Pornography and the First Amendment: The Feminist Balance

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Feminists have dubbed pornography "the propaganda of misogyny."[1] Despite feminist abhorrence of pornography's effects on women,[2] pornography is speech protected by the first amendment of the United States Constitution.[3]

Any legal analysis concerning sexually explicit material must distinguish between obscene material that is not speech protected by the first amendment,[4] and pornographic material. "Pornography" commonly refers to any sexually explicit material. "Obscenity" includes only a portion of the pornography genre and is sometimes referred to as "hard-core" pornography.[5] Pornographic material is legally obscene only if it appeals to the prurient interest, is patently offensive, and lacks literary, artistic, political, or scientific value.[6]

Prohibitions of obscenity are based on a moral, "social value judgment,"[7] and not on evidence of obscenity's harm to society. The earliest regulations of obscenity had a religious purpose,[8] and long after religion's effect on secular life had diminished in American society, states continued to enact statutes regulating obscenity.[9] The religious justifications for the regulations were replaced with no more than the Supreme Court's assertion in 1957 that "this Court has always *assumed* that obscenity is not protected by

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1. LaBelle, *The Propaganda of Misogyny*, in TAKE BACK THE NIGHT 168, 172 (L. Lederer, ed. 1980).

2. *See infra* notes 63-88 and accompanying text.

3. *See* American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984) *aff'd*, No. 84-3147, slip op. (7th Cir. Aug. 27, 1985).

4. *See* Miller v. California, 413 U.S. 15 (1973).

5. *See id.* The *Miller* Court refers to obscenity as "hard core sexual conduct," and isolates "hard core" pornography from speech which receives first amendment protection. *Id.* at 27 and 29. *See also* F.F. SCHAUER, THE LAW OF OBSCENITY, 41-44 (1976).

6. Miller v. California, 413 U.S. at 24. For the complete definition of legal obscenity, see *infra* note 96 and accompanying text.

7. Memorandum from Catharine A. MacKinnon and Andrea Dworkin to the Minneapolis City Council, Dec. 26, 1983, at 6 [hereinafter cited as Memorandum]. The Minneapolis City Council passed an ordinance similar in language and effect to the Indianapolis ordinance, discussed *infra* notes 19-34 and accompanying text, on Dec. 30, 1983. The mayor of Minneapolis subsequently vetoed the ordinance.

8. SCHAUER, *supra* note 5, at 8-9.

9. *Id.* at 10.

the freedoms of speech and press."[10]

The feminist view of pornography, in contrast to the legal view of obscenity, is not rooted in religious values. While not necessarily immoral in a religious or sexual sense, pornography is immoral in a humanistic sense in that it negatively impacts women's status and treatment in society.[11] Feminists urge that pornography is "an institution of gender inequality" that actually harms women.[12] Pornography's evil is not its sexual content, but its "degrading and dehumanizing portrayal of women."[13]

On April 23, 1984, the Indianapolis City-County Council adopted the feminist view of pornography's harm by enacting an ordinance that treats pornography as a violation of women's civil rights.[14] After Indianapolis Mayor Hudnut signed the ordinance into law, book sellers, distributors, and publishers promptly challenged it. The American and Indiana Civil Liberties Unions joined the plaintiffs as *amicus curiae*. On November 19, 1984, United States District Court Judge Sarah Evans Barker held the ordinance unconstitutional, void, and of no effect.[15]

Feminists do not unanimously support efforts to suppress pornography. Feminist civil libertarians recognize the danger inherent in state action infringing speech,[16] but support efforts to raise the public consciousness regarding pornography's harms through picketing, leafleting, and letterwriting.[17] While the danger of suppressing speech must be carefully considered, pornography's harm to women, as found to exist by the Indian-

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10. Roth v. United States, 354 U.S. 476, 481 (1957) (emphasis added). The Court further found that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." 354 U.S. at 484.

11. Memorandum, *supra* note 7, at 1.

12. MacKinnon, *Not a Moral Issue*, 2 YALE L. & POL. REV. 321, 325 (1984). *See infra* note 13.

13. Longino, *Pornography, Oppression, and Freedom: A Closer Look*, in TAKE BACK THE NIGHT 26, 32 (L. Ledered, ed. 1980). Longino states pornography's harms as:

1. Pornography, especially violent pornography, is implicated in the committing of crimes of violence against women.
2. Pornography is the vehicle for the dissemination of a deep and vicious lie about women. It is defamatory and libelous.
3. The diffusion of such a distorted view of women's nature in our society as it exists today supports sexist . . . attitudes, and thus reinforces the oppression and exploitation of women.

Id. at 35.

See Hommel, *Images of Women in Pornography and Media*, 8 N.Y.U. REV. L. & SOC. CHANGE 207 (1978-79). Hommel provides numerous examples of pornographic portrayals of women. An *Ace* magazine article, "Rape Me, Rape Me Not," explains that women take martial arts training merely to slow down the rapist and prolong the rape. *Id.* at 209. A *Chic* magazine article, "Columbine Cuts Up," shows a woman in the act of self-mutilation. She is stabbing herself in the vagina with a butcher knife and cutting her labia and breasts with scissors. *Id.* at 212.

14. INDIANAPOLIS AND MARION COUNTY, INC., ORDINANCE 35 (June 15, 1984) [hereinafter cited as ORDINANCE].

15. American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984) *aff'd*, No. 84-3147, slip op. (7th Cir. Aug. 27, 1985).

16. *See* Smith, *Violent Pornography and the Women's Movement*, 4:5 CIV. LIB. REV., Jan./Feb. 1978, 50, 51. *See also infra* note 93.

17. Smith, *supra* note 16, at 52. *See also* Smith, *Private Action Against Pornography: An Exercise of First Amendment Rights*, 8 N.Y.U. REV. L. & SOC. CHANGE 247 (1978-79). Women Against Violence Against Women is an activist group that fights pornography through public education, consciousness raising, and consumer boycotts. *Id.* at 247. Smith maintains that the group's activities, while aimed at curtailing pornographic speech, are still consistent with civil liberties principles. *Id.* at 247, 250.

apolis City-County Council,[18] is great enough to merit a legal remedy. Between the Indianapolis ordinance, which creates a broad exception to first amendment freedoms, and the activities aimed at raising the public consciousness, a third alternative exists. The creation of a private cause of action based on criminal obscenity law would allow women to seek redress for pornography's harm.

This Note first analyzes the Indianapolis pornography ordinance and the district court's decision that the ordinance is unconstitutional. This Note then discusses pornography's harm to women. A model statute based on criminal obscenity law is proposed, and a plaintiff's standing, burden of proof, and alternative remedies under the proposed statute are discussed.

