The Lessons of *Miller* and *Hudnut*: On Proposing a Pornography Ordinance that Passes Constitutional Muster

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THE LESSONS OF MILLER AND HUDNUT: ON PROPOSING A PORNOGRAPHY ORDINANCE THAT PASSES CONSTITUTIONAL MUSTER

Martin Karo* and Marcia McBrian**

"[It is] the right of the Nation and of the States to maintain a decent society . . . ." \(^1\)

Efforts to restrict or ban pornography have recently assumed increased prominence for several reasons. First, much more pornographic material is available now than ever before, \(^2\) and an increasingly large proportion is violent, degrading, and explicit. \(^3\)

Second, and most important, is the growing realization that pornography is not "harmless dirty pictures." Researchers have compiled a massive body of evidence that indicates pornography directly and indirectly causes serious harm to women. \(^4\)


2. See U.S. DEP'T OF JUST., 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 280, 284 (1986) [hereinafter REPORT].
3. Id. at 323-24.
4. See REPORT, supra note 2, at 322-47; see also Donnerstein, Aggressive Erotica and Violence Against Women, 45 J. PERSONALITY & SOC. PSYCHOLOGY 269, 274-75 (1980) (finding that for male experimental subjects, aggressive erotic film caused an increase in aggressive behavior over nonviolent erotica and nonviolent, nonsexual control films; aggression was measured via electric shocks administered to other people; violent pornography caused increased aggression overall, and produced the highest increase in aggression toward females); Malamuth, Factors Associated With Rape as Predictors of Laboratory Aggression Against Women, 45 J. PERSONALITY & SOC. PSYCHOLOGY 432, 432-33 (1983) (citing Burt, Cultural Myths and Supports for Rape, 38 J. Personality & Soc. Psychology 217, (1980)) (finding that acceptance of rape myths, such as those embodied in common pornographic rape depictions, correlated positively with acceptance of violence toward women); Malamuth, Heim & Feshbach, Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects, 38 J. PERSONALITY & SOC. PSYCHOLOGY 399, 405 (1980) (finding that erotic depictions of rape in which the victim is portrayed as experiencing an orgasm aroused viewers as much as depictions of mutually consenting sex, and finding that male subjects were more aroused when the victim experienced an orgasm and pain than when the victim experienced an orgasm and no pain); Nelson, Pornography and Sexual Aggression, in THE INFLUENCE OF PORNOGRAPHY ON BEHAVIOUR 171 (1982). See generally Donnerstein & Berkowitz, Victim Reactions in Ag-
the movement of feminism into the American political mainstream has caused many politicians to become more sensitive to feminist concerns. Fourth, pornography distribution has become a key profit item for organized crime. Fifth, harm to children, a traditionally recognized evil of pornography, is an even greater


Although some observers theorize that only violent pornography causes harm, recent research does not support this view. See Baron & Straus, Sexual Stratification, Pornography, and Rape in the United States, in PORNOGRAPHY AND SEXUAL AGGRESSION 185, 195-98 (1984) (establishing positive correlation between the circulation of popular men's sex magazines and the rate of reported rape); Donnerstein & Barrett, Effects of Erotic Stimuli on Male Aggression Toward Females, 36 J. PERSONALITY & SOC. PSYCHOLOGY 180, 185 (1978) (finding that nonviolent erotic films increased subsequent aggression overall); Malamuth & Check, Penile Tumescence and Perceptual Responses to Rape as a Function of Victim's Perceived Reactions, 10 J. APPLIED SOC. PSYCHOLOGY 528, 537 (1980) (finding that male experimental subjects previously exposed to nonviolent, mutually consenting intercourse pornography were as aroused by a subsequent rape depiction as males previously exposed to a rape portrayal in which the victim was perceived as being aroused by the assault; both groups much more aroused than males previously exposed to violent pornography in which the victim continually abhors the assault); Zillmann & Bryant, Pornography, Sexual Callousness, and the Trivialization of Rape, 32(4) J. OF COMM. at 10, 19 (1982) (finding that high exposure to nonviolent pornography resulted in a loss of compassion toward women as rape victims and toward women in general).

To capsulize the findings of the research: exposure to pornography, both nonviolent and more strikingly violent, increases anger, arousal, and aggressive behavior toward women, and induces trivialization of rape and assaults against women. Scientific experiments using pornography to trigger actual violence and/or sexual assaults against women would be unethical, but anecdotal evidence indicates that pornography is often involved in actual incidents of violence against women, including the use of materials like "how-to" manuals in rapes and assaults. See Ordinance to Add Pornography as Discrimination Against Women: Hearings Before the Government Operations Committee, Minneapolis City Council, 2d Sess. at 23-29, 63-79 (Dec. 12-13, 1983); MacKinnon, Pornography, Civil Rights, and Speech, 20 HARV.C.R.-C.L. L. REV. 1, 46-50 (1985). Regarding the link between pornography-inspired arousal and behavior, see Griffin, Sadism and Catharsis: The Treatment Is the Disease, in TAKE BACK THE NIGHT 141 (L. Lederer ed. 1980). Moreover, Malamuth found a close relationship between laboratory aggression and real-world aggression. Malamuth, supra, at 440-41 (finding a valid relationship between factors associated with real-world aggression against women and laboratory aggression). For a discussion of the early studies and their limitations, see Donnerstein, Pornography and Violence Against Women: Experimental Studies, 347 ANNALS OF THE N. Y. ACAD. OF SCI 277 (1980).

5. REPORT, supra note 2, at 1039-53.
concern in the wake of growing public recognition of child sexual abuse.\(^6\)

Recognizing these factors, various political bodies have recently taken action. A Presidential Commission on pornography published its findings and recommendations.\(^7\) The Supreme Court upheld a strong New York law outlawing child pornography.\(^8\) The city of Indianapolis passed a civil rights-based antipornography ordinance\(^9\) drafted by feminists Catharine MacKinnon and Andrea Dworkin, but the ordinance was later declared unconstitutional.\(^10\)

American cities and states need new antipornography laws that forbid depictions that cause harm and do not have serious countervailing social value. First, as discussed below, present laws are ineffective; they were originally intended to enforce outmoded notions of “propriety,” not to prevent harm to women. As society changed, the impetus to enforce laws based on propriety notions progressively eroded. Second, existing law enforcement is inadequate; many judicial officers simply do not view obscenity violations as serious crimes.\(^11\) Legislatures must correct this impression, sending prosecutors, law enforcement officers, and judicial officials a clear signal by enacting new and comprehensive antipornography ordinances. Third, a law allowing limited private rights of action would create a powerful impetus to alter behavior that harms society by assessing the

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6. REPORT, supra note 2, at 405-10.
7. REPORT, supra note 2.
9. INDIANAPOLIS, IND., CODE § 16-1 (1984). An identical ordinance was passed by the Minneapolis City Council, MINNEAPOLIS, MINN., CODE OF ORDINANCES, tit. 7, ch. 139 (1982), but was eventually vetoed by the Mayor.
11. REPORT, supra note 2, at 366-72; see also Press, The War Against Pornography, NEWSWEEK, Mar. 18, 1985 at 58, 65.
12. REPORT, supra note 2, at 368.
costs of the harm against the pornographer in the form of damages.

This Note first reviews the evolution of obscenity law, concentrating on the modern obscenity test formulated in *Miller v. California*, including its requirement that any obscenity prosecution must be based on a state statute, not merely on the common law. It then examines the elements of the *Miller* test, arguing that legislatures may determine statewide “community standards” of patently offensive depictions of sexual conduct and discusses the permissibility of legislative expansion of pornography regulation beyond the present boundaries. Part II examines the federal courts’ analysis of the civil rights-based anti-pornography ordinance passed in Indianapolis. Part III suggests standards for antiobscenity laws. Part IV proposes a model ordinance, which should be held constitutional under existing law, designed to attack the most harmful pornographic material.

I. CONTEMPORARY OBSCENITY LAW

Existing obscenity laws are the product of many years of evolution. The rationale for these laws has changed over time; antiobscenity laws enacted specifically to avert harm to women are a very recent phenomenon. Because new obscenity laws must fit within the established constraints of the first amendment, an examination of the history of obscenity law is necessary to illuminate the purposes and limits of the first amendment.

A. A Short History of Obscenity Law

Restricting obscenity is not new. As long ago as 1727, English courts convicted publishers of offensive material of corrupting the public morals, a common law crime. American pornography law originated with a 1711 Massachusetts colonial statute.


Congress passed a strong antiobscenity law, popularly known as the Comstock Act, in 1873. At first, American courts applied the English Hicklin test in Comstock Act cases despite widespread disagreement over what constituted obscenity under that test.

In the early twentieth century, the Hicklin test lost vitality. Judge Learned Hand criticized it in 1913 and enunciated the modern “community standards” test eventually adopted by the Supreme Court. Subsequent cases thoroughly rejected Hicklin. The demise of Hicklin did not mean that the courts used the first amendment to protect obscenity in the early twentieth century. Quite the contrary; although the courts often disagreed regarding what was considered obscene, judges did not see the first amendment as a significant barrier to obscenity prosecutions. In Roth v. United States, however, the Supreme Court held that simply designating a prosecution as an obscenity case did not automatically remove the case from the purview of the first amendment.

