Pornography and Rape

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"Pornography is the theory; rape is the practice" (Morgan, 1980, p. 128). Serving as a basis for passionate debate, this oft-quoted statement has permeated discussions of pornography research and pornography legislation within feminist groups, psychological researchers and lawmakers. Indeed, these groups sharply divide with respect to their opinions of pornography and its relationship to rape. Some of the most intense debates, though, can actually be found *within* such groups. It is for this reason that the literature surrounding pornography and sex crimes is immense and fraught with inconsistencies and directly opposing viewpoints. Lacking consistency, debate on this topic has altogether failed to demonstrate a clear legal path toward a society that is most non-threatening to women. Moreover, many groups that study the relationship between pornography and rape fail to take into consideration the issues and concerns of other groups that research this relationship. Stated another way, a group, such as psychologists, might come to a seemingly coherent conclusion regarding pornography; at the same time, by failing to take into account feminist or legal implications, the conclusions are quite useless. Reviewing the literature of important classes of thought on pornography and rape, and then synthesizing the most prominent findings of each grouping, will surely prove to be the best method of determining appropriate rape and pornography legislation. In looking at the legal, psychological, and theoretical aspects of the pornography debate, this essay will seek to discern the best legal approach to rape and pornography, an approach that will give consideration to all relevant implications and conclude by proposing actions to give women the best opportunity for being safe within their communities.

Introduction to prevalence and theories of pornography

While it would seem to be a relatively undisputable fact, even the prevalence of pornography brings debate. The most prominent finding asserts that the pornography industry is, in fact, larger than all other forms of "mainstream" media combined. Cramer, McFarlane, Parker, Soeken, Silva and Reel (1998), citing Lederer (1980), state that in 1980, pornography constituted a $4 billion per year industry in the United States. Citing Schlosser (1997), the same study finds that by 1995 the pornography industry had grown to bring in $10 billion per year. This change constitutes a 9.2% growth rate. If the industry were to continue growing at even a fraction of this rate, pornography could soon constitute one of the most significant forces in society. Being that pornography has for some time been a prominent aspect of American society, many groups have taken a stance on its implications and appropriateness. Christian/conservative moralist politicians and police authorities first put forth the idea that pornography might create the pretext for rape (Kutchinsky, 1991). From 1960 until the early 1970s, figures such as Senator Kefauver and J. Edgar Hoover and documents such as the report of the U.S. Presidential Commission have expounded on the need to legislate against pornography (Kutchinsky, 1991). At the same time that some politicians and police were beginning to assert the foulness of pornography, psychologists, psychiatrists, educationists

and behavioral scientists were generally denying any link between pornography and rape (Kutchinsky, 1991). Taking such empirical studies into account, the 1970 minority report of the U.S. Commission on Obscenity and Pornography "...found no evidence...that exposure to explicit sexual material plays a significant role in the causation of criminal behavior" (Kutchinsky, 1991, p. 47). Since the mid-1970s, many feminist groups and thinkers have "joined" Christian/conservative groups in opposing pornography (Kutchinsky, 1991).[1] Feminists have indeed been one of the most vocal groups with regard to pornography. The feminist view on pornography, though, is in no way unified. As stated previously, many feminists have opinions on pornography that are similar to those of religious conservatives. But there exists a principal difference in the reasoning of these two groups. For religious conservatives, the threat that pornography poses to the "...moral development of children, traditional family values, and the moral fabric of society" (O'Toole & Schiffman, eds., 1997, p. 386) creates the need for a ban on pornography. Anti-pornography feminists oppose pornography on the basis of its role in creating and maintaining the character of women as inferior (O'Toole & Schiffman, eds., 1997). These feminists maintain that pornography leads to the destruction of women's rights, as well as "dehumanization, sexual exploitation, forced prostitution, and physical injury" (O'Toole & Schiffman, eds., 1997, p. 388). Whereas religious conservatives oppose pornography because of its moral implications, anti-pornography feminists oppose it because of the harm it causes to women. There exists a second side to the feminist debate on pornography. Some groups of feminists would agree with liberals in stating that regulation of pornography is unnecessary and could even be harmful (O'Toole & Schiffman, eds., 1997). As was the case with anti-pornography feminists and religious/conservative groups, pro-pornography feminists and liberals possess similar end goals for pornography legislation, but differ greatly in the theories backing those conclusions. For many feminists, the restriction of pornography represents a restriction on women's sexuality. In the same tone, pro-pornography feminists say restricting pornography would inhibit women's ability to earn money and to be a part of the public sphere. For feminists who see pornography as a positive opportunity for women, legislation is only desired insofar as it would allow women to participate in the management of the industry and make the business safer for those who work within it (O'Toole & Schiffman, eds., 1997). Liberals, too, generally oppose regulation of pornography, but for very different reasons than their pro-pornography feminist counterparts. Liberals often believe that people desiring to ban pornography are too "moralistic" (O'Toole & Schiffman, eds., 1997). Liberals assert that society needs to relax and accept nudity and sexuality. Most importantly, liberals defend the right to produce and consume pornography in that the hindrance of such would directly oppose the heart of the First Amendment (O'Toole & Schiffman, eds., 1997). Again, while the desired ends of pro-pornography feminists and liberals relatively coincide, the arguments behind their conclusions differ substantially. Looking at the aforementioned factions of the pornography debate, it is clear why legislation and social consensus on the subject are difficult to achieve. After exploring the legal and psychological issues of pornography and rape, it will be necessary to return to the debates of these groups. Knowing the legal possibilities and the psychological implications of pornography and rape, it will be possible to weigh each group's arguments in order to formulate the most appropriate legal approach to pornography.