I. INDIANAPOLIS PORNOGRAPHY ORDINANCE

The Indianapolis ordinance, while providing a legal remedy to women harmed by pornography, carves a new exception into first amendment freedoms. Technically, the ordinance amends Chapter 16 of the Indianapolis Code, entitled "Human Relations; Equal Opportunity."[19] The ordinance states first that "pornography is a discriminatory practice based on sex which denies women equal opportunities in society."[20] Pornography is defined as "the graphic sexually explicit subordination of women, whether in pictures or in words."[21] The pictures or words must include one of six scenarios which depict violence against or degradation of women.[22] The acts which give rise to a cause of action under the ordinance are trafficking in

18. ORDINANCE, *supra* note 14, § 16-1(a)(2) states:
Pornography is a discriminatory practice based on sex which denies women equal opportunities in society. Pornography is central in creating and maintaining sex as a basis for discrimination. Pornography is systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, access to and use of public accommodations, and acquisition of real property; promote rape, battery, child abuse, kidnapping and prostitution and inhibit just enforcement of laws against such acts; and contribute significantly to restricting women in particular from full exercise of citizenship and participation in public life, including in neighborhoods.

19. ORDINANCE, *supra* note 14.

20. *Id.* sec. 1, § 16-1(a)(2).

21. *Id.* sec. 2, § 16-3(q)(1)-(6).

22. *Id.* The statute states:
(q) Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
(1) Women are presented as sexual objects who enjoy pain or humiliation; or
(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or
(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.

pornography,[23] coercion into pornographic performance,[24] forcing pornography on a person,[25] and assault or physical attack due to pornography.[26] A complaint under the ordinance can be filed against the perpetrators, makers, sellers, exhibitors, and distributors of the pornography[27] and can result in a cease and desist order,[28] a temporary or permanent injunction,[29] and/or damages.[30]

The ordinance's civil rights approach to pornography is unique. Proponents of the ordinance assert that it "is a civil law *against* pornography, but . . . also *for* the equality of the sexes."[31] Thus, the ordinance is buttressed by equal protection and anti-discrimination laws.[32] This civil rights justification rests on the assumption that pornography subordinates women in society. After extensive hearings, the Indianapolis City-County Council accepted this assumption as fact, stating, "[p]ornography is a systematic practice of exploitation and subordination based on sex which differentially harms women."[33]

In assessing the constitutional obstacles to the enactment, proponents of the ordinance take an offensive approach. Because pornography "contributes to a silencing of women," proponents assert, a legal remedy against pornography furthers women's first amendment rights.[34] The authors of the ordinance, however, failed to include any first amendment balance to temper its broad sweep. Proponents assert that pornography is not speech, but rather is the actual subordination of women. While this may justify the omission of a first amendment balance, the omission implies exactly what civil libertarians fear: that the ordinance will operate as a blanket chill on heretofore protected speech.

A defense based on literary, artistic, political, or scientific value might have been provided in the ordinance.[35] The absence of such a defense suggests that the authors believe either that pornography, as defined by the ordinance, would never have a value warranting protection, or that a literary, artistic, political, or scientific value would never outweigh pornography's harm.[36] Either belief is dangerous from a civil libertarian's view.

A. *American Booksellers Association v. Hudnut*

When the Indianapolis ordinance was challenged in *American Booksell-*

23. *Id.* sec. 2, § 16-3(g)(4).
24. *Id.* sec. 2, § 16-3(g)(5).
25. *Id.* sec. 2, § 16-3(g)(6).
26. *Id.* sec. 2, § 16-3(g)(7).
27. *Id.* sec. 4, § 16-17(a)(6)-(7).
28. *Id.* sec. 5, § 16-26(d).
29. *Id.* sec. 6, § 16-27.
30. *Id.* sec. 5, § 16-26(d).
31. Memorandum, *supra* note 7, at 8.
32. *Id.* at 10.
33. ORDINANCE, *supra* note 14, sec. 2, § 16-1(a)(2).
34. Memorandum, *supra* note 7, at 10.
35. In Miller v. California, 413 U.S. at 34, the Supreme Court noted that material which has "serious literary, artistic, political or scientific value" is protected by the first amendment.
36. One of the authors of the Indianapolis ordinance has stated, "if a woman is subjected, why should it matter that the work has other value?" MacKinnon, *supra* note 12, at 332.

ers Association v. Hudnut,[37] the United States District Court's holding that the ordinance was unconstitutional came as no surprise. The court based its decision on three grounds: 1) the ordinance regulates speech that is protected by the first amendment; 2) the ordinance suffers from vagueness; and 3) the ordinance allows an unlawful prior restraint by an administrative committee.

1. *First Amendment Analysis*

In *American Booksellers*, the court followed a three-step analysis to determine the constitutionality of the ordinance under the first amendment.[38] First, does the ordinance attempt to restrain speech or behavior? Second, if the ordinance regulates speech, is the speech protected by the first amendment? Third, if the speech is protected, does a compelling state interest justify the removal of the speech from first amendment protection?

The court easily found that, despite the defendants' "sleight of hand" in defining pornography as an act—the actual subordination of women—the ordinance nonetheless regulated speech.[39] The court further found that the speech regulated by the ordinance was protected by the first amendment.[40] The first amendment does not afford absolute protection to obscenity,[41] libel,[42] words directed at inciting imminent lawlessness,[43] or material depicting children engaged in sexual conduct.[44] The court found that although pornography resembles obscenity, the ordinance "spans so much more broadly with its regulatory scope than merely 'hard core' obscenity" that it intrudes unlawfully on protected speech.[45]

The crux of the court's first amendment analysis was whether the state's interest in sex-based equality was "so compelling as to be fundamental" and thus outweighed the free speech interest of the plaintiffs.[46] The state's interest in *American Booksellers* was to protect women from the humiliation and degradation that results when women are depicted in a context of sexual subordinance.[47] The defendants asserted that pornography harms all women. Specific harms cited by the defendants included: coercion of women into pornography through physical force, psychological pressure, drugs, and economic exigencies; forcing women to engage in dangerous acts in the production of pornography; negative impacts on the behavior of viewers in terms of their attitudes toward and perceptions of women; and the use of pornography in the sexually violent abuse of women and children.[48] The

37. 598 F. Supp. 1316 (S.D. Ind. 1984) (appeal filed).
38. *Id.* at 1329-30.
39. *Id.* at 1330.
40. *Id.* at 1332.
41. Miller v. California, 413 U.S. 15.
42. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
43. Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
44. New York v. Ferber, 458 U.S. 747 (1982).
45. *American Booksellers*, 598 F. Supp. at 1332.
46. *Id.* at 1335.
47. *Id.*
48. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment at 2-15, American Booksellers Ass'n, Inc. v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984) [hereinafter cited as Defendants' Memorandum].

court found that the state's interest was not so fundamental as to warrant an exception to first amendment freedoms.[49] It is worthy of note that the court did not question the City-County Council's findings of "harm."[50]

Once the ordinance was held unconstitutional as an infringement of protected speech, the issues of vagueness and prior restraint were effectively moot. The court addressed both issues, however, assuming *arguendo* that the state's interest outweighed first amendment rights.[51]

2. *Vagueness*

In order to overcome a vagueness challenge, a law must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[52] In the area of first amendment freedoms, vagueness constitutes a special problem. A vague statute infringing speech may cause people to "steer far wider of the unlawful zone,"[53] thus creating an inhibition of speech which the statute's authors did not intend.

