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FOR PROHIBITING POSSESSION OF VIOLENT PORNOGRAPHY

Mark B. Rasmuson[†]

INTRODUCTION

Prohibitions on the possession of obscene materials have traditionally been outside the reach of the states,[1] although obscenity is not a form of speech protected under the First Amendment.[2] The test for obscenity requires a consideration of contemporary community standards.[3] The variability of contemporary community standards and the question of which community standards apply has invited harsh criticism[4] of the contemporary community standards test.

Criticism, however, does nothing for curbing the production, distribution, and possession of harmful violent pornographic content, which is most surely obscene.[5] Since there exists a right to "maintain a decent society,"[6] and some obscene material is so harmful that its possession must be restricted,[7] then the effort of the State in prohibiting possession of violent pornography must be constitutionally upheld if such possession is similarly harmful.

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[1] Stanley v. Georgia, 394 U.S. 557, 568 (1969).
[2] Miller v. California, 413 U.S. 15, 23 (1973).
[3] *Id.* at 24.
[4] *See, e.g.*, Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 368 (2008).
[5] *See* discussion *infra* Parts I.A.2.c, II.A.; *see also* MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS, THE WITHERSPOON INSTITUTE 23–40 (2010).
[6] Jacobellis v. State of Ohio, 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting).
[7] *See* New York v. Ferber, 458 U.S. 747, 764–65 (1982) (Holding that prohibitions on the possession of child pornography are constitutionally permitted).

In Part Two, this paper reviews prohibitions on possession of violent pornography in the United Kingdom and obscenity law in the United States. The subsequent section considers criticisms of violent pornography. Part Three provides an analysis of whether a prohibition on violent pornography would pass constitutional muster. In Part Four, some of the challenges of a model statute are reviewed.

I. THE LAW AND VIOLENT PORNOGRAPHY

A. Current Law

1. Regulating Possession of Violent Pornography

a. U.K. Laws on Possession of Obscene Images and Extreme Pornography

On July 22, 2013, Prime Minister David Cameron publicly addressed the need to criminalize the possession of violent pornography "as a matter of urgency."[8] The Criminal Justice and Immigration Act of 2008 ("the Act of 2008") already prohibited possession of extreme pornography in England, Wales, and Northern Ireland[9] but, unlike the Criminal Justice and Licensing (Scotland) Act of 2010 ("the Scotland Act"),[10] did not explicitly prohibit possession of "obscene pornographic images which realistically depict rape or other non-consensual

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[8] David Cameron, U.K. Prime Minister, The Internet and Pornography: Prime Minister Calls for Action (July 22, 2013), *available at* https://www.gov.uk/government/speeches/the-internet-and-pornography-prime-minister-calls-for-action.

[9] Criminal Justice and Immigration Act, 2008, c. 4, §63 (Eng., Wales, N.Ir.) (This Act criminalizes the possession of an image that is both "pornographic" and "extreme." An image is "pornographic" when "produced solely or principally for the purpose of sexual arousal" and "extreme" when "in an explicit and realistic way" it portrays "an act which threatens a person's life," "an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals," "an act which involves sexual interference with a human corpse," or "a person performing an act of intercourse or oral sex with an animal (whether dead or alive)." A reasonableness standard is used to determine whether an image is pornographic and whether a person or animal is real.), *available at* http://www.legislation.gov.uk/ukpga/2008/4/part/5.

[10] Criminal Justice and Licensing (Scotland) Act, 2010, (A.S.P. 13), § 42 (prohibiting possession of a "pornographic," "extreme," and "obscene" image, where "extreme" may be defined as an "explicit and realistic" depiction of "rape or other non-consensual penetrative sexual activity"), *available at* http://www.legislation.gov.uk/asp/2010/13/section/42/enacted.

penetrative sexual activity, whether violent or otherwise."[11] Prime Minister Cameron acknowledged the absence of a provision prohibiting the possession of violent pornography as a "loophole" [12] in the Act of 2008 because "pornography that is violent and that depicts simulated rape,"[13] while readily available on the Internet,[14] "can only be described as extreme."[15]

The Criminal Justice and Licensing (Scotland) Act of 2010, which prohibits the possession of images which are pornographic, extreme, and obscene,[16] makes no offense the possession of images not already illegal to publish, sell, import, or possess with intent to sell in the U.K. [17] under the Obscene Publications Acts (OPA) 1959[18] and 1964,[19] as well in Scotland, under section 51 of the Civic Government (Scotland) Act (CG(S)A) 1982.[20] Instead, the Scotland Act of 2010, was passed in response to "the wide range of extreme pornography available via the Internet which cannot, in practice, be controlled by . . . existing laws,"[21]

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[11] JOHN WOODHOUSE, HOME AFFAIRS COMMITTEE, EXTREME PORNOGRAPHY, 2013, SN/HA/5078, at 1 (U.K.), *available at* http://www.parliament.uk/briefing-papers/SN05078/extreme-pornography.

[12] *See* Cameron, *supra* note 8.