Psychological data: Does pornography play a role in the rape and sexual abuse of women?

Some psychologists claim that pornography undoubtedly leads to sexual violence (O'Toole & Schiffman, 1997; Pornography, 1986). These psychologists assert that a number of factors

inherent in pornography make it almost certain that male use of pornography will cause violence toward women. The idea that pornography lowers men's inhibitions surrounding sexual violence and that pornography conditions the male orgasm permeate much discussion of how pornography causes rape (O'Toole & Schiffman, 1997; Pornography, 1986). Psychologists who believe in a connection between pornography and sexual violence also rely heavily upon the issue of "positive victim reactions" in pornography (Schlesinger & Revitch, 1997; Odem & Clay-Warner, 1998). In this theory, it is held that because most pornography depicts women who seem to enjoy violence and degradation, men begin to believe that women enjoy sexual violence (Schlesinger & Revitch, 1997; Odem & Clay-Warner, 1998). This, in turn, causes men to act violently during sexual encounters, not realizing how damaging the violence is to their partners (Schlesinger & Revitch, 1997; Odem & Clay-Warner, 1998). Psychologists who affirm a strong connection between pornography and rape are a minority. Other psychologists maintain that no link exists between pornography and sexual violence (Kutchinsky, 1991). According to Berl Kutchinsky, one of the most known researchers of rape and pornography, "Most other research data we have about pornography and rape suggest that the link between them is more than weak...pornography does not represent a blueprint for rape, but is an aphrodisiac, that is, food for the sexual fantasy of persons - mostly males - who like to masturbate"(Kutchinsky, 1991, p. 62). Researchers who find no connection between pornography and rape find flaws in studies that do conclude with a relationship (Kutchinsky, 1991). While a number of psychologists subscribe to the idea that no link exists between pornography and rape, it is not a widely accepted conclusion. Instead, most lab studies find results somewhere between the two extremes of a definite relationship between pornography and rape and no relationship at all (Kutchinsky, 1991). Most psychological research concludes that pornography, in certain circumstances, can create specific negative effects in men. Calloused attitudes toward women (O'Toole & Schiffman, 1997), attitudes that trivialize rape (Russel, 1998; O'Toole & Schiffman, 1997), temporary heightened proclivity to aggressiveness (Bergen & Bogle, 2000), an increase in men who report they would consider rape under certain circumstances (Russel, 1998; O'Toole & Schiffman, 1997; Pornography, 1986), an increase in the belief that women are trivial and worthless, and a heightened acceptance of rape myths (O'Toole & Schiffman, 1997; Kimmel & Linders, 1996; Bauserman, 1996; Bergen & Bogle, 2000; Pornography, 1986) are all widely validated outcomes of pornography. While the research doesn't prove that pornography causes men to rape or that pornography has no role in sexual violence, most studies conclude that pornography creates certain attitudinal changes in men. As a tangent to these findings, an equally great number of studies find that only when certain other factors are present in men does pornography cause increased inclination toward sexual violence (Russel, 1998; O'Toole & Schiffman, 1997; Bauserman, 1996; Seto, Maric, & Barbaree, 2001; Kutchinsky, 1991). Put differently, pornography affects different men in quite different ways (Bauserman, 1996). This body of research can be summarized to conclude that while pornography might play a part in sexual violence, that role varies extremely within men and is impossible to precisely define.[2] Myriad studies have also been done outside of the lab in an attempt to determine the relationship between pornography and sexual violence. Studies of the prevalence of pornography and rates of sexual violence in different cities are a widely used manner of deducing whether or not pornography causes rape. Many studies find no difference in rates of sexual offenses when times of legalized pornography are compared with times when pornography is extremely regulated (Kutchinsky, 1991; Bauserman, 1996; Kimmel & Linders, 1996; Winick & Evans, 1996). These same studies find that, in cities where high usage of pornography appears to correlate with high rates of sexual offenses, there exist important tertiary factors that create the seeming effect. It appears that characteristics, such as hyper-masculinity, are apparent in most cities where large levels of both pornography