The *American Booksellers* court found the reference to "subordination" of women to be particularly vague.[54] The defendants asserted that "subordination" has a common meaning and referred to *Webster's Dictionary*[55] and the six specific scenarios of "subordination" outlined in the ordinance.[56] The court, nonetheless, believed it was impossible to settle on a single meaning of the term that would give a person of ordinary intelligence notice of what was prohibited.[57] The court also found that the six scenarios of subordination outlined in the ordinance were vague, specifically objecting to the words, "degradation," "abasement," and "inferior."[58] Rather than provide definitions or rewrite the ordinance, the court held the ordinance unconstitutionally vague.[59]

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49. *American Booksellers*, 598 F. Supp. at 1336. Judge Barker's conclusion, which should give pause to even the most ardent opponent of pornography, is worth noting. She states:

> It ought to be remembered by defendants and all others who would support such a legislative initiative that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing greater good for one sector of our society erodes the freedoms of all and, as such, threatens tyranny and injustice for those subjected to the rule of such laws.

Id. at 1337.

50. *Id.* at 1336-37. *See* New York v. Ferber, 458 U.S. 747 (1982). The *Ferber* Court also refused to second-guess the legislative judgment. The Court stated it was the judgment of both the legislature and the relevant literature that the use of children in pornographic materials was harmful to the physiological, emotional, and mental health of the child. *Id.* at 758. *See also infra* note 90 and accompanying text.

51. *American Booksellers*, 598 F. Supp. at 1337.

52. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

53. Keyishian v. Board of Regents of New York, 385 U.S. 589, 604 (1967) (quoting Speiser v. Randall, 357 U.S. 513, 526).

54. 598 F. Supp. at 1338.

55. Defendants' Memorandum, *supra* note 48, at 41.

56. *See supra* note 22.

57. 598 F. Supp. at 1338.

58. *Id.* at 1339.

59. *Id.*

3. *Prior Restraint*

The court noted the due process requirements for restraint of speech, outlined by the Supreme Court in *Freedman v. Maryland*.[60] These include four procedural safeguards: 1) the censor has the burden of proving the speech is not protected; 2) the censor must initiate judicial action to restrain speech; 3) prior to judicial review, the censor can restrain material only to preserve the status quo; and 4) judicial review must be prompt.[61]

Applying these safeguards to the Indianapolis ordinance, the court found that the ordinance's enforcement procedures allow an unlawful prior restraint in several respects.[62] First, if the civil rights administrative committee decides in favor of the complaining party, it is the defendant's burden to seek a judicial hearing and to prove that the material is protected. Second, the administrative board can issue a cease and desist order which can remain effective until the pendency of judicial review. Third, the administrative board can order any relief it deems necessary, beyond relief that will merely preserve the status quo for a final determination. Finally, the ordinance nowhere requires a prompt judicial determination.

As evidenced by the *American Booksellers* opinion, the Indianapolis ordinance is fraught with constitutional difficulties. The Indianapolis City-County Council failed to enact an ordinance that could withstand judicial scrutiny, but the Council's efforts were not in vain. The Council's extensive hearings on and documentation of pornography's effects affirm what feminists have long believed—that there is a strong causal connection between pornography and harm to women.

II. PORNOGRAPHY'S HARM TO WOMEN

Nearly fourteen pages of the defendants' brief in *American Booksellers* are devoted to describing pornography's negative effects.[63] The defendants cite several research studies, as well as the testimony of victims of pornography to support the conclusion that pornography harms all women.[64]

The most well-known pornography victim is Linda Marchiano, or Linda Lovelace, of *Deep Throat* fame. Marchiano asserts that during the filming of *Deep Throat* she was physically and psychologically imprisoned, sexually exploited, "beaten, hypnotized, raped and threatened with death or disfigurement."[65] In her testimony to the Senate Judicial Subcommittee on Juvenile Justice, Marchiano stated, "Every time someone watches [*Deep Throat*], they're watching me being raped."[66]

Pornography's harm extends well beyond those harms inflicted on the

60. 380 U.S. 51 (1965).
61. *Id.* at 58-59.
62. *American Booksellers*, 598 F. Supp. at 1340-41. Only those procedures relating to coercion and forcing pornography operated as unlawful prior restraints. *See supra* notes 23-26 and accompanying text.
63. Defendants' Memorandum, *supra* note 48, at 2-15.
64. *Id.* at 2.
65. *Id.* at 3.
66. *Linda Lovelace, NOW testify on porn as violence*, Arizona Daily Star, Sept. 13, 1984, at B6, col. 6.

women directly involved in its production. Most significant to women as a class are the studies indicating that depictions of sexual aggression with positive consequences can negatively influence the viewer's perceptions of and attitudes toward women.[67] The studies support the finding that exposure to such stimuli increases the viewers' acceptance of rape myths and violence against women.[68] In fact, after exposure to aggressive pornography, male subjects report that they are more likely to rape a woman.[69] One scientist has noted a direct causal relationship between exposure to violent pornography and violence against women.[70]

Even the most conservative studies concede that exposure to pornography causes increased sexual behavior.[71] The risk of violence arises when someone predisposed to rape is exposed to pornography.[72] At the very least, there is no evidence to *exclude* pornography as a cause of rape among those who are predisposed to sex crimes.[73]

In a 1984 Arizona criminal trial, the defendant admitted murdering and sexually mutilating his female victim.[74] On the day prior to the criminal acts, the defendant had viewed two films, *Maniac* and *Pieces*, which depict violent acts toward women such as scalping and dismembering.[75] When confessing his acts, the defendant stated, "I started to put the knife to her hair. I seen [sic] this movie called *Maniac* and it's where this guy scalps women's hair off."[76] The psychological experts who testified at the defendant's trial concluded that the films were one factor in the violent acts that followed their viewing. One psychiatrist stated that years of "repressed, sexually-tinged violence" erupted in the defendant, "perhaps because of the film."[77] The defendant had a history, dating back to his childhood, of being stimulated by pornography.[78] Noting the defendant's history and personality development, a psychologist testified that there had been "a particular appeal to [the defendant] for some time where women are placed in sadistic postures with the male always being dominant," and the film must have stimulated him.[79] Expert psychological testimony also revealed that due to the defendant's personality type and his abuse of alcohol, the movies may have been enough to stimulate his acts.[80] The testimony at this 1984 trial is

67. Defendants' Memorandum, *supra* note 48, at 6 (citing Malamuth & Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, 15 ADV. EXP. SOC. PSYCH. 103 (1982)).

68. Defendants' Memorandum, *supra* note 48, at 6.

69. Donnerstein, *Erotica and Human Aggression*, in AGGRESSION, Volume 2 (Geen & Donnerstein, eds. 1983) 127, 151.

70. *Id.*

71. SCHAUER, *supra* note 5, at 61.

72. *Id.*

73. *Id.*

74. Trial Transcript at 94-122, Arizona v. Bernal, No. CR-11923, June 20, 1984.

75. *Id.* at June 26, 1984, at 53. Conversation with Anthony Fines, defense attorney, Feb. 5, 1985.