Roth indicated that genuinely obscene materials remained outside the protection of the first amendment. The Roth Court defined obscenity as sexual material “utterly without redeeming social importance.” The Court assumed a dichotomy between material that presented ideas, no matter how controversial or

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17. See generally The Queen v. Hicklin, 3 L.R.-Q.B. 360 (1868). The Hicklin test of obscenity was whether the offending passages, taken alone, 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.
23. Id. at 484.
24. Id. at 485.
25. Id. at 484. The Supreme Court’s definition of obscenity differs from the common usage denoting offensive or obnoxious language. Cf. F.C.C. v. Pacifica Found., 438 U.S.
hateful, and material intended purely to titillate or excite. The Court found the Roth language entirely unsatisfactory in practice, however, and replaced Roth's obscenity definition sixteen years later in Miller v. California.

Chief Justice Burger, writing for the Court in Miller, enunciated the modern obscenity test:

[W]e now confine the permissible scope of such regulation to works which depict or describe sexual conduct... A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Miller test represents a significant compromise struck to enunciate a clear, workable obscenity standard: a nationwide standard applies to the search for serious literary, artistic, politi-
cal, or scientific value; but a community standard applies to a work's appeal to prurient interest and patent offensiveness.

B. The Meaning of "Community Standards"

Miller clarifies that the jury should apply community standards to determine the permissibility of material before it. But this phrase, which dates to Roth, is not self-defining, and courts encountered considerable trouble interpreting it. Even Miller leaves some doubt as to what practices the phrase allows.

1. The permissibility of legislative determination—Miller did not say, for example, where the jury is to find community standards. Although it would be rational to leave determinations of community standards wholly to the jury on the grounds that it is a proxy for its community, Miller does not specifically sanction this practice. Indeed, Jenkins v. Georgia held that juries could not rely solely upon their own idea of what the community should permit. By limiting jury discretion in determining prurience and patent offensiveness, the Court forced the jury to rely on broader sources of community standards.

29. See Smith v. United States, 431 U.S. 291, 301 (1977); see also Pope v. Illinois, 481 U.S. 497, 500-01 (1987) (holding that juries may not apply local standards in deciding social value, but may apply local standards regarding patent offensiveness and appeal to prurient interest under the Miller test).

30. Smith, 431 U.S. at 301. Juries do not have unbridled discretion regarding determination of appeal to prurient interest and patent offensiveness; determinations are subject to constitutional review. Jenkins v. Georgia, 418 U.S. 153, 160 (1974). The Court wanted the widest possible dissemination of valuable ideas and did not want small-minded local officials stifling their free flow. At the same time, the Court noted, national standards for prurient interest and patent offensiveness were unworkable. Miller, 413 U.S. at 32-33.


33. Shugrue, supra note 32, at 159.

34. See Note, Community Standards, Class Actions, and Obscenity Under Miller v. California, 88 HARV. L. REV. 1838, 1843 n.39 (1975). ("The most common approach has been to leave identification of the relevant community and its standards to the trier of fact.")


36. Id. at 161. Schauer relies upon the same principle to support legislative determination of standards: "[P]atent offensiveness implies community rejection. But community acceptance or rejection seems to be a peculiarly legislative matter. . . ." Schauer, supra note 32, at 18.
The source used to determine community standards should be statutory. Expert testimony on obscenity, presumably including the prevailing community standards, is not favored by the Supreme Court. More important, to prosecute for obscenity at all, the state must rely on a statute; the more specific that statute, the less discretion the factfinder has. Miller itself requires specific statutes that delineate forbidden conduct.

Statutory, rather than jury, determinations have practical advantages for both sides in the pornography debate. Those favoring pornography restrictions may prefer to lobby legislators because, unlike jury determination at trial, they have a full and fair opportunity to influence the outcome. Moreover, the legislature may accord more weight to their interests and injuries, which are real but difficult to value in dollars.

Distributors of pornography may prefer legislative determinations as well. Major magazine and video tape distributors generally sink enormous investments into their systems. An unfortunate decision by an unusually sheltered small-town jury could be accompanied by a large damage award or criminal penalty.


38. Limits exist regarding how far the state can restrict the jury in federal obscenity prosecutions. In Smith v. United States, 431 U.S. 291 (1976), the Supreme Court held that a state legislature could not eliminate jury discretion in deciding the dimensions of "patently offensive" and intent to appeal to prurient interest. Id. In other words, the state legislature must allow the jury room for its own discretion in a federal obscenity trial; only local community standards as understood and applied by jurors will be used in prosecutions. Different standards may apply in different courts. Although local community standards must apply in federal obscenity prosecutions, a statewide community standard for state prosecutions may be permissible. See Myers, "Contemporary Community Standards" in Obscenity Prosecutions—Smith v. United States, 30 BAYLOR L. REV. 317, 325-26 (1978); Waples & White, Choice of Community Standards in Federal Obscenity Proceedings: The Role of the Constitution and the Common Law, 64 VA. L. REV. 399, 405-09 (1978). The state retains a considerable role in formulating community standards. For example, the state can define proscribed conduct:

This is not to say that state legislatures are completely foreclosed from enacting laws setting substantive limitations for obscenity cases. On the contrary, we have indicated on several occasions that legislation of this kind is permissible. State legislation must still define the kinds of conduct that will be regulated by the State.

Smith, 431 U.S. at 302 (citation omitted); see also Myers, supra at 326. Myers argues that the subjective standard the Supreme Court approved in Smith inadequately protects individual rights. Id. at 328-29. Other Supreme Court decisions demonstrate that juries need considerable guidance with respect to patent offensiveness according to community standards. See, e.g., Jenkins v. Georgia, 418 U.S. 153, 161 (1974).

Franchisees, fearing similar penalties, might react by ceasing to carry all potentially controversial material.\textsuperscript{40} The end result could be the loss of an entire distribution network and enormous sums of money. Moreover, although any given trial usually has only one defendant, all pornographers have an interest in the outcome of a case. Distributors and franchisees can influence the legislature, and the legislative determination can be relied upon. In the same vein, civil libertarians are not limited to filing \textit{amici} briefs; the statute drafting process, with its prominent public hearings, assures that those favoring the privilege to print almost anything can reach an influential, educated, and worldly audience.

2. \textit{State standards are appropriate}— What size community should be used in formulating the statutory standard? As the Supreme Court noted, standards of what is erotic or patently offensive vary from state to state and within states. In the Court’s opinion, national standards of prurience or patent offensiveness are clearly incompatible with national diversity.\textsuperscript{41} Between the extremes of nation and jury, courts have upheld a wide variety of geographic definitions of community.\textsuperscript{42} State courts have approved units ranging from state\textsuperscript{43} to county\textsuperscript{44} to city\textsuperscript{45} to local community.\textsuperscript{46} Federal courts have held community to mean state,\textsuperscript{47} county,\textsuperscript{48} and federal judicial district.\textsuperscript{49} As to

\textsuperscript{40} For example, Southland Corporation recently pulled \textit{Playboy}, \textit{Penthouse}, and \textit{Forum} magazines from the shelves of all "7-11" franchise convenience stores in response to protests by Jerry Falwell’s organization.

\textsuperscript{41} \textit{Miller,} 413 U.S. at 30.

\textsuperscript{42} Waples & White, \textit{supra} note 38 at 402-03.

\textsuperscript{43} People v. Calbud, Inc., 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980); LaRue v. State, 611 S.W.2d 63 (Tex. Crim. App. 1980); Commonwealth v. 707 Main Corp., 371 Mass. 374, 357 N.E.2d 753 (1976); People v. Better, 33 Ill. App. 3d 58, 337 N.E.2d 272 (1975); Pierce v. State, 292 Ala. 473, 296 So.2d 218 (1974), \textit{cert. denied}, 419 U.S. 1130 (1975). Statewide standards have been supported based on the value of (relative) uniformity, \textit{Pierce}, 296 So.2d at 224-26; Court v. State, 63 Wis. 2d 570, 576-77, 217 N.W.2d 676, 679 (1974) (per curiam). Statewide standards have been criticized as artificial, see Court, 63 Wis. 2d at 582-83, 217 N.W.2d at 682 (Hansen, J., concurring). \textit{But see Pierce, supra} 292 Ala. at 480-82, 296 So. 2d at 226.


\textsuperscript{47} United States v. Danley, 523 F.2d 369, 370 (9th. Cir. 1975).


\textsuperscript{49} United States v. Dachsteiner, 518 F.2d 20, 21-22 (9th Cir.), \textit{cert. denied}, 421 U.S. 954 (1975).
where the relevant community is located, federal courts have split, opting for both the trial and material-distribution locations. Analysis of the Miller opinion suggests the Court envisioned a statewide standard. As Judge Harold Leventhal noted, “[m]ost of the references in Miller are to ‘state’ offenses, and there is a ring of federalism that focuses on states’ rights.” Certainly the Court will accept a statewide standard; it upheld California’s standard in Miller. In doing so, the Court contrasted the tastes of the people of Maine and Mississippi to those of New York City and Las Vegas and concluded “[p]eople in different States vary in their tastes and attitudes.” Finally, in formulating its test, the Miller Court referred to “sexual conduct specifically defined by the applicable state law;” to pass such a law, the state legislature must determine, inter alia, the standard of permissibility. Consequently, the relevant law would inherently reflect statewide standards of offensiveness and prurience.

