the trier of fact more than 50% sure that the defendant is at fault. Preponderance of the evidence is the standard of proof in most civil cases, as compared to "beyond a reasonable doubt," which is the more strict standard of proof in criminal cases. "Beyond a reasonable doubt" implies that the trier of fact is entirely satisfied in the guilt of the defendant. *See Id.* at 160.

under the PVCA.[84] To prove the elements the victim may use almost any form of evidence available under the proscribed rules of evidence;[85] the offender, however, may not testify at the trial.[86] When the victim successfully fulfills her obligation of proof, she may be awarded actual damages, compensation for pain and suffering, reasonable attorneys' fees, and other costs associated with the lawsuit.[87]

III. ANALYSIS OF THE PORNOGRAPHY VICTIMS' COMPENSATION ACT

Since the PVCA's introduction in July 1991, a number of commentators, editorialists, and legal scholars have discussed the plausibility of creating a tort remedy for victims of sexual crimes caused by pornography. A review of newspaper and magazine articles results in no less than forty works discussing the merits of the Pornography Victims' Compensation Act.[88] Among these articles is a vast amount of empirical research, victim testimony, legal theories, and case history which conclude that regulating obscenity will result in fewer crimes against women.

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84. S. 1521 § 3(b). In addition, the plaintiff must also provide evidence of two additional factors: (1) that the defendant is a commercial producer, distributor, exhibitor, or seller of the material that the assailant viewed; and (2) that the material in the aggregate affects interstate or foreign commerce. *Id.* § 3(b)(4) & (6).

85. *Id.* § 3(c). In federal courts, the proper rules of evidence are the Federal Rules of Evidence.

86. *Id.*

87. *Id.* § 3(d). The specific method for computing monetary damages is beyond the scope of this article.

88. Traditionally, newspapers and magazine editorialists are strongly in support of a broad interpretation of freedom of speech because most produce work protected by the First Amendment. Thus, it is not surprising that the majority of columnists writing about the PVCA are in strong opposition to this alleged limitation on the First Amendment. *See* Stephen Chapman, *Victims' Act Would Create Its Own Victims*, CHI. TRIB., Mar. 5, 1992, at C29; Ellen Goodman, *A Bad Bill, Movies Don't Rape, Rapists Do*, CHI. TRIB., Apr. 26, 1992, at C7; Clarence Page, *Dubious Notions About Sex Crimes and Pornography*, CHI. TRIB., Apr. 22, 1992, at C15; Marcia Pally, *Porn Didn't Make Him Do It*, THE WASH. POST, Feb. 11, 1992, at A21; and Ellen Willis, *An Unholy Alliance*, NEWSDAY, Feb. 25, 1992, at 78. *But see* Rhonda Goebel, *Helping Victims*, CHI. TRIB., Apr. 24, 1992, at C18; Robert Peters, *Too Soft On Porn*, NEWSDAY, Mar. 11, 1992, at 83; and Louise Sweeney, *Making Pornographers Pay*, THE CHRISTIAN SCIENCE MONITOR, May 21, 1992, at 8.

A. *Empirical Studies and Victim Testimony Finding a Correlation Between Pornography and Violence Against Women*

In 1968 President Lyndon Johnson appointed a commission to examine the relationship between sexually explicit materials and violent behavior. This commission ended two years later, finding no conclusive proof that such exposure plays a significant role in criminal sexual behavior.[89] Unsatisfied with this result, Edwin Meese, the Attorney General under President Ronald Reagan, appointed a new commission fifteen years later: the Meese Commission.[90] In 1986 this Commission announced findings contradictory to those of the 1970 Commission.[91] It concluded that exposure to certain forms of pornography leads to more aggression and increased violence against women.[92]

1. Empirical Research

Although criticism surrounds the Meese Commission report,[93] a

89. COMMISSION ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 139 (1970) [hereinafter 1970 REPORT].

90. Attorney General Meese appointed this commission in response to the increasing amount of sexual violence in films and the growing concern about child pornography. Wendy Melillo, *Can Pornography Lead to Violence?*, THE WASH. POST, July 21, 1992, at Z10.

91. ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 324 (1986) [hereinafter 1986 REPORT]. This commission did not fund any research. Instead, it held public hearings on current studies. The Meese Commission then requested an independent review of the relationship between pornography and violence and asked the Surgeon General to gather a group of medical, sociology, and psychology experts. Melillo, *supra* note 90, at Z10.

There have been a number of rationales given for the different conclusions in each report. *See generally* Jacobs, *supra* note 3, at 9 n.25 (arguing that since the 1970 study was conducted entirely by men, the biases of male researchers in a patriarchal society must be considered; the 1986 Commission was approximately one-half women); Victoria Mikesell Mather, *No Harm, No Foul: Pornography (Violent or Otherwise)*, 14 U. ARK. LITTLE ROCK L.J. 455, 477 (1992) (concluding that videotape technology has made sexually explicit material much more available since 1970).

92. 1986 REPORT, *supra* note 91, at 322-49. The Meese Commission made a number of recommendations, it: (1) advised states to change the misdemeanor status for secondary offenses to felony status; (2) recommended states to update their obscenity definition to conform with *Miller v. California*; (3) urged the federal government to enact legislation to prohibit "dial-a-porn" telephone numbers; and (4) suggested a number of other ideas to better control the proliferation of sexually explicit material. *Id.* at 491-523.

93. For a discussion of the criticisms of the Meese Report, see *infra* notes 136-53 and accompanying text.

great deal of evidence supports the Commission's findings.[94] Dr. Edward Donnerstein conducted the most comprehensive laboratory studies and found that men exposed to aggressive erotic films are more inclined to react violently and inflict pain upon women.[95] Donnerstein concluded that viewing this sort of material increases rape fantasies in males,[96] enhances their tendency to believe that women deserve and enjoy rape,[97] and diminishes their ability to perceive rape as harmful to the victim.[98]

Another group of studies found a strong correlation between child pornography and child molestation.[99] When presented to Congress, these studies led the committee to conclude that an obsession with child pornography is the most pervasive single characteristic among pedophiles.[100] The studies revealed that obscene material played a deliberate and essential role in over one-half of all child molestations.[101] In an additional study, researchers found that offenders in over forty child abuse cases[102] viewed various forms of either adult or child por-

94. *See infra* notes 95-103 and accompanying text for a discussion on the studies supporting the Meese Commission's findings. *See also* 1986 REPORT, *supra* note 91, at 322-47; Neil Malamuth et al., *Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects*, 38 J. PERSONALITY & SOC. PSYCHOL. 399, 405 (1980) (claiming that erotic depictions of female rape victims experiencing orgasms was more arousing for men than depictions of women experiencing an orgasm without pain); Dolf Zillman & Jennings Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32(4) J. OF COMM. 10, 19 (1982) (stating that high exposure to nonviolent pornography results in less compassion toward women as rape victims). *See generally* Mary F. Chervenale, *Selected Bibliography on Pornography and Violence*, 40 U. PITT. L. REV. 652, 658-60 (1978) (listing scientific studies on pornography and violence).

95. Edward Donnerstein, *Aggressive Erotica and Violence Against Women*, 39 J. PERSONALITY & SOC. PSYCHOL. 269-77 (1980).

96. AGGRESSION: THEORETICAL AND EMPIRICAL REVIEWS 31 (Russell G. Green & Edward I. Donnerstein eds., 1983).

97. *Id.* at 135.

98. Edward I. Donnerstein & Daniel Linz, *Sexual Violence in the Media: A Warning*, PSYCHOL. TODAY, Jan. 1984, at 14. *See also* Seymour Feschbach & Neil Malamuth, *Sex and Aggression: Proving the Link*, PSYCHOL. TODAY, Nov. 1978, at 111, 116.

99. S. REP. NO. 372, 102d Cong., 2d Sess. 9 (1992).

100. *Child Pornography and Pedophilia: Hearings Before the Subcomm. on Investigations of the Comm. on Governmental Aff.*, 99th Cong., 1st Sess. 46 (1986).

101. *See* S. REP. NO. 372, *supra* note 99, at 33 (citing John Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-Offenders*, 25 J. OF SEX RES. 267 (1988)).