76. Trial Transcript at 102, Arizona v. Bernal, No. CR-11923, June 20, 1984.

77. *Id.* at 117, June 21, 1984 (video deposition of Martin Blinder, M.D., Asst. Clinical Professor of Psychiatry, University of California Medical Center).

78. *Id.* at 53, June 26, 1984 (testimony of Larry A. Morris, Ph.D., Clinical Psychologist, Tucson, Arizona).

79. *Id.* at 54.

80. *Id.* at 56-58, June 25, 1984 (testimony of Bob G. Johnson, Psychologist and Professor, University of Arizona).

not, of course, conclusive evidence of pornography's harm to women. It merely illustrates the proposition that pornography cannot be excluded as a cause of antisocial behavior among predisposed persons.

First amendment absolutists, when confronted with the harm of pornography, take refuge in the 1970 government-sponsored report of the Commission on Obscenity and Pornography.[81] The Commission concluded that pornography does not promote antisocial behavior.[82] Since 1970, however, scholars and scientists have shed considerable doubt on that conclusion.[83] Even assuming accuracy of the conclusion by the 1970 Commission, its specific findings are of little value in 1985. In 1970, pornography combining sex and violence was rare.[84] A recent study, however, found that depictions of sexual violence toward women have greatly increased in the readily available sexually explicit magazines.[85] Thus, the solace one finds in the Commission on Obscenity and Pornography report is, at best, of dubious value.

The "harm" caused by violent pornography is three-fold. First, violent pornography physically endangers and sexually exploits those women involved in its actual production.[86] Second, violent pornography negatively impacts its viewers' attitudes toward all women and promotes acceptance of violence toward women.[87] Finally, violent pornography increases the risk of violent acts toward women by those viewers who are predisposed to antisocial behavior.[88]

While empirical data clearly linking pornography to violence may be lacking,[89] the Supreme Court in upholding regulations on obscenity has

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81. THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY (Washington, D.C.: U.S. Government Printing Office, Sept. 1970) [hereinafter cited as COMMISSION REPORT].

82. *Id.* at 27.

83. *See* Diamond, *Pornography and Repression: A Reconsideration of "Who" and "What"* in TAKE BACK THE NIGHT 183, 195-96 (L. Lederer, ed. 1980). The Commission relied heavily on the experience in Denmark, where legal restrictions on pornography were removed in the 1960's. The Denmark experience suggested that sex crimes decreased once the restrictions were lifted. COMMISSION REPORT, *supra* note 81, at 231. One scholar conducting research on the Danish experience found the data relied on by the Commission to be misleading. Diamond, *supra*, at 195-96. The Commission compared Denmark's crime rate statistics from before and after the removal of restrictions on pornography, but in fact, the statistics were not comparable. First, homosexual prostitution had been removed from the sex crime category. *Id.* at 196. This created an artificial decrease in total sex crimes. Second, the Commission combined the statistics for "rape" and "attempted rape" to show an overall decrease. However, while "attempted rape" had in fact decreased, a decline in "rape" had not occurred. *Id.* Most significant is a 1976 study which concluded that in Denmark, since 1969 there has been an increase in rape which exceeds anything experienced in the decade prior to 1969. Court, *Pornography and Sex-crimes: A Re-evaluation in the Light of Recent Trends Around the World*, 5 INT'L CRIM. & PEN. 129, 143 (1977).

84. Goleman, *Violence Against Women in Films*, N.Y. Times, Aug. 28, 1984, at C5, col. 5 (citing Dr. Neil Malamuth, Psychologist, Univ. of Cal. at Los Angeles).

85. Malamuth & Donnerstein, *The Effects of Aggressive-Pornographic Mass Media Stimuli*, 15 ADV. EXP. SOC. PSYCH. 103 (1982). The authors cite several studies showing that "aggression has become increasingly prevalent in sexually explicit [materials] during the 1970's." *Id.* at 105. The number of rapes depicted in hard-core paperback books doubled between 1968 and 1974. *Id.* at 105-06.

86. *See supra* notes 65-66 and accompanying text.

87. *See supra* notes 67-70 and accompanying text. *See also supra* note 13.

88. *See supra* notes 72-80 and accompanying text.

89. In spite of a lack of empirical evidence, even the Supreme Court has noted "an arguable correlation between obscene material and crime." Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 (1973) (citing THE REPORT OF THE COMM'N ON OBSCENITY AND PORNOGRAPHY 390-412 (Hill-Link Minority Report) (1970)). The increase in the amount of violent pornography in the last

stated, "It is not for us to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself."[90] The primary flaw of the Indianapolis ordinance is that it is not limited to obscene and unprotected speech, and therefore it plainly impinges on a Constitutional right. The effect and purpose of the ordinance is, in fact, to impact speech well outside of legal obscenity.

Criminal obscenity statutes are not based on the feminist perspective of pornography and, therefore, fail to address its harm to women.[91] A sexual scene depicting violence against women or the degradation of women, while certainly pornography in the feminist view, is not necessarily offensive to a given community's standards and, therefore, is not necessarily legal obscenity.[92] Nonetheless, in light of the first amendment dangers inherent in the broad sweep of the ordinance,[93] a more moderate and less encompassing approach is warranted. While criminal obscenity statutes do not currently meet women's needs with regard to pornography's harm, an amendment to existing obscenity law can address this void.

III. PROPOSED MODEL STATUTE

Obscenity is not protected speech under the first amendment.[94] Accordingly, restraint of pornography requires a judicial determination that the material is obscene under the three-prong test outlined in *Miller v. California*.[95] A work is obscene if:

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decade has made this correlation not only "arguable," but very likely. *See supra* notes 84-85 and accompanying text.

90. Paris Adult Theatres I v. Slaton, 413 U.S. 49, 60 (1973).

91. Criminal obscenity regulations, with their religious roots, do not focus on women's injuries. While the Supreme Court, in *Paris Adult Theatres*, 413 U.S. at 61 and 63, took notice of obscenity's general harm to society, this is not the harm for which women seek redress. Rather, women are concerned with the actual violence toward women that *violent* pornography may engender in society. Edward Donnerstein, Professor at the University of Wisconsin at Madison, has conducted extensive research on the effects of pornography. He states, "If you take out [of pornography] the aggressive component and leave just the sexual, you do not seem to observe negative effects of desensitization to violence against women." *Pornography: Love or Death?* 20 FILM COMMENT 29 Dec. 1984 at 35. *See also* Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5 (1984). Jacobs notes that obscenity statutes not only fail to address women's injuries, but they are also ineffective to deal with the bulk of pornography due to cumbersome criminal procedural requirements. *Id.* at 46-48.

92. Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 466 (1984). A graphic depiction of sexual intercourse may be obscene, but would not be pornography if it did not degrade women. On the other hand, a sexual scene of a bound and battered woman might not offend community standards of decency, but would be pornographic due to the sexual violence against women which it depicts. *Id.*

See *infra* note 96 and accompanying text for the *Miller* test of legal obscenity.

93. In a June 18, 1984 letter to the editor of the New York Times, Ira Glasser, Executive Director of the American Civil Liberties Union discussed the anti-pornography laws and stated:

> Once [the government is] empowered to restrict "dangerous" and "harmful" expression, it will be the government, not feminists or other advocates of freedom and equality, who define what speech is harmful, what expression is dangerous and who needs to be suppressed. Everything in our history compels the conclusion that such powers, once legitimized, will be exercised by the government in a way that will not benefit advocates of equality and political freedom.

See also E.M. SCHUR, LABELING WOMEN DEVIANT at 183 (1984).

94. Miller v. California, 413 U.S. 15, 23 (1973).

95. *Id.* at 24.

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

2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and

3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[96]

Obscene material that depicts sexually explicit violence against women falls within a feminist definition of pornography. This Note proposes an amended obscenity law that creates a private cause of action based on violent obscene material. Since obscenity is not protected by the first amendment, such legislation would arguably face no first amendment obstacle. The first step in this proposal to serve women's needs and address pornography's harms is to identify the subset of obscenity that harms women—obscenity containing violent depictions. A definition of "violent depictions" added to current obscenity statutes can serve as the basis for a woman's private cause of action.[97]

Considering the constitutional obstacles addressed in *American Booksellers*, this proposal merely creates a narrow category of actionable speech within an already unprotected area of speech. The proposal does not expand the area of speech not entitled to first amendment protection. Further, because the vagueness problem encountered by the Indianapolis ordinance could defeat an attempt to create a private cause of action under criminal obscenity statutes, "violent depictions" must be defined with exactitude so as to provide a person of ordinary intelligence with notice of precisely what is actionable.[98] Terms such as "degradation" and "abasement," which primarily describe intangible attitudes, must be avoided. The specific descriptions in the Indianapolis ordinance, including "rape," "tied up," "cut up," "bruised," "penetrated by animals," and "bleeding"[99] do not suffer from vagueness. Finally, there is the due process requirement that no pornographic speech be restrained prior to a judicial determination of obscenity, absent strict procedural safeguards.[100] Obtaining a prompt judicial determination of obscenity in already overcrowded courts is unlikely. Therefore, an order restraining the materials is appropriate only after a final determination of liability—that is, a finding that the material at issue is obscene and contains violent depictions.

A. *Standing*

A plaintiff seeking to involve the courts in her grievance must have "standing" to bring suit. The standing requirement, in its simplest terms, is that the party has an interest in the litigation's outcome.[101] The requirement of standing at the federal level derives from the constitutional "cases and

96. *Id.*
97. *See* Appendix, Model Statute.
98. *See* Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).
99. *See supra* note 22.
100. *See supra* notes 60-61 and accompanying text.
101. Chambers v. United Farm Workers Organizing Committee, 25 Ariz. App. 104, 106, 541 P.2d 567, 569 (1975).

controversies" requirement of Article III of the Constitution.[102] The Supreme Court has articulated a three-prong standing analysis, under which the plaintiff must show 1) injury in fact, 2) a causal connection between the injury and the challenged conduct, and 3) that the remedy sought will alleviate the injury.[103] While the three prongs must be absolutely satisfied at the federal level, state courts are not bound by the Article III requirements.[104]

"Injury in fact" is a broad concept, encompassing economic, aesthetic, and environmental harms.[105] Regarding magnitude of the injury, "an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."[106] Thus, a female plaintiff in a suit against a distributor of violent obscenity may allege injuries that range from the obscene material's negative influence on a viewer's perceptions of the plaintiff[107] to the decreased safety and consequent decreased freedom of movement which she experiences due to the risk that exposure to violent obscenity stimulates the actions of those predisposed to antisocial behavior.[108] While these "trifles" provide the basis for standing, the "principle" that the female plaintiff is entitled to a social equality and freedom, which violent obscenity hinders, provides the motivation. That women as a class suffer the plaintiff's injury is not a basis for denying standing.[109]

"Injury in fact" is also present if a statute creates legal rights that are subsequently invaded.[110] A statute that prohibits violent obscenity and is enforceable through a private cause of action by a female plaintiff confers on all women a legal right. Women are granted the right to live in a society free of violent obscenity's harms. The distribution of violent obscenity invades that statutorily granted legal right, thus creating standing.

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102. U.S. CONST., art. III, § 2. *See* Valley Forge College v. Americans United, 454 U.S. 464, 471 (1982).

103. *Valley Forge College*, 454 U.S. at 472.

104. Reliable Collection Agency, Ltd. v. Cole, 584 P.2d 107, 111 (Hawaii 1978).

105. United States v. SCRAP, 412 U.S. 669, 686 (1973).

106. *Id.* at 689, n.14 (citing Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)). The "trifles" cited by the *SCRAP* Court included a fraction of a vote, a $5.00 fine, and a $1.50 poll tax. 412 U.S. at 689, n.14.

107. *See supra* notes 67-68 and accompanying text.

108. *See supra* notes 72-80 and accompanying text.

109. *See* United States v. SCRAP, 412 U.S. at 687 (standing will not be denied simply because many people suffer the same injury).

110. Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982). At issue in *Havens* was a private citizen's standing to sue under the Fair Housing Act of 1968. The Act prohibits any individual or firm from falsely representing the availability of housing. The Act explicitly allows a private cause of action to enforce the prohibition. Thus, the person to whom a false representation is made has "standing" to enforce his or her legal right to truthful information. The "injury in fact" is the receipt of the false information. *Id.*

Standing has been granted on even slighter grounds under the Endangered Species Act. The Act allows any person to file a civil suit to enforce the provisions of the Act. 16 U.S.C.A. § 1540(g) (West 1974 and West Supp. 1985). Individual citizens thus have standing to seek the Act's protection for an endangered species. Fund for Animals, Inc. v. Florida Game and Fresh Water Fish Comm'n, 550 F. Supp. 1206, 1208 (S.D. Fla. 1982). In effect, the Endangered Species Act confers "automatic standing" on anyone who claims a violation of the Act. National Wildlife Federation v. Coleman, 400 F. Supp. 705, 710 (S.D. Miss.), *rev'd on other grounds*, 529 F.2d 359, *cert. denied*, 429 U.S. 979 (1975). In *Fund for Animals*, 550 F. Supp. at 1208, the District Court granted standing without discussion of whether the plaintiffs had alleged "injury in fact." Thus, it appears that the "injury in fact" inquiry is of less importance when a statute has conferred automatic standing.