[13] *Id.*

[14] *See* Campaign Briefing, Rape Crisis South London, Closing the Loophole on Rape Pornography (indicating that "[i]n the top 50 Google results for 'rape porn', 77% of results were accessible porn sites with rape content" and "[o]f the top ten Google search results for 'free porn', half the websites host free rape pornography"), *available at* http://www.endviolenceagainstwomen.org.uk/news/102/call-on-the-pm-to-ban-rape-porn-100-sign-letter.

[15] Cameron, *supra* note 8; *see also* Campaign Briefing, *supra* note 14 (Rape Crisis South London lobbied the Prime Minister for a prohibition on "rape pornography" but more narrowly defined the "loophole in legislation" as the "freely, legally accessible" depictions of rape "alongside simulations of incest and child sexual abuse" where images "explicitly defined themselves as being rape, non-consensual or forced sex" with descriptions like "young schoolgirls" abducted and cruelly raped. Hear her "screams."; "little schoolgirl raped by teacher" and "little girls cruelly raped at home"; "tiny girl sleep rape" and "girl raped at gunpoint".").

[16] *See* Criminal Justice and Licensing (Scotland) Act, 2010, § 42, *supra* note 10.

[17] *See* Consultation: On the Possession of Extreme Pornographic Material (Aug. 2005), at 1 [hereinafter Consultation], *available at* http://www.scotland.gov.uk/Topics/Justice/crimes/pornography/ExtremePornograhicMateria.

[18] *See* Obscene Publications Act, 1959, c. 66, §1 (prohibiting the publication of obscene material), *available at* http://www.legislation.gov.uk/ukpga/Eliz2/7-8/66/section/1/enacted.

[19] *See* Obscene Publications Act, 1964, c. 74, § 1 (prohibiting the possession of obscene material for the purpose of gain), *available at* http://www.legislation.gov.uk/ukpga/1964/74/section/1/enacted.

[20] *See* Civic Government (Scotland) Act, 1982, c. 45, § 51, *available at* http://www.legislation.gov.uk/ukpga/1982/45/section/51.

[21] Consultation, *supra* note 17, at 1.

which laws were thought to "obviate[] the need for a possession offence"[22] by "[c]losing down sources of supply and distribution."[23] The objective of the prohibition on possession of extreme pornography is "[t]o help ensure the public are protected from exposure to extreme pornography that depicts horrific images of violence."[24] Cameron similarly noted in his July 2013 address that while "a free and open internet is vital,"[25] there is no other market or industry upon which the government has such a "light touch" for regulation.[26]

Furthermore, "the [violent] material depicts activities which are illegal in themselves and the participants may in some cases have been the victims of criminal offences. It goes well beyond what is available for sale in licensed sex shops, classified R18 by the British Board of Film Classification. Thus our mainstream entertainment industry, which works within the obscenity laws, would not be affected by the proposals in this document."[27]

A case brought against a person for obscene publications[28] will first outline the test for obscenity, which is a modification on the Hicklin doctrine.[29] Under *Regina v. Hicklin*,[30] the test for obscenity was articulated as "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral

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[22] *Id.*

[23] *Id.*

[24] Criminal Justice and Licensing (Scotland) Bill, 2009, S.P. Bill [24–PM] ¶153 [hereinafter Policy Memorandum] (policy memorandum prepared by the Scottish Government for Criminal Justice and Licensing (Scotland) Bill introduced Mar. 9, 2009), available at http://www.lawscot.org.uk/media/33231/3183_lic_memorandum_of_evidence%20part_8_and_9_may.pdf.

[25] Cameron, *supra* note 8.

[26] *See* Cameron, *supra* note 8, (arguing "there is extreme pornography" that is "so bad" it cannot be sold in sex shops but is nonetheless available online and "what you can't get in a shop, you shouldn't be able to get online.").

[27] Consultation, *supra* note 17, at 1.

[28] *See* Crown Prosecution Service, *Obscene Publications*, PROSECUTION POLICY AND GUIDANCE: LEGAL GUIDANCE, *available at* https://www.cps.gov.uk/legal/l_to_o/obscene_publications/.

[29] *Compare* Obscene Publications Act, 1959, *supra* note 18, c. 66, §1 *with* Regina v. Hicklin, [1868] L.R. 3 Q.B. 360 (in *Hicklin* the obscene nature of materials was determined by considering whether material would deprave or corrupt those who "may" be exposed thereby where OPA 1959 is concerned with material that might deprave or corrupt a person who is "likely" to be exposed thereby).

[30] Regina v. Hicklin, [1868] L.R. 3 Q.B. 360.

influences, and into whose hands a publication of this sort may fall."[31] Under the OPA 1959, material is obscene where it has a tendency to deprave or corrupt the minds of those who are "likely" to hear, see, or read it.[32] Distribution of an image might be justified, however, where under "the opinion of experts" the image has "literary, artistic, scientific or other merits"[33] but the test for obscenity relies on questions of fact determined by a jury[34] "without the assistance of expert evidence."[35] Where a person may not be prosecuted for distribution or publication under OPA 1959, the Crown Prosecution Service advises prosecutors to "consider charging suspects with the new offence of possession of extreme pornographic images."[36]

b. Defining *Pornographic*, *Obscene*, and *Extreme* in the U.K.