102. *The Effects of Pornography on Children and Women: Hearings Before the Sub-*

nography or both prior to the offense.[103]

2. Victim Testimony

Victim testimony is another form of evidence used to confirm the correlation between obscene material and sexually related crimes. During the Meese Commission hearings, women described their experiences with pornography.[104] These women testified that they were coerced with threats to participate in countless horrific methods of torture, sadism, rape, and bondage.[105] The Meese Commission also heard testimony from a researcher who interviewed a number of prostitutes.[106] The study showed that clients often use pornography to describe their sexual expectations.[107]

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comm. on Juvenile Justice of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1984) (testimony of John Raburn for the National Center for Missing and Exploited Children), at 7, *cited in* S. REP. NO. 372, *supra* note 99, at 7.

103. *See* S. REP. NO. 372, *supra* note 99, at 7. In a detailed study, researchers found that 83% of rapists reported at least occasional usage of pornography on a current basis. Sixty-seven percent of the child molesters admitted to at least occasional use of pornography, whereas only 29% of the control group admitted as such. John Marshall, PORNOGRAPHY AND SEX OFFENDERS, *in* PORNOGRAPHY: RESEARCH ADVANCES AND POLICY CONSIDERATIONS (Dolf Zillman & Jennings Bryant, eds., 1989).

104. *See* 1986 REPORT, *supra* note 91, at 773-95.

105. *Id.* One woman reported being left alone in a room, tied up while sitting nude on a chair. When the man returned, he was accompanied by two other men. "They burned her with cigarettes and attached nipple clips to her breasts. They had many S and M [sadism and masochism] magazines with them and showed her many pictures of women appearing to consent, enjoy, and encourage this abuse. She was held for twelve hours, continuously raped and beaten." *Ordinances to Add Pornography as Discrimination Against Women: Public Hearings Before the Government Operations Committee, Minneapolis City Council*, 1st Sess. 18, 19 (1983). Another woman tells the story of family abuse involving pornography:

> I was sexually abused by my older brother when I was 5 or 6 years old, and going on until I was 13, and moved out of the house. . . . He had a lot of pornography, and so did my dad. My brother would describe things he'd seen in a magazine, so show [sic] them to me, and want me to pose. He was obsessed with Hustler, where people would send in pictures of their wives or girlfriends, and he was very turned on by the idea that he could be a pornographer, too.

Tamar Lewin, *Pornography Foes Push for Right to Sue*, N.Y. TIMES, Mar. 15, 1992, at 16.

106. 1986 REPORT, *supra* note 91, at 773-95.

107. Melillo, *supra* note 90, at Z10. Melillo interviewed Evelina Giobbe, the founder and director of Women Hurt in Systems of Prostitution Engages in Revolt (WHISPER). Giobbe based her conclusions on interviews with nineteen women working as prostitutes in the Minneapolis-St. Paul area. Giobbe went on to explain that using pornography as an example can bring demands for "sadomasochistic acts, bond-

In reviewing the PVCA, the Senate Committee on the Judiciary heard testimony from pornography victims. One such victim, Donna Ferguson, told of being abused as a child by her foster father.[108] She described to the committee her experiences of being forced to imitate scenes from hard-core pornographic magazines.[109] She also reported being sexually abused by four other men while in foster homes, two of whom were also obscenity users.[110]

B. *Legal Theories in Support of the Pornography Victims' Compensation Act:* Butler v. Her Majesty the Queen

Even before the Meese Commission found a correlation between obscenity and sexual crimes, a number of courts in the United States, including the Supreme Court,[111] acknowledged this determination. In 1978, a Georgia appellate court held that a defendant's pornographic collection was admissible under the Federal Rules of Evidence, to show an alleged rapist's criminal intent.[112] The court admitted the evidence, finding it relevant to show the defendant's "bent of mind."[113]

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age, anal intercourse, acts involving urination and defecation and the shaving of genital hair to give the appearance of prepubescence." *Id.*

Researchers speculate that men use pornography as a basis for what they expect in sex with their lovers, and not just with prostitutes. A study showed that at least 10% of the women surveyed had experienced a partner's attempt to have them imitate something the man had seen in some pornographic material. Many of the women were asked to participate in sadomasochistic behavior, and 15% were physically forced to initiate sexual activities after their partners viewed pornography. Diana Russell, *What Does the New Research Say?, in* TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 224 (Laura Lederer ed., Marrow 1980).