Specific statewide standards have practical advantages for both sides in the pornography dispute. Those favoring pornog-
Pornography restrictions might prefer the relative uniformity statewide standards bring,\textsuperscript{60} a patchwork approach, caused by township ordinances or zoning restrictions, virtually assures that overall standards will be eroded over time.\textsuperscript{61}

Distributors of the material have an incentive to prefer statewide standards as well. Different standards in each town (or each part of the same town) create considerable uncertainty for distributors; economies of scale favor the larger distribution system. The same chilling effect might adversely affect the mass media in general.\textsuperscript{62} The defense burden at trial is heavier for a local than a state standard.\textsuperscript{63} Statewide standards may provide the best balance achievable between the right of the media to disseminate information, the right of artists and authors to expand the boundaries of culture, and the right of the people at large to protect their persons and their sensibilities.

II. JUDICIAL OPINION ON CIVIL RIGHTS-BASED ANTIPORNOGRAPHY ORDINANCES: Hudnut Revisited

Despite the evidence that pornography harms women,\textsuperscript{64} the courts have not welcomed the new generation of anti-pornography laws. In the most prominent decision to date, American Booksellers Ass'n v. Hudnut, an Indiana federal district court\textsuperscript{65} and the Seventh Circuit\textsuperscript{66} raised several objections to the civil rights-based pornography ordinance adopted in Indianapolis: it was unconstitutionally vague,\textsuperscript{67} and it would tempt other groups to seek similar ordinances.\textsuperscript{68} They identified several problems with the ordinance: (1) it defined pornography as con-
duct and discrimination, which it clearly was not;\(^{69}\) (2) it strayed too far beyond the boundaries of *Miller*, ignoring the terms contained therein and neglecting the "serious literary, artistic, political or scientific value" test;\(^{70}\) (3) it did not require an individual to show specific injury before bringing an individual lawsuit;\(^{71}\) (4) the explicit political goals\(^{72}\) of the ordinance set a poor precedent—every politically weak group might seek such protection;\(^{73}\) (5) several of the terms the ordinance used, such as "subordination of women," are unconstitutionally vague;\(^{74}\) and (6) it allowed prior restraints without procedural due process.\(^{75}\)

The central and most important objection was that "[t]he ordinance discriminates on the ground of the content of the speech. . . . The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents."\(^{76}\) The courts refused to approve the legislation of attitudes: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."\(^{77}\)

Merely labeling antipornography ordinances as dangerous encroachments on first amendment rights ignores the rights of those harmed by pornography. Feminists have attacked rights analysis as being at best indeterminate and at worst self-defeat-

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69. *Hudnut*, 598 F. Supp. at 1330-31. The Indianapolis ordinance defined pornography as conduct and discrimination. INDIANAPOLIS IND. CODE § 16-1(a)(2) (1984). This categorization suited the political aims of the ordinance drafters, but it is not accurate legally. Although pornography production is conduct, and it may cause discrimination, the end product of the production process is exactly that—a product. Whether pornography is ultimately classified as an ordinary product or as speech (either protected or unprotected), it cannot be categorized as discrimination. A horse does not become a camel by changing its name. See Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 YALE L. & POL'y REV. 130, 137 (1984).


71. *Id.* at 326.

72. *See infra* notes 166, 179-82 and accompanying text.


74. *Id.* at 1337-38.

75. *Id.* at 1340-41.


77. *Id.* at 327 (quoting West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
Professor Frances Olsen points out that rights analysis juxtaposes the right to freedom and the right to security without providing any way to choose between the two: "Rights theory does not indicate which of the two values—freedom or security—the decisionmaker should choose in a given case. Because it cannot transcend this fundamental conflict of values, rights theory does not offer an adequate basis for legal decisions." The courts' formulation already contained a conclusion that a valid speech interest is at stake.

The district court compared the definition of pornography in the ordinance with categories of traditionally unprotected speech and concluded that because the ordinance definition of pornography reached beyond the traditional boundaries of obscenity, the ordinance was unconstitutional. The court seemed to accept the idea that "obscenity harms people," but it sidestepped the question of whether and to what extent pornography


"Only by ignoring at least half the rights that could be asserted can rights rhetoric even appear to solve concrete problems. Id. at 391.

[79] Thinking in terms of rights encourages a partial and inadequate analysis of sexuality. Just as rights theory conceptualizes a society composed of self-interested individuals whose conflicting interests are mediated by the state, it conceptualizes the problem of sexuality as a question of where social controls should end and sexual freedom begin. Id. at 389.

Unfortunately, feminists who set out to discuss sexuality find their arguments trivialized into a line-drawing debate. Id. at 389-90.

In this way, feminists who are or should be engaged in a joint or parallel project of challenging the dominant definition of sexuality come to perceive themselves as opposing one another.

Id. at 390.

79. Id. at 388-89; see also MacKinnon, supra note 4, at 25-26. Which right ought to win depends on value judgments, not rights analysis. One commentator suggests that conflicting rights can be balanced against each other to determine the proper outcome. Katz, Regulating Obscenity, 5 Whittier L. Rev. 1, 11 (1983); see also MacKinnon, supra note 4, at 26. Katz's approach, however, also leads to value judgments: what weight should be given to each right in the weighing of the rights? Most attempts to weigh rights make pitiful abstractions out of the truly gruesome crimes that pornography causes or incites: women are beaten, raped, and even murdered. Whatever free expression value pornography possesses seems minimal in the face of that harm. The injustice is even clearer when the observer recognizes that the value on the side of the pornographer is generally free enterprise, not free expression. In other words, rights analysis is conclusive only when one ignores half of the rights that could be asserted in a given conflict.

The Hudnut decisions suffer from the facile application of rights analysis that Olsen describes. The district court defined the conflict this way: "This litigation, therefore, requires the Court to weigh and resolve the conflict between the First Amendment guarantees of free speech, on the one hand, and the Fourteenth Amendment right to be free from sex-based discrimination, on the other hand." Hudnut, 598 F. Supp. at 1327.


81. Id. at 1337.
phy harms women. Judge Barker conceded that "there may be many good reasons to support legislative action," but concluded that "[t]his Court cannot legitimately embark on judicial policy-making, carving out a new exception to the First Amendment simply to uphold the Ordinance."[^82] The district court concluded, without explanation, that sex discrimination is not a compelling state interest justifying an exception to the first amendment.[^83]

The court did not hesitate to predict the ruin of civil liberties that would follow in the wake of the ordinance,[^84] but it exercised much less imagination when describing the harm pornography inflicts on women. Indeed, the court was uncomfortable with the idea that pornography harms women, suggesting that the effects of pornography can be avoided or otherwise guarded against.[^85]

Although the district court was reluctant to recognize that pornography might cause harm, the Seventh Circuit was quick to make that admission:

> Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. . . . Yet this simply demonstrates the power of pornography as speech.[^86]

The court's statement contains a conclusion about the relative value of the interests being weighed.[^87] It implicitly weighs women's rights to security against the pornographer's right to

[^82]: Id. The court never addressed why the harm-to-society rationale, used to justify expansions of traditional obscenity regulation in *Ferber* and *Pacifica*, does not apply with equal force to pornography. The analogy is not perfect-*Ferber* and *Pacifica* are concerned with the special need to protect children—but it is illuminating. Moreover, the horrifying prevalence of violent crimes against women and the existence of special laws designed to deter these crimes show that a special need to protect women exists.

[^83]: Id. at 1342.

[^84]: Id. at 1335-37, 1339. The court foresaw a swift trip down the slippery slope to total destruction of the first amendment: abuse of the precedent by interest groups to gain power; the erosion of freedom and the consequent danger of tyrannic rule; and the effective banning of valuable books. Id.

[^85]: Id. at 1334.


[^87]: Discussion of the rights on the other side of the scale is beyond the scope of this inquiry. These rights include the right to be free from sexual harassment at home and in the workplace; the right of women to personal security; the right to justice, especially in rape and sexual harassment trials; the right to be free from libel; and the right of actors and actresses to be free from economic and sexual exploitation by pornography producers. See generally MacKinnon, *supra* note 4; A. Dworkin, *Pornography: Men Possessing Women* (1981).
print or film what he pleases. The argument assumes a proposition that it can not prove: that speech is worth protecting, regardless of the consequences, so long as it does not fall into one of the categories customarily viewed as unprotected by the first amendment. The court described various types of harmful speech that are protected under the first amendment, including pornography.\footnote{Hudnut, 771 F.2d at 329.} The court never drew a line, however, between harmful, protected speech and harmful, unprotected speech. It did not explain why some pornography should be unprotected on the basis of its sexually explicit content and other pornography, equally or more harmful, should remain protected.

Another disturbing aspect of the district court opinion and, to a somewhat lesser extent, the Seventh Circuit opinion, is the way the conflict between rights was quickly abstracted from the context of sexual inequality. Both courts devoted much discussion to the value of speech and the harmful consequences of restricting speech,\footnote{Id. at 331-33; Hudnut, 598 F. Supp. at 1327.} but they did not accord the same treatment to women's rights. The courts spoke abstractly of "sex-based discrimination," "social harm," and "women's status," and weighed these considerations against "our fundamental freedoms as a people."\footnote{E.g., Hudnut, 598 F. Supp. at 1327. Interestingly, the court seems oblivious to the idea that women's rights (including the right to be free from rape or battery) might be considered part of "our fundamental freedoms as a people."} Although the Seventh Circuit nodded in the direction of more specific harms, such as rape and battery,\footnote{Hudnut, 771 F.2d at 329.} neither court explained why these and other harms to women were not sufficiently compelling to justify an exception to full first amendment protection.

