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COMMENT: COMPREHENSIVE JUSTICE FOR VICTIMS OF PORNOGRAPHY-DRIVEN SEX CRIMES: HOLDING PORNOGRAPHERS LIABLE WHILE AVOIDING CONSTITUTIONAL VIOLATION

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[*1067]

> The photograph is captioned "Beaver Hunters." Two white men, dressed as hunters, sit in a black Jeep. The Jeep occupies almost the whole frame of the picture. The two men carry rifles. The rifles extend above the frame of the photograph into the white space surrounding it. The men and the Jeep face into the camera. Tied onto the hood of the black Jeep is a white woman. She is tied with thick rope. She is spread-eagle. Her pubic hair and crotch are the dead center of the car hood and the photograph. Her head is turned to one side, tied down by rope that is pulled taut across her neck, extended to and wrapped several times around her wrists, tied around the rearview mirrors of the Jeep, brought back around her arms, crisscrossed under her breasts and over her thighs, drawn down and wrapped around the bumper of the Jeep, tied around her ankles... . The text under the photograph reads: "Western sportsmen report beaver hunting was particularly good throughout the Rocky Mountain region during the past season. These two hunters easily bagged their limit in the high country. They told Hustler that they stuffed and mounted their **[*1068]** trophy as soon as they got her home." n1

Violent depictions of women in submissive positions such as the one described above exist throughout pornography and are replicated in sex crimes. In numerous instances, women and children have been forced to participate in acts that recreate pornographic images, which are primarily consumed by men. Consider the following examples: First, a woman named Jayne Stamen married a man who tortured her by acting out the violent pornographic images he consumed regularly. n2 "He tied her up when he raped her; he broke bones; he forced anal intercourse; he beat her mercilessly; he penetrated her vagina with objects, 'his rifle, or a long-necked wine decanter, or twelve-inch artificial ... penises.'" n3 Second, another woman married to a consumer of pornography recalled how her husband had rape and bondage magazines lying throughout the house and said, "'He used to tie me up and he tried those things on me.'" n4 Third, "Steven Pennell, the infamous 'Corridor Killer,' kept a favorite triple-XXX [sic] video cued to a lurid sexual torture scene. He would replay it and replicate the scene on his victims until he had tortured them to death." n5 Oregon victims of crimes such as these would have no recourse against the pornographers who produced and **[*1069]** distributed the material which so clearly motivated the perpetrators. Currently, Oregon state law does not recognize injuries inflicted by pornography and does not provide redress to victims of pornography-motivated crimes. n6

Article I, section 8 of the Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." n7 The federal right to free speech is articulated in the First Amendment of the United States Constitution: "Congress shall make no law ... abridging the freedom of speech." n8 Detailed in this

Comment are three strategies plaintiffs and prosecutors should have the ability to use to hold accountable those who produce, distribute, exhibit, rent, or sell pornographic material that motivates sex crimes.

First, plaintiffs could hold the pornographer liable through the common law tort theory of negligence. The more difficult issues for plaintiffs' attorneys are analyzed, including intervening and superseding cause arguments and other causation issues. Secondly, two model statutes are proposed, neither of which resembles any statutes currently existing in Oregon law. One statute is civil and the other is criminal. The first proposed statute would create a civil cause of action through which plaintiffs could sue those who produce, distribute, exhibit, rent, or sell pornographic material if that material was a substantial factor in the commission of a sex crime. The proposed criminal statute would make the producing, distributing, exhibiting, renting, or selling of pornography a class C felony. Part I establishes a definition of pornography that this Comment and the proposed statutes will follow. Part II explains the necessity of holding pornographers liable. Part III sets out the proposed civil and criminal strategies for holding pornographers liable. Part IV examines the proposed statutes under the Oregon State Constitution, and Part V examines them under the United States Constitution. This Comment concludes that if pornographic material is replicated in a sex crime, pornographers should be found civilly or criminally liable and that this can be done without violation of either the Oregon Constitution or the United States Constitution.

[*1070]

I

Defining Pornography

The definition of pornography this Comment will follow is similar to that advanced by feminist Marianne Wesson, Professor of Law at the University of Colorado, with two modifications. Wesson defines pornography as material in any medium which depicts violence directed at, or pain inflicted on an unconsenting person or child and is aimed at real or apparent sexual gratification or arousal "in a context suggesting endorsement or approval of such behavior, and that is likely to promote or encourage similar behavior in those exposed to the depiction." n9 The difficulty with Wesson's definition is that it excludes depictions of "consensual" acts, or of women gaining sexual pleasure from being tortured. For instance, if in Hustler's "Beaver Hunters" photograph, the woman tied to the Jeep appeared to be consenting and a sexual predator acted out the photograph with one of his victims, the victim would not have recourse under Wesson's definition.

Besides including sexually violent acts committed upon an apparently willing participant, this Comment will focus only on harm inflicted due to obscene material. Although the Oregon Constitution protects obscenity, n10 the United States Constitution does not. n11 In Parts IV and V, this Comment will explain why the definition of pornography it follows does not violate either the Oregon Constitution or the United States Constitution, despite the fact that the Oregon Constitution protects obscenity.

Miller v. California n12 defined obscenity using five elements: (1) the reader is the average person; (2) the work must be taken as a whole; (3) it must appeal to the purient interest; (4) it must depict or describe sexually offensive conduct specifically forbidden by law to depict; and, finally (5) it must be without redeeming value. Miller further held that obscenity is not constitutionally protected under the United States Constitution and, therefore, that it is a form of speech subject to regulation. n13

[*1071] While it is necessary to limit the definition of pornography to obscene material, putting the definition of pornography in context by requiring the pornographer to endorse or approve of the material is also necessary because it ensures that the statute is not overly broad. It excludes suits against murder-mystery writers, rape education books, and televison documentaries which include reenactments. Therefore, the definition of pornography this Comment follows includes obscene material in any medium which depicts or describes violence directed at, or pain inflicted on, a person, and when such material is intended to cause real or apparent sexual gratification or arousal in a context where a reasonable person would conclude that the author is endorsing or approving such material.

II

Holding Pornographers Accountable

Even pornography as it is defined in this Comment is vehemently protected by many free speech advocates. n14 Efforts to combat the violent pornography that contributes to crimes against women and children have been going on for years. They are consistently met with opposition and are hotly debated. Usually the arguments come down to a

libertarian-style theory of free speech versus the radical feminist view that violent pornography causes specific harms to women. Resistance to anti-pornography efforts stems from liberal feminists (liberal in the sense that they adhere to modern liberal political thought), other libertarian-minded free speech theorists, and efforts by the pornography industry to protect itself. n15

Opponents of pornographer liability worry that holding the pornographer responsible may protect the perpetrator and provide him with a "psychological escape" from accountability for his actions. n16 The most notorious example of this is Ted Bundy, the serial murderer who blamed his assaults, rapes, and murders on his consumption of pornography. n17 However, even Bundy acknowledged **[*1072]** that he was personally responsible for his crimes and made it clear that he was, in no way, blaming pornography for his actions. n18 Pornographer liability would not shield the perpetrator. Serial murderers like Ted Bundy will not avoid criminal liability if the victims themselves, or their representatives, have the ability sue the pornographers that influenced the perpetrator's actions. A common law tort suit, criminal charges, or a statutory civil action against pornographers does not provide the perpetrator with a legal defense. This is apparent in negligence and products liability law where more than one person may be held responsible for a specific injury and the fact that someone else may have contributed to the injury does not indemnify the other tortfeasor. n19 Further, research has revealed that pornographer liability would actually succeed in making pornographic images seem illicit and abnormal. Diana Scully studied men who committed sex crimes and were influenced by pornography, reporting that the reason criminals commit these acts is that the pornography is assuasive, telling them what they are doing is normal and acceptable and that their victims will enjoy the assault. n20 The notion that once pornography is made actionable it becomes less normal to fantasize about and act upon makes sense, as that is what tort law is all about: using civil litigation to socially regulate people and things that are harmful to society. When pornography is no longer widespread in society because distributors and **[*1073]** manufacturers cannot afford to put it in the marketplace, it becomes less available to the perpetrator, and it tells the perpetrator that the images he is viewing are illicit and wrong.

Another argument against the regulation of pornographic material (including violent material like that described above), and a favorite of the liberal feminists, is that it is a manifestation of sexual Victorianism, or prudishness, and that pornography provides women an opportunity for sexual expression. However, the type of pornography this Comment discusses is in no way sexually liberating, as it causes harm to women. Pornography as it is defined in this Comment has nothing to do with benevolent eroticism. The material discussed in this Comment is sexual material that demonstrably causes injury. If the price society has to pay to suppress injury means that people are not able to express their eroticism, that is a price society should be willing to pay.

The most popular argument against the regulation of pornography is that it restricts free speech rights. Civil liberties in the tradition of liberalism are rights guaranteed to individuals, limited only to the extent that they interfere with the liberties of others. Traditional liberals, especially libertarians, tend to argue against efforts to regulate or restrict speech as if the Amendments in the Constitution (our civil liberties articulated) are absolute. Clearly, however, civil liberties are limited to the extent that they interfere with other's rights. The United States Supreme Court, for instance, has declared obscenity n21 and child pornography n22 unprotected forms of speech. Further, the Oregon Supreme Court ruled that although the state may not ban harmless speech per se, it can ban or punish speech when it causes harm. n23

This Comment will focus primarily on the free speech argument and show that both a criminal and a civil law can provide recourse to victims injured by violent pornography while withstanding constitutional scrutiny under Oregon's free speech clause, Article I, section 8, and under the First Amendment of the United States Constitution. Unfortunately, neither Oregon tort law nor criminal law has precedents or statutes providing recourse for pornography victims such as Jayne Stamen. To most efficiently withstand scrutiny under both Article I, section 8 and **[*1074]** the First Amendment, this Comment will not focus on victims of pornography per se, such as women as a class of people who are generally injured and degraded by pornography (as discussed by feminist theorists Catharine MacKinnon and Andrea Dworkin), but rather victims of pornography who can demonstrate that a particular piece of material so closely resembled their sexual violation that it was a substantial factor in the commission of the offense. n24 This Comment assumes that no expression is per se harmful, as that is the precept upon which Oregon constitutional analysis is founded. n25 But, when harm does occur and a crime is committed, both criminal and civil strategies should be employed to hold pornographers accountable for pornography-driven crimes.