use and sexual offenses exist (Kutchinsky, 1991; Bauserman, 1996; Kimmel & Linders, 1996; Winick & Evans, 1996). In theory, it is the generally hyper-masculine attitude of these cities that creates high levels of both pornography use and sexual crimes (Kutchinsky, 1991; Bauserman, 1996; Kimmel & Linders, 1996; Winick & Evans, 1996). Finally, a large body of research focuses on the attitudes and practices of convicted sexual offenders compared with "normal" men. A consistent finding in this research is that convicted sexual predators do not have earlier or more unusual experiences with pornography than does the general population of men (Bauserman, 1996). The difference that has been found is that, whereas non-sexual offenders most enjoy images of consenting sex, convicted rapists enjoy both consenting and non-consenting images (Pornography, 1986; Winick & Evans, 1996). Most sexual offenders stated higher levels of arousal to violent pornography than to non-violent pornography (Pornography, 1986; Winick & Evans, 1996). It was additionally found that more rapists than non-offending men utilized greater amounts of pornography and that substantially more convicted rapists than non-offending men stated that, after viewing violent pornography, they felt a strong desire to act out the scenes (Pornography, 1986; Winick & Evans, 1996). This final finding is important in that it leads into a body of research that examines the experiences of women who are victims of sexual violence. Most studies of pornography and rape deal with the issue of whether pornography turns otherwise docile men into violent sexual predators. But for an increase in negative attitudes toward women, the conclusion has been reached that pornography has no serious, lasting effect on the general population of men. The question then becomes, what effect does pornography have on those who do rape? In answering this question, the true harm of pornography becomes clear. As was previously stated, pornography often creates in men a desire to imitate the images they see. Furthermore, it has been found that pornography is often used to make women engage in certain acts, to legitimize the acts the women are being forced to perform and to undermine women's resistance, refusal or disclosure of such acts (Russel, 1998). Pornography is used to train women to believe that submission and violence are a normal and pleasurable part of women's sexuality. Looking to actual data on the sexual abuse of women, Russel (1998) found that the more pornography women had been exposed to, the more likely it became that they had also been intimidated into performing sexual acts in which they did not want to participate (O'Toole & Schiffman, 1997). In a random sample of women, it was found that 10% had been upset and/or felt humiliated by a man attempting to force them into a sexual act he had seen in pornography (O'Toole & Schiffman, 1997). This percentage rose to 74% when the women sampled were victims of wife rape (Russel, 1982; Cramer, McFarlane, Parker, Soeken, Silva, & Reel, 1998). 32% of wife rape victims reported having been asked to pose for pornographic pictures by their abusers (Bergen & Bogle, 2000). In a study conducted by Cramer, et al. (1998), 24% of prostitutes who reported having been raped referred to their attacker's use of pornography in the assault.[3] Overall, it is obvious that, for women who are victims of sexual abuse and rape, pornography plays a significantrole. Moreover, even for women who are not victims of sexual violence, pornography is often used as a tool for pressuring certain sexual activities and for coercion into posing for pornography. Even more alarming than the prevalence of pornography in the sexual abuse of women is the increased level of violence initiated by pornography use. Utilizing the Index of Spouse Abuse, Danger Assessment, and Severity of Violence Against Women scales, it was found that the violence of sexual assaults *significantly* increased when pornography was involved, as opposed to those assaults in which pornography was not present or utilized (Cramer, et al., 1998). Overall, it was found that those abusers who used pornography were overwhelmingly the most violent and sadistic abusers (Cramer, et al., 1998; Bergen & Bogle, 2000). Additionally, it was found by Bergen and Bogle (2000) that sexual abuse involving pornography came at a substantially higher level and frequency than abuse where

pornography did not play a role. Scientific data did not support a general connection between pornography and sexual violence. Looking at studies of random samples of men, of convicted sex offenders and of cities in times of legalized and prohibited pornography, the claim that pornography causes men to rape is not supported. Moving to studies of female victims of sexual abuse and rape, the findings are particularly less favorable toward pornography. A significant number of women who are victims of sexual violence report that pornography was utilized in their assault. A significant amount of women, even though they did not report sexual abuse per se, asserted that pornography had been used by men to coerce them into unwanted sexual acts and into posing for pornographic photographs and videos. Above all, it was the use of pornography that significantly raised the level of violence in sexual attacks on women.

Pornography and rape: Attempted legislation

As the prevalence of pornography has increased and the debate surrounding its ill effects has become more intense, several attempts at creating legislation against pornography and for victims of related sexual abuse have been made. Before exploring some of the proposed legislation, it will be helpful to understand the current laws, which, according to the courts, are wholly sufficient in protecting the community from the harms, as defined by the courts, of pornography (McBride-Stetson, 1991). From the beginning of the nineteenth century, illegal, sexually explicit materials were determined using the definition of obscenity. Legislation was enacted based on a question of public morals. Moralists defined obscenity as the "...unnatural abuse of sexual or excretory functions"(McBride-Stetson, 1991, p. 211). To these moralists, any representation of sexual acts could be considered obscene (McBride-Stetson, 1991). The movement against obscenity climaxed with the passing of the Comstock Act (the Act for Suppression of Trade in and Circulation of Obscene Literature and Articles of Immoral Use), 18 U.S.C. (1873) by Congress. This Act prohibited importing or mailing obscene materials, which included sexually explicit books and pictures, as well as contraceptives and related literature (McBride-Stetson, 1991). Not until the early 1900s did liberals begin to challenge the moralist view of obscenity. In the argument of liberals, such regulation of obscenity constituted an infringement upon rights affirmed within the First Amendment (McBride-Stetson, 1991). As the dispute between First Amendment rights and the immorality of obscenity grew, so did relevant case law. In 1957, in *Roth v. United States*, 354 U.S. 476 (1957), the Supreme Court held that obscenity could be prohibited because, simply, it was not speech (*Roth* v. *United States*, 354 U.S. 476, 1957). Ultimately, though, the Supreme Court sought to balance the First Amendment rights of free speech and press with societal interests, public safety and community morals. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court established test criteria for determining that which is legally "obscene." The test criteria were:

(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 (*Miller* v. *California*, 1973, p.24).