In the U.K. generally, "pornographic" describes that which is produced principally for the purpose of sexual arousal; "obscene," that which tends to deprave and corrupt persons exposed to it; and "extreme," that which depicts life-threatening violence, sexual injury, rape, necrophilia, and bestiality.[37]

Under the Scotland Act of 2010, the "possession"[38] of an "extreme pornographic image"[39] is prohibited. An extreme pornographic image is "obscene,"[40] "pornographic,"[41] and "extreme."[42] An image is obscene where its "effect" is "such as to tend to deprave and corrupt persons who

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[31] *Id.*

[32] Obscene Publications Act, 1959, *supra* note 18, c. 66, §1.

[33] Obscene Publications Act, 1959, *supra* note 18, c. 66, §4; *see also* Crown Prosecution Service, *Obscene Publications*, PROSECUTION POLICY AND GUIDANCE: LEGAL GUIDANCE, *available at* https://www.cps.gov.uk/legal/l_to_o/obscene_publications/.

[34] R v. Barker (Will), [1962] 46 Cr. App. R. 227 ("the first issue for the jury is whether the effect of the article was such as to tend to deprave and corrupt the individual to whom it was published").

[35] *See* Crown Prosecution Service, *Obscene Publications*, PROSECUTION POLICY AND GUIDANCE: LEGAL GUIDANCE, *available at* https://www.cps.gov.uk/legal/l_to_o/obscene_publications/.

[36] *Id.*

[37] *See* Criminal Justice and Licensing (Scotland) Act, 2010, *supra* note 10, § 42(2)[6]; Criminal Justice and Immigration Act, 2008, *supra* note 9, § 63(7); *and* Obscene Publications Act, 1959, *supra* note 18, c. 66, §1.

[38] Criminal Justice and Licensing (Scotland) Act, 2010, *supra* note 10, § 42(2)[1].

[39] *Id.*

[40] *Id.* § 42(2)[2].

[41] *Id.*

[42] *Id.*

are likely" to see it.[43] The test for obscenity is a question for the jury,[44] based on the Hicklin doctrine.[45]

As defined by the Act, "[a]n image is pornographic if it is of such a nature that it must reasonably be assumed to have been made solely or principally for the purpose of sexual arousal."[46] Both the content of "the image itself" and the "context for the image" are to be considered.[47] If "an image forms an integral part of a narrative constituted by a series of images, and having regard to those images as a whole, they are not of such a nature that they must reasonable be assumed to have been made solely or principally for the purpose of sexual arousal,"[48] then the image, as part of a whole, would not be pornographic.[49]

The third element requires the image to be "extreme."[50] An extreme depicts "in an explicit and realistic way any of the following—(a) an act which takes or threatens a person's life, (b) an act which results, or is likely to result, in a person's severe injury, (c) rape or other non-consensual penetrative sexual activity, (d) sexual activity involving (directly or indirectly) a human corpse, (e) an act which involves sexual activity between a person and an animal (or the carcase of an animal)."[51]

Under the Act of 2008,[52] it is similarly an offense in England, Wales, and Northern Ireland to possess an "extreme pornographic image,"[53] which means an image is both "pornographic" and "extreme."[54] An image is "pornographic" when "produced solely or principally for the purpose of sexual arousal"[55] and "extreme" when "in an explicit and realistic way"[56] it portrays "an act which threatens a

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[43] Obscene Publications Act, 1959, *supra* note 18, c. 66, §1; see also Consultation, *supra* note 17, at 6.
[44] *See Barker*, *supra* note 34.
[45] *See Hicklin*, *supra* note 29.
[46] Criminal Justice and Licensing (Scotland) Act, 2010, *supra* note 10, § 42(2)[3].
[47] *Id.* § 42(2)[4].
[48] *Id.* § 42(2)[5].
[49] *Id.*
[50] *Id.* § 42(2)[2].
[51] *Id.* § 42(2)[6].
[52] Criminal Justice and Immigration Act, 2008, *supra* note 9, § 63.
[53] *Id.* § 63(1).
[54] *Id.* § 63(2).
[55] Criminal Justice and Immigration Act, 2008, *supra* note 9, § 63(5)[b].
[56] *Id.* § 63(7).

person's life,"[57] "an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,"[58] "an act which involves sexual interference with a human corpse,"[59] or "a person performing an act of intercourse or oral sex with an animal (whether dead or alive)."[60] An objective standard of reasonableness is used to determine whether an image is pornographic and whether a person or animal is real.[61]