III

Criminal and Civil Strategies for Holding the Pornographer Liable

Oregon plaintiffs should have three strategies to recover for harm done to them by pornography. First, they should sue the pornographer through the common law theory of negligence. **[*1075]** Causation may be shown by introducing

pornographic material found in possession of the perpetrator that depicts violent sexual acts similar to those committed upon the plaintiff and by introducing the proliferation of studies reporting on the negative influence of pornography. n26 Plaintiffs could also argue that pornographers should be held liable for their role in the commission of sex crimes by using a "paradigm of participation" analysis. n27 Under the paradigm of participation, those who choose to participate in an action that is found to be causally linked to the victim's injury should be held responsible for that injury. n28

Second, civil legislation that would give victims of sex crimes a cause of action against pornographers is proposed. This model legislation would allow plaintiffs to recover if they prove by a preponderance of the evidence that the pornographic material was a substantial factor in causing the perpetrator to commit the sex crime. The plaintiff may recover if she proves that the defendant knew or had reason to know that the material would lead to a sexual offense. The plaintiff could recover for actual damages, court costs and attorneys fees, emotional distress, pain and suffering, and loss of consortium.

Third, plaintiffs may wish to see the state bring criminal charges against the pornographer. Model legislation is proposed that would make the production, distribution, exhibition, rental, or sale of pornographic material a class C felony. To prevail, the prosecution would have to show that the pornographer knew, or had reason to know, that the material would lead a consumer of the material to commit a sex offense. The purpose of these model statutes and strategies is to provide victims with as many avenues for recovery as possible while avoiding violation of the fundamental right to free speech.

[*1076]

A. Oregon Common Law Tort Liability

1. An Overview of Oregon Tort Law

The common law of negligence imposes "generalized standards... on persons at large." n29 Negligence is comprised of four elements. Duty is a question of law and, in common law cases, "'no-duty' is a defensive argument asking a court to limit the reach of these generalized standards as a matter of law." n30 In Oregon, the element of breach includes issues of both unreasonableness and foreseeability. n31 As Justice Linde noted in Fazzolari v. Portland School District Number 1J: "The issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff." n32 Cause-in-fact is described in Oregon as "substantial factor," n33 which is determined using a "but-for"-plus analysis. n34 In other words, substantial factor requires more than but for, but in many cases, the elements of but-for and substantial factor are the same. n35 Rarely is a case "'found where the defendant's act could be called a substantial factor when the event would have occurred without it; nor will cases very often arise where it would not be such a factor when it was so indispensable a cause that without it the result would not have followed.'" n36 Finally, proof of damages is required, usually involving physical injury to person or property.

In Oregon, to determine causation and bring a case to the jury, a judge must find that a reasonable jury could conclude that the "defendant's conduct was a substantial factor in producing the injury of which plaintiff complains." n37 Oregon uses "foreseeability" **[*1077]** as a part of breach to limit the scope of liability. n38 The concept of foreseeability

> states that one is negligent only if ... an ordinary reasonable person ... ought reasonably to foresee that he will expose another to an unreasonable risk of harm. Foreseeability is an element of fault; the community deems a person to be at fault only when the injury caused by him is one which could have been anticipated because there was a reasonable likelihood that it could happen. n39

Finally, the issue of foreseeability relates to another legal issue, that of intervening cause or conduct.

In Buchler v. Oregon Corrections Division, n40 a recent Oregon Supreme Court case regarding elements of negligence, the court discussed causation, foreseeability, and intervening criminal acts. Buchler involved a convicted felon who was placed by the corrections division in a forest work camp located in a remote area. A crew supervisor left the ignition keys in a state van and the prisoner found the van and escaped. Two days later, fifty miles away from the forest camp, after burglarizing his mother's house where he stole a gun, the prisoner shot two people. The prisoner did not have a violent criminal record and the corrections division was not aware that the prisoner had exhibited any violent behavior previously.

The court held that the harm was not reasonably foreseeable, since the vehicle was not the mechanism the prisoner used to inflict the harm; it was "merely" a means of facilitating escape. The court reasoned that even without the van, on foot, the prisoner could have escaped and walked to his mother's house after a few days, stolen her gun, and committed the same crime. In regard to third parties' intervening acts, the Buchler court found that "mere 'facilitation'" is not enough for a court to find liability. n41 Instead, the defendant's act must be an "invitation to third parties to engage in potentially dangerous wrongdoing." n42

Oregon's most recent case on the subject of intervening cause is Faverty v. McDonald's Restaurants of Oregon, Inc. n43 Although **[*1078]** this is only a court of appeals decision, it is Oregon's latest ruling on negligence law. There, the plaintiff sued McDonald's for negligently working a high school-age employee unreasonably long hours, arguing that McDonald's knew the employee would not drive home safely. McDonald's made efforts to accommodate its high school employees and make sure that they did not work too many long hours, but McDonald's was also aware that at least two of its employees had car accidents due to falling asleep at the wheel after working late nights. The Oregon Court of Appeals found that the defendant controlled all work assignments and, therefore, knew, or should have known, the number of hours the employee had worked. There was evidence that the employee was visibly tired and that the managers on site saw him during his shift. There was also evidence that the defendant knew the employee was a high school student and that most high school employees drove to McDonald's on their own. Therefore, the court held that a reasonable jury could find that McDonald's knew or should have known that working the employee so late would "impair his ability to drive home safely." n44 The court used the Fazzolari test, n45 noting that: "'The issue of liability for harm actually resulting from defendant's conduct properly depends on whether that conduct unreasonably created a foreseeable risk to a protected interest of the kind of harm that befell the plaintiff.'" n46

The combination of Faverty and Buchler has made for an interesting analysis of intervening cause and foreseeability in Oregon tort law. While Buchler found that a van with keys left in the ignition merely facilitated the escape of a non-violent felon, Faverty did not find that an intervening cause existed and held McDonald's liable for consequences resulting from overworking its teenage employee. Applying Buchler, it seems that McDonald's should have been able to prevail on the argument that its actions were not unreasonable. As the dissenting opinion in Faverty notes:

> In the context of this case, the question is whether defendant created an unreasonable risk of harm to every person on the highway that morning when it scheduled Theurer [the employee] **[*1079]** to work. That question must be answered in the light of the uncontroverted facts that Theurer was an adult employee, that defendant did not require him to work the shift, that Theurer assured defendant's manager that he would rest between shifts and that he would be able to handle the shift physically, that Theurer never asked to be relieved from the shift, and that the harm to plaintiff occurred off defendant's work premises as a result of an activity over which defendant had no right of control. By holding defendant responsible for the safety of all persons on the roadway, the majority makes "general foreseeability" the test for determining whether defendant's conduct is deemed "negligent." n47

The Faverty dissent also recalled Buchler's ruling that mere facilitation is not enough to get one's case to a jury. n48 Thus, the dissent argued, there must be some evidence that the defendant acted unreasonably and that it invited the plaintiff to engage in wrongdoing. In essence, there must be evidence that defendant created "a risk of the type of harm that befell the plaintiff." n49 The dissent went on to argue that it is unjust to require employers to predict the activities of their employees, since the physical condition of one's employee is something known only to that employee and, therefore, it is not reasonably foreseeable to the employer. n50

Clearly, in light of the Buchler and Faverty decisions, Oregon's intervening cause and foreseeability analysis is confusing. Plaintiffs' attorneys should therefore be aware of the difficult case law analysis they will be faced with. However, as this Comment will discuss next, the task of squaring Buchler with Faverty is not insurmountable.

2. Applying the Law to Pornographer Liability

In a tort suit against a pornographer or distributor of pornography, an Oregon plaintiff must apply the case law set out above. The plaintiff must show that: pornography was a substantial factor in the commission of the sex crime; it was reasonably foreseeable that the pornography would lead to such an offense; and that pornography was an invitation to commit the offense rather than "mere 'facilitation' of an unintended adverse result, where intervening intentional criminality of another person is the harm- **[*1080]** producing force." n51 Most likely, this means that a plaintiff's attorney must prove that, but for the pornography, the perpetrator would not have committed the crime. However, in

Purcell v. Asbestos Corp., n52 the Oregon Court of Appeals allowed for a more general form of causation, implying that less than but-for was enough: "'Nor is it essential to ... liability that its negligence be sufficient to bring about plaintiff's harm by itself; it is enough that the [defendant] substantially contributed to the injuries eventually suffered by [the plaintiff].'" n53

Unfortunately for plaintiff's lawyers, relying on Purcell to show general causation is probably not enough to get one's case to a jury under the Oregon State Constitution. n54 City of Portland v. Tidyman held that proof of a general correlation between speech and the injury, such as introducing studies that certain material may be harmful, are not enough to prove that a harm actually exists. n55 This does not mean that studies are not helpful for persuasive reasons, though. So, causation should be shown in two ways: by proving a particular causal relation between specific pornography produced or distributed by the pornographer and the plaintiff's injury, and a general causal relation between pornographic material and sex crimes. n56 Showing the general causal relationship reassures "the judge, who in its absence would harbor a First Amendment-generated solicitude for the defendant's conduct." n57 In civil cases where injuries were found to have been caused by speech, courts have answered the free speech argument by explaining "that the defendant's speech was known to be likely to cause harm." n58

Particular causation, the showing that this particular material led to this particular harm, might be proven in a number of ways. For instance, during a search of the perpetrator's home, the police **[*1081]** may find pornographic materials depicting or describing what was done to the victim, or pornographic material may have been used during the crime, with the victim being forced to replicate the images or descriptions. Examples are cited at the beginning of this Comment where the perpetrator's pornography was replicated upon his victim.