For the court, this represented a compromise between moralist and liberal views of pornography. But by the time the Court had issued this ruling governing obscenity, the debate surrounding pornography had already begun to shift. Instead of rejecting the right to produce and consume pornography on the basis of its threat to the morals of society, pornography began being rejected on the basis of the violent crimes it was said to incite within the community (McBride-Stetson, 1991). In response to this new perceived threat of pornography, President Lyndon B. Johnson assembled a commission whose job it was to study pornography and obscenity (the U.S. Commission on Obscenity and Pornography) (McBride-Stetson, 1991). The commission was able to find no danger in pornography (McBride-Stetson, 1991). Yet, a commission appointed by President Ronald Reagan and headed by Ed Meese, fifteen years later, made quite opposite conclusions.[4] While obscenity law remains, debate about its sufficiency and appropriateness continues. Because of the harmful implications of pornography for women, Andrea Dworkin and Catharine MacKinnon pushed legislators to greatly alter the old definition of obscenity (Amending Title 7, Chapter 139 of the Minneapolis Code of Ordinances relating to Civil Rights; Code of Indianapolis and Marion County Indiana, Chapter 16). Using an innovative approach to pornography and the law, Dworkin and MacKinnon attempted to persuade local governments that pornography was actually a form of sex discrimination (Dworkin & MacKinnon, 1988). For this reason, they stated, women should be able to sue producers and distributors of pornography based on personal harm sustained (Dworkin & MacKinnon, 1988). In 1983 and 1984, Dworkin and MacKinnon lobbied Minneapolis and Indianapolis to adopt a revised law that defined pornography by the harm it caused to women (Dworkin & MacKinnon,1988). The proposed law would make pornography, as defined within the ordinance, actionable through civil suits brought by individual women who believed they had, in some manner, been harmed by such pornography (Dworkin & MacKinnon, 1988). With the proposed legislation, women had the option of pursuing both compensatory damages and "cease and desist" court orders through the civil suits (Dworkin & MacKinnon, 1988). The central point of the model ordinance was that, instead of governments maintaining all control over pornography, women would be empowered by the ability to sue the industry. Moreover, the law allowed for acknowledgement of and a check on harms done to women (Freidman-Goldsteing, 1994). The proposed law came closest to being implemented in Indianapolis, where it passed but was eventually ruled unconstitutional (McBride-Stetson, 1991). Arguably, one of the most important sections of the proposed law was the definition of pornography. The Indianapolis law defined pornography as follows: Pornography is the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

1. Women are presented as sexual objects who enjoy pain or humiliation; or 2. Women are presented as sexual objects who experience sexual pleasure in being raped; or 3. Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or 4. Women are presented as being penetrated by objects or animals; or 5. Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or 6. Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display (Code of Indianapolis and Marion County Indiana, Chapter 16).

The ordinance created by Dworkin and MacKinnon differs from the legal definition of obscenity and laws surrounding obscenity in important ways. The first difference deals with substance. The Supreme Court divides the general category of offensively explicit sexual material into two groups: that which is obscene because it lacks serious artistic or other importance, and that which is not obscene because it possesses serious literary, artistic, political or scientific importance (although it just happens to be sexually explicit) (Friedman-Goldstein, 1994). Dworkin and MacKinnon, on the other hand, define pornography as any explicit material that, through graphic sexual portrayal, exhibits the subordination of women and as that which meets one or more of the abovementioned six criteria of pornography. In the language of the new law, any explicit material was eligible to be labeled "pornography"(Friedman-Goldstein, 1994). It is these very differences that made the Dworkin/MacKinnon law stand out. It was also these differences that gave hope to women who had been or would be harmed by pornography (Friedman-Goldstein, 1994). Ultimately, these differences caused the mayor of Minneapolis to veto the ordinance and for it to be ruled unconstitutional in Indianapolis. Looking closely at the definitions of *pornography* and *obscenity*, the difference between the two standards becomesclear. Utilizing the definition of pornography, material that might have been legal under the definition of obscenity because it presented an important exchange of ideas would be actionable under the MacKinnon/Dworkin law because it presented the sexually explicit subjugation of women (Friedman-Goldstein, 1994). Looking at this large discrepancy, it is clear that the law hardly stood a chance of being upheld by the courts. In the case of Indianapolis, in *American Booksellers Association v. Hudnut*, 475 U.S. 1001 (1986), a federal district court judge threw out the ordinance as unconstitutional after a suit was filed against the mayor of Indianapolis, William Hudnut, by the American Booksellers Association, the Association for American Publishers and other interested parties. Next, the decision of the federal district court, stating that the statute was unconstitutional, was affirmed unanimously by a federal circuit court of appeals (*American Booksellers Association* v. *Hudnut*, 771 F.2d 323, 324,7th Cir., 1985). Finally, the U.S. Supreme Court denied certiorari in the case. The Minneapolis law failed to an even greater extent, in that it was passed twice by the City Council only to be vetoed each time by the mayor (Schneir, 1994). While the failure of the new ordinance was a disappointment, the work of MacKinnon and Dworkin served as a sort of wakeup call for many women, as well as legislators. Within the next decade, several more attempts were made at enacting Dworkin/MacKinnon-type pornography laws. Like the Indianapolis and Minneapolis model ordinances, later attempts at legislation also failed (Reske, 1992). In the early 1990s, ordinances were again proposed in several cities, which mirrored the feminist model of pornography legislation used in Minneapolis and Indianapolis. In 1991, the *Pornography Victim's Compensation Act* was presented to the U.S. Senate (Reske, 1992). Initially, the bill was an exact replica of the Dworkin/MacKinnon ordinance. But after public and governmental pressure, the bill was changed, such that only legally obscene material would be covered (Reske, 1992).[5] The proposed measure did not require a prior determination of obscenity for a suit to be filed. Moreover, it did not require that there be a conviction for the alleged crime or even a charge. In the words of Senator Mitch McConnell, who introduced the bill, "The bill does not dictate what pornographers may produce; it simply holds them liable for it"(Reske, 1992, p. 32). While numerous senators backed the *Pornography Victim's Compensation Act*, many others opposed it, citing the standard "slippery slope" argument. The slippery slope argument holds that the restriction of any category of speech will lead to more and more limitations and the degradation of the spirit of the First Amendment. One senator said, "At the risk of sounding old-fashioned, I'm still pretty sure that rape and child molestation predate erotic books and pornographic magazines and X-rated videocassettes"(Reske, 1992, p. 32). As seems to be standard in discussions of pornography,