Notably, the Scotland Act of 2010 is similar to the Act of 2008 (England, Wales, and Northern Ireland) in nearly every aspect, except the former requires a separate evaluation regarding whether an image is obscene and includes a prohibition on depictions of rape or other non-consensual penetrative sexual activity. In the 2008 Act, specific enumerated prohibitions might have been thought to make unnecessary an obscenity clause, but the lack of a prohibition on pornography that depicts rape is a "loophole"[62] that Parliament will be "closing,"[63] thus "making it a criminal offense to possess internet pornography that depicts rape."[64]

2. U.S. Law on Possession of Obscenity

Presently, obscenity law in the United States prohibits possession of obscenity only where there is also intent to sell or distribute[65] or where the obscenity is defined as child pornography.[66] Other attempts to regulate possession of obscenity and pornography have been held unconstitutional because they were found to be overbroad,[67] vague,[68] proscribing "mere possession" of obscene material,[69] or failing to require

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[57] *Id.* § 63(7)[a].
[58] *Id.* § 63(7)[b].
[59] *Id.*
[60] *Id.* § 63(7)[d].
[61] *Id.*, § 63(7).
[62] Cameron, *supra* note 8.
[63] *Id.*
[64] *Id.*
[65] 18 U.S.C. § 1460 (1990).
[66] *See, e.g.*, 18 U.S.C.A. § 2252A(a)(3)(B), U.S. v. Williams, 553 U.S. 285, 288–289 (2008); *see also Ferber*, 458 U.S. at 764–765.
[67] *See, e.g.*, Shinall v. Worrell, 319 F. Supp. 485 (E.D.N.C. 1970).
[68] *See, e.g.*, Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); Com. v. Burak, 232 Pa. Super. 499, 503 (1975).
[69] *See, e.g.*, *Stanley*, 394 U.S. at 568; Henley v. Wise, 303 F. Supp. 62, 68 (N.D. Ind. 1969).

scienter.[70] There is no federal or state statute prohibiting possession of violent pornography, though producers have violent pornography have been prosecuted for production and distribution of obscenity.[71]

a. U.S. Anti-Obscenity Statutes

Similar to Great Britain's Obscene Publications Act of 1964, under 18 U.S.C. § 1460, a person may not possess with intent to sell "any obscene visual depictions."[72] Materials that are "obscene, lewd, [or] lascivious" are "nonmailable matter"[73] and may not be imported[74] (even by an "interactive computer service"[75]). The production, transportation, distribution, and transmission of "obscene, lewd, lascivious, or filthy" media are likewise prohibited.[76] Persons "engaged in the business" of producing, distributing, and selling obscene material may be prosecuted under the same law.[77]

b. U.S. Obscenity Jurisprudence

The Supreme Court has held that possession of obscenity is prohibited where there is specific intent to sell or distribute[78] but the Supreme Court has held that prohibitions on "mere possession" of obscenity are unconstitutional,[79] though prohibitions on the receipt of obscene materials may be constitutional.[80]

Until 1957 obscenity law in the U.S. followed the Hicklin Doctrine.[81] Then, in *Roth v. United States*,[82] the United States Supreme

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[70] Smith v. California, 361 U.S. 147, 155 (1959); Grove Press, Inc. v. Evans, 306 F. Supp. 1084, 1088 (E.D. Va. 1969); Fortner v. State, 258 Ark. 591, 596, 528 S.W.2d 378, 381 (1975).
[71] *See e.g. infra* Part I.A.2.c.
[72] 18 U.S.C. § 1460 (1990).
[73] 18 U.S.C. § 1461 (1990).
[74] *Id.*
[75] 18 U.S.C. § 1462 (1996).
[76] 18 U.S.C. § 1465 (2006).
[77] 18 U.S.C. § 1466 (2006) (defining "[the person] engaged in the business" as "the person who produces [sic] sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit . . .); *see id.*
[78] *Miller*, 413 U.S. at 25.
[79] *Stanley*, 394 U.S. at 568.
[80] *See* United States v. Reidel, 402 U.S. 351, 355–356 (1971).
[81] Boyce, *supra* note 4, at 313–317; *see Hicklin*, *supra* note 29.

Court upheld a lower court's rejection of the Hicklin test, which was summarized as a standard based on "susceptible persons,"[83] in favor of a new standard based on "the average person, applying contemporary community standards."[84] The trier of fact must determine whether "the dominant theme of the material taken as a whole appeals to prurient interest."[85] Though, "[i]n the years after *Roth*, the Court struggled to formulate a [different] definition of obscenity,"[86] it nonetheless provided in dicta helpful language for understanding what was meant by "prurient interest."[87]

In writing for the Court, Justice Brennan clarified the difference between "sex and obscenity" by saying that "[o]bscene material is material which deals with sex in a manner appealing to prurient interest."[88] He attempted to clarify obscene material, which by definition appeals to a prurient interest, in a footnote to the opinion as "material having a tendency to excite lustful thoughts" and appealed to Webster's New International Dictionary (1949) which defined prurient as "[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings, of desire, curiosity, or propensity, lewd."[89]

Justice Brennan, in the same footnote, clarified there was no "significant difference" between the majority's understanding of obscenity and the meaning giving in the Model Penal Code.[90] The current edition of the Uniform Modal Penal Code defines obscenity almost identically to that referred to in the majority opinion:

> Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a

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[82] Roth v. United States, 354 U.S. 476 (1957).
[83] *Id.* at 489.
[84] *Id.*
[85] *Id.*
[86] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1052 (4th ed. 2011).
[87] *Roth*, 354 U.S. at 489.
[88] *Id.* at 487.
[89] *Id.* at 488 n.20.
[90] *Roth*, 354 U.S. at 488, ("We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, s 207.10(2) (Tent.Draft No. 6, 1957), viz.: ['. . .]A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters[. . .']").

> shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.[91]

This current definition of obscenity in the Model Penal Code utilizes both the "average person" standard adopted by *Roth* and the "susceptible persons" standard from the older Hicklin test.

As noted above, the Court struggled over time with the *Roth* test for obscenity. "[I]n *Redrup v. New York*, the Court essentially gave up trying to devise a test that a majority could support. In *Redrup*, the seven-Justice majority simply issued a laconic per curiam opinion that reversed, with little analysis, the defendant's conviction for selling pulp pornographic fiction. During the next six years, the Court 'systematically Redrupped—reviewed and reversed summarily, without further opinion—scores of obscenity rulings by lower state and federal courts.'"[92]

In 1973, the Court articulated a new test for obscenity in *Miller v. California*,[93] which requires the trier of fact to determine: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."[94] Here, the trier of fact must determine whether both the elements "appeals to prurient interest" and "patently offensive" are obscene after applying "contemporary community standards."[95] The *Miller* decision has never been overruled and, though

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[91] MODEL PENAL CODE § 251.4.

[92] Boyce, *supra* note 4, at 318 (internal citations omitted).

[93] Miller v. California, 413 U.S. 15 (1973).

[94] *Id.* at 24 (internal citations omitted).

[95] Boyce, *supra* note 4, at 319.

fraught with complications,[96] continues to be the standard used by the Court.

A major problem posed by the *Miller* test is that it permits a variable application of law not only over time but across communities. There is no national standard for obscenity. This is problematic at a time when obscene content is readily available through the internet. Law enforcement officials struggle to develop protocol for prosecuting obscenity and juries struggle to understand the meaning of "contemporary community standards."[97]

Though the conviction of one or several defendants for violating obscenity laws might curb their own behavior, such convictions, due to the variability of the obscenity standard, may not apply in the future. This highlights the need for strict liability statutes which prohibit the possession of violent pornography.

Attorneys and legal counsel for major pornographers have prepared guidelines for avoiding the violation of obscenity statutes. For example, one of the leading attorneys for the pornography industry, Paul Cambria, advised his client *Hustler* to stay within the bounds of the *Miller* Test by avoiding the production of media which included certain acts,[98] which are now commonplace in pornography.[99] The "Cambria List"[100] was created through the cooperation of the major pornographers in an effort to avoid producing and distributing depictions of "sexually

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[96] *See, e.g.*, Boyce, *supra* note 4, at 338–51.

[97] *Frontline: American Porn* (Feb. 2002), http:// www.pbs.org/wgbh/pages/frontline/shows/porn.

[98] *Frontline: American Porn*, *supra* note 97.

[99] *Id.*

[100] *See* "The Cambria List." *Frontline: American Porn* (Feb. 2002), http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html (the Cambria List, published by *Frontline*, advises against producing films with scenes "that depict any unhappiness or pain" and strictly advises producers to exclude scenes depicting any of the following: the "appearance of pain or degradation"; ejaculation on the face; ejaculation on a body if the act is revolting ("nasty"); several men ejaculating on a single woman or man; "spitting or saliva mouth to mouth"; the use of "food used as sex object"; urination "unless in a natural setting, e.g., field, roadside"; "coffins"; "blindfolds"; "wax dripping"; oral sex with two penises "in/near one mouth"; deformation of a vagina by "stretching"; brachiovaginal or brachioproctic insertion; visible female ejaculation; "bondage-type toys or gear unless very light"; females "sharing same dildo" orally or vaginally; use of "toys" when such use is revolting; use of two persons hands for vaginal manipulation; male-to-male penetration; "transsexuals"; bisexuals; "degrading dialogue"; "menstruation topics"; "incest topics"; "forced sex, rape themes, etc"; "black men-white women themes.").

explicit acts that often attract prosecutors' attention,"[101] which are obscene.

Likewise, prosecutors and investigators have used shorthand to identify which materials are probably obscene. Deborah Sanchez, former Deputy L.A. City Attorney, now a judge for the Superior Court of California, County of Los Angeles,[102] used the acronym CURB-FHP[103] as a prosecutor to aid in evaluating which acts violated statutes prohibiting obscenity: "children involved,"[104] "urination or defecation in conjunction with a sex act,"[105] "rape scenes,"[106] "bestiality,"[107] "fisting or foot insertion,"[108] "homicide or dismemberment in conjunction with a sex act,"[109] and "severe infliction of pain."[110]

c. Violent Pornography as Obscenity

In 2003, a federal grand jury indicted Extreme Associates., Inc, Robert Zicari, and Janet Romano for violating federal obscenity statutes, 18 U.S.C. §§ 1461, 1462, and 1465.[111] In *United States. v Extreme Associates*,[112] the Third Circuit reversed the ruling of the District for the Western District of Pennsylvania, which attempted to apply a novel standard, and held that the constitutionality of federal obscenity statutes regulating distribution of obscenity were to be evaluated under the First

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[101] Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator and Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 148 (2004).