Rice v. Paladin Enterprises is illustrative of proving causation where the material that motivated the crime is followed so exactly that it is considered incitement and more than mere advocacy. n59 In Rice, Paladin Enterprises published Hit Man, a how-to-commit-murder manual for independent contractors. Hit Man encouraged people to be independent contractors and showed them how to commit murder for hire. The book had an effect upon the behavior of a hit man hired by an estranged husband to murder his wife and handicapped son. The murderer followed the content of Hit Man so closely that the court held that the First Amendment did not preclude a cause of action against the manual's publisher. Under Rice, mere instruction and abstract advocacy is protected. Speech, therefore, is presumptively not protected. In the same way, pornography can tell a sex crime perpetrator that his violent sexual fantasies and desires are normal n60 and show him how to act out his fantasies and desires on both willing and unwilling women.

To prove general causation, a plaintiff's attorney could introduce evidence showing that pornography substantially contributed to the plaintiff's injury by normalizing violent sex - much in the same way Hit Man normalized murder for hire. For example, sex offenders have discussed the way pornography normalized their activities and helped them overcome any reservations they might have had about committing sex crimes. n61 Ray Wyre's n62 **[*1082]** work with offenders has documented that child abusers initially use child pornography "to legitimize their behaviour to themselves.... It is precisely because they know that what they are doing, or wanting to do, is wrong that they 'need' to use child pornography to rationalize it. It enables them to construct a different version of reality ... ." n63 Wyre explains that pornography is dangerous because ninety-seven percent of pornographic rape stories "end with the woman changing her mind and having orgasms and being represented as enjoying rape. Sex offenders use this kind of pornography to justify and legitimate what they do. It provides them with an excuse and a reason for what they do." n64

Some experts believe pornography conditions one to adopt perpetrator-like behavior because of its normalization tendencies and because the orgasm positively reinforces the viewer's sexually violent experience. n65 Wyre, who has worked with sex offenders since the mid-1970s, n66 believes "for some men it is just pornography - and nothing else - which creates the predisposition to commit sexual abuse. I have little doubt that there are men who in reading pornography, and particularly child pornography, will acquire ideas that they will put into practice. Their ideas are initiated by pornography." n67 Wyre sees a direct causal connection between pornography and some sex offenders and views the orgasm as part of the reinforcing behaviour. "Pornography makes the behaviour more acceptable and right because it reinforces the nice experience of sexual arousal and orgasm to something that is wrong. Pornography predisposes some men to act out their behaviour." n68

The orgasm as a positive reinforcer, as a contribution to the association of pleasure with pornographic violence, is known as "'masturbatory conditioning.'" n69 Even for men who do not find **[*1083]** rape sexually exciting, "masturbation subsequent to the movie reinforces the association... . The pleasurable experience of orgasm - an expected and planned-for activity in many pornography parlours - is an exceptionally potent reinforcer." n70

The most reliable evidence examining the effects of pornography is found in the work of Donnerstein, Linz, and Penrod. n71 Donnerstein's work is compelling because he testified before the 1986 Attorney General's Commission on Pornography and his work was cited by the Commission when it argued for increased prosecution of pornographers. n72 However, Donnerstein also publicly stated that the general link between pornography and violence against women has been exaggerated. n73 This Comment does not attempt to comprehensively explain the intricacies involved in pornography studies, however, a summary of Donnerstein, Linz and Penrod's work is found in this quotation:

> Violent pornography influences attitudes and behaviors... . Viewers come to cognitively associate sexuality with violence, to endorse the idea that women want to be raped, and to trivialize the injuries suffered by a rape victim. As a result of the attitudinal changes, men may be more willing to abuse women physically (indeed, the laboratory aggression measures suggest such an outcome). n74

Critics note that one of the difficulties with studies on pornography is that laboratory conditions do not adequately replicate reality. n75 However, this is because it is not practical to allow someone exposed to violent pornography to carry out violent behavior on a subject. n76 Criticism aside, studies and expert opinions regarding the causal connection between pornography and violence are helpful for attorneys. Combined with a crime scene that strikingly resembles pornography found in the possession of the perpetrator, it will be easier for attorneys to argue that pornography **[*1084]** is an invitation to commit a sex offense, rather than mere facilitation.

Unlike Buchler, where the focus was a van left with keys in the ignition, the focus here is far less innocuous, since pornography is inherently violent. Also unlike the van in Buchler, pornography is a mechanism used to commit the injury. Attorneys should not have a difficult time arguing that a particular crime would not have been committed a particular way if the perpetrator had not been masturbating to this particular material just before, or during, the commission of the crime (i.e., but-for). The court in Buchler reasoned that without the van, the criminal still could have committed that crime. Particularly motivated crimes, however, crimes which strikingly resemble pornography scenes that the perpetrator finds sexually pleasurable, could not have been committed without that particular pornography. Pornography spells out violent acts and invites people to experience sexual pleasure from watching those acts. Leaving a van with keys in it does not spell out inherently violent acts. Pornographer liability is more like Faverty because it is reasonably foreseeable that providing violent images expected to evoke sexual pleasure would lead one to act out those fantasies.

The argument that it is reasonably foreseeable will be easier to make as studies continue to surface showing that pornography has real effects upon its viewers, even those people society would classify as "normal." n77 When more of these studies are released it will be that much more foreseeable to manufacturers and distributors that consumers of pornography may be influenced to a point of acting out these images on unwilling victims. n78 The availability of these studies will also have an impact on juries and judges who will find the causation and foreseeability arguments more plausible. n79

It is important to note that the role of studies on pornography regarding cause and effect links might help plaintiffs get to a jury **[*1085]** or might help prove foreseeability, but to win in Oregon, plaintiffs must show that a particular piece or pieces of pornography caused a particular crime - studies are not enough. For example, in City of Portland v. Tidyman, the city of Portland argued that the regulation of "adult" businesses was not aimed at speech per se, but at the harmful effects of the businesses. n80 However, the evidence introduced to prove that the effects of adult businesses were harmful consisted of studies and "legislative findings" n81 that adult businesses were harmful. To withstand a challenge under Article I, section 8 of the Oregon Constitution, laws must demonstrate "the specified harm under changing conditions, not on mere apprehension." n82 This Comment does not presume that pornographers should be held liable because there is a statistical correlation and a cause and effect relationship. Instead, statistics will be helpful in proving foreseeability and overcoming the argument that the defendant was an intervening/superseding cause and that, therefore, the pornographer should not be held liable. The strategy set out here passes the test in Tidyman because pornographers are not liable until the sex crime actually takes place - they are not liable until the harm caused by speech actually occurs.

Plaintiffs' attorneys may also be able to win the intervening/superseding cause argument by employing traditional principles of tort law, such as the notion that the pornographer or the distributer is liable regardless of an intervening criminal act because he produced the dangerous environment and material. n83 As long as the incident was foreseeable, the creator and distributor of a dangerous medium will not be insulated from liability, even if the perpetrator is the ultimate and direct cause of the injury. n84 Attorneys **[*1086]** should not be afraid to make this argument in Oregon,

as long as they have shown that the pornography was an invitation to commit the crime, as this argument is analogous to Faverty. Recall that, in Faverty, the court asked whether the conduct unreasonably created foreseeable risk.

3. The Paradigm of Participation: A Creative Strategy for Plaintiffs' Lawyers

If investigators cannot find the particular piece of pornography that provided a step-by-step blueprint for the perpetrator, resourceful plaintiffs' lawyers have other options. The criminal may, by his own volition, disclose the material(s) that motivated his actions, n85 or attorneys could employ a strategy suggested by Timothy D. Lytton, Assistant Professor of Law at Capital University. Lytton asks why plaintiffs' lawyers do not employ the "paradigm of participation" theory when suing pornographers and pornography distributors. n86 Under the paradigm of participation theory, one should be held responsible for causing injury to another only if that injury results from an area within which one chooses to participate n87 and one's action must causally lead to the injury of another. n88 Lytton draws from a number of examples to illustrate this strategy, such as dram shop acts and litigation due to injuries caused by the drug diethylstilbestrol (DES).

Dram shop liability arises out of legislation or precedent that allows for suits against tavern owners serving intoxicated patrons where the patrons then injure others. In Thorp v. Casey's General Stores, Inc., n89 the court assumed a causal link between serving intoxicated persons generally and the service to the particular intoxicated patron who caused the injury because it recognized the difficulty in proving direct causation in a dram shop case using traditional tort law. n90 Similarly, in DES cases, a dangerous drug was advertised and sold for use during pregnancy. There were many different manufacturers of the drug and it was difficult to trace the injury to the particular manufacturer of the pill. So, courts inferred a causal link even though the plaintiff could not show that a particular manufacturer produced the particular **[*1087]** pill that caused the injury. Courts in DES cases relied on the theory that a manufacturer turned the drug out to the national market and was responsible for the share of the market he controlled, regardless of whether or not the plaintiff could prove that his particular pill was the one that caused the injury. n91

For a clearer illustration of how these examples interact, consider:

	1	2	3
DRAM SHOP:	sale of liquor	intoxication	injury
DES:	sale of DES	ingestion of DES	injury
PORNOGRAPHY	sale of pornography	consumption of pornography	injury n92

Traditionally, tort law requires "a connection of both cause and proximate cause between the elements in columns 1 and 3." n93 However, DES and dram shop liability only require showing cause and proximate cause between the column 2 element and the injury, column 3. n94 "With regard to the connection between the elements in columns 1 and 3, the courts assumed a causal link and considered irrelevant the question of proximate relation." n95

Plaintiffs' lawyers may be successful in using similar strategies when suing pornographers and pornography distributors. Liability for pornographers under the paradigm of participation requires two things: (1) assuming that the manufacture, distribution, or exhibition of pornography is causally linked to sex crimes, and (2) proof that a particular piece(s) of pornography consumed by the perpetrator caused harm to the plaintiff. n96 Many of those who oppose pornographer liability refuse to assume the first requirement and have difficulty with the notion that anyone could satisfy the second requirement. n97 But, as Lytton points out, courts already assume causality between selling alcohol to intoxicated patrons, promoting DES, and specific **[*1088]** harms to plaintiffs that are also caused by other tortfeasors. n98 Plaintiffs' lawyers should employ the DES and dram shop liability paradigms of participation and try to persuade courts to assume a causal link between pornography and the injury in the same way a link is assumed in those cases. The burden of proof should be on the pornographers and distributors just as it rests on the DES manufacturers and transporters and on tavern owners. n99