numerous legislators chose to ignore the fact that individual pornographers could only be subject to action if it was found that the material they produced or distributed directly related to harm against a woman (child, transsexual, homosexual or man). In a similar move, the legislature of Massachusetts, in 1992, debated an ordinance entitled the *Act to Protect the Civil Rights of Women and Children* (Beisner, 2001). This bill was quite similar to the bill presented to the U.S. Senate in the previous year - especially in that it was eventually defeated (Beisner, 2001). As in the law presented to the U.S. Senate, much of the bill's opposition claimed that only the most proximate party (the rapist, husband or father) should be able to be sued for harms done to women (Beisner, 2001). Indeed, the slippery slope argument was also utilized (Beisner, 2001). The number of attempts at legislating against pornography from a feminist, woman-centered standpoint is small. Still, substantial efforts have been made by prominent groups and legislators to push such legislation (O'Toole & Schiffman, 1997). At the same time, similarly substantial and committed efforts have been made by other groups and legislators to avoid the issue of pornography and its harms to women. For this reason, legislation that could help to protect women's rights and safety has not yet been put into place. A decision made in 1992 by the Canadian Supreme Court comes close to being an exception to this statement (O'Toole and Schiffman, 1997). Still, this decision fell quite short of taking a legitimate interest in women's rights and safety. Responding to widespread claims that pornography, above and beyond being detrimental to society's morals, represented a direct threat to the safety and well being of women, the Canadian Supreme Court, in February 1992, ruled that the definition of pornography should be based on the harm it does to women's pursuit of equality (O'Toole and Schiffman, 1997). Rather than defining obscenity by abstract community standards, the Canadian government recognized that the real harms of obscene materials, the harms that needed to be prevented, were the harms against women. Due to the power of Canada's provincial governments, the regulatory capabilities of this decision were quite limited (O'Toole and Schiffman, 1997). Were the intent of this decision to be carried out, it would be a great victory for those adhering to the ideals of the anti-pornography feminist. Instead, though, the ruling was frequently used to ban bringing lesbian works and even the writings of Dworkin herself into the country. Because the legislation proved only to be symbolic, and not to protect women against the harms of pornography, it, too, must be considered a failure (O'Toole and Schiffman, 1997). Although it is the express duty of the legislature to create legislation, the courts do indeed have a hand in how laws are interpreted and essentially carried out. The courts' responses in several important cases show clearly the perspective of the judicial branch regarding pornography, women's rights and the truth of women's suffering due to pornography.

Pornography and rape: Case history

Due to the failure of federal and local governments to pass laws by which producers and distributors of pornography that causes harm to women could be held civilly liable, few, if any, cases of this nature have been brought to the courts. On a more general level, courts have had occasion to decide cases of civil liability in which broadcasts and publications of the media are said to have caused injury to persons. These cases weigh media rights to free speech under the First Amendment and liability for incitement causing bodily harm. In looking at cases involving the media and its liability for causing injury, a better understanding of the courts' stance on incitement caused by media sources is possible. Furthermore, it is also possible to discern the ways in which women can utilize current law and the courts in order to seek recourse for harm caused by pornography. The legal theory that has been used in attempting to make the media liable for bodily harm inflicted on individuals is termed *negligence*. Historically, the negligence cause of action has served to protect the physical