108. *See* S. REP. NO. 372, *supra* note 99, at 9.

109. *Id.*

110. *Id.* She further testified that these incidents resulted in a series of medical problems and psychological difficulties. She testified that her foster father "literally robbed me of my childhood, my sense of security, my ability to trust anyone. He committed the crime against me, and yet I served a sentence equivalent to two-thirds of my life for what he did as a result of his addiction to hardcore pornography." *Id.*

111. In 1972, Justice Burger determined that "although 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." Paris Adult Theater I v. Slaton, 413 U.S. 49, 60-61 (1973). *See also* Memoirs v. Massachusetts, 383 U.S. 413, 452-53 (1966) (Clark, J., dissenting) ("Sex murder cases are invariably tied to some form of obscene literature. . . . [T]he files of our law enforcement agencies contain many reports of persons who patterned their criminal conduct after behavior depicted in obscene material.").

112. Watson v. State, 250 S.E.2d 540, 543 (Ga. App. 1978).

113. *Id.*

In *State v. Herberg*,[114] the defendant abducted a fourteen year-old girl and brutally raped her.[115] When the police finally apprehended the assailant, in his possession were a number of obscene magazines.[116] In upholding the assailant's conviction, the Minnesota Supreme Court acknowledged the relationship between the possession of these magazines and the heinous crime.[117] The court concluded that the defendant had forced the victim to imitate a number of the scenes portrayed in the hard-core magazines.[118]

The Supreme Court of Canada recently confirmed this growing judicial understanding of the harm that obscenity causes. In *Butler v. Her Majesty the Queen*,[119] the high court determined that it was reasonable to conclude that obscene material leads to violence against women.[120] The case involved the repeated conviction of an owner of a hard-core video store who was charged with possessing, distributing, and selling obscene material.[121] The defendant argued[122] that the material he sold was protected under the Canadian Charter of Rights and Freedoms (Charter).[123] The Supreme Court supported the defendant's claim

114. 324 N.W.2d 346 (Minn. 1982).

115. *Id.* at 347. The defendant held her prisoner and forced her to stick safety pins into her nipples and then ask to be hit by the assailant. *Id.* She was forced to perform fellatio, submit to anal penetration, and burn herself on her breast and pubic areas. He then proceeded to defecate and urinate on her, forcing her to ingest the excrement until she choked, then strangled her until she became unconscious, at which point he let her go. *Id.*

116. 324 N.W.2d. at 347. These magazines included *Violent Stories of Kinky Humiliation*, *Violent Stories of Dominance and Submission*, and *Enemas and Golden Showers*.

117. *Id.*

118. *Id.* Specifically, the court held that "in committing these various acts, the defendant was giving life to some stories he had read in various pornographic books." *Id.*

119. 1 S.C.R. 452 (Can. 1992).

120. *Id.* at 509-10.

121. *Id.* at 461. The Winnipeg police entered the store on August 21, 1987 and seized all of Donald Victor Butler's inventory. The plaintiff was charged with 173 counts: 3 counts of selling obscene material, 41 counts of possessing obscene material for the purpose of distribution, 128 counts of possessing obscene material for the purpose of sale, and 1 count of exposing obscene material to the public. Butler reopened his business on October 19 of the same year. The police returned 10 days later with another search warrant, and added 77 more counts to his indictment. *Id.* at 461-62.

122. Butler also claimed that the anti-obscenity statutes were unconstitutionally vague, which the Supreme Court quickly dismissed. *Butler*, 1 S.C.R. at 490-91.

123. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 2(b).

holding that Canada's anti-obscenity statutes[124] on their face violate this new charter on individual freedoms.[125] Yet, in reviewing the purpose behind the anti-obscenity statutes, the Court determined that the regulations were a reasonable limit to the Charter and thus constitutional.[126]

Relying on prior case law, the Court reasoned that states enacted the anti-obscenity statutes to protect society from the harm that obscenity fosters:[127] obscenity's harm is its humiliation, degradation, and victimization of women and its appearance of normality and acceptance in male-female relationships.[128] The Court went on to discuss how this anti-female attitude can result in violence against women. Recognizing that there is no single cause of violence against women, Justice Sopinka emphasized that this harm is engendered by negative attitudes against women. Justice Sopinka then discussed the empirical research[129] that showed a clear correlation between obscenity and violence.[130]

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124. The portion of Canada's Criminal Code that involves obscenity is R.S.C., ch. C-46, § 163 (1985) (Can.). The relevant portions are as follows:

(1) Every one commits an offense who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever . . .

(2) Every one commits an offense who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever.

R.S.C., ch. C-46, § 163 (1)(a) & (2)(a) (1985) (Can.). A detailed discussion of the Canadian codes is beyond the scope of this Recent Development. For purposes of this article, it is only important to understand that the defendant argued the constitutionality of these statutes.

125. *Butler*, 1 S.C.R. at 489-90.

126. *Id.* at 509. A caveat in the first section of the Charter upheld the constitutionality of any anti-obscenity statute so long as its objective was compelling and the restriction was reasonable. Section 1 of the Charter provided for a three prong test to determine if a statute was a reasonable limit to the freedoms created in the Charter. *See* CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1; *Butler*, 1 S.C.R. at 498-99.

127. *Butler*, 1 S.C.R. at 493. "It is harm to society from undue exploitation that is aimed at by the section, not simply lapses in propriety or good taste." *Id.* (quoting Towne Cinema Theaters, Ltd. v. The Queen, 1 S.C.R. 494 (Can.)).

128. *Butler*, 1 S.C.R. at 493 (quoting *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol. 1 (1985)).

129. For a discussion on the empirical research presented to the Supreme Court of Canada, *see supra* notes 93-103 and accompanying text.

130. *Butler*, 1 S.C.R. at 501-03.

The Court acknowledged that not all within the scientific community see a causal connection between obscenity and violence against women.[131] Yet using past Canadian precedent, Justice Sopinka concluded that as long as the Parliament had a reasonable basis for finding that obscenity can lead to harm against women, it was justified in constructing statutes to prohibit obscene material.[132] Considering the evidence presented, the Court found such a reasonable basis. The Court concluded that protecting women against the harms of obscenity was sufficiently compelling to limit the Charter of Rights and Freedoms.[133]

IV. CRITICS OF THE PORNOGRAPHY VICTIMS' COMPENSATION ACT

The Pornography Victims' Compensation Act is not without its critics. The most common objections to the Act are twofold: (1) studies finding an increase in crime against women with the advent of greater availability of pornography are false;[134] and (2) the constitutional right to freedom of speech must be maintained.[135]

A. *Critics of Studies Finding a Relationship Between Pornography and Sexual Crimes*

In an attempt to diminish the potential positive effect of the Pornography Victims' Compensation Act, critics are quick to dismiss the studies on which the Act is based.[136] A number of legal scholars argue that studies such as Donnerstein's are inconsistent with general scientific belief. The primary study used to counter the 1986 Meese Com-

131. *Id.* at 501.

132. *Id.* at 502-03. In Irwin Toy Ltd. v. Quebec, 1 S.C.R. 927 (Can.), the Court assessed competing social science evidence regarding the effects of advertising aimed at children. The Court concluded that the question "is whether the government had a *reasonable basis* for concluding that the ban on all advertising directed at children impaired freedom of expression." *Irwin Toy*, 1 S.C.R. at 994 (emphasis added).

133. *Butler*, 1 S.C.R. at 509-10.

134. *See* Henry Louis Gates, Jr., *Girls Lean Back Everywhere: The Law of Obscenity and the Assault on Genius; Book Reviews*, THE NATION, June 29, 1992, at 898 (stating that the repeal of Denmark's pornography law led to a decrease in sex crimes); Layman, *supra* note 15, at 1491 (arguing that clearer proof of a correlation between pornography and sexual assaults is needed). *See also infra* notes 136-153 and accompanying text.

135. *See* Willis, *supra* note 88, at 78 (claiming that PVCA is a disaster to all who value free speech). *See also infra* notes 154-163 and accompanying text.