[102] California Court, *California Trial Court Roster* (April 2014), http://www.courts.ca.gov/2948.htm.

[103] "Interview with Deborah Sanchez," *Frontline: American Porn* (Feb. 2002), http://www.pbs.org/wgbh/pages/frontline/shows/porn/interviews/sanchez.html.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *See* Unites States v. Extreme Associates, Inc., 352 F.Supp.2d 578, 584 (W.D. Pa.), *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006).

[112] *Extreme Associates*, 352 F.Supp.2d 578, 584 (W.D. Pa.) *rev'd*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 547 U.S. 1143 (2006).

Amendment and substantive due process privacy rights. Extreme Associates conceded that the material in question was obscene.[113]

In a 2002 behind-the-scenes *Frontline* interview[114] with pornographers and owners of the adult entertainment company Extreme Associates, husband Robert Zicari ("Rob Black") and wife Janet Romano ("Lizzie Borden"), the latter explained that prior to shooting a particular pornographic film depicting rape and murder, they would not be informing the actress prior to the filming that the male actors during filming would actually assault her.[115] According to Borden, the plot of the film was of "a girl being kidnapped, then forced to have sex against her will, [and finally] being butchered at the end."[116] During the assault she would be beaten ["she's going to be hit"],[117] "spit on"[118] and "degraded."[119] Borden thinks making these films is "therapeutic"[120] and "good"[121] for her[122] because she can "exploit[] people"[123] and "take [her] aggression out on other people."[124]

Prior to filming, one member of the crew encouraged the actress to "just go with the flow [and] [l]et happen what's gonna happen."[125] In the course of filming, the actress was "kicked and beaten,"[126] and subjected to "oral, vaginal, and anal sex" with each of the two men,[127] followed by a simulation of her throat being cut,[128] then left for dead in a pool of [fake] blood.[129]

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[113] Brief for the United States at 19, United States v. Extreme Associates Inc., 431 F.3d 150, 155 (3d Cir. 2005) (No. 05-1555), 2005 WL 6104849 at *1.

[114] *Frontline: American Porn*, *supra* note 97.

[115] *Frontline: American Porn*, *supra* note 97.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Frontline: American Porn*, *supra* note 97.

[129] *Id.* A determination of its criminality cannot be known without more facts, but that the Frontline camera crew withdrew themselves from the filming speaks to the violent nature of they saw, though to them it "appear[ed] what was happening was "legally consensual." According to Frontline in

Without active prosecution of producers and distributors "the major players in the multi-billion dollar pornography industry" will continue "unscathed" by prosecution for obscenity even at the expense of "undermin[ing] respect for the rule of law."[130] Such a result is "strange"[131] but accurately describes the present laws regulating obscenity.[132]

B. Criticisms of Violent Pornography

1. Feminist Critique

Among the most well-known antipornography statutes, and a good example of the feminist critique, is the Indianapolis ordinance,[133] influenced by Catharine MacKinnon and Andrea Dworkin[134] and later found unconstitutional for vagueness,[135] which defined all pornography as violent pornography:

> Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) Women are presented as sexual objects who experience sexual pleasure in being raped; or (3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) Women are presented being penetrated by objects or animals; or (5) Women are presented in scenarios of degradation, injury, abusement, torture,

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2002, "in the sexual cornucopia of the internet," while Extreme Associates offers "pretty rough stuff," theirs "is just another website." *Id.*

[130] Boyce, *supra* note 4, at 368 (concluding that the community standards approach to exempting obscenity from constitutional protection "cannot be justified or salvaged and should be scrapped").

[131] Andrew Koppelman, *Does Obscenity Cause Moral Harm?* 105 COLUM. L. REV. 1635, 1655 (2005).

[132] *Id.*

[133] INDIANAPOLIS, IND., CODE ch. 16, § 16-1 (1984).

[134] *See* ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS 31–36 (1988).

[135] Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1337–1341 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

> shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; and (6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display. The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.[136]

Such an ordinance was unconstitutional for vagueness because "[p]ersons subjected to this Ordinance cannot reasonably steer between lawful and unlawful conduct, with confidence that they know what its terms prohibit."[137] The phrase of particular concern to the court was "subordination of women," an element essential to the definition of pornography in the ordinance.[138]

a. Violent Pornography Objectifies Women

Both the production and possession of violent pornography require the objectification of the women involved and women generally.[139]

> The first and most important way pornographers get men to buy into [extreme pornography] is by depicting and describing women as [] objects who are deserving of sexual use and abuse. It is especially important for the pornographers to shred the humanity of the women in the images. . . . To erode any empathy that many men may have for the women in porn—an emotion that would most likely end up derailing the porn experience as they might feel sorry for her—the porn needs to construct porn

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[136] INDIANAPOLIS, IND., CODE ch. 16, § 16-3(q) (1984), *cited in* Am. Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1320 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (emphasis added).