safety of persons by discouraging hazardous behavior and compensating individuals for injury caused by another party (French, Teays, & Purdy, 1998). In order to bring forth a claim of negligence, injured persons must prove four elements: duty, breach, causation, and injury (French, Teays, & Purdy, 1998). "Duty" states that when the conduct of one party creates an unreasonable risk of harm, that person has a "duty to act with the care of a reasonably prudent person under the circumstance"(French, Teays, & Purdy, 1998, p. 141). Negligence laws state that an unreasonable risk of harm is created when the social utility of an act is outweighed by its magnitude of risk (French, Teays, & Purdy, 1998). "Breach" occurs when a person does not act in a reasonable manner to prevent harm to foreseeable plaintiffs (French, Teays, & Purdy, 1998). "Causation" is arguably the most difficult tenet to prove. Simply put, to be legally actionable, the actions of a person must have a reasonably close connection to the harm incurred by an individual (French, Teays, & Purdy, 1998). In analyzing causation, the concept of "proximate cause" is utilized (French, Teays, & Purdy, 1998). Only results that an actor could have foreseen are legally actionable under negligence laws.[6] Finally, and most obviously, "injury" states that harm must exist for a suit to be brought. Even after proving the four previously described elements, individuals must overcome the First Amendment right to free speech before proving negligence (French, Teays, & Purdy, 1998). Negligence is an obviously broad cause of action used to impose civil liability on individuals for harms incurred by others. It is not often used in attempts to bring suit against media for causing bodily injury. Instead, a more narrowly tailored cause for action has been utilized in such cases: *incitement*. "Incitement" is defined as speech that creates an immediate risk of breach of peace (French, Teays, & Purdy, 1998). In cases of true incitement, the First Amendment right to free speech is overcome. Thus, such speech is actionable. In *Brandenburg v. Ohio,* 395 U.S. 444, (1969), the Supreme Court of the United States defined incitement as "speech which advocates the use of force or unlawful activity which incites or produces 'imminent lawless action and is likely to incite or produce such action'"(*Brandenburg* v. *Ohio*, 395 U.S. 444). This is often referred to as the "fighting words doctrine." In later cases it was added that the speaker must possess the intent of producing lawless behavior (French, Teays, & Purdy, 1998). Proving incitement is indeed quite difficult, especially in that injured persons must prove the intent of the speaker to cause injury. As was briefly mentioned, it was in *American Booksellers Association v. Hudnut*, 475 U.S. 1001 (1986), that the courts struck down the pornography ordinance proposed by Andrea Dworkin and Catherine MacKinnon in Indianapolis. In that decision, the United States Court of Appeals for the Seventh Circuit concluded that the legislation would have violated pornographers' rights to free speech under the First Amendment (*American Booksellers Association* v. *Hudnut*, 771 F.2d 323, 324,7th Cir., 1985). At the same time, the court conceded that women's rights to physical safety and equality were impaired by pornography (*American Booksellers Association* v. *Hudnut*, 771 F.2d 323, 324,7th Cir., 1985). The court held that the power of pornography as free speech was proven by the harms it posed to women. Thus, pornography had to be protected as free speech (*American Booksellers Association* v. *Hudnut*, 771 F.2d 323, 324,7th Cir., 1985). This type of backward reasoning, as well as other forms of faulty logic, seems to thread through most court decisions surrounding pornography and its harms to women. Credit can only be given to the courts for being consistent; albeit their consistency has been in rejecting the rights of women when balanced against the right to free speech. Two important cases can be used to illustrate the courts' views on pornography and ensuing sexual violence: *Olivia N. v. National Broadcasting Company,* 458 U.S. 1108 (1982), and *Herceg v. Hustler Magazine, Inc.,* 485 U.S. 959 (1988). The *Olivia N.* case began with an NBC broadcast of a television movie that portrayed a young girl being raped with a plunger (*Olivia N. v. National Broadcasting Company,* 458 U.S. 1108, 1982). In the following days, a group of adolescents discussed the