136. For a discussion on the studies, see *supra* notes 93-103 and accompanying text.

mission Hearings[137] occurred in Denmark.[138] In the late 1960s Denmark repealed its pornography laws, thus making sexually explicit material much more available to the public.[139] In the ensuing years, Danish studies found that the incidence of sex crimes diminished overall,[140] flatly contradicting the notion that exposure to pornography leads to increased violence against women.[141]

In the same time period the availability of pornography increased in the United States. Yet contrary to the Denmark study, the incidents of sexual crimes in the United States increased.[142] However, observations in individual state counties support the relationship between pornography and sexual crimes. In 1984 in Oklahoma County, Oklahoma, the office of the district attorney cracked down on sexually oriented businesses.[143] The pornographic television channel was eliminated, along with peep shows, hard-core pornographic theaters, topless and bottomless shows, and most of the adult bookstores.[144] The result was not an

137. For a discussion on the Meese Commission, see *supra* notes 90-92 and accompanying text.

138. Gates, *supra* note 134, at 898.

139. *Id.*

140. *Id.* For a complete discussion regarding the Denmark study, see 1970 REPORT, *supra* note 89, at 272-73.

It is important to consider whether the incidence of sex crimes is really rare in countries such as Denmark, or whether only the reporting of such crimes is rare. Often, women who are victims of sexual abuse choose not to report such crimes for any number of reasons. For instance, sexually abused women realistically may know that the perpetrator will not be punished for the crime because of laws that are hard to apply. In addition, the victim may not be emotionally prepared for the personal attacks that will ensue when she does choose to report the crime. *See* Gates, *supra* note 134, at 898 ("[t]oo many complicating factors enter into such studies to deduce any hard and fast rules.").

141. A study conducted between 1964 and 1984 in four countries — Denmark, Sweden, West Germany, and the United States — found that the United States was the only country to report an increase in rapes. At the time of this study, the United States' local obscenity laws were more strict than in any of the other three countries. Melillo, *supra* note 90, at Z10. The researchers argue that the increase in the United States illustrates the tenuous relationship between pornography and rape. According to these researchers, rape is an act of violence, not a sex crime; "pornography does not represent a blueprint for rape, but is an aphrodisiac, that is, food for the sexual fantasy of persons." *Id.*

142. Deana Pollard, *Regulating Violent Pornography*, 42 VAND. L. REV. 125, 132 n.40 (1990). The F.B.I. calculates that the number of rapes increased more than 95% during the 1960s. This was the same period that pornographic material became more prevalent in our society. Jacobs, *supra* note 3, at 11-12.

143. S. REP. NO. 372, *supra* note 99, at 9.

144. *Id.*

increase in the amount of sexually-related crimes, as the Denmark study would suggest. Instead, the county found a decrease in the amount of rapes by 24.4% over five years.[145] Thus, because these United States statistics contradict those of Denmark, it would be irresponsible to rely solely on the Danish studies when discussing the present situation in the United States.[146]

The other popular argument presented to discount studies that find a correlation between exposure to pornography and increased aggression against women is that the tests themselves are skewed. Often, determinations made in laboratory studies are not necessarily equally applicable outside the testing site. Commentators complain that the Donnerstein studies are accurate only in an artificial environment.[147]

First, the subjects of the studies were not asked to inflict pain upon another person; instead, they were asked to perform artificial forms of aggression.[148] In addition, critics claim that the study condoned violence and aggression, and potentially even encouraged it.[149] The men participating in this study may not have actually perceived themselves as inflicting pain. Thus, they may have been more comfortable expressing their desire to commit violent acts than they would be if they actually committed the acts themselves.[150]

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145. *Id.* Although the county's rape statistics decreased, the number of rapes in the State of Oklahoma overall increased. *Id.*

146. Moreover, the Denmark studies concentrated on the effects of erotica, not violent pornography and obscenity. Melillo, *supra* note 90, at Z10. The Donnerstein studies observed more violent pornography, the type that would bring about liability under the PVCA.

147. *See generally* Anthony D'Amato, *A New Political Truth: Exposure to Sexually Violent Materials Causes Sexual Violence*, 31 WM. & MARY L. REV. 575 (1990) (criticizing the Meese Commission findings as influenced by the political process); Nan D. Hunter & Sylvia Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce, et al. in* American Booksellers Ass'n v. Hudnut, 21 U. MICH. J.L. REF. 69, 112-18 (1987-88) (arguing that the conclusions of the studies linking obscenity and violence must fail for numerous reasons); Barry W. Lynn, *"Civil Rights" Ordinances and the Attorney General's Commission: New Developments in Pornography Regulation*, 21 HARV. C.R.-C.L. L. REV. 27, 67-71 (1986) (explaining numerous criticisms of Donnerstein's approach).