The second requirement of Article III standing is a causal connection between the injury and the illegal act.[111] Studies indicate that violent obscenity increases the viewer's acceptance of violence against women[112] and increases the risk of violence against women when viewed by someone who is predisposed to committing sex crimes.[113] Thus, there is a direct causal connection between violent obscenity and injury to all women.[114]

Finally, the plaintiff's standing depends on whether "the exercise of the Court's remedial powers would redress the claimed injuries."[115] A woman's statutorily granted right to live in a society free of the harms posed by violent obscenity can be effectuated by both injunctions and damages. Injunctions redress the claimed injury by removing the offending material from society. Damage remedies redress the plaintiff's intangible harm and have a deterrent effect on distributors of violent obscenity, resulting in a decrease in the amount of violent obscenity available in the future. Thus, both remedies redress the claimed injury and enforce the plaintiff's statutorily granted right.

Women's organizations have standing to file suit against the distributors of violent obscenity if the illegal act injures the organization's activities or drains its resources.[116] For example, a women's organization, which has as its purpose the promotion of women's equal status and treatment in society, may be directly affected by violent obscenity. The presence of violent obscenity both frustrates the organization's goals and forces the organization to expend its resources in efforts to counteract the violent obscenity's perpetuation of a negative and inferior view of women.

B. *Plaintiff's Burden*

A plaintiff bringing suit under an amended obscenity statute faces a tremendous, but not insurmountable burden. Whether the material contains "violent depictions," as defined by statute, will be obvious on the face of the material. The more difficult question is whether the material falls within the *Miller* three-prong definition of obscenity.

Miller requires, first, that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.[117] "Prurient interest" is a "shameful or morbid interest in nudity, sex, or excretion."[118] If the material is intended to "produce psychic or physical stimulation, on a less than intellectual plane, and on a short-term basis," then the prurient interest test is met.[119]

Whether the material appeals to the prurient interest, applying local

111. Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 41 (1976).
112. *See supra* note 68 and accompanying text.
113. *See supra* notes 72-80 and accompanying text.
114. *See supra* note 70 and accompanying text.
115. Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 74 (1978).
116. *See* Havens Realty Corp. v. Coleman, 455 U.S. at 379.
117. Miller v. California, 413 U.S. at 24.
118. Roth v. United States, 354 U.S. 476, 487 n.20 (1957) (citing MODEL PENAL CODE § 207.10(2), Tentative Draft No. 6, 1957).
119. SCHAUER, *supra* note 5, at 102. One scholar succinctly defined "appeal to prurient interest" as "to give a man an erection." MacKinnon, *supra* note 12, at 333.

community standards, is a question of fact for the jury.[120] The "average person" may, in fact, be repulsed by violent sexual activity. When dealing with material of a deviant nature, however, the "average person" standard is no longer applicable.[121] The jury question becomes whether the material containing sexual violence appeals to the prurient interest of members of the deviant group, who are the probable recipients of the material.[122]

Miller's second prong is that the work depicts or describes, in a patently offensive way, sexual activity specifically defined by the applicable state law.[123] In Arizona, "sexual activity" is narrowly defined by statute as representations or descriptions of ultimate sexual acts—normal or perverted, actual or simulated—and masturbation, excretory functions, sadomasochistic abuse, and lewd exhibition of the genitals.[124] "Ultimate sexual acts" are further defined as "sexual intercourse, vaginal or anal, fellatio, cunnilingus, beastiality or sodomy."[125] Once it is determined that the material falls within the definition of "sexual activity," the plaintiff's burden under *Miller*'s second prong is to persuade the jury that the work is "patently offensive." This finding depends on the jury's subjective view of whether the material "affronts contemporary community standards relating to the description or representation of sexual matters."[126] Simply put, to meet this second prong the material must exceed what society considers decent or tolerable.[127]

Finally, *Miller* requires that the work, taken as a whole, lack serious literary, artistic, political, or scientific value.[128] In most cases this determination can be made only with the assistance of expert witnesses.[129] Since the first amendment is primarily aimed at protecting ideas,[130] this final prong serves to protect "serious" ideas, even if they appeal to prurient interest and are patently offensive. Because this prong creates a constitutional protection, judges should be willing to make a final determination of "value" regardless of the jury's verdict.[131]

While the *Miller* test places a difficult burden on the plaintiff, the principles of free speech mandate this burden. Creating a cause of action within the framework of obscenity law thus strikes an appropriate balance between freedom of speech and women's right to be compensated for pornography's harm.

C. *Remedies*

The effectiveness of a private cause of action based on obscenity statutes

120. Miller v. California, 413 U.S. at 30.
121. Mishkin v. New York, 383 U.S. 502, 509 (1966).
122. *Id. See* SCHAUER, *supra* note 5, at 77-80.
123. *Miller*, 413 U.S. at 24.
124. ARIZ. REV. STAT. ANN. § 13-3501(9)(a) and (b) (1978).
125. *Id.* at § 13-3501(10).
126. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 418 (1966).
127. *See* SCHAUER, *supra* note 5, at 104.
128. *Miller*, 413 U.S. at 24.
129. SCHAUER, *supra* note 5, at 144-45.
130. Roth v. United States, 354 U.S. 476, 484 (1957).
131. SCHAUER, *supra* note 5, at 151.

depends primarily upon the remedy afforded. The remedy must serve a dual purpose. First, it must provide an incentive to women to file suit against makers and distributors of violent obscene materials. Second, the remedy must serve as a deterrent to those who would engage in the criminal distribution and production of violent obscenity.

An injunction against the violent obscene material is an appropriate remedy, but provides little incentive to plaintiffs or deterrence to other potential defendants. Injunctions issued at the conclusion of a civil trial will have a minor impact on most defendants due to the nature of obscenity. Many obscene publications are widely circulated over a short time period. Thus, an injunction, which issues at the close of a civil trial, will ring hollow if the material at issue is no longer in distribution.

That pornography is a four billion dollar per year industry[132] suggests the ideal remedy. Substantial money judgments will provide an incentive to plaintiffs and deter other potential defendants by removing the economic motive to continue the production and sale of obscene items.

A damages remedy for the harm caused by violent obscenity is perhaps best understood in an analogy to dignitary torts. Dignitary torts include intentional infliction of emotional distress, defamation, and invasion of privacy.[133] Often, the only harms caused by dignitary torts are the damage to the plaintiff's dignity and self-image, and the resulting mental distress.[134] The harms caused by violent obscenity are the negative impact on the viewers' attitudes toward women, acceptance of violence toward women, and the increased risk of a woman's sexual assault.[135] Like the injury in dignitary torts, obscenity's harms are intangible. In the dignitary class of torts, damages can be substantial, without specific proof of harm.[136] General damages awarded for dignitary invasions compensate the plaintiff for the affront to her dignity and emotional harm.[137] Similarly, the harm caused to women by violent obscenity supports an award of substantial damages for the latter harm.