movie and subsequently raped Olivia N. with a bottle (*Olivia N. v. National Broadcasting Company,* 458 U.S. 1108, 1982). The trial court determined that the television broadcast did not constitute incitement and thus dismissed the case (*Olivia N. v. National Broadcasting Company,* 458 U.S. 1108, 1982). In the California Court of Appeal, it was concluded that the lower court, by viewing the television movie, had violated Olivia N.'s right to trial by jury. This was because only a jury possessed the power to determine whether a broadcast constituted incitement (French, Teays, & Purdy, 1998). On remand, Olivia N.'s counsel was unable to circumvent the incitement test by utilizing simple negligence. It was ultimately found that Olivia N. could not prove incitement and that the NBC broadcast did not constitute any other form of unprotected speech. The court found that utilizing negligence liability standards would inhibit the media in its choice of broadcasts and would essentially run in opposition to the guarantees of free speech. Olivia N. did not recover monetarily for her injuries (*Olivia N. v. National Broadcasting Company,* 458 U.S. 1108, 1982). In the face of such a revered freedom as the right to free speech, it seems almost impossible that any action will bepermitted against speech claimed to be negligent or inciting. A similar decision was reached in *Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959 (1988). The issue in the *Hustler* case involved an article entitled, "Orgasm of Death," which described the procedure of autoerotic asphyxiation in which individuals cut off their supply of oxygen while masturbating in order to enhance sexual pleasure (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). The injured party in this case was Troy D., a fourteen-year-old boy who attempted autoerotic asphyxiation and, as a result, died (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). Troy D. was found the next day by a friend, hanging in his closet, with the *Hustler* magazine lying next to him open to the "Orgasm of Death" article (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). The friend who found Troy D., Andy V., and Troy D.'s mother sued *Hustler* magazine for emotional harm resulting from the death of Troy D. The plaintiffs claimed that the *Hustler* magazine had incited Troy D. to carry out a likely fatal act. They also argued that, because the case did not involve core speech, a less rigorous test than the one enunciated in *Brandenburg* should be utilized (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). Quite simply, the court found that the article did not create an imminent risk of harm. The court further stated that, although the article may have encouraged the practice of autoerotic asphyxiation, that encouragement did not rise to the level necessary in claims of incitement (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). The court afforded the "Orgasm of Death" article full First Amendment protection. Judge Edith H. Jones both concurred and dissented in part to this ruling. In her analysis of the decision, she criticized the fact that First Amendment jurisprudence served to protect individuals from "defamation, obscenity and the threat of mob violence," but that it failed to protect individuals from bodily harm and death caused by speech (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). Jones further maintained that, because pornography does not contribute to any productive exchange of ideas, it should not have been afforded full First Amendment protection (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). The dissent additionally argued that *Hustler* magazine should have known that adolescents make up a significant portion of its readership and that pornography had been causally linked to sexual violence (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). Having knowledge of those facts, the article would indeed have created an undue risk of harm. Finally, the dissent rejected the slippery slope argument used in the decision, stating that cases should be decided on their individual merits rather than based upon the decision's possible future impact (*Herceg v. Hustler Magazine, Inc.*, 485 U.S. 959, 1988). The argument of the dissent seems rational, appropriate and promising to anti-pornography feminists and women. Still, because this type of opinion continues to exist as the dissent in most cases, the courts have a way to go in recognizing the need to protect women from pornography. Several cases involving the

media's role in causing harm to individuals have been resolved in the imposition of civil liability. In some ways, these cases are different than the previously described cases involving rape and pornography. Still, in their most fundamental characteristics, these cases where negligence was successfully proven are quite similar to *Olivia N.* and *Herceg*. In *Weirum v. RKO General Inc.,* 15 Cal. 3d 40 (1975), a wrongful death action was brought against a radio station. A radio disk jockey, on air, encouraged listeners to follow the car of another disk jockey with prizes promised to the first motorist to reach him (*Weirum v. RKO General Inc.,* 15 Cal. 3d 40, 1975). In the ensuing car "chase" two motorists forced another motorist off the road, killing him (*Weirum v. RKO General Inc.,* 15 Cal. 3d 40, 1975). The Supreme Court of California dismissed the First Amendment defense given by the radio station and found that the radio station's broadcast did incite the accident (*Weirum v. RKO General Inc.,* 15 Cal. 3d 40, 1975). In a second case, *Hyde v. City of Columbia*, 637 S.W.2d 251 (1982), a kidnapping victim (Hyde) sued a newspaper for negligent publication after the newspaper published her name and address before her kidnapper had been caught. Hyde sued and recovered for mental anguish caused when the kidnapper phoned her after the newspaper published her personal information (*Hyde v. City of Columbia*, 637 S.W.2d 251, 1982). *Soldier of Fortune* magazine was the target of numerous suits before it was eventually forced to discontinue publication due to its immense legal costs. In *Norwood v. Soldier of Fortune Magazine, Inc.,* 651 F. Supp. 1397 (1987), it was alleged that an assassin hired through a "gun for hire" ad in the magazine shot and wounded Norman Douglas Norwood (*Norwood v. Soldier of Fortune Magazine, Inc.,* 651 F. Supp. 1397, 1987). The United States District Court for the Western District of Arkansas first denied *Soldier of Fortune* magazine's motion for summary judgment. The court stated that "reasonable jurors could find that the advertisement posed a substantial risk of harm" (*Norwood v. Soldier of Fortune Magazine, Inc.,* 651 F. Supp. 1397, 1987). The court also held that "gun for hire" ads were not the type of speech intended for protection under the First Amendment and that the plaintiff did not seek to abridge free speech, but rather to receive compensation for personal harm (*Norwood v. Soldier of Fortune Magazine, Inc.,* 651 F. Supp. 1397, 1987). In *Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830 (1989), a classified ad was printed, which read, "EX-MARINES-67-69 'Nam Vets, Ex-Di, weapons specialist-jungle warfare, pilot, M.E., high risk assignments, U. S. or overseas" (*Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830, 1989). Following this ad, a man hired the writer/ex-Marine to kill his wife (*Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830, 1989). The murdered woman's son and mother sued *Soldier of Fortune* magazine for wrongful death, stating that the magazine had acted negligently in publishing the ad. Utilizing Texas tort law, the court considered the suit using a risk-utility balancing test. In the end, the court found that the magazine could not have reasonably foreseen that the printing of the classified advertisement in question would result in bodily harm to any individual (*Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830, 1989). The court also afforded First Amendment protection to the ad, reasoning that classified ads do possess an amount of social utility (*Eimann v. Soldier of Fortune Magazine, Inc.,* 880 F.2d 830, 1989). In a final case, which applied the same risk-utility test, a different conclusion was arrived at by the United States Court of Appeals for the Eleventh Circuit. In *Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), *cert denied,* 113 S. Ct. 1028 (1993), an advertisement was published that read, "GUN FOR HIRE: 37-year-old professional mercenary desires jobs. VietnamVeteran. Discrete and very private. Bodyguard, courier, and other special skills. All jobs considered"(*Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), *cert denied,* 113 S. Ct. 1028, 1993). The writer of the advertisement was subsequently hired to kill a man's business partner (*Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), *cert denied,* 113 S. Ct. 1028, 1993). The sons of the murdered man sued the magazine for negligent publication of the advertisement. The court