148. Daniel Linz, et al., *The Attorney General's Commission on Pornography: The Gaps Between "Findings" and Facts*, 1987 AM. B. FOUND. RES. J. 713, 722.

149. *Id.*

150. Pauline B. Bart & Margaret Jozsa, *Dirty Books, Dirty Films, and Dirty Data, in* TAKE BACK THE NIGHT: WOMEN ON PORNOGRAPHY 304-05 (Laura Lederer, ed., Marrow 1980):

> [W]e do not know the relationship among any of the following: what people believe and what they tell researchers they believe; what kinds of things they think they will do and what they *actually* will do and under what circumstances they will do

Furthermore, the men in Donnerstein's study were mostly college students.[151] It is quite likely that this population is not the "average person" who reads pornography. Additionally, college students may be more apt to experience the "experimenter demand effect" — when a subject attempts to guess the researchers' hypothesis and then works to confirm it.[152] Taken together, these considerations make some legal scholars question whether studies accurately reflect what occurs in real life situations.[153]

B. *The Constitutional Right to Freedom of Speech Must Be Maintained*

Another argument often discussed in opposition to the Pornography Victims' Compensation Act is that it restricts the constitutional right to freedom of speech. According to some detractors, the PVCA would take our obscenity precedent back to the *Hicklin* era.[154] This viewpoint contends that the PVCA turns obscenity back into a moral issue, and culpability would be determined not by the average consumer, but by those most susceptible to its influence.[155] This perception would cause a great deal of the pornography industry to curtail their materials, and, in doing so, curtail their First Amendment rights.

In support of this argument, legal scholars point to a number of recent federal and state cases. Two such cases are *Zamora v. Columbia Broadcasting Systems*,[156] and *Herceq v. Hustler Magazine*.[157] In *Zamora*, the court found a national television network not liable for exposing the plaintiff to violent television programs which allegedly

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it; e.g., if they do it in an experimental laboratory situation in a psychology department, will they do it in the outside world and, conversely, if they do it outside, will they do it for the psychologist?

Id. (emphasis in the original).

151. Linz, et al., *supra* note 148, at 722.

152. *Id.*

153. In using the Donnerstein studies, the 1986 Presidential Commission did not disregard these fears. Instead, the Commission acknowledged the gaps in the studies, but chose to make assumptions regarding the gaps. *See* 1986 REPORT, *supra* note 91, at 325.

154. For a discussion on the *Hicklin* case, see *supra* notes 16-18 and accompanying text.

155. Gates, *supra* note 134, at 898.

156. 480 F. Supp. 199 (S.D. Fla. 1979).

157. 565 F. Supp. 802 (S.D. Tex. 1983).

caused him to kill an eighty-three year old woman.[158] The court held that the network had no responsibility to keep violent shows from the plaintiff.[159] Similarly, in *Herceq*, a pornographic magazine company was found not liable for causing the auto-erotic death of the plaintiff's son.[160]

The courts in both of these cases reasoned that both the network's and the magazine's First Amendment right to freedom of expression protected their actions.[161] In order to find these defendants liable, victims would have to show that the material presented a clear and present danger. Neither of the victims were able to do so.[162] Without such a showing, the courts held that the defendants could not be held liable for actions allegedly taken pursuant to their First Amendment freedoms.[163]

V. CONCLUSION

Obscenity is anti-woman speech, similar to racist speech or anti-Semitic speech; and like these other forms of speech, obscenity is more than just words. Research shows that obscenity leads to violence against women; that men are more apt to sexually assault or rape women after viewing obscene material.[164] Victim testimony and case studies document the degradation, humiliation, and physical torture

158. *Zamora*, 480 F. Supp. at 201-07.

159. *Id.* In another media case, Olivia N. v. National Broadcasting Co., 126 Cal. App. 3d 488 (1981), *cert. denied sub. nom.*, Neimi v. National Broadcasting Co., 458 U.S. 1132 (1982), a nine year old girl was raped with a bottle by four youths after they had seen a similar rape in a television movie, *Born Innocent*. *Id.* at 492. The broadcast media cases are collected in Vitants M. Gulbis, Annotation, *Liability for Personal Injury or Death Allegedly Resulting from Television or Radio Broadcast*, 20 A.L.R.4th 327 (1983).