The courts, after recognizing the possibility that pornography harms women, ultimately failed to seriously measure the depth of the harm, and further failed to balance that harm against first amendment considerations. Put in these terms, the decision is not as clear, the judgment not as evident as it seemed to the Hudnut courts. The courts did not give balanced and full consideration to all of the relevant rights, nor could they provide a convincing basis for their preference for first amendment freedoms over women's right to security. The possible future loss of civil liberties envisioned by the courts\footnote{Hudnut, 598 F. Supp. at 1337.} is no worse than the very present, very real suffering of women.
III. THE JUSTIFICATION FOR FURTHER LEGISLATIVE ACTION

Legislative action to regulate pornography has both theoretical underpinning and historical constitutional precedent. Pornography restrictions will not seriously threaten other types of speech, and rationales invoked to protect other types of speech do not apply to pornography. Present obscenity law provides sufficient latitude for the legislative branch to move farther against pornography.

A. The Legislature May Expand the Boundaries of Pornography Regulation

Laws impinging on expression strike a raw nerve in constitutional jurisprudence and are treated harshly by the judiciary. For example, when the Indianapolis City Council passed a much-publicized antipornography ordinance, their explicit intent was to protect women from the harms pornography causes. Traditionally, protecting the health and welfare of the citizenry is one of the state’s highest functions, one the courts grant a high degree of deference. The Indiana federal district court, however, found any harm pornography causes women irrelevant because it decided that the legislature may not expand the traditional boundaries of obscenity regulation or the traditional rationales advanced for it.93

The court’s argument is a common one in the pornography debate,94 but it has several flaws. First, it begins by assuming what it must prove: that pornography is protected speech. A review of Miller and related opinions and authorities95 reveals that much, if not most, material labelled “pornography” is legally obscene, and so is not protected by the first amendment.96

93. Hudnut, 598 F. Supp. at 1332-35. This view was also advanced by several people who testified before the Attorney General’s Commission. REPORT, supra note 2, at 355-58.

94. See, e.g., Tigue, supra note 68, at 91-94.

95. See Miller v. California, 413 U.S. 15, 18-19 n.2 (1973); infra notes 127-29 and accompanying text.

96. New York v. Ferber, 458 U.S. 747, 764 (1982); Miller, 413 U.S. at 23; Kois v. Wisconsin, 408 U.S. 229 (1972); United States v. Reidel, 402 U.S. 351, 354 (1971); Roth v. United States, 354 U.S. 476, 484-85 (1957). The Court declared in Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942), that certain types of expression are not protected speech. These include libel, “fighting words,” and obscenity. The connecting thread, as the Court noted, is that these are examples of low value speech. They contrib-
Second, the argument implicitly assumes that the goal of anti-pornography ordinances is to impose morality, not redress harm. This assumption avoids asking the hard question of whose rights should prevail in a clash of rights. Several prominent jurists have made this mistake, claiming that it is improper to "legislate attitudes"—effectively ignoring countervailing civil rights violations. The Hudnut court observed that "[the] power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth." But the primary aim of civil rights-based ordinances is not to declare the "truth" of sexual equality; the aim is to protect the existing constitutional rights of female United States citizens, rights that pornography violates.
Finally, the Supreme Court has permitted limitations on expression in selected cases to prevent harm. It upheld a New York ban on child pornography on the grounds that it harmed children without presenting any empirical proof or showing that the individuals depicted in the material at issue were actually harmed.\textsuperscript{100} Tort law permits monetary recovery for slander \textit{per se} without proving actual damages.\textsuperscript{101} Vulgar language may be prohibited in certain contexts without any showing of harm to the public morals.\textsuperscript{102} Although the above examples can be differentiated as special cases, there is a unifying principle: in each case, the Court allowed the legislature to assume (or the Court itself assumed) that harm would result;\textsuperscript{103} empirical studies supporting the propositions were not required.\textsuperscript{104}

In several of the above examples, the government or the Court used law to educate as well as to redress harm. The legislature is not merely a reactive body; legislative acts often cause social change. The government can lead social change by deciding community standards as a legislative determination, which in turn will educate and change public behavior. This approach has been used before; as discussed further \textit{infra}, legislatures have often created or extended free speech exceptions to cover situations involving harmful speech.

force tolerance, it can outlaw acts of bigotry—acts that for the actor express personal and perhaps highly cherished beliefs. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Brown v. Board of Educ., 347 U.S. 483 (1954). Legal sanctions imply that a matter is so compelling that it cannot be left to individual whim. If the law takes racism seriously, people will take racism seriously. The same concept applies to sex discrimination and pornography; as feminist Andrea Dworkin simply but eloquently notes, "Law educates." Dworkin, \textit{Against the Male Flood: Censorship, Pornography, and Equality}, 8 Harv. Women's L. J. 1, 23 (1985). The progress that has been made against racism testifies to the law's power to educate, to declare the goals of a culture.

For a thoughtful comparison of racism and sexism, see MacKinnon, supra note 4, at 8-10.

104. \textit{See} Paris Adult Theater I v. Slaton, 413 U.S. 49, 58 n.8, 60-61 (1973); Note, \textit{Anti-Pornography Laws and First Amendment Values, supra} note 99, at 478. By contrast, no such assumptions are required regarding pornography; a great number of published studies discuss the link between pornography and violence against women. \textit{See supra} note 4; Griffin, \textit{Women, Pornography and the First Amendment}, Student Law. Dec. 1980 at 24, 45-46. MacKinnon also cites a long list of cases in which the Supreme Court held a speech interest less important than the potential harm. MacKinnon, \textit{supra} note 4, at 28 n.50.
B. Other Categories of Restricted Speech

The idea that the legislature can restrict speech to avert certain harms is not novel. Several types of harmful speech besides obscenity may be prohibited. The Supreme Court has long permitted governmental restrictions on political speech if that speech incites people to imminent lawless action. The "clear and present danger" speech test is strict—the speech must constitute incitement to imminent action, not merely advocacy of political change or theory, and the speech must seem likely to succeed in inciting or producing lawless action. It is clear from Brandenburg v. Ohio, however, that if grave harm is incited and threatened, even political speech may be suppressed. Nor is the Brandenburg "clear and present danger" speech restriction unique; the Court has upheld several newer categories of free speech exceptions.

1. Group Libel—One nonprotected speech category that pornography resembles is libel. Traditionally, libel had to be directed at an identifiable person to be actionable. In Beauharnais v. Illinois, the Supreme Court recognized libel of an entire group as a wrong that the state may redress. The Beau-

108. “Pornography is the vehicle for the dissemination of a deep and vicious lie about women. It is defamatory and libelous.” Longino, Pornography, Oppression, and Freedom: A Closer Look, in TAKE BACK THE NIGHT 40, 48 (L. Lederer ed. 1980). Feminists have cited the libelous nature of pornography as a rationale for pornography regulation. Note, Anti-Pornography Laws and First Amendment Values, supra note 99, at 467; Comment, Feminism, Pornography, and Law, supra note 97, at 523; see also Jacobs, Patterns of Violence: A Feminist Perspective on the Regulation of Pornography, 7 HARV. WOMEN'S L.J. 5, 53-54 (1984). Some critics of pornography regulation based on a libel theory maintain that the way to fight untrue pornographic “speech” is with more speech. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 731 (1978). The feminist response is that pornography silences women, and devalues their speech. MacKinnon, supra note 4, at 63; see also A. DWORKIN 1 supra n.87; Note, Anti-Pornography Laws and First Amendment Values, supra n.99.
harnais Court allowed the legislature to extend an existing speech exception to cover a new area.111

2. Child Pornography—Creating an entirely new speech exception, the Supreme Court in New York v. Ferber112 declared that child pornography is not protected speech. Ferber involved a New York statute that prohibited using children in pornographic films or pictures and distributing the material, even though those films or pictures might not themselves be obscene under the Miller test. The Court based its decision on the need to protect children from harm.113 Significantly, the Court noted that its goal extended beyond protecting the participants to protecting youthful viewers.114 Thus, in order to protect youth, the Court permitted the government to restrict certain pornographic material sold to adults.115 In view of the minimal literary, scientific, or educational value of these materials,116 the Court found that the state had the power to ban child pornography, not merely to restrict access by juveniles or regulate the age of the performers.

167 (1955); Riesman, Democracy and Defamation: Control of Group Libel, 42 COLUM. L. REV. 727 (1942); Tanenhaus, Group Libel, 35 CORNELL L.Q. 261 (1950).

111. The purpose of raising Beauharnais is to demonstrate that the Court allowed the legislature to extend a traditional speech exception, libel, for a good purpose; the continuing vitality of the case is not being defended. Whether a disclaimer is necessary is unclear; some courts have questioned the vitality of Beauharnais (see, e.g., Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir.), cert. denied, 439 U.S. 916 (1978)), but the Supreme Court continues to rely on it. See Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 504 (1984); New York v. Ferber, 458 U.S. 747, 763 (1982); Smith v. Collin, 436 U.S. 953 (1978) (Blackmun, J., dissenting from a denial of a stay to a court of appeals order, joined by Rehnquist, J.). Moreover, several commentators believe group libel doctrine is not, or should not be, dead. See, e.g., Note, Group Vilification Reconsidered, 89 YALE L.J. 308 (1979); cf. Delgado, Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 HARV. C.R.-C.L. L. REV. 133 (1982).