found that the magazine did have a duty to abstain from publishing the advertisement, in that it posed a substantial risk of creating harm (*Braun v. Soldier of Fortune*, 968 F.2d 1110 (11th Cir. 1992), *cert denied*, 113 S. Ct. 1028 1993). While this decision could be said to have a "chilling" effect on free speech within advertising, the court reasoned that creating an unreasonable risk of harm was enough to suppress some of the magazine's First Amendment rights. To some, there seems to exist an obvious distinction between the cases in which First Amendment rights to free speech were upheld and the cases in which the interests of injured parties were supported (French, Teays, & Purdy, 1998). Many people would likely claim that the former cases, which involved sexual assault as a result of specific media articles and broadcasts, were not actionable because the sexual content of the media portrayals was not and could not have been the most proximate cause of the ensuing harm. In analyzing the latter cases, such as *Weirum*, *Hyde*, and the *Soldier of Fortune* magazine cases, those people would likely agree that the media representation *was* the most proximate cause of harm (French, Teays, & Purdy, 1998).

The future of pornography legislation

Is pornography as proximate a cause of sexual violence as were the "gun for hire" ads in the injury and death of the several above-mentioned individuals? Looking at the psychological data, it is apparent that a claim does not exist for banning pornography on the basis that it causes otherwise docile men to commit rape. Equally as obvious is that something must be done to allow women recourse against those whose pornography contributes to their being forced and coerced into sexual activity, humiliation and physical suffering. In the case of men who rape and abuse, pornography is a most proximate cause of the immense levels of coercion, force and violence they use. As it stands, obscenity law exists as the only legislation that comes close to regulating pornography. Obscenity law, though, is quite useless to all but religious conservatives who seek to restrict pornography on the basis of its immorality. Not only does obscenity law fail to regulate against a multitude of pornographic representations that are potentially harmful to women, but it has also failed in suppressing that which *is* deemed obscene (O'Toole & Schiffman, 1997). For these reasons, new legislation is entirely necessary. In creating a law that, while it does not completely prohibit pornography, offers women (and children, men, homosexuals and transsexuals) a legal means by which to take action against harm incurred by pornography, there are several benefits. First, there will be minimal harm done to the First Amendment right to free speech. The slippery slope debate will be less valid because pornography and the right to free speech are not taken away. Instead, individuals would be able to take action only against pornography that causes physical harm. Second, pro-pornography feminists can be assured that women will continue to have the right to express their sexuality and retain control of their employment and economic well being.[7] Third, victims of sexual violence will have means by which to receive remedy for their injuries from all parties responsible, i.e. the actual perpetrator and that entity which most likely heightened some combination of the violence, frequency and intensity of the attack. While this type of law would not prohibit any certain classes of pornography or images therein, it must be reasoned that violent pornography would eventually become less prevalent. Makers and distributors of pornography would be wary of being involved with pornography that might bring about expensive lawsuits. The type of pornography that would be taken action against most often would be pornography that poses the greatest threat to the emotional and physical safety of women. Economically, this type of pornography would create a great risk to pornographers in that their chances of being sued because of it would be great. It is reasonable to assume that most of the pornography industry would retreat into only producing and distributing that pornography which did not increase their likelihood of being sued. Indeed, a law that protects First Amendment rights at the same

time as it protects the interests of women is most desirable. Countless considerations must be weighed in determining a correct legal path regarding pornography. Not only do the shortcomings of current legislation need to be taken into account, but so, too, do psychological data and theoretical perspectives on speech rights and women's rights. As legislation continues to be shaped that offers freedom and protection to women, it can be assured that women will continue to rise up against innumerable other threats and biases they face within patriarchal society. It must be hoped that the government will soon realize that the right of women to survive, physically and emotionally, cannot be overshadowed by the menace of pornography and that it is appropriate for women to exert their force against that which threatens their freedom: pornography.

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[1] The word "joined" being used to connote a shared *goal*, but not a shared *theory*.
[2] It should also be noted that, in all of the previously cited studies, only violent pornography, versus soft-core pornography or erotica, produced effects in men.
[3] Respondents were not specifically asked about the use of pornography in their rape; thus, it can be hypothesized that this percentage is significantly higher than the 24% who spontaneously offered the information.
[4] It can be hypothesized that the differing politics of Lyndon B. Johnson and Ronald Reagan had an impact on the conclusions of each committee.
[5] Remember that, as written, Dworkin and MacKinnon's original draft of the ordinance made it possible for women to sue producers and distributors of pornography that would have been protected as free speech under obscenity law. `
[6] This imperative becomes quite important in looking at whether a person can take action against the media for incurred bodily harm.
[7] Whether or not this is what pornography accomplishes remains a question.