B. Statutory Tort Liability

Aside from common law remedies, the Oregon legislature could provide victims recourse through a statutory cause of action like the Federal Pornography Victims Compensation Act of 1992 n100 (PVCA) (which did not pass), or Illinois' civil liability legislation. n101 Statutes that provide a cause of action for victims **[*1089]** codify the duty of the pornographer and may be necessary if common law suits end up being too difficult to win. In the PVCA and the Illinois statute, to help prove causation and avoid protection of the perpetrator, the victim must have brought and won criminal charges against the perpetrator for his criminal actions. But allowing victims of sex crimes caused by

pornography to sue the pornographer should provide the victim with comprehensive justice; it should not be made more difficult by requiring the victim to win a criminal conviction first. Rape cases are notoriously difficult to win, since there are rarely any witnesses and the burden of proof on the victim is enormous. Additionally, many victims refuse to testify in those cases to avoid confronting their perpetrator and for fear of being "raped all over again" in the courtroom. n102 Given the above analysis that proving causation will not be too big of a burden for plaintiffs' lawyers and the fact that the perpetrator cannot hide behind pornographer civil liability, there is no reason to require a criminal conviction before a victim or the victim's family members may sue the pornographer or distributor of pornography responsible for inspiring the crime.

Therefore, this Comment proposes a civil statute providing for liability against pornographers and distributors of pornography. This statute would likely pass muster under Oregon constitutional law:

> A victim of a sex offense or a guardian, immediate family member, or estate of such a victim may bring a civil action against a producer, distributor, exhibitor, renter, or seller of pornographic material which was a substantial factor in causing the perpetrator, through his or her reading or viewing of the pornographic material, to commit the sex offense. No victim may recover in any such action unless he or she proves by a preponderance of the evidence that: (1) the reading or viewing of the specific obscene material produced, distributed, exhibited, rented, or sold by the defendant was a substantial factor in causing the person to commit such violation and (2) it was reasonably foreseeable that the manufacture, production, or wholesale distribution of such material was likely to motivate or cause a sexual offense. The producer, distributor, exhibitor, **[*1090]** renter, or seller shall be liable to the victim for: (1) actual damages incurred by the victim, including medical costs; (2) court costs and reasonable attorneys fees; (3) infliction of emotional distress; (4) pain and suffering; and (5) loss of consortium. "Pornographic" shall be defined as: obscene material in any medium which depicts or describes violence directed at, or pain inflicted on, a person, when such material is intended to cause real or apparent sexual gratification or arousal in a context where a reasonable person would conclude that the author is endorsing or approving such material.

C. Criminal Liability

An alternative to tort suits is criminal liability for pornographers. Pornographers could be found criminally liable for aiding and abetting, or inciting, the sex crime against a specific victim. It would be more difficult to prove beyond a reasonable doubt that the pornography contributed to the sexual offense (whereas in a civil suit one must only prove the claim by a preponderance of the evidence). n103 However, if the civil suits are not successful in bankrupting or deterring the pornographer, criminal charges will likely do both.

The criminal statute would look like the following:

> It is a class C felony to produce, distribute, exhibit, rent, or sell pornographic material in any medium when one knows or has reason to know that it would cause a perpetrator, through his or her reading or viewing of the pornographic material, to commit a sex offense, and which has caused a perpetrator to commit such an offense. "Pornographic" shall be defined as: obscene material in any medium which depicts or describes violence directed at, or pain inflicted on, a person, when such material is intended to cause real or apparent sexual gratification or arousal in a context where a reasonable person would conclude that the author is endorsing or approving such material.

Just as one who aids and abets a criminal in the commission of a crime or who encourages or incites a criminal to commit such a crime should be held criminally liable, so should a pornographer be held liable for his role in creating an environment where women are depicted enjoying rape, tied spread-eagled to the roof of **[*1091]** a Jeep, and where, as a result, women are raped and then killed (as in "snuff films"). The question at this point is whether pornographers may be held accountable for the crimes they motivate without infringing on the Oregon Constitution's free speech clause.

IV

Article I, Section 8 of the Oregon Constitution

Article I, section 8 of the Oregon Constitution states: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." n104

Whether a statute will pass muster under Oregon's free speech provision, Article I, section 8, depends upon how that statute is written. Oregon's constitutional framework is in place to restrict lawmakers. "There is little political incentive to repeal laws made in apprehension of harm from offensive expression when the danger fails to materialize ... . Thus it is important that the constitutional guarantee restricts lawmakers ... not merely the unconstitutional application of laws." n105

A. Step One: Whether the Statute is Directed At an Opinion or a Subject of Communication

For purposes of the statutes proposed in this Comment, the Oregon Supreme Court has set out a two-step test to determine whether a law is constitutional. n106 The first step asks whether a statute is directed at an opinion or a subject of communication. n107 This is to ensure that the statute is directed at a specific harm and not speech per se that may or may not cause harm in the future. n108 **[*1092]** If it is directed at speech per se, the court will decide whether that speech falls wholly "within a well-established historical exception, such as perjury, slander or solicitation." n109 "Historical exception" means that the law is prohibiting or regulating something that was well-settled to be a crime when this country was established. For example, in State v. Henry, regarding obscenity, the Oregon Supreme Court held: "The prime reason that 'obscene' expression cannot be restricted is that it is speech that does not fall within any historical exception to the plain wording of the Oregon Constitution that 'no law shall be passed restraining the expression of [speech] freely on any subject whatsoever." n110 The court in City of Portland v. Tidyman explained the government's responsibility in crafting a statute, since Article I, section 8 is directed at lawmakers: "A law focused on the risk of specified harm leaves it incumbent on government to demonstrate that risk when and where the law is to be applied rather than rest on previous legislative declarations at the time of enactment." n111

An example of a statute that survives Article I, section 8 is the one analyzed in State v. Plowman where the Oregon Supreme Court ruled that a statute criminalizing intimidation did not proscribe the substance of an opinion or the subject of communication, but an effect of communication: "acting together to cause physical injury to a victim whom the assailants have targeted because of their perception that that victim belongs to a particular group. The assailants' opinions, if any, are not punishable as such. [The statute] proscribes and punishes committing an act, not holding a belief." n112

The criminal and civil statutes set out above are not directed at speech per se, or the subject of an opinion or communication. Instead, they are directed at the harm caused by speech and cannot come into effect unless that harm has materialized. Pornographers cannot be found liable simply for producing pornography. They can only be found liable if it has been proven that the materials they are responsible for getting into the hands of the perpetrator were the inspiration for the commission of a sex crime. Therefore, there is no reason to ask whether the statutes **[*1093]** regulate speech that falls into the category of a well-established historical exception.

B. Step Two: Whether the Statute is Overbroad

If the legislation is not aimed at speech per se but is directed at harm, one proceeds to the next step: determining whether the legislation is overbroad. The statute must not be overbroad by infringing on protected speech. Laws that proscribe harm and not speech can still include speech as an element or a target of the law. n113 A statute limiting harm even when it is caused by speech is constitutional, except when the statute is overbroad. The legislation proposed in this Comment, for example, is aimed at prohibiting a harm caused by pornography, or speech. If a statute is found to be overbroad, the court may interpret the statute to clarify or narrow it, but if it cannot do so while preserving legislative intent, the statute will be declared unconstitutional. n114 A law targeting a harm caused by speech is overbroad if it criminalizes situations that all people know are privileged. For example, in Robertson, the court examined a statute "creating and defining the crime of 'coercion.'" n115 The statute made "it a crime to compel or induce another person to engage in conduct from which he has the legal right to abstain by causing him to fear the disclosure of discreditable assertions about some person." n116 The statute in question was a speech-harm statute making it illegal to say something that would cause harm to a person. The harm the statute was seeking to prevent was fear. The court held that it was overbroad because it would outlaw a doctor telling a patient that he has to quit smoking or else he may suffer severe health consequences, or a doctor telling a patient that she is about to die. Both of those situations are constitutionally protected, yet the statute in question would have held the doctors in those cases liable for their statements.

The proposed legislation is not overbroad because it defines pornography as that which a reasonable person would consider as endorsement of violent sexual acts upon another. It does not regulate murder mysteries, movies that depict rape scenes like **[*1094]** The Accused, n117 or television shows about forensic science that include reenactments of sexual crime scenes.

The proposed legislation does, however, target pornography which includes sexual violence inflicted upon a person who appears to be a consenting participant. Radical feminist Andrea Dworkin n118 notes that one of the most dangerous forms of pornography depicts brutalized women appearing to enjoy, or consent to, the torture. "The most enduring sexual truth in pornography ... is that sexual violence is desired by the normal female, needed by her, suggested or demanded by her." n119 It is quite possible that the reason some "men do not believe that rape or battery are violations of female will ... [is] because ... [they] have consumed pornography... ." n120 Social science and psychological evidence has found that aggressive behaviors and other adverse consequences result "from exposure to coercive and/or violent sexually explicit material - especially portrayals in which women are shown tolerating, if not enjoying, abusive treatment **[*1095]** as in the rape-myth scenario." n121 Further, "studies have shown that viewing portrayals of sexual violence as having positive consequences increases male subjects' acceptance of violence against women." n122

Including pornography that appears to be consensual in this definition would make depictions of sadomasochism a form of pornography. Susan Etta Keller, Assistant Professor of Law at Western State College of Law, analyzes different forms of sadomasochism and argues that some forms may "make it possible for couples or individuals to explore issues of power, and the attractions of submission and dominance, without directly living them. This process, by offering these individuals some mastery over these difficult issues, might even be empowering." n123

However, sadomasochism sexualizes force, dominance and inequality. "'It is hostility - the desire, overt or hidden, to harm another person - that generates and enhances sexual excitement,' wrote Robert Stoller." n124 Defenses of sadomasochism are defenses of power dichotomies. n125 "The relational dynamics of sadomasochism do not even negate the paradigm of male dominance, but conform precisely to it." n126 It sexualizes domination, torture, control, submission, and contempt. n127