113. Id. at 759 n.10.

114. Id. at 756-57; see also Kaplan v. California, 413 U.S. 115, 120 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58 n.7 (1973) (noting that because books are portable and durable, simply banning children from adult moviehouses does not adequately protect juveniles); REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 401 (1970) (Hill-Link Minority Report) (citing the comparatively heavy use of pornographic material by young persons).


116. "We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." New York v. Ferber, 458 U.S. 747, 762-63 (1982).
Although the case of children is distinguishable, the logic is equally compelling when applied to adult women: if legislatures may prohibit child pornography because of the special need to protect children, then they should also be able to prohibit violent pornography because of the special need to protect adult women from sex-related violence, coercion, and sex discrimination. The state’s police power can no more protect the victims

117. The significance of this distinction is uncertain. The Supreme Court has always maintained that the state has legitimate interests in regulating obscene material beyond the interest in protecting children and unconsenting adults. Paris Adult Theatre I, 413 U.S. at 57; Miller v. California, 413 U.S. 15, 18-20 (1973); Stanley v. Georgia, 394 U.S. 557, 567 (1969). Moreover, the harm of child pornography probably cannot be effectively eradicated without also addressing adult pornography. See MacKinnon, supra note 4, at 38, n.77 (1985); Burgess, Hartman, McCausland & Powers, Response Patterns in Children and Adolescents Exploited Through Sex Rings and Pornography, 141 Am. J. Psychiatry 656, 657-58 (1984) (documenting instances where money from sale of photos is used as an inducement to young participants); Report, supra note 2, at 411-413, 782-86, 788.

118. See Gershel, Evaluating a Proposed Civil Rights Approach to Pornography: Legal Analysis as if Women Mattered, 11 Wm. Mitchell L. Rev. 41, 71-72 (1985) (special need to protect persons coerced into performing in pornography). Children have historically been treated differently by the law and by society than adults (men and women). For obvious reasons, children have fewer rights and less freedom, and the state has adopted a paternalistic attitude regarding their protection. The Ferber court held that the state may protect children from the evils of child pornography because children are unable to protect themselves. Women are similarly unable to protect themselves against sex discrimination and sexual violence. This does not mean courts should apply the standards relevant to children to women across the board. Rather, where a historically oppressed or helpless group is concerned, greater than ordinary remedies may be required to administer true justice. The exact form of the remedy depends on the individual case.

Although the differences in the positions of women and children are clear—women vote, they are educated, they are physically stronger, and psychologically more independent—the similarities of women and children with respect to the harms of pornography are quite compelling. The actors who produce the material are exploited, both physically and economically. L. Lovelace, Ordeal (1981); Report, supra note 2, at 837-900 and the numerous sources cited therein. Also, they often suffer severe psychological harm. Report, supra note 2, at 837-900. Other women are also victimized, with resulting physical and mental harm. Jacobs, supra note 108, at 7-25; Baldwin, The Sexuality of Inequality: The Minneapolis Pornography Ordinance, 2 Law and Inequality 629, 637-40 (1984) and sources cited therein; Report, supra note 2, at 767-835 and sources cited therein. The harms include rape, forced sexual performances, sodomy, prostitution and the related danger of sexually transmitted diseases, incest, other child sexual abuse, suicidal thoughts and behavior, lesser mental harms, lowered self-esteem, and continued sexual dysfunction. Id. Pornography also causes economic harm to women through forced pornographic performances and pornography-induced or inspired sex discrimination. MacKinnon, supra note 4, at 39 n.80-81 and accompanying text; Report, supra note 2, at 826-35 and sources cited therein.

The logic developed in Ferber regarding the rights of children, and in Brown and other race discrimination cases regarding the rights of minorities, demands parallel treatment to protect the rights of women. See MacKinnon, supra note 4, at 25-26. To hold otherwise is to say in effect to women, “the state has a compelling interest in protecting children and eradicating race discrimination, an interest sufficient to override first amendment rights, but you women cannot come to the courts for similar protection. Protecting
of pornography-induced sexual abuse and exploitation without restricting pornography than it could protect the victims of child sexual abuse caused by child pornography without a similar ban.\textsuperscript{119}

C. Pornography is Not Political Speech

One of the most forceful arguments advanced against statutory pornography restrictions is that the Court's approach to past first amendment exceptions amounts to piecemeal hacking away at the first amendment.\textsuperscript{120} Speech serves multiple values simultaneously—political, expressive, artistic—and separating or ranking these values is not always easy.\textsuperscript{121} The most compelling reason not to grant the legislature control over community standards is that pornography is entitled to the same protection as political speech,\textsuperscript{122} so the government may not ban it no matter how much harm it causes.\textsuperscript{123}

the bodies of children is more important than protecting your bodies; protecting the opportunities of racial minorities is more important than protecting your opportunities."

\textsuperscript{119} The Court found that nothing short of a ban would accomplish the goal:

The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.

\textit{Ferber}, 458 U.S. at 760.


\textsuperscript{121} This argument implies that pornography has some value initially. Some theorists refuse to go even that far. Chafee, for example, based his justification of first amendment protection on the value of speech, and reached the conclusion that pornography is entitled to little protection because it is low value speech: "[P]rofanity and indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by . . . social interests. . . ." \textit{Chafee, Free Speech in the United States} 150 (1941).

\textsuperscript{122} See \textit{Miller v. California}, 413 U.S. 15, 42-47 (1973) (Douglas, J., dissenting); \textit{Wallsgrove, Feminist Anti-Censorship Taskforce: The case against Indianapolis, Off Our Backs}, June 1985 at 12: "[A]s all feminists agree, sex is political; we should therefore argue that its expression needs more protection than it currently has." \textit{Id.} at 13 (emphasis in original). This argument holds that because sex is political, pornography is political speech, especially insofar as it implicitly or explicitly advocates imbalanced power relationships. \textit{Id.}

\textsuperscript{123} Comment, \textit{Feminism, Pornography, and Law}, supra note 97, at 528-29; \textit{Press, supra note 12}, at 66; \textit{Hunter & Law, Amicus Curiae Brief of the Feminist Anti-Censorship Taskforce and the Women's Legal Defense Ass'n Fund, In Opposition to the Indianapolis Ordinance}, American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir.
This argument fails to persuade. The government may restrict even political speech, the most zealously protected kind, if it directly incites violence.\textsuperscript{124} Certainly pornography is entitled to no more protection than political speech.\textsuperscript{125} The Supreme Court does not even consider them in the same league.\textsuperscript{126}

\textbf{D. Pornography Equals Obscenity}

Another argument of those opposed to pornography restrictions is that pornography is not obscenity.\textsuperscript{127} Although distinctions can be drawn between pornography and obscenity,\textsuperscript{128} in practice, the Supreme Court’s conception of obscenity has amounted to what commonly is considered hard-core pornography.\textsuperscript{129} The purported distinction never meant much; when past courts differentiated pornography and obscenity, they were try-

\begin{itemize}
\item \textsuperscript{124} Schenck v. United States, 249 U.S. 47, 52 (1919).
\item \textsuperscript{125} Pornographers might attack a \textit{Schenck} analogy by arguing that no strong relation exists between pornography and the evil feared. This argument is discussed in note 4 \textit{supra}. Even if this argument is given some credence, it does not surmount the constitutional issue. If pornography is nonprotected speech, to uphold the law a court need only find sufficient evidence of harm for a rational legislature to conclude that a ban on pornography might help. Paris Adult Theater I v. Slaton, 413 U.S. 49, 60-61 (1973); see Part III.G \textit{infra}. Only if pornography is protected speech must a law restricting it meet the clear and present danger test. See \textit{Miller}, 413 U.S. at 42, n.6 (Douglas, J., dissenting); Kaminer, \textit{A Woman’s Guide to Pornography and the Law}, 230 \textit{NATION} 754, 755 (1980).
\item \textsuperscript{126} See, \textit{e.g.}, \textit{Young v. American Mini Theaters}, 427 U.S. 50 (1976):
\begin{itemize}
\item [I]t is manifest that society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammled political debate. . . . Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen’s right to see “Specified Sexual Activities” exhibited in the theaters of our choice.
\end{itemize}
\item \textsuperscript{127} Gershel, \textit{supra} note 118, at 64; \textit{see also} Emerson, \textit{supra} note 69, at 134.
\item \textsuperscript{128} Gershel, \textit{supra} note 118, at 64-66.
\item \textsuperscript{129} Indeed, in \textit{Miller} itself, the Supreme Court said that its “obscenity” opinion referred to pornography:
\begin{itemize}
\item This Court has defined “obscene material” as “material which deals with sex in a manner appealing to prurient interest” [citing Roth v. United States, 354 U.S. 476, 487 (1957)]. . . .
\item The material we are discussing in this case is more accurately defined as “pornography” or “pornographic material.” . . . [Pornography] now means . . . “a depiction (as in writing or painting) of licentiousness or lewdness: a portrayal of erotic behavior designed to cause sexual excitement.” [citing Webster’s Third New International Dictionary (Unabridged 1969)] . . . We note, therefore, that the words “obscene material,” as used in this case, have a specific judicial mean-
ing to protect works such as *Ulysses*. The pornography objected to would be considered obscene by any court following the obscenity test of *Miller*.