In addition to substantial general damages, an award of punitive damages is appropriate under an obscenity statute. Punitive damages serve as a punishment and deterrent,[138] and provide an incentive to the plaintiff to sue.[139]

Punitive damages are warranted in a civil suit only when a defendant has engaged in conscious wrongdoing.[140] The Arizona criminal obscenity statute requires proof that the defendant "knowingly" dealt in obscene

132. J. Cook, *The X-Rated Economy*, FORBES, Sept. 18, 1978, at 81. Pornography industry revenues exceed the combined revenues of the conventional motion picture and record industries. *Id.*

133. D.B. DOBBS, LAW OF REMEDIES § 7.1, 509 (1973).

134. *Id.* at 509-10.

135. *See supra* notes 64-88 and accompanying text.

136. D.B. DOBBS, *supra* note 133, at § 7.3, 528.

137. *Id.* at § 3.2, 139.

138. *Id.* at § 3.9, 204.

139. *Id.* at 205.

140. Sales & Cole Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117, 1130 (1984).

materials.[141] This scienter element does not require that the defendant knew the materials were within the *Miller* formulation of legal obscenity.[142] Rather, the defendant must merely know or have reason to know that a further inspection of the character and content of the materials is warranted.[143] A civil cause of action should also be based on the "knowing" production or sale of violent obscene materials. A verdict in favor of the plaintiff would thus imply knowledge and conscious wrongdoing, which warrant a punitive damage award.[144]

The primary criticism of punitive damage awards is that they are unrelated to the purpose of the civil law: compensation of the plaintiff.[145] Juries return large punitive damage awards for conduct that society has not deemed criminal.[146] This criticism has no bearing on a civil cause of action based on the *criminal* distribution and production of obscenity.

In Arizona, the production or sale of obscenity is punishable as a class six felony by up to one and one-half years imprisonment.[147] It must be noted that the existence of a criminal penalty is not a bar to an award of punitive damages in a civil suit based on the criminal conduct.[148] The criminality of the conduct actually reinforces the basis for awarding punitive damages in the civil suit. Supporting this position, the Second Circuit Court of Appeals in *Roginsky v. Richardson-Merrell, Inc.*[149] noted that punitive damages should be awarded *only* for conduct that borders on the criminal.[150] In addition, the Arizona legislature, by making the conduct punishable by a term of imprisonment, might have believed either that the conduct warranted retribution or that a term of imprisonment would deter others. Either belief, punishment or deterrence, justifies an award of punitive damages in a civil suit based on the criminal conduct.[151]

An alternative to punitive and general damages in a civil suit based on violent obscene materials is a restitutionary remedy. A constructive trust is normally imposed on a defendant's profits only to prevent unjust enrichment.[152] In *Snepp v. United States*,[153] however, the United States Supreme Court significantly broadened the use of the constructive trust. The defendant, Snepp, had executed an agreement with the CIA promising that he would not publish any material concerning his employment with the CIA

141. ARIZ. REV. STAT. ANN. § 13-3502 (1978).

142. *See* State v. Yabe, 114 Ariz. 89, 559 P.2d 209, (Ariz. App. 1977). In interpreting ARIZ. REV. STAT. ANN. § 13-531.01 (renumbered § 13-3501 (1978)) the statutory predecessor of ARIZ. REV. STAT. ANN. § 13-3501, the Arizona court stated, "knowledge of the legal status of the materials" is irrelevant to a prosecution under the criminal obscenity statute. 114 Ariz. at 92, 559 P.2d at 212.

143. ARIZ. REV. STAT. ANN. § 13-3501(4)(a) (1978).

144. D.B. DOBBS, *supra* note 133, at § 3.9, 205.

145. Sales & Cole, *supra* note 140, at 1158.

146. *Id.* at 1159.

147. ARIZ. REV. STAT. ANN. § 13-3502 and § 13-701(B)(5) (1978).

148. *See* Puz v. McDonald, 140 Ariz. 77, 78, 680 P.2d 213, 214 (Ariz. App. 1984) (criminal penalties imposed on armed robbers did not bar plaintiff-victims' recovery of punitive damages in civil suit against defendant-armed robbers).

149. 378 F.2d 832 (2nd Cir. 1967).

150. *Id.* at 843.

151. *See* D.B. DOBBS, *supra* note 133, at § 3.9, 204.

152. *Id.* at § 4.3, 246.

153. 444 U.S. 507 (1980). The facts of *Snepp* are set forth 444 U.S. at 507-09.

without prior approval of the agency. The purpose of the agreement was to permit the CIA to excise any classified information prior to publication. Snepp thereafter breached the agreement by publishing a book about the CIA without the agreed on agency approval. The United States sought the imposition of a constructive trust on Snepp's book sale profits. The Court allowed the constructive trust, based on Snepp's breach of a trust with the CIA. The Court gave weight to the CIA's interest in protecting government secrets, and found that 1) actual damages were unquantifiable; 2) nominal damages were a hollow remedy; and 3) punitive damages were speculative.[154] The Court stated that requiring the defendant to disgorge his profits would be a "swift and sure" remedy to deter others.[155]

The Supreme Court's analysis, applied to a civil cause of action based on violent obscenity, is compelling.[156] A plaintiff bringing an action against a distributor or seller of obscene items containing violent depictions will find her actual damages unquantifiable and nominal damages an empty alternative. Punitive damages, as in *Snepp*, will be speculative and without relation to her harm. Requiring the defendant to disgorge the profits made on the obscene material will, however, provide a meaningful deterrent to others. Disgorgement removes the economic motive which is central to the growth and continuance of the pornography industry.

The constructive trust granted in *Snepp* has been criticized as too broad a remedy. The Supreme Court, it is argued, should have ordered an apportionment of profits.[157] An apportionment would have allowed the government to recover only the percentage of profits corresponding to the percentage of protectable government information printed in Snepp's publication. This criticism, extended to a constructive trust awarded in a private obscenity action, would require an apportionment based on violent depictions. By legal definition, the obscenity itself is not apportionable. An item is obscene only if, "taken as a whole," it appeals to the prurient interest.[158] A jury finding of obscenity thus implies that the "whole" item is obscene; it does not, however, imply that the "whole" is composed of violent depictions.

Statutory damages represent a third alternative remedy in a private cause of action based on violent obscenity. An example of statutory damages is found in the Federal Copyright Act.[159]

A copyright infringer is liable for either actual damages and profits, or

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154. *Id.* at 514.

155. *Id.* at 515.

156. Justice Stevens's dissent in *Snepp* has little application to a private cause of action based on violent obscenity. The dissent stated that the constructive trust remedy was inappropriate since the profits did not flow from the breach. *Id.* at 521 (Stevens, J., dissenting). The defendant's book contained no classified information. Thus, even had the CIA performed a pre-publication review of the book, the defendant would have published the book and gained the same profits after the agency review. *Id.* In the case of a civil suit based on violent obscenity, the defendant's profits flow directly from the act creating liability. The obscene material is both the basis of liability and the source of the profits.

157. Anawalt, *A Critical Appraisal of* Snepp v. United States: *Are There Alternatives to Government Censorship?*, 21 SANTA CLARA L. REV. 697, 718-721 (1981).

158. *See supra* note 96 and accompanying text.