160. *Herceq*, 565 F. Supp. at 805. An article in *Hustler* magazine described the superior orgasms achieved while simultaneously masturbating and being asphyxiated. This encouraged the son of the plaintiffs to attempt it, leading to his death. *Id.* at 803. The plaintiffs based their claim on the theories of negligent publication and strict liability. *Id.*

161. *Id.* at 804-05; *Zamora*, 480 F. Supp. at 207.

162. *Herceq*, 565 F. Supp. at 804; *Zamora*, 480 F. Supp. at 207.

163. *Herceq*, 565 F. Supp. at 804; *Zamora*, 480 F. Supp. at 207.

164. For a discussion on the relevant empirical research, see *supra* notes 93-103 and accompanying text. For the arguments against such research, see *supra* notes 134-153 and accompanying text.

women are forced to endure due to men's obsession with obscenity.[165] The Pornography Victims' Compensation Act is one important step to eradicating this vicious sexual discrimination.

Critics of the PVCA argue that this Act would unconstitutionally infringe on an individual's First Amendment rights.[166] This is simply incorrect. In order to prevent the trampling of any constitutional right, the senators sponsoring this bill limited the restrictions to obscenity and child pornography,[167] two types of speech without First Amendment protection.[168] Understanding that there is not a valid First Amendment challenge, there remains one main legal question that must be resolved to justify the PVCA: Is there documented evidence showing any correlation between obscenity and violence against women sufficient to support such a civil remedy?

Historically, the federal legislative branch has had the discretion to determine if evidence is sufficient to warrant legislative action.[169] Over eighty years ago, in *Jacobsen v. Massachusetts,*[170] the Supreme Court codified this tenant of our government.[171] Writing for the Court, Justice Harlan observed that to create laws based on a belief, the belief need not be held by the entire populous;[172] the legislative branch must be given the power to legislate based on its own principles. Justice Harlan determined that evidence is not required to draft legislation

165. For a discussion on victim testimony, see *supra* notes 104-110, and accompanying text.

166. For a discussion the constitutional criticisms of the PVCA, see *supra* notes 154-163 and accompanying text. *See also* S. REP. NO. 372, 102d Cong., 1st Sess. 27 (1992) (minority views of Chairman Biden, and Senators Kennedy, Metzenbaum, Leahy, Simon, and Kohl).

167. Initially, the PVCA included hard-core pornography, but the sponsors of the bill agreed to limit it to constitutionally unprotected speech.

168. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . ."). *See also* New York v. Ferber, 458 U.S. 747 (1982) ("[T]he States are entitled to greater leeway in the regulation of pornographic depictions of children.").

169. *See* Gregg v. Georgia, 428 U.S. 153, 184-87 (1976) (plurality opinion). *See also* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329 n.2 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986) (characterizations made by the Congress are not subject to judicial review).

170. 197 U.S. 11 (1905).

171. *Id.*

172. *Id.* at 35.

based on a common belief or correlation.[173] He found that even scientific evidence showing the legislative belief to be wrong cannot mandate the legislators to act a certain way.[174] Therefore, like the Canadian opinion expressed in *Butler*,[175] even if there is contradicting empirical evidence, the legislature's right to base the PVCA on the correlation between pornography and violence against women is absolute.

Gloria Steinem explains that obscenity "will continue as long as boys are raised to believe they must control or conquer women as a measure of manhood, as long as society rewards men who believe that success . . . depends on women's subservience."[176] Because there are no quick ways to change these attitudes, measures like the Pornography Victims' Compensation Act must be enacted. The PVCA is one important effort to curtail the exploitation of women, so that we as a community may maintain an ordered society. It is imperative that we give such efforts the opportunity to mold our society, thereby making obscenity less attractive, and saving countless female lives.

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173. *Id.* "A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts." *Id.*

174. 197 U.S. at 35.

175. *See* Butler v. Her Majesty the Queen, 1 S.C.R. 452, 501-03 (Can. 1992). *See also supra* notes 119-133 and accompanying text.

176. Gloria Steinem, OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 230 (1983).

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