The best rationale for allowing the legislature to act is that the Court has always allowed restrictions on this material. Without specific statutory standards, however, every public official takes a risk whenever she makes an obscenity arrest or seizure, and under present statutes every judge or jury has to decide the issues *de novo*. Furthermore, until trial, no one knows where the line between offensive but permissible material and material that may be banned lies. A statutory standard will provide clearer guidance to the police, the court, and citizens. Clear standards also reduce the risk to booksellers and movie producers. Finally, a clear standard removes a contentious trial issue that would otherwise require tedious discovery; this should in turn expedite trials.

**E. Pornography Bans are More Than Mere Regulations of Taste**

Another criticism of past ordinances is that pornography restrictions regulate taste. Two responses to this criticism are: (1) that pornography results in harm is indisputable—the only argument is over how serious the harm is—so the restrictions are based on more than taste; and (2) that the government often regulates taste related to free expression without serious pro-
test—taste regulation of pornography is not significantly different from other taste regulations in principle.

Of equal importance, the legislature is the proper body to make these decisions. The legislature is peculiarly suited to factfinding. Every interested party has an opportunity to be heard. The citizenry can properly air its concerns—economic, moral, safety, expressive. In marked contrast, in the trial court only the parties involved can be heard, and the evidence the court may hear is highly restricted. In any event, the chance of enforcement excesses is not enough, by itself, to overrule otherwise constitutional laws passed by democratically-elected legislatures: "[T]he possibility of abuse is a poor reason for denying [the state] the power to adopt measures . . . sanctioned by centuries of Anglo-American law."

F. Pornography Restrictions are Not the First Step on a Slippery Slope

In the end, opponents of antipornography ordinances fall back on the slippery slope argument: if pornography is banned, then critical political speech will soon be banned as well. The weakness of this argument is exposed by the many restrictions already tolerated on free speech without seriouslyimpeding political discussion. The child pornography restrictions, the clear and present danger restrictions, and the obscenity and libel laws have not significantly inhibited political debate. No reason exists to suppose a pornography restriction will be more damaging.

134. For example, the government regulates taste in the zoning regulations common in many communities governing house color or fence height. Zoning restrictions on pornographic movie houses and bookstores have been upheld by the Supreme Court. See, e.g., Young v. American Mini Theatres, 427 U.S. 50 (1976). Another example is the restriction on broadcasting "dirty words." F.C.C. v. Pacifica Found., 438 U.S. 726 (1978).

135. Beauharnais v. Illinois, 343 U.S. 250, 263 (1952). When the speech causes no harm, or the harm is outweighed by the benefits, the justification for restricting speech may be weaker. The former case, however, is inapplicable to pornography, and the latter case involves a weighing of empirical evidence that seems to be in the discretion of the legislature.

136. MacKinnon & Hunter, Coming Apart: Feminists and the Conflict over Pornography, Off Our Backs at 6, 7-8 (June 1985); Press, supra note 11, at 63.
G. The Standard of Proof Required for the Legislature to Act

One extremely important element of the Roth obscenity definition that survives to the present day determines the standard that legislative action must meet. If the material is not legally obscene, any restrictive law must meet the clear and present danger or compelling interest level of justification. If the material is legally obscene under the prevailing obscenity test, however, the state may restrict it as long as a mere "rational basis" for the regulation exists, or it is non-obscene but harmful to children as indicated by Ferber. The Miller Court assumed that the harm from obscenity was within the capacity of the legislature to redress. So did the Ferber Court regarding the harm.


It is not for us to resolve empirical uncertainties underlying state legislation. Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist. In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality."

Although honest disagreement may remain regarding the precise strength of the correlation between pornography and harm or exactly how harm follows from pornography, pornography considered obscene under Miller is not protected speech. Miller v. California, 413 U.S. 15, 36-37 (1973). The legislature can therefore conclude that violent pornography harms women and may be banned on those grounds.

An analogy to the law of incitement to violence demonstrates this point. A speaker, holding forth on a political issue, can be muted, arrested, and jailed if his speech is deemed likely to goad the audience to immediate violent action. Brandenburg v. Ohio, 395 U.S. 444 (1969). The legislature may forbid the speech without conducting substantial fact-finding on the link between speech and violence, and the police need not wait until a riot occurs before arresting the speaker. See Paris Adult Theater I, 413 U.S. at 60-63. A speaker urging his (male) audience to seize, beat, and rape women could be legally stopped before his words prodded the crowd to such action. The government could rationally rely upon this principle to prohibit the same message if printed or filmed. Restriction of printed material deemed likely to incite such actions—like pornography, according to the available data on the pornography-violence link (see supra note 4)—falls under this rubric.

Most of the material that a model ordinance ought to ban is already recognizably obscene under the Miller test. A good illustration is provided by the "rape fantasy" depictions, typical in pornography, Report, supra note 2, at 323-24, used in several of the Donnerstein and Malamuth studies on the link between pornography and violence. See supra note 4. In a typical scenario, an assailant sexually assaults a woman; frightened and resisting at first, she soon becomes a multiple-orgasmic willing participant. Or imagine the same depiction as the subject of a photo essay. These materials fit into the Miller criteria: by their own terms, the materials are intended to appeal to prurient interest; the depictions are patently offensive (especially to women, who make up over 50% of the population); as long as the work lacks serious literary, artistic, political, or scientific value, it may be considered obscene. See supra note 28 and accompanying text.
from child pornography. Asserting that the legislature can exercise similar discretion in drafting a new ordinance to pursue the types of pornography generally ignored under existing law enforcement norms is a straightforward extension of this precedent.

IV. PROPOSED STANDARDS FOR A NEW ORDINANCE

The current proliferation of pornography, amply documented in the Attorney General’s report and other sources,\textsuperscript{138} demonstrates the need for new antipornography ordinances. A clear new law would simplify the problems of enforcement. More important, it would signal law enforcement bodies to take strong action against harmful forms of pornography. The challenge for a legislature is to draft a statute that covers all objectionable material, whether printed, broadcast, or audio-visual, without exceeding constitutional boundaries. An effective statute, which covers almost all of the materials banned in the Indianapolis ordinance but also conforms to \textit{Miller}, is a reachable goal.

A. New Statutes Must Conform to Miller

In drafting a new antipornography statute, a legislature must draw on existing obscenity law. The Indianapolis ordinance sweepingly expanded the class of prohibited material. As such, it was a radical departure from past expansions of \textit{Miller}.\textsuperscript{138} The Supreme Court has not carved large new chunks out of protected speech, preferring to create small exceptions or to redefine the borders of an existing exception. The purpose of a new antipornography ordinance should be to reach material not effectively restricted at the present time; and some ways of reaching that goal are more acceptable than others. Inevitably, a new law that draws heavily on a standard enunciated by the Su-

\footnotesize{138. REPORT, supra note 2, at 277-97, 323-24; Press, supra note 11, at 58-63, 67. The industry, which sold over eight billion dollars’ worth of material in 1984, is enormous by any standard. Galloway & Thornton, \textit{Crackdown on Pornography—A No-Win Battle}, U.S. NEWS & WORLD REP., June 4, 1984, at 84. There are more sellers of pornographic videotapes than McDonald’s restaurants. In New York alone, dial-a-porn services received over 800,000 phone calls \textit{per day} in 1984, over 180,000,000 calls for the year. REPORT, supra note 2, at 78.}

The recent Supreme Court decisions in *Pope v. Illinois* \(^{140}\) and *Hudnut*, \(^{141}\) clarify that any pornography ordinance will have to conform to the strictures of *Miller*. As detailed supra, the *Miller* test has three elements; material is obscene when it: (1) appeals to the prurient interest under contemporary community standards; (2) depicts, in a patently offensive way, conduct specifically described by the applicable state law; and (3) lacks serious literary, artistic, political, or scientific value (the "LAPS" test). \(^{142}\) In dicta the *Miller* court limited the scope of prohibitable obscenity to "hard-core sexual conduct." \(^{143}\)

Under the "community standards" element, a jury of ordinary community members must find that the author, producer, or distributor intended the material to appeal to prurient interest. \(^{144}\) "Prurient interest" is not itself problematic; it is a common, well-understood legal term, \(^{145}\) and the qualifying phrase, "taken as a whole," serves to prevent the government from using a few lurid passages in an otherwise innocuous book to declare it obscene. \(^{146}\)

The "patently offensive" requirement has caused courts some difficulty, \(^{147}\) but it need not frustrate legislative efforts. Patent offensiveness is a question of community taste. \(^{148}\) Who is to be the arbiter of taste for the community? *Miller* implies this is a jury function. Determining patent offensiveness on a case-by-case basis, however, will lead to nonuniform results, with attendant problems. \(^{149}\) Since offensiveness is a value judgment, the elected representatives of the community would seem to be in the best position to make a uniform pronouncement on what is

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143. Id. at 27.
144. Id. at 30.
145. The term originated in *Roth v. United States*, 354 U.S. 476, 487 n.20 (1957). See supra notes 29-30 and accompanying text; see also *Brockett v. Spokane Arcades*, Inc., 472 U.S. 491, 494 (1985); United States v. Guglielmi, 819 F.2d 451, 454 (4th Cir. 1987); *Polykoff v. Collins*, 816 F.2d 1326, 1335 (9th Cir. 1987); *Goldstein v. Allain*, 568 F. Supp. 1377, 1385 (N.D. Miss. 1983); *MODEL PENAL CODE* § 207.10(2) commentary, at 10 (Tent. Draft No. 6, 1957) (defining intent to appeal to prurient interest as "the capacity to attract individuals eager for a forbidden look").
148. See *Miller v. California*, 413 U.S. 15, 33 (1973); Leventhal, supra note 53, at 1262; *Case Comment, Obscenity*, supra note 54, at 328.
149. See supra notes 58-62 and accompanying text.
patently offensive under community standards.\textsuperscript{150} Indeed, part of the duty of legislators is to create and enforce community standards of taste and conduct.