[137] *Am. Booksellers Ass'n*, 598 F. Supp. at 1339.

[138] *Id.* at 1338.

[139] *See* GAIL DINES, PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY 1065 of 2777 (Beacon Press, Kindle Edition, 2010).

> women in ways that clearly demarcate them from the women men know and love.[140]

b. Violent Pornography Subjugates Women to Men

A recent essay[141] "combines quantitative studies with qualitative analyses" to summarize the "main propaganda messages of pornographic films"[142]:

> 1. All women always want sex from men;
>
> 2. Women like all the sexual acts that men perform or demand, and
>
> 3. Any woman who does not at first realize this can be persuaded by force. Such force is rarely necessary, however, for most of the women in pornography are the 'nymphomaniacs' of men's fantasies. Women are the sexual objects whose job it is to fulfill male desire.[143]

Depictions of "persua[sion] by force"[144] are depictions of violent pornography, where a person, usually a woman, is raped, coerced, or otherwise forced to have sex against her will.

2. Criminal Law Critique

a. Violent Pornography May Involve Real Violence[145]

In the legal guide prepared by the Crown Prosecution Service, they stated that "the extreme pornography offence" was meant to "strengthen controls on extreme pornographic material" because there was both "a desire to protect those who participate in the creation of sexual material containing violence, cruelty or degradation, who may be the victim of crime in the making of the material, whether or not they

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[140] GAIL DINES, PORNLAND, *supra* note 139.

[141] Robert Jensen, *Stories of a Rape Culture: Pornography as Propaganda*, *in* BIG PORN INC: EXPOSING THE HARMS OF THE GLOBAL PORNOGRAPHY INDUSTRY 25, 30 (Melinda Tankard Reist & Abigail Bray eds., 2011).

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Frontline: American Porn*, *supra* note 97.

notionally or genuinely consent to take part" and "a desire to protect society, particularly children, from exposure to such material, to which access can no longer be reliably controlled through legislation dealing with publication and distribution, and which may encourage interest in violent or aberrant sexual activity."[146]

b. Pornography and the Brain

In recent jurisprudence, whether using pornography is harmful to an isolated individual alone with the internet or with a book or with a film is not a question for the Court, which refuses to adjudicate on the "moral content of a person's thoughts."[147] In *Stanley v. Georgia*,[148] the Supreme Court found that the interest of the state in "protect[ing] the individual's mind from the effects of obscenity"[149] through legislation was tantamount to legislating the "moral content"[150] of that individual's mind.[151] Such an inferential leap, however, may be unjustified in light of modern neurology, which evaluates the effects of obscenity on the brain, because the "effects of obscenity" are not relegated only to a consideration of morality.[152] Rather, there is a real threat[153] to a person who experiences stimuli of violence and pornography simultaneously[154] because neural connections are reinforced[155] when the pleasure centers of the brain produce dopamine.[156] The neural connections formed[157] and reinforced[158] as a result of viewing violent pornography become similar

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[146] Crown Prosecution Service, *Extreme Pornography*, PROSECUTION POLICY AND GUIDANCE: LEGAL GUIDANCE, http://www.cps.gov.uk/legal/d_to_g/extreme_pornography/.
[147] *Stanley*, 394 U.S. at 565.
[148] *Id.* at 557.
[149] *Id.* at 565.
[150] *Id.*
[151] *Id.*
[152] *See* Pamela Paul, *From Pornography to Porno to Porn: How Porn Became the Norm*, *in* THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS 305, 50239 of 6139 (Witherspoon Institute, Kindle Edition, 2010).
[153] *See* NORMAN DOIDGE, THE BRAIN THAT CHANGES ITSELF 105(New York Viking, 2007); *see also* MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS, THE WITHERSPOON INSTITUTE 23–40 (2010).
[154] *Id.* at 54.
[155] *Id.* at 122.
[156] DOIDGE, THE BRAIN THAT CHANGES ITSELF, at 106–07.
[157] *Id.* at 108.
[158] *Id.* at 109.

to the "maps" formed when individuals use drugs like cocaine.[159] This can lead to troubling consequences. For example, one person was asked by his partner to strike her during sex and he found he enjoyed the violence and sex together; this thought concerned the man and was one of the reasons he sought a physician's help.[160] "One of his most tormenting symptoms was the almost perfect fusion in his mind of sex with aggression. He felt that to love someone was to consume her, to eat her alive, and that to be loved was to be eaten alive. And his feeling that sexual intercourse was a violent act upset him greatly, yet excited him. Thoughts of sexual intercourse immediately led to thoughts of violence, and thoughts of violence, to sex. When he was effective sexually, he *felt* dangerous. It was as though he lacked separate brain maps for sexual and violent feelings."[161] Similar results have been observed as a result of exposure to violent pornography.[162]