159. 17 U.S.C.A. § 504(c) (West 1977). A second example of statutory damages can be found at 18 U.S.C.A. § 2520(a) (West Supp. 1985). This statute authorizes civil damages for illegal wiretapping in the amount of "$100 a day for each day of violation or $1,000, whichever is higher." This

statutory damages as the court considers just.[160] A plaintiff may elect statutory damages in lieu of actual damages and profits at any time prior to the final judgment.[161] One purpose of the statutory damage remedy is to discourage wrongful conduct.[162] When profits and damages cannot be established, therefore, statutory "in lieu" damages are mandatory.[163]

A statute granting a private cause of action based on violent obscenity should provide for minimum and maximum damages to deter wrongful conduct. The exact amount of a particular award should be within the judge's discretion. The legislative determination of maximum fines as criminal penalties provides guidance in setting maximum statutory damages. In Arizona, the production, publication, sale, and possession of obscene items are class six felonies.[164] The statutory maximum fine that can be levied against a "person" committing a felony is not more than $150,000.[165] The maximum fine that can be imposed on an "enterprise" committing a felony is $1,000,000.[166] The Arizona criminal obscenity statute states that any "person" who produces, publishes, sells, or possesses obscene items is guilty of a felony. However, "person" is defined to include, as the context requires, an "enterprise."[167]

Both criminal obscenity and a private cause of action based on violent obscenity have as their bases the same act: dealing in legally obscene material. Thus, the fines for criminal obscenity are appropriate in the private cause of action. It also follows that the maximum statutory damages assessed against an individual defendant in a private suit should be no more than $150,000. The maximum statutory damages assessed against an enterprise defendant should be no more than $1,000,000.

The minimum statutory damages determination is, by necessity, somewhat arbitrary. The legislature has not set minimum fines for criminal activity, but several factors exist to support a substantial minimum sum. First, the likeness between the intangible harm engendered by dignitary torts and the harm caused to women by violent obscenity supports a substantial minimum damage award.[168] Second, the criminal nature of the act on which liability is based supports a substantial minimum award to punish the defendant and to deter others.[169] Third, a substantial minimum award is supported by the fact that a defendant's economic gain is central to the growth of the pornography industry.[170] In sum, a statute creating a private cause of

type of statutory penalty could also be adapted to a private cause of action based on obscenity containing violent depictions.

160. 17 U.S.C.A. § 504(a) & (c) (West 1977).

161. *Id.* at § 504(c)(1).

162. *See* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (interpreting former § 101(b) of copyright statute).

163. Russell v. Price, 612 F.2d 1123, 1139 (9th Cir. 1979) *cert. denied* 446 U.S. 952 (1980).

164. ARIZ. REV. STAT. ANN. § 13-3502 (1978).

165. *Id.* at § 13-801(A) (1978).

166. *Id.* at § 13-804(A)(1) (Supp. 1984).

167. *Id.* at § 13-105(21) (Supp. 1984). Enterprise includes a corporation, association, labor union, or other legal entity. *Id.* at § 13-105(10) (Supp. 1984).

168. *See supra* notes 135-37 and accompanying text.

169. *See supra* notes 138-51 and accompanying text.

170. *See supra* note 132 and accompanying text.

action based on violent obscenity should allow a plaintiff to elect mandatory statutory damages in lieu of compensatory and punitive damages, or restitution.

The effectiveness of a private cause of action based on criminal obscenity statutes depends on a remedy that provides incentive for plaintiffs to bring suit and deters pornographers. The proposed remedies—compensatory and punitive damages, restitution, or statutory damages—meet these objectives.

CONCLUSION

Feminists have long recognized the harm caused by an ever-growing and increasingly violent pornography industry. The Indianapolis pornography ordinance, while not constitutionally sound, must be praised for its success in raising the public's consciousness of the detrimental effects of pornography. A broad ban that impinges on constitutional rights, however, is unwarranted in view of the lack of empirical data conclusively linking pornography and harm to women. On the other hand, where the production and sale of pornography lose first amendment protection and become criminal activity, remedies are justified.

Women do not seek governmental protection. Rather, they demand legal avenues by which to pursue their right to compensation for violent obscenity's harm. The creation of a private cause of action based on already criminal obscenity is overdue.

APPENDIX

PROPOSED AMENDMENT TO ARIZONA CRIMINAL CODE, CHAPTER 35, OBSCENITY

§ 13-3501. Definitions[171]

11. "Violent depictions" means

(a) women are presented as the victims of sadomasochistic abuse; or

(b) women are presented being raped; or

(c) women are presented as tied up, cut up, bleeding, mutilated, bruised, physically hurt, dismembered, or severed into body parts; or

(c) women are presented being penetrated by objects or animals.

§ 13-3505. Obscene prints and articles; jurisdiction[172]

F. The sheriff directed to seize and destroy such obscene prints and articles *under this section and under section 13-3509(C)(2)* shall not be liable for damages sustained by reason of the injunction order in cases where judgment is *finally* rendered in favor of the person, firm, association or corporation sought to be enjoined.

§ 13-3509. Obscenity containing violent depictions; civil remedies.[173]

A. Obscenity containing violent depictions injures women by:

1. Creating and maintaining sex as a basis for discrimination.

2. Negatively impacting its viewers' attitudes towards women.

3. Promoting acceptance of violence toward women.

4. Promoting acts of aggression, including rape, battery, child abuse, and kidnapping.

5. Increasing the risk of violent acts toward women by viewers who are predisposed to antisocial behavior.

B. A woman may file an action in superior court against any person who knowingly:

1. Prints, copies, manufactures, prepares, produces, or reproduces any obscene item containing violent depictions for the purpose of sale or commercial distribution.

2. Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item containing violent depictions, or offers to do any such things.

3. Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item containing violent depictions.

C. Following a determination of liability:

1. The plaintiff shall recover:

(a) damages in the court's discretion in the form of:

(1) compensatory and punitive damages; or

(2) restitution.

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171. Definitions 1-10 can be found at ARIZ. REV. STAT. ANN. § 13-3501(1)-(10) (1978).

172. The italicized portion is a proposed addition to ARIZ. REV. STAT. ANN. § 13-3505(F) (1978).

173. The text of proposed § 13-3509 would, in its entirety, be an addition to Arizona Criminal Code, Chapter 35.

(b) statutory damages, in lieu of compensatory and punitive damages or restitution, at the plaintiff's election any time prior to a final judgment. In a suit against an individual person, statutory damages shall be no less than $25,000 and no more than $150,000 as the court deems just. In a suit against an enterprise, statutory damages shall be no less than $150,000 and no more than $1,000,000, as the court deems just.

(c) costs of the suit; and

(d) reasonable attorney fees.

2. The court shall enter a final order of injunction against the person, firm, association or corporation named as defendant(s). Such final order shall contain a provision directing the defendant(s) to surrender to the sheriff of the county in which the action was brought any of the materials upon which liability was based and such sheriff shall be directed to seize and destroy such materials.

D. A man may have a cause of action under subsection B of this section upon alleging injury of the type specified in subsection A of this section.