The model ordinance proposed \textit{infra} is innovative in its position that a state or community legislature may legitimately say, via legislation, "We, the elected representatives of the community, determine that 'X' representation of sexual conduct is patently offensive as a matter of law." This permits the community to determine what is patently offensive, while providing reasonable notice to pornographers of what will be found obscene. The final judgment of offensiveness versus redeeming value still rests with the jury, but the ordinance creates a clearer set of guidelines for the court, while allowing the community to retain its voice in the decision.

\textit{Miller}'s dicta contains a "hard-core" limitation;\textsuperscript{151} the \textit{Hudnut} court criticized the Indianapolis ordinance because it also limited non-hard-core conduct.\textsuperscript{152} In doing so, the Court came perilously close to elevating form above function because neither \textit{Miller} nor \textit{Hudnut} defined "hard-core," instead referring to "the regulating state law."\textsuperscript{153} But not all states include "hard-core" in their definitions of obscenity.\textsuperscript{154} Moreover, "hard-core" is a term of art which could easily confuse a jury.\textsuperscript{155} The \textit{Miller} Court's "hard-core" limitation is not necessary to its holding, and, undefined, it is not helpful in guiding a jury decision on obscenity.

The antipornography ordinance proposed below does not contain an explicit "hard-core" limitation. There is substantial dan-

\begin{itemize}
  \item \textsuperscript{150} Schauer, supra note 32, at 18; cf. \textit{Miller}, 413 U.S. at 33:
  \text{[T]}he primary concern with \ldots the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one.
  \item \textsuperscript{151} \textit{Miller}, 413 U.S. at 27: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." The Court uses the term twice more, \textit{id.} at 28, 35, but it is not defined either explicitly or by the context of those usages.
  \item \textsuperscript{152} American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1332 (S.D. Ind. 1984).
  \item \textsuperscript{153} \textit{Miller}, 413 U.S. at 27.
  \item \textsuperscript{154} For example, the California law upheld in \textit{Miller} did not include the term "hard-core." CAL. PENAL CODE § 311 (1969). The Georgia law upheld in \textit{Paris Adult Theater I} also omitted the term. GEORGIA CODE ANN. § 26-2101 (1969).
  \item \textsuperscript{155} By bombard ing the jury with extremely offensive material labelled as "hard-core," a clever defense attorney could mislead the court into allowing sexually explicit material that the community would find highly offensive. See Fahringer, supra note 59, at 33; Myers, \textit{supra} note 38, at 320 n.29.
\end{itemize}
ger that the term will confuse a jury, but little chance it will clarify the relevant issues. Without resorting to unnecessary terms, the proposed statute reaches patently offensive sexually explicit material. In other words, the model ordinance is restricted by its own terms to material that clearly fits within the Miller Court’s conception of “hard-core.”

Another important element of Miller is the obscenity exception that redeems material with serious literary, artistic, political, or scientific value (the “LAPS” test). The Indianapolis ordinance omitted a LAPS test on the ground that pornography harms women, whether or not there is social value in it. Where the pornographic material possesses no substantial countervailing benefit, no balancing is possible and the Indianapolis position is sensible. But in a case where the pornographic work possesses some substantial social value, a reasonable jury ought to have the latitude to find that the material’s harm is mitigated by its benefits. Furthermore, the material that a LAPS test would save is probably not the most harmful. A LAPS exception would not seriously hinder efforts to ban violent pornography, and an antipornography ordinance almost certainly cannot be passed today without one. The model ordinance proposed below includes a LAPS exception.

156. Contrast this to the Indianapolis ordinance, which included conduct that would clearly not be considered “hard-core.”


158. MacKinnon, supra note 4, at 21-22.

159. See Report, supra note 2, at 265 (emphasis in original):

[W]e find it difficult to understand how much of the material we have seen can be considered to be even remotely related to an exchange of views in the marketplace of ideas, to an attempt to articulate a point of view, to an attempt to persuade, or to an attempt seriously to convey through literary or artistic means a different vision of humanity or of the world. We do not deny that in a different context and presented in a different way, material as explicit as that which we have seen could be said to contain at least some of all of these characteristics. But we also have no doubt that these goals are remote from the goals of virtually all distributors or users of this material, and we also have no doubt that these values are present in most standard pornographic items to an extraordinarily limited degree.

For example, video tapes that show little more than women enjoying being raped, or glossy photos of women being beaten, are likely to cause more harm to women at large than serious discourses on the subordinate status of women which include graphic examples. See Report, supra note 2, at 382-84 (positing that material consisting only of printed words is less harmful than photographs or films).
B. Create a Civil Right of Action

The model ordinance provides that individual women may sue for damages pornography has caused them. The statute has two prongs: the state may employ criminal sanctions to restrict pornography, and private parties may sue in tort for damages caused by pornography. The tort remedy relies on the basic tort principle that where A (here, a pornographer) has wrongfully harmed B, B has a right to seek monetary damages from A to compensate her for her injuries. The threat of a civil action will act as a powerful check on pornography; the pornographer's minimal fear of often spotty criminal obscenity law enforcement is bolstered by the far more acute fear of paying damages to woman harmed by a pornographic publication.

Some observers believe that an antipornography statute will result in a flood of litigation because any woman who feels aggrieved by pornography may file a lawsuit. The problem of excess litigation can be minimized by imposing a restriction consistent with traditional tort law, that an individual bringing suit under an antipornography ordinance be required to show that an identifiable piece of pornography caused her some actual harm. The model ordinance requires this.

American tort law has not sanctioned recovery for imagined or slight affronts. Pornography does not cause mere injured feelings, but rather causes harm to one woman based on publication depicting another woman. The theoretical basis behind a blanket ban of such lawsuits is untenable; barring women who claim and are prepared to prove real damages from court to protect court dockets is wrong. Seeking redress in the courts for injury is

160. This provision was a central part of the Indianapolis ordinance. INDIANAPOLIS, IND. CODE §§ 16-17(a), 16-26(7)(b) (1984).
161. See PROSSER & KEETON ON TORTS, § 2 (5th ed. 1984):
   The same act may be both a crime against the state and a tort against an individual. In such a case, since the interests invaded are not the same, and the objects to be accomplished by the two suits are different, there may be both a civil tort action and a criminal prosecution for the same offense. See also Jacobs, supra note 108, at 52-53.
162. PROSSER & KEETON ON TORTS at 8: "The civil action for a tort . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer. If successful, the plaintiff receives a judgment for a sum of money, enforceable against the defendant."
163. See REPORT, supra note 2, at 366-68.
164. MacKinnon, supra note 4, at 29 n.52.
165. See Tigue, supra note 68, at 104-05. Feminists would argue that this is not necessarily a bad thing. See Comment, Feminism, Pornography, and Law, supra note 97, at 524-25.
a fundamental right, not to be denied due to administrative concerns. For example, no court would be permitted to refuse to hear civil rights cases on the grounds that racial discrimination is so commonplace or so easy to allege that the courts would be burdened by hearing the claims. Similarly, habeas corpus petitions are not denied wholesale because many prisoners wish to file them. The proposed ordinance provides a statutory framework for redress for women who suffer physical injury or civil rights violation traceable to pornography.

Furthermore, critics fear that allowing an ordinance that seems to enable women to improve their political position through restrictions on free speech could open the way for any aggrieved group to utilize similar legislation to its own ends. This potential problem did not originate with the Indianapolis ordinance; it dates back at least to Beauharnais. The objection surfaced in Hudnut because the ordinance drafters had broad political goals; they intended to use the antipornography ordinance as a tool to enhance the power and position of women. To the extent that the Indianapolis drafters attempted to use the courts rather than the legislature or the economy to transfer political power, the objection is proper. The narrower issue is the safety of women and the morality of allowing distribution of pornographic material harmful to women; the model ordinance pursues these goals alone. Confining the issue in this manner avoids the "slippery slope" problem while regulating objectionable material.

C. Use Clear Terms

Law must be clearly understood to be effective and equitable; interested parties must have fair notice of the boundaries of legality. Many of the terms in the Indianapolis ordinance are unconstitutionally vague. Such terms as "subordination of women," "inferior," "fragmented or severed into body parts," and "servility," are used throughout the Indianapolis ordinance,

168. MacKinnon, supra note 4; Dworkin, supra note 99.
169. Hudnut, 598 F. Supp. at 1337-39. Some feminists believe the indeterminate Indianapolis ordinance language posed a second danger: vague terms could be used by the (male-dominated) society and government against women, especially lesbians. Wallsgrove, supra note 122, at 12.
but are neither self-defining nor defined.\footnote{170} One way around this problem is to define broad but necessary terms within the ordinance itself. Another is to use terms that are already well understood in obscenity law. Either strategy is an appropriate way to give prospective pornographers fair notice that their product will run afoul of the law. The model ordinance uses both techniques.