II. PROHIBITING POSSESSION OF VIOLENT PORNOGRAPHY

Violent pornography is probably already unprotected speech and, therefore, subject to statutory prohibitions as obscenity. However, the major constitutional barrier to a prohibition on possession of violent pornography is the content-based restriction it requires, which must be analyzed by the Courts under strict scrutiny[163] and, therefore, rarely pass constitutional muster. For a restriction on violent pornography to be a constitutional restriction, the content must fall within one of the special exceptions permitting content-based speech discrimination.[164]

A. Constitutional Analysis: Violent Pornography is Probably Already Unprotected Speech under Miller

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[159] *See id.* at 112–15; *see also Porn is Like a Drug*, FIGHT THE NEW DRUG, http://www.fightthenewdrug.org/get-the-facts#brain/porn-is-like-a-drug (last visited April 1, 2014).
[160] BRAIN THAT CHANGES ITSELF, *supra* note 153, at 93–94.
[161] *Id.* at 122.
[162] *See e.g.*, Melinda Tankard Reist & Abigail Bray, *Introduction: Unmasking a Global Industry*, *in* BIG PORN INC: EXPOSING THE HARMS OF THE GLOBAL PORNOGRAPHY INDUSTRY xv–xvii (Melinda Tankard Reist & Abigail Bray eds., 2011)
[163] *See, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 811–13 (2000).
[164] 16B C.J.S. CONSTITUTIONAL LAW § 827.

A recent online article from an official blog of a well-known American publisher remarked concerning the recent speech by David Cameron[165] on prohibiting possession of extreme pornography. The writer opines, "On the plus side, 'extreme' pornography which involves violent scenes or simulated rape, is going to be outlawed [in the UK] . . . although *that one kind of seems like a no brainer*."[166]

Under *Miller v. California*, material is obscene if 1) the average person, applying contemporary community standards, would find that the material taken as a whole appeals to the prurient interest; 2) the average person, applying contemporary community standards, would find that the material depicts or describes sexual conduct in a patently offensive way; and 3) a reasonable person would find, taking the material as a whole, that is lacks serious literary, artistic, political or scientific value.[167] All three elements of the test must be met for the material to be obscene.[168]

Here, we will consider the following content reported by Rape Crisis South London, which was used to appeal to the Prime Minister Cameron:

> In our own research into the freely available content on 'rape porn' websites, we found many of the videos' themes to be endorsing and promoting various criminal acts including kidnapping [and] additional physical violence. . . . These images are explicitly defining themselves as being rape, non-consensual or forced sex. Our research found video descriptions like 'young schoolgirls abducted and cruelly raped. Hear her screams.'; 'little schoolgirl raped by teacher' and 'little girls cruelly raped at home'; 'tiny girl sleep rape' and 'girl raped at gunpoint'. The websites hosting the content included words like brutal rape, real rape, savage rape,

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[165] *See* Cameron, *supra* note 8.

[166] Scott Christian, *Today in Bro: Tumblr Porn is Back, While British Porn Is On the Ropes*, GQ: THE Q (July 22, 2013, 2:58 PM), http://www.gq.com/blogs/the-feed/2013/07/today-in-bro-tumblr-porn-is-back-british-porn-is-out.html (emphasis added).

[167] *Miller*, 413 U.S. at 24.

[168] *Id.* at 24–25.

> only rape, in their web address[es] . . . The viewers of these sites are encouraged to believe these images are real, that they are watching 'real rape'. The loophole in legislation means that alongside images of rape, simulations of incest and child sexual abuse are freely, legally accessible in England and Wales as long as all participants in the image can be identified through digital imaging as being 18 or over, regardless of young appearance or contextual factors. Watching randomly selected videos on each site, we discovered there were two forms of 'rape' video; one where realistic violence or drugging was used to force sex, and the other of staged "positive-outcome rape" scenarios, both of which we believe to be sending out profoundly damaging messages.[169]

For indictment before a federal grand jury of the United States under 18 U.S.C. § 1460, which prohibits the production, distribution, or possession with intent to distribute any obscene material,[170] a determination must be made whether under contemporary standards, the average person would find that violent pornography that depicts the rape of young girls, who are not in fact minors, appeals to the prurient interest, that is, "material having a tendency to excite lustful thoughts"[171] or "a shameful or morbid interest, in nudity, sex or excretion."[172]

Under the first prong of *Miller*, the finder of fact would probably find that the average person would consider the depiction of graphic rape of a young girl, which includes video of actual sexual penetration made to look forced or video of actual sexual penetration made to look forced but staged as a "positive-outcome rape"[173] scenario, taken as a whole, as appealing to (1) pedophiles—a "specially susceptible audience"[174]— in order to excite lustful thoughts, or (2) adults who

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[169] Campaign Briefing, *supra* note 14