Sadomasochistic and bondage pornography have been particularly instrumental in pornography-driven crimes. For instance, John Douglas, the FBI special agent who helped shape the investigative technique of criminal profiling, recalled a murder scene where serial rapist and murderer of Carolyn Hamm, David Vasquez, left "Carolyn's nude body in the basement, lying face-down across the doorway into the garage. Her wrists had been tied behind her ... and there was a noose around her neck ... ." n128 **[*1096]** When detectives visited a former residence of Vasquez's, they found pornography, including a photograph

> of a woman bound and gagged, with a rope ligature around her neck... . It's not unusual to find this type of offender with a large pornography collection ... our research does show that certain types of sadomasochistic and bondage-oriented material can fuel the fantasies of those already leaning in that direction.... The one bondage picture was disturbingly close to the actual crime. n129

Understanding why the sexualization of male dominance is so dangerous to women requires recognizing that sexism exists. And sexism does exist. There is a wage gap, n130 a mere 7.8% of United States women avoid being sexually harassed or assaulted in their lifetimes n131 and a male-defined beauty myth has caused eating disorders that strike up to one-tenth of all young American women. n132 Recognizing these facts makes it easier to understand why the objectification of women is so pervasive and why the sexualization of male dominance makes the objectification and dehumanization of women in pornographic material seem normal and acceptable, maintaining a sexist society. n133

[*1097] While male dominance is especially dangerous due to the reality of sexism, (and this Comment certainly views pornography from a feminist perspective) it is also important to note that the laws advocated in this Comment are gender-neutral. Domination should be condemned in all its forms, and sadomasochistic depictions of women in the dominating position which motivate sex crimes should be actionable as well. Thus, sadomasochistic depictions of violence and torture (whether inflicted by males or females) that are instrumental in the commission of sex crimes should be included within the definition of pornography.

Targeting pornography that includes violence inflicted upon a consenting participant does not infringe on protected speech. Regardless of whether the pornography involves two consenting participants, the statutes are limited to the extent that the defendant must know or have reason to know that the material would cause a perpetrator to commit a sex offense, and a reasonable person viewing the material must conclude that the author is endorsing or approving of the material (the violence).

Therefore, holding pornographers liable for their role in sex crimes perpetrated primarily against women and children is consistent with efforts of the Oregon Constitution to prevent infringement upon free speech. Feminist arguments against pornography like those presented here (e.g., the argument that pornography contributes to sex crimes

against women and children and therefore should be regulated accordingly) are sometimes viewed as contrary to efforts to protect the freedom of speech and many anti-censorship task-forces have dedicated themselves to opposing feminists who support the regulation of pornography. n134 However, as libertarian and protective of free speech as the Oregon Constitution is, this Comment proves that feminist efforts to regulate pornography can exist while free speech remains unharmed.

First, the statutes are not directed at an opinion or subject of communication. They are directed only at the harms caused by pornography - not pornography itself. Secondly, the statutes are not overbroad. They ensure that pornography encompasses violent sexual material that a reasonable person would conclude is **[*1098]** being endorsed or approved of by the pornographer. Therefore, the statutes would not allow a rape victim to sue the makers or producers of the movie The Accused, which depicts a violent rape scene. There should be no difficulty with both statutes withstanding scrutiny under the Oregon Constitution.

V

A First Amendment Analysis

The First Amendment applies to the states via the Fourteenth Amendment. n135 Therefore, it is necessary to examine the viability of these theories under the United States Constitution. The First Amendment states, in pertinent part: "Congress shall make no law ... abridging the freedom of speech." n136 It is common knowledge that the law recognizes certain categories of speech or quasi-speech as deserving of either limited or no First Amendment protection. n137 The key for prosecutors and plaintiffs' attorneys is to show that, in their particular case, pornography is more like the speech the Constitution does not protect than it is like speech that is protected.

A. Tort Law and the First Amendment

There are a number of tort cases that a plaintiff's attorney should be aware of when confronted with a First Amendment challenge. The first is Olivia N. v. National Broadcasting Co. n138 In Olivia, the plaintiff alleged that a non-obscene television show which re-enacted a rape scene of a young girl caused a group of juveniles to commit rape, since what the juveniles did to the victim was strikingly similar to the television version. The court dismissed the suit on the basis that the program was not obscene and that the re-enactment of the rape was not "incitement." n139 The definition of pornography presented in this Comment requires that the material be endorsed or approved of by the pornographer. "Although the court hinted that proof of 'incitement' would require a showing that the defendant intended to encourage behavior, an alternative interpretation of that term **[*1099]** would encompass any implication that the broadcaster, writer, or filmmaker approves of the conduct depicted." n140 Further, the material targeted by this Comment is unprotected, obscene material n141 and the Olivia court focused on incitement only after determining that the re-enactment was not obscene. n142 Therefore, if the rape scene had appeared in obscene material, the court probably would have applied a less stringent standard and may have allowed recovery. n143

The difficulty the First Amendment has with material like that in dispute in Olivia revolves around the effort to avoid chilling speech that is necessary to the marketplace of ideas. n144 However, because under First Amendment doctrine obscene speech makes no contribution to the marketplace, or to social and political speech, it is unprotected and is at the mercy of state regulation, including tort liability. n145

Herceg v. Hustler Magazine, Inc. n146 is another relevant case involving tort liability. In Herceg, an adolescent boy was found dead after practicing autoerotic asphyxia as described in detail in a magazine article. The article included numerous warnings, as well as an official warning at the beginning of the article that the practice was dangerous. Despite the warnings, the plaintiffs to the action based their claim entirely on the theory of incitement. n147 The court did not find evidence of incitement due to the warnings and the lack of proof that the article created an "imminent" danger. n148 This case is distinguishable from any suits advocated in this Comment, as Herceg only relied on lack of imminent incitement. Additionally, the court found that the Hustler article was not obscene and that it was protected material, as opposed to the strategies set forth in this comment which are aimed at exclusively obscene material.

A case that provides hope for plaintiffs' attorneys is Braun v. Soldier of Fortune Magazine, Inc. n149 There, Soldier of Fortune **[*1100]** ran an ad where the opening statement was "Gun for Hire." The ad resulted in the man who placed the ad being hired as a hit man to murder Richard Braun. The court found for the plaintiffs, holding that "the First Amendment permits a state to impose upon a publisher liability for compensatory damages for negligently publishing a commercial advertisement where the ad on its face, and without the need for investigation, makes it apparent that there is a substantial danger of harm to the public." n150 Although the court treated the ad as "commercial speech" and acknowledged that this category of speech has limited protection, other courts have found liability where

injuries caused by speech were "more in the nature of 'the thing itself' than of an advertisement for it." n151 For example, courts have found liability in cases involving defamation of a private individual where the public information is false and the publisher is negligent in publishing it. n152

Therefore, although these are cases a plaintiff's lawyer should be aware of, Braun shows that a plaintiff's lawyer has a good chance of arguing that finding liability on the part of the pornographer would not violate the First Amendment. Further, because the harm targeted in this Comment must have been caused by obscene material, the suits advocated here will be easy to distinguish from cases like Olivia and Herceg, as there is no need for courts to worry about chilling any form of protected speech that is vital to the marketplace of ideas.

B. Distinguishing This Comment from Hudnut

Just as the Pornography Victims Compensation Act was compared to the MacKinnon-Dworkin laws, n153 one of which was struck down in American Booksellers Ass'n v. Hudnut, n154 the strategies advocated in this Comment will be likened to the MacKinnon-Dworkin laws, regardless of how dissimilar this Comment's position and the MacKinnon-Dworkin position are. Thus, it is necessary to contrast what is advocated here with the MacKinnon-Dworkin laws. It will be easiest to use Hudnut for comparison as that is the most well-known and consistently cited case regarding feminist anti-pornography efforts.

[*1101] In the Hudnut opinion, Judge Easterbrook, writing for a unanimous court, outlines four specific reasons for striking down the Indianapolis ordinance: (1) the ordinance is content-based, not content-neutral, so it violates free speech in that it does not abide by the content-neutral provision of the obscenity definition (as decided in Miller v. California n155); (2) pornography is not conduct, it only causes conduct, so it is still considered a form of speech; (3) to oppose monopoly sexism, the law sets up its own truth; and (4) the ordinance is not like New York v. Ferber n156 (which made it constitutional to regulate child pornography) because that law was "written without regard to the viewpoint depicted in the work." n157

The first finding, that the law is content-based, originated in Miller. Miller defined obscenity and held that obscene material was not protected by the First Amendment. The Court defined obscenity using five elements: (1) the reader is an average person; (2) the work must be taken as a whole; (3) it must appeal to the prurient interest; (4) it must depict or describe sexually offensive conduct specifically forbidden by law to depict; and, finally (5) it must be without redeeming value. The Indianapolis ordinance, the subject in Hudnut, ignored the second and fifth elements and replaced the third and fourth with "sexual subordination of women." By defining pornography as the "sexual subordination of women" the law is content-based, not content-neutral. In other words, the way the ordinance defined sexually offensive is not consistent with the Supreme Court's analysis, as the law must meet all four criterion and thus must also be content-neutral.

By defining pornography as the "sexual subordination of women," the court found that the ordinance was content-based, not content-neutral. However, the strategies set out here are gender-neutral (therefore content-neutral) and do not target pornography because it subordinates women. In fact, the strategies here do not target pornography at all. Instead, they seek to provide comprehensive recourse to victims injured by harms caused by pornography. Liability may not be found unless pornography has been proven to be a substantial factor in the commission of the harm, and the definition proposed here defines pornography **[*1102]** in a content-neutral way. Indeed, one would have to evaluate the content of the pornography to find liability, but this evaluation is limited to finding a correlation between the content of the pornography and what was done to the victim. In the same way, the content of child pornography is limited to an evaluation of determining whether the material is in fact child pornography. Further, the strategies advocated here comport with obscenity law and define pornography as obscene material, rather than defining it in gender-specific terms and excluding the obscenity requirement, as the Indianapolis ordinance did. As Judge Easterbrook noted, the ordinance's "definition of 'pornography' is considerably different from obscenity." n158 Unlike the MacKinnon-Dworkin laws, these strategies do not make pornography the equivalent of sexual harassment or treat it as a form of sex discrimination.

Next, Judge Easterbrook found that pornography is not conduct, it only causes conduct. This is in response to MacKinnon's argument that pornography is not a form of speech, it is an act. The court based its analysis on the finding that the danger caused by pornography is not imminent. However, unlike the MacKinnon-Dworkin laws, this Comment does not contend that pornography is inherently dangerous. It contends that it can, in certain instances, lead perpetrators to commit sexually violent acts and that when, and only when those acts are committed, is the pornographer liable. The attorney should not argue that pornography is an act, but rather that pornography causes, or incites, acts and, that due to a causal connection (when proven), the pornographer should be punished. The argument here is not that the effects of

pornography are being felt socially because pornography contributes to an overall social climate of sexism. The argument instead is that when a particular piece of pornographic material is replicated in a particular crime, the pornographer should be punished.

The court's third finding is that, by opposing monopoly sexism, the law is setting up its own truth. Easterbrook notes that the power to stifle speech "on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth... . If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, **[*1103]** there is no such thing as a false idea ... ." n159 As explained previously, the strategies proposed here do not seek to treat pornography as sex discrimination and are gender-neutral. The MacKinnon-Dworkin laws relied on the argument that pornography is a pervasive force which causes the injury: e.g., sexism. Instead of asserting a truth like "pornography contributes to sexism," this Comment requires plaintiffs' attorneys and prosecutors to show that there was a striking resemblance between the pornography and the crime committed: that the pornography was an invitation to the perpetrator to commit the crime. It does not assert a gender-specific truth at the outset.

Regarding gender-specific truths, it is significant that the strategies outlined here only distinguish between forms of pornography to the extent that they avoid being overbroad and reaching into constitutionally-protected areas. This distinction between this Comment and Hudnut is especially important in light of the Supreme Court's decision in R.A.V. v. City of St. Paul. n160 There, the Court held unconstitutional a city ordinance prohibiting the display of symbols which one "'knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.'" n161 The Court held the statute invalid due to its viewpoint-based restriction on speech, characterizing status-based hatred simply as another viewpoint in the marketplace of ideas. It acknowledged, however, that:

> When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class. n162

Thus, because the strategies outlined here are content-neutral, they would survive scrutiny not only under Hudnut, but under R.A.V. The causal connection between the particular piece of pornography and violence committed upon the victim helps to dispel the theory that the state simply favors non-violent pornography. n163 **[*1104]** "The greater the degree of violence or degradation the material contains, the greater its contribution to sexual crimes, and hence the more strongly the rationale for its regulation applies." n164

The Hudnut court's final point is that the MacKinnon-Dworkin laws are not analogous to the child pornography law held to be unprotected in Ferber because, to be constitutional, the ordinance must be "neutral with respect to viewpoint." n165 As explained previously, however, the speech evaluation strategies advocated here are limited because they evaluate the work only in comparison to the crime committed. This is similar to the way one must evaluate the content of a work to decide if that work depicts or describes children in sexual poses.

Is important to note that the Hudnut court concedes that the section of the ordinance creating remedies for harms caused by pornography is salvageable. n166 Pointing out that speech may not be penalized if it does not cause immediate injury, the court reasoned that if immediately after the Ku Klux Klan rally in Brandenburg v. Ohio a mob had injured an African-American, the victim could have recovered damages from the speaker who motivated the crowd to the point of incitement. n167 Additionally, all of the Supreme Court justices assumed in NAACP v. Claiborne Hardware that if the threats in Charles Evers' incendiary speech had been a little less veiled and had led directly to an assault against a person shopping in a store owned by a white merchant, the victim of the assault and even the merchant could have recovered damages from the speaker. n168

This analysis implies that strategies such as those outlined in this Comment can be distinguished from Hudnut in that, if one can prove that the material leads directly to the harm, one may recover damages for harms caused by pornography. Therefore, if plaintiffs' attorneys and prosecutors are careful to point out that the victim's injuries must have been caused by obscene, unprotected material and if they are able to further distinguish their cases from Hudnut, they should be able to prevail against a First **[*1105]** Amendment challenge without chilling speech vital to the marketplace of ideas.

Conclusion

The victims of sex crimes driven by pornography should be entitled to comprehensive justice. This means not only holding the perpetrator criminally (and perhaps civilly) liable, but also holding the pornographer, and those who contributed to ensuring that the pornography ended up in the hands of the perpetrator, liable.

In an effort to be pragmatic, a common law theory of negligence as well as civil and criminal statutes have been presented to encourage discussion regarding what can be done about sex crimes motivated by pornography and to offer some realistic solutions that comport with the law. The statutes set out in this Comment pass the test formulated by the Oregon Supreme Court. They are not directed at an opinion or a subject of communication (speech per se), they seek to prevent a harm caused by pornography where a reasonable person would conclude that the author of the pornography is approving or endorsing of such material. Only when that harm is proven to have been caused by pornography may the pornographers be held liable. People consuming pornography may continue to hold opinions and consume that subject of communication without governmental intervention. It is only when those opinions and that consumption causes harm or injury that the pornographer becomes liable.

These strategies also avoid violation of the First Amendment of the United States Constitution. They are content-neutral laws aimed at harm caused by obscene pornography. Obscenity is clearly an unprotected form of speech and plaintiffs' lawyers and prosecutors should be able to distinguish their cases from cases where liability was found to be unconstitutional, such as Olivia and Hudnut. Instead of proposing gender-specific laws that focus on the subordination of women, this Comment is aimed at giving all victims of pornography-driven crimes comprehensive justice. While recognizing that women and children are the prime targets of subordination in pornography, this Comment advocates laws and legal arguments that focus on all Oregon victims of crimes who currently have no recourse against the pornographers who produced and distributed the material which so clearly motivated their perpetrators.

FOOTNOTES:

n1. Andrea Dworkin, Pornography: Men Possessing Women 25-26 (1989). Dworkin uses this photograph to illustrate "male power expressed in pornography" and how "the degradation of the female is the means of achieving this power." Id. at 25.

n2. Id. at xxiii. Stamen is currently in jail because she hired three men to beat up her husband and these men ended up killing him. Id. She is also in jail for criminal solicitation because she had previously hired hit men to kill her husband. Id. She tried to leave him, but he would consistently come after her with his rifle. Id. "The judge wouldn't admit testimony on the torture because he said the husband wasn't on trial. The defense lawyer said in private that he thought she probably enjoyed the abusive sex. Jayne's case will be appealed, but she may well have to stay in jail ... ." Id. at xxiv.

n3. Id. at xxiii.

n4. Catharine A. MacKinnon, Francis Biddle's Sister: Pornography, Civil Rights, and Speech, in Feminism Unmodified: Discourses on Life and Law 163, 188-89 (1994) (quoting Public Hearings on Ordinances to Add Pornography as Discrimination Against Women III, Committee on Governmental Operations, City Council, Minneapolis, Minn. 29 (Dec. 12-13, 1983) (testimony of Sharon Rice Vaughn, reading statement by Donna Dunn of Women's Shelter, Inc., in Rochester, Minn., which describes events reported by a woman at the shelter). This same woman discovered "two suitcases full of Barbie dolls with rope tied on their arms and legs and with tape across their mouths" and said that her husband used to do those same things to her. Id. at 188.

n5. Mitch McConnell, Porn Victims Need This Bill, USA Today, April 21, 1992, at 10A.

n6. Dworkin, supra note 1, at xviii.

n7. Or. Const. art. I, 8.

n8. U.S. Const. amend. I.

n9. Marianne Wesson, Girls Should Bring Lawsuits Everywhere ... Nothing Will Be Corrupted: Pornography as Speech and Product, 60 U. Chi. L. Rev. 845, 851-52 (1993).

n10. State v. Henry, 302 Or. 510, 525, 732 P.2d 9, 18 (1987).

n11. Miller v. California, 413 U.S. 15, 23 (1973).

n12. Id. at 24.

n13. Id. at 18.

n14. Nadine Strossen, Civil Liberties, 4 Geo. Mason U. Civ. Rts. L.J. 253, 260 (1994).

n15. See generally Paul Brest & Ann Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 Stan. L. Rev. 607 (1987); David Breyden, Between Two Constitutions: Feminism and Pornography, 2 Const. Comment. 174 (1985).

n16. Wesson, supra note 9, at 869.

n17. Theodore Robert Bundy, the prolific serial killer, did not escape conviction by arguing that pornography caused him to engage in criminal behavior. He was executed January 24, 1989 in the Florida State Prison's electric chair. Pamela Reynolds, Bundy Dies in Florida Electric Chair, Boston Globe, Jan. 25, 1989, at 1. Just before he was to die, Bundy gave his last interview to James Dobson, head of the Christian fundamentalist organization, Focus on the Family. In this interview Bundy traced his compulsive murdering to his consumption of hard-core pornography. Laura Parker, Bundy's Last Minute Appeals Rejected; Visitor Says Serial Killer Remorseful as Execution Hour Nears, Wash. Post, Jan. 24, 1989, at A9.

n18. Corinne Sweet, Pornography and Addiction: A Political Issue, in Pornography: Women Violence and Civil Liberties 179, 195-96 (Catherine Itzin ed., 1992). Ted Bundy stated:

> I tell you that I am not blaming pornography ... I take full responsibility for whatever I have done and all the things I have done. I don't want to infer ... that I was some kind of helpless victim [but] we're talking about an influence that is an influence of violent types of ... pornography, which had an indispensable [link] in the chain ... of events that led to the behaviour... the assaults, the murders.

Id.

n19. Wesson, supra note 9, at 870.

n20. Id. (citing Diana Scully, Understanding Sexual Violence: A Study of Convicted Rapists 100-17 (1990)).

n21. Miller v. California, 413 U.S. 15, 23 (1973).

n22. New York v. Ferber, 458 U.S. 747, 757-67 (1982).

n23. State v. Robertson, 293 Or. 402, 433, 649 P.2d 569, 588 (1982).

n24. The laws MacKinnon and Dworkin have advocated, such as the Indianapolis ordinance at issue in American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), treat pornography as sexual harassment. The Indianapolis ordinance contained "four prohibitions. People may not 'traffic' in pornography, 'coerce' others into performing in pornographic works, or 'force' pornography on anyone." Id. at 325. Judge Easterbrook explains:

> "Forcing pornography on a person," according to 16-3(g)(5), is the "forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place." The statute does not define forcing, but one of its authors states that the definition reaches pornography shown to medical students as part of their education or given to language students for translation.

Id. at 325-26 (quoting Catharine A. MacKinnon, Pornography, Civil Rights, and Speech, 20 Harv. C.R.-C.L. L. Rev. 1, 21 (1985)).

The statutes this Comment proposes, however, do not include those four prohibitions and are limited by providing recourse to victims only after a sex crime is committed and only when that sex crime so clearly resembles the pornography that the jury is able to determine that the pornography was a substantial factor in the commission of the offense. Additionally, the proposed statutes focus on criminal and tort liability, not on equal protection or sexual harassment law as the Dworkin-MacKinnon statutes do.

n25. Robertson, 293 Or. at 433, 649 P.2d at 586. Assuming no expression is per se harmful is also another way in which the proposed statutes in this Comment are different from the Dworkin-MacKinnon statutes, as the Dworkin-MacKinnon laws consider pornography inherently harmful and would make trafficking in pornography actionable. Hudnut, 771 F.2d at 325.

n26. Although studies regarding the negative impact of pornography are conflicting, many researchers and psychologists continue to rely on or cite to studies arguing that pornography negatively influences the way men interact with, or view, women. Martin Barron and Michael Kimmel, in their article on sexual violence in the pornographic media, note that studies have given us "some idea of the negative effect of sexually violent pornography, especially on men's attitudes towards women." Sexual Violence in Three Pornographic Media: Toward a Sociological Explanation, 37 J. Sex Res. 161 (2000).

n27. Timothy D. Lytton, Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law, 78 Cornell L. Rev. 470 (1993).

n28. Id. at 471.

n29. Fazzolari v. Portland Sch. Dist. No. 1J, 303 Or. 1, 10, 734 P.2d 1326, 1331 (1987).

n30. Id.

n31. Id. at 17, 734 P.2d at 1336.

n32. Id.

n33. Simpson v. Sisters of Charity of Providence in Or., 284 Or. 547, 559, 588 P.2d 4, 12 (1978).

n34. Id. at 560, 588 P.2d at 13. But see Purcell v. Asbestos Corp., 153 Or. App. 415, 422, 959 P.2d 89, 94 (1998) (holding that "substantially contributed," which may be less than "but for," was enough).

n35. Id.

n36. Id. (quoting William L. Prosser, Handbook of the Law of Torts 41, at 240 (4th ed. 1971)).

n37. Dewey v. A.F. Klaveness & Co., A/S, 233 Or. 515, 539, 379 P.2d 560, 572 (1963); see also Purcell, 153 Or. App. at 421-25, 959 P.2d at 93-95.

n38. Buchler v. Or. Corrections Div., 316 Or. 499, 509, 853 P.2d 798, 803 (1993).

n39. Stewart v. Jefferson Plywood Co., 255 Or. 603, 609, 469 P.2d 783, 786 (1970).

n40. 316 Or. at 499, 853 P.2d at 798.

n41. Id. at 511, 853 P.2d at 805.

n42. Id. at 510, 853 P.2d at 804.

n43. 133 Or. App. 514, 892 P.2d 703 (1995), appeal dismissed, 326 Or. 530, 971 P.2d 407 (1998).

n44. Id. at 526, 892 P.2d at 710.

n45. Fazzolari v. Portland School Dist. No. 1J, 303 Or. 1, 17, 734 P.2d 1326, 1336 (1987).

n46. Faverty, 133 Or. App. at 520, 892 P.2d at 707 (quoting Fazzolari, 303 Or. at 17, 734 P.2d at 1336).

n47. Id. at 539, 892 P.2d at 717 (Edmonds, J., dissenting).

n48. Id. (Edmonds, J., dissenting).

n49. Id. at 540, 892 P.2d at 718 (Edmonds, J., dissenting).

n50. Id. at 542, 892 P.2d at 719 (Edmonds, J., dissenting).

n51. Buchler v. Or. Corrections Div., 316 Or. 499, 511, 853 P.2d 798, 805 (1993).

n52. 153 Or. App. 415, 959 P.2d 89 (1998).

n53. Id. at 422, 959 P.2d at 94 (quoting McEwen v. Ortho Pharmaceutical Corp., 270 Or. 325, 418, 528 P.2d 522, 543 (1974)).

n54. See generally City of Portland v. Tidyman, 306 Or. 174, 191, 759 P.2d 242, 251 (1988) (holding that "if a law speaks the harm and not only the expression, its valid application depends on demonstrating the specified harm under changing conditions, not on mere apprehension").

n55. Id.

n56. Wesson, supra note 9, at 865.

n57. Id. at 866.

n58. Id. (citing Soldier of Fortune v. Braun, 968 F.2d 1110 (11th Cir. 1992) (approving a "modified negligence" standard for publishers of classified advertisements)); see also Beauharnais v. Illinois, 343 U.S. 250, 253 (1952).

n59. 128 F.3d 233 (4th Cir. 1997).

n60. Hit Man made murder sound normal: "'The kill is the easiest part of the job. People kill one another every day. It takes no great effort to pull a trigger or plunge a knife.'" Id. at 236 (quoting an excerpt of Hit Man without citing particular page numbers). Like the material targeted in this Comment, Hit Man encouraged and approved of illegal behavior: "'It is my opinion that the professional hit man fills a need in society and is, at times, the only alternative for 'personal' justice.'" Id. In fact, for summary judgment purposes, Paladin stipulated that Hit Man was intended to be used by criminals who would actually follow through with the instructions and commit murder. Id. at 241.

n61. Liz Kelly, Pornography and Child Sexual Abuse, in Pornography: Women, Violence and Civil Liberties 111, 120 (Catherine Itzen ed., 1992).

n62. "Ray Wyre is the Director of the Gracewell Clinic, the first residential clinic for child sex abusers in the UK, and well known for his pioneering work in promoting the treatment of male sex offenders." About the Contributors, in Pornography: Women, Violence and Civil Liberties 640, 645 (Catherine Itzen ed., 1992).

n63. Kelly, supra note 61.

n64. Ray Wyre, Pornography and Sexual Violence: Working with Sex Offenders, in Pornography: Women, Violence and Civil Liberties 236, 236 (Catherine Itzen ed., 1992).

n65. Diana E.H. Russell, Pornography and Rape: A Causal Model, in Pornography: Women, Violence and Civil Liberties 310, 346 (Catherine Itzen ed., 1992).

n66. Wyre, supra note 64.

n67. Id. at 237-38.

n68. Id. at 238.

n69. Russell, supra note 65, at 324.

n70. Id.

n71. Marianne Wesson, Sex, Lies and Videotape: The Pornographer as Censor, 66 Wash. L. Rev. 913, 927-28 (1991) (citing Edward I. Donnerstein et al., The Question of Pornography: Research Findings and Policy Implications (1987)).

n72. Wesson, supra note 71, at 928.

n73. Id.

n74. Id. (citing Donnerstein et al., supra note 71, at 20.).

n75. Id.; see also Interview by Anastasia Toufexis with Park Dietz, Dancing With Devils, Psychol. Today, May 1, 1999, at 54.

n76. Wesson, supra note 71, at 928.

n77. Wesson, supra note 9, at 865. Wesson states:

> As more and more research seems to affirm that exposure of men to violent sexual material leads to harm to women, and as this research and its conclusions are publicized and discussed, it will become

> more and more difficult for creators and dealers of pornography to claim they did not foresee that their activities would lead to harm.

Id.

n78. Id.

n79. Id. at 865-66.

n80. City of Portland v. Tidyman, 306 Or. 174, 184, 759 P.2d 242, 247 (1988).

n81. Id.

n82. Id. at 190, 259 P.2d at 251.

n83. Wesson, supra note 71. Wesson states:

> It is a well-established principle of tort law that one who creates a dangerous situation or produces a dangerous instrumentality may be held liable not withstanding the intervening act of a third party. Tort law is replete with examples of successful litigation pursued against creators of dangerous conditions, even though the intervening act of another contributed to the eventual harm. That the intervening act is criminal in nature does not insulate the originator of the danger from incurring liability, if the ultimate harm suffered, though remote, was reasonably foreseeable by the originator.

Id. at 918-19.

n84. Id.

n85. Wesson, supra note 9, at 870.

n86. Lytton, supra note 27, at 492.

n87. Id. at 473.

n88. Id. at 477.

n89. 446 N.W.2d 457, 467 (Iowa 1989).

n90. Lytton, supra note 27, at 494 (citing Thorp, 446 N.W.2d at 467).

n91. Id. at 494 (citing Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989)).

n92. The chart depicted is Lytton's, minus Comprehensive Environmental Response, Compensation, and Liability Act, the fourth example he discusses, which is omitted from this Comment. Id. at 500.

n93. Id.

n94. Id.

n95. Id.

n96. Id. at 501.

n97. Id.

n98. Id.

n99. Id.

n100. S. 1521, 102d Cong. (1991). The PVCA was introduced by Senator Mitch McConnell (R-Ky.). 137 Cong. Rec. S5298 (1991) (statement of Sen. McConnell). It "provides victims of sex crimes a civil cause of action against pornographers if the victim can prove a link between the crime and specific sexually explicit material." Id. Supporters of the bill cited the link between pornography and sexual violence as the policy reason behind its introduction. Id. "Pornography is fueling violence in this country, and it is time pornographers were held accountable for the harm they cause... . It is time to hold accountable those who are getting rich off of producing veritable how-to manuals and films for rapists and child abusers." Id. The purpose of PVCA was to: "require the commercial producers, commercial distributors, commercial exhibitors, and sellers of obscene material or child pornography to be jointly and severally liable for all damages resulting from any sexual offense that was foreseeably caused, in substantial part, by the sexual

offender's exposure to the obscene material or child pornography." S. 1521, 102d Cong. 2(b) (1991). To recover, the victim would have been required to:

> prove, by the preponderance of evidence, that-(1) the victim was a victim of a rape, sexual assault, act of sexual abuse, sexual murder, or other forcible sexual crime, as defined under the relevant State or Federal law, whether or not such rape, assault, abuse, murder, or other forcible crime has been prosecuted or proven in a separate criminal proceeding; (2) the material-(A) is obscene, or (B) constitutes child pornography; (3) the material was a substantial cause of the offense; (4) the defendant is a commercial producer or commercial distributor of the material, or commercially exhibited or sold the material to the sexual offender; (5) the commercial producer, commercial distributor, commercial exhibitor, or seller of the material should have reasonably foreseen that such material would create an unreasonable risk of such a crime; and (6) the production, distribution, sale, or transport of the type of material in the aggregate affects interstate or foreign commerce.

S. 1521, 102d Cong. 3(b)(1)-(6) (1991).

n101. Under the Illinois statute, a victim of a sexual offense

> has a cause of action for damages against any person or entity who, by the manufacture, production, or wholesale distribution of any obscene material which was possessed or viewed by the person convicted of the offense, proximately caused such person, through his or her reading or viewing of the obscene material, to commit the violation.

720 Ill. Comp. Stat. Ann. 5/12-18.1(a) (West 2000).

n102. David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. Crim. L. and Criminology 1194, 1195 (1997).

n103. The difficulty of proof in a criminal case was certainly brought to light during the trial of O.J. Simpson for the murders of Nicole Brown and Ronald Goldman, where prosecutors failed to secure a criminal conviction, but the victim's families were able to practically bankrupt Simpson in a civil trial. William Booth & Sharon Waxman, Jury Holds Simpson Responsible for Slayings, Wash. Post, Feb. 5, 1997, at A01.

n104. Or. Const. art. I, 8.

n105. City of Portland v. Tidyman, 306 Or. 174, 190, 759 P.2d 242, 250 (1988).

n106. State v. Moyle, 299 Or. 691, 705 P.2d 740 (1985); State v. Robertson, 293 Or. 402, 649 P.2d 569 (1982). These cases do lay out a three-step test formulated by the Oregon Supreme Court. An Oregon attorney general opinion states that the third step requires the court to apply the law to the specific facts of the case to determine whether it is unconstitutional. 46 Op. Or. Att'y Gen. 294, 330 (1989) (citing Robertson, 293 Or. 402, 649 P.2d 569). However, for purposes of analyzing the laws proposed in this Comment, step three is not necessary. It was formulated in regards to a trespass statute and does not factor into an analysis where a statute includes speech as an element. Further, there are not any court cases discussing or interpreting this third step. Therefore, it does not apply to the constitutional inquiry at hand.

n107. 46 Op. Or. Att'y Gen. 294, 330 (citing Robertson, 293 Or. 402, 649 P.2d 569).

n108. Id.

n109. Id.

n110. 302 Or. 510, 513, 732 P.2d 9, 18 (1987).

n111. City of Portland v. Tidyman, 306 Or. 174, 191, 759 P.2d 242, 251 (1988).

n112. State v. Plowman, 314 Or. 157, 165, 838 P.2d 558, 563 (1992).

n113. 46 Op. Or. Att'y Gen. 294, 329 (1989).

n114. Id. at 329-30.

n115. State v. Robertson, 293 Or. 402, 404, 649 P.2d 569, 571 (1982).

n116. Id.

n117. The Accused (Paramount Pictures 1988). Jodie Foster stars with Kelly McGillis in this film, directed by Jonathan Kaplan, based on a true story about Sarah Tobias (Foster), a gang rape victim, and the prosecuting attorney, Katherine Murphy (McGillis).

n118. Although I subscribe to most, if not everything, espoused by radical feminists Andrea Dworkin and Catharine MacKinnon, this Comment does not subscribe to the totality of their beliefs. Radical feminists argue that pornography contributes to an overall socialization of people and that it helps maintain patriarchal structures. However, this line of reasoning has been struck down under First Amendment theory. See Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd mem., 475 U.S. 1001 (1986). In an effort to be pragmatic and to draft laws that would comport with the Oregon Constitution, this Comment does not subscribe to radical feminist beliefs. Instead, it advocates liability for pornographers only when pornography causes a demonstrable, specific instance of harm, rather than advocating liability because pornography contributes to the overall subordination of women.

Clearly, pornography is a feminist issue. This Comment looks at pornography from a feminist perspective, although there are many different strands of feminism and many feminists believe pornography does not subordinate women. While radical feminists like Dworkin and MacKinnon believe sexual relations between men and women are at the heart of sexism, liberal feminists (liberal in the sense that they adhere to modern political thought) analyze civil liberties in a more libertarian fashion. For instance, Nadine Strossen, former head of the ACLU, and a liberal feminist, argues that free speech is the "strongest weapon for countering mysogynistic discrimination and violence, and censorship consistently has been a potent tool for curbing women's rights and interests. Freedom of sexually oriented expression is integrally connected with women's freedom ... ." Nadine Strossen, Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights 30 (1995).

n119. Dworkin, supra note 1, at 166.

n120. Id.

n121. James Weaver, The Social Science and Psychological Research Evidence: Perceptual and Behavioural Consequences of Exposure to Pornography, in Pornography: Women, Violence and Civil Liberties 284, 306 (Catherine Itzin ed., 1992).

n122. Russell, supra note 65, at 333-34.

n123. Susan Etta Keller, Viewing and Doing: Complicating Pornography's Meaning, 81 Geo. L.J. 2195, 2220-21 (1993).

n124. Catharine A. MacKinnon, Toward a Feminist Theory of the State 136 (1989) (quoting Robert J. Stoller, Sexual Excitement: Dynamics of Erotic Life 6 (1979)).

n125. Id. at 142.

n126. Id.

n127. Id.

n128. John Douglas & Mark Olshaker, Journey Into Darkness 296 (1997).

n129. Id. at 299-300.

n130. Rosa DeLauro notes "according to the Department of Labor, the average woman earns about 75 cents for every dollar earned by the average man. Women of color fare even worse, bringing in just 63 cents for every dollar earned by men." Pay Fairness Isn't Issue Just Affecting Women, Orlando Sentinel Trib., May 16, 1999, at G1.

n131. MacKinnon, supra note 4, at 1, 6 (citing Diana Russell, The Secret Trauma: Incest in the Lives of Girls and Women 20-37 (1986); Diana Russell, Rape in Marriage 27-41 (1982)). MacKinnon adds:

> The figure includes all the forms of rape or other sexual abuse or harassment surveyed, noncontact as well as contact, from gang rape by strangers to obscene phone calls, unwanted sexual advances on the street, unwelcome requests to pose for pornography, and subjection to peeping Toms and sexual exhibitionists (flashers).

MacKinnon, supra note 4, at 233 n.18.

n132. Naomi Wolf, The Beauty Myth: How Images of Beauty are Used Against Women 181 (1991).

n133. “Many people ... find subordination and the force that helps to sustain it sexually exciting. Because they find sexism sexy, they tolerate - or actively embrace - subordination and violence. In short, sexism is reproduced because it is sexy.” Joshua Cohen, Freedom, Equality, Pornography, in Justice and Injustice in Law and Legal Theory 99, 104 (Austin Sarat & Thomas R. Kearns eds., 1996) (explaining one style of argument for regulation of pornography, relying in large part on MacKinnon’s analysis). Further, “pornography plays a central role in defining what sexuality is for us, in particular in sexualizing - and so making permissible and attractive - subordination and the force that helps sustain it... . It ‘makes hierarchy sexy.’” Id. at 105.

n134. Examples include the National Coalition Against Censorship’s Working Group on Women, Censorship, and Pornography; the Feminist Anti-Censorship Taskforce; and Feminists for Free Expression. Nadine Strossen, Preface: Fighting Big Sister for Liberty and Equality, 38 N.Y.L. Sch. L. Rev. 1, 4 (1993).

n135. See generally Glitlow v. New York, 268 U.S. 652 (1925) (holding a New York statute that prohibited advocacy and anarchy was not violative of the constitutional guaranty of freedom of speech guaranteed by the Fourteenth Amendment).

n136. U.S. Const. amend. I.

n137. Wesson, supra note 71, at 924.

n138. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981).

n139. Id. at 892-93.

n140. Wesson, supra note 9, at 864.

n141. See Miller v. California, 413 U.S. 15 (1973).

n142. Daniel A. Cohen, Compensating Pornography’s Victims: A First Amendment Analysis, 29 Val. U. L. Rev. 285, 288 (1994).

n143. Id.

n144. Id. at 290.

n145. Id.

n146. 814 F.2d 1017 (5th Cir. 1987).

n147. Wesson, supra note 9, at 864.

n148. Id.

n149. 968 F.2d 1110 (11th Cir. 1992).

n150. Id. at 1119.

n151. Wesson, supra note 9, at 861.

n152. Id. (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974)).

n153. Id. at 849-50.

n154. 771 F.2d 323 (7th Cir. 1985), aff’d, 475 U.S. 1001 (1986).

n155. 413 U.S. 15 (1973).

n156. 458 U.S. 747 (1982).

n157. Hudnut, 771 F.2d at 332.

n158. Id. at 324.

n159. Id. at 330-31.

n160. 505 U.S. 377 (1992).

n161. Id. at 380 (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn., Legis. Code 292.02 (1990) (repealed 1992)).

n162. Id. at 338.

n163. Cohen, supra note 142, at 296.

n164. Id.

n165. Am. Booksellers Ass'n v. Hudnut, 771 F.2d 323, 332 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986).

n166. Id. at 333.

n167. Id. (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

n168. Id. (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).