\section*{D. Provide for Prospective Rulings}

Perhaps the most important objection to the Indianapolis ordinance is that it imposed prior restraints.\footnote{171} Prior restraints, are not impermissible per se, but before imposing a prior restraint, the state must give the affected party a full and fair opportunity to be heard in a speedy judicial determination.\footnote{172} The Indianapolis ordinance contained no such provision.\footnote{173} On the other hand, requiring the state to wait until after publication of the material to prosecute is unacceptable because the primary purpose of an antipornography ordinance is to avoid the harm pornography causes, not to lock up or fine the pornographers after they have caused the damage.\footnote{174} Moreover, the nature of pornographic material distribution is such that preventing publication is far easier and more effective than subsequent attempts to halt sales and distribution.\footnote{175}

The best solution is to allow a potentially affected party to seek a prospective ruling as to whether the ordinance will proscribe the material he or she wishes to publish.\footnote{176} Although prospective rulings are generally rare in the United States, they are frequently used to accommodate free speech concerns.\footnote{177} The

\footnotetext[170]{\textit{Hudnut}, 598 F. Supp. at 1337-39.}  
\footnotetext[171]{\textit{Id.} at 1340-41. For a discussion on the application of prior restraints in obscenity cases, see Edelstein & Mott, supra note 59, at 546-66.}  
\footnotetext[172]{The Supreme Court noted the factors necessary for a prior restraint in Freedman v. Maryland, 380 U.S. 51, 59 (1965): action to enjoin publication must be taken rapidly; the pretrial restraint must be "the shortest fixed period compatible with sound judicial resolution;" the final determination must be made by a judicial officer, not an administrative officer; and judgment must be promptly rendered.}  
\footnotetext[173]{\textit{Hudnut}, 598 F. Supp. at 1341.}  
\footnotetext[174]{\textit{REPORT}, supra note 2, at 287-89.}  
\footnotetext[175]{\textit{Id.; see Kaminer, supra note 125, at 755.}  
\footnotetext[176]{Other observers have suggested declaratory judgments as a mechanism to avoid the conundrum. See, e.g., Note, \textit{Community Standards}, supra note 34, at 1858; see also Pollitt v. Connick, 596 F. Supp. 261, 267-68 (E.D. La. 1984).}  
chief safeguards are to ensure a full and fair hearing, and to hold the hearing expeditiously so that permitted speech is not unduly hindered.¹⁷⁸

E. Avoid Politically-Charged Terms

The proposed model ordinance attacks both the traditional evils associated with obscenity and the harms to women addressed by the Minneapolis and Indianapolis ordinances. The model ordinance improves on the Minneapolis and Indianapolis ordinances by carefully avoiding the use of politically charged terms.

The reasons for this omission are twofold. First, political terms such as "subordination" and "inferiority" are vague. They caused the courts to declare the Indianapolis ordinance void. Employing accepted, well-defined legal terms may facilitate judicial acceptance of such ordinances. Second, the use of political terms and the definition of the issue as a civil rights struggle¹⁸⁰ is self-defeating. An antipornography ordinance that defines pornography as a political issue places itself squarely in the political speech arena; laws restricting political speech must meet the strictest of standards.¹⁸¹ Because the proposed ordinance attacks almost all the materials the Indianapolis ordinance proscribed, the Indianapolis wording has no particular advantage other than to make a political statement.

The effect of the latter point should not be minimized. The Indianapolis ordinance had a salubrious effect by defining the issue as a political one: it served to redefine the terms of the women’s rights debate. Ten years ago, the affront to public morals was the only evil associated with pornography. Then research began to show pornography as a safety issue. Today, be-

¹⁷⁹ As used by the feminist drafters of the Indianapolis and Minneapolis ordinances, the terms are political because they are concerned with the disempowering of women. For a discussion of the political significance of pornography and the terms of the Indianapolis ordinance, see MacKinnon, supra note 4; Dworkin, supra note 99.
¹⁸⁰ See supra note 9.
cause of the Minneapolis and Indianapolis ordinances, pornography is regarded as a political issue as well. But although the issue is political, talking about rights is not enough. Legislative action is necessary. Women are sustaining real harm because of pornography; it is vitally important to put rhetoric aside and pass an effective antipornography ordinance that the courts will uphold as constitutional. The model ordinance does, in the end, accomplish a political goal to the extent that it eliminates pornography that oppresses women; but its immediate goal is to gain acceptance by using accepted legal reasoning, precedent, and terms. As *Brown v. Board of Education* graphically demonstrated, law can accomplish social and political goals; but in order to accomplish social change, the law must first be on the books.

**Model Ordinance**

I. Offensive Depictions

In all state obscenity prosecutions, the jury shall be instructed that depictions of the following forms of conduct are patently offensive under state law:

1) Rape, wherein the person being raped is portrayed as enjoying, inviting, or deserving the assault;
2) persons bound, chained, or otherwise forcibly restrained in a position and/or setting that makes such restraint sexual;
3) persons beaten, bruised, cut, mutilated, dismembered, otherwise physically hurt, or murdered in a context intended to appeal to the prurient interest of the viewer or reader;
4) persons urinated, defecated, or masturbated on;
5) persons penetrated (in any body orifice) by objects or animals in a manner intended to appeal to the prurient interest of the viewer or reader;
6) persons portrayed as enjoying pain or humiliation in a sexual context or where the pain or humiliation is intended to appeal to the prurient interest of the viewer or reader;
7) persons portrayed as enjoying, inviting, or deserving sexual harassment or other sexual misconduct punishable by statute or under the common law, where such portrayal is intended to appeal to the prurient interest of the viewer or reader.

The same provisions shall apply when women, men, children, and/or animals are the subject of the material.

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II. Terms and Conditions
1) "Prurient interest" shall be used as defined by the United States Supreme Court. It shall be for the jury to decide whether the creator, publisher, exhibitor, or distributor of the material at issue intended the material to appeal to the prurient interests of the audience. The court may find intent to appeal to prurient interest upon examination of the material, without more. Once the state has made out a prima facie case of intent to appeal to prurient interest, the defendant may disprove such intent with a contrary showing by a preponderance of the evidence. The jury shall also consider whether the material, taken as a whole, appeals to the prurient interest of the general public or the target audience. It shall not be a defense that the material's prurient appeal or circulation is broader than originally intended.
2) It shall be a defense to this act that the work at issue, taken as a whole, has serious literary, artistic, political, or scientific value.

III. Civil Rights of Action
1) Any author, producer, camera operator, publisher, distributor, exhibitor, vendor, or other person involved in the manufacturing or distribution of material covered by section I of this ordinance may be sued for damages under this section. Regardless of any claim that the material published has serious literary, artistic, political, or scientific value, where the material proximately and foreseeably causes physical harm to an identified person, that person or his/her estate shall have a cause of action under the law irrespective of any free expression claim. It shall be for the jury to decide whether it was foreseeable that the particular harm complained of would result from the portrayal.
2) Any woman injured by a portrayal of women in her profession or job as primarily sexual objects, where such portrayal impairs her ability to perform her work, or foreseeably causes others to impair her ability to perform her work, shall have a right to seek damages under this statute.
3) Any person who has material that is prohibited under this ordinance forced upon him/her in his/her workplace, place of education, or public place may seek damages under this statute. Only the perpetrator of such force or the affiliated institution may be held liable. "Force" shall be defined as the uninvited presentation of pornography in such a way that the person cannot reasonably avoid or ignore it. It shall be a defense to this section that the pornographic materials were used for legitimate educational purposes where alternative materials would not have served the same purpose.
4) Any woman who has been coerced, intimidated, or fraudulently induced into posing or performing for material prohibited by this statute, may seek damages and/or injunctive relief under this statute. Proof of one or more of the following shall not, without more, constitute a defense to this section or negate a finding of coercion:
   i) that the person is or has been a prostitute;
   ii) that the person has attained the age of majority;
   iii) that the person has been photographed or otherwise depicted in pornography in the past;
   iv) that the person is related by blood or marriage to any person affiliated in any way with the production, distribution, exhibition, or sales of pornographic material.

IV. Prospective Rulings
1) Any author, publisher, photographer, distributor, exhibitor, or seller of film, videotape, photographic, or literary material may petition the court for a prospective ruling as to whether a particular work will be prohibited under this ordinance. A finding that the material is prohibited may be appealed immediately, and, if so appealed, shall be heard as soon as practicable by the appeals court. Such ruling shall be considered a finding of fact by the court in any subsequent litigation under this ordinance; except that a finding that material is forbidden under this act may be overturned by an appeals court hearing any appeal of a conviction under this statute.

2) If, in a full and fair hearing for a prospective ruling under this ordinance, with fair notice given to all interested parties, the court finds a particular work to be prohibited under this ordinance, and the material is published, exhibited, or sold in spite of such finding, and in subsequent litigation over the material the party charged under this act is not successful in having the material declared not prohibited under this act, such party shall be required to pay court costs and the attorney fees of the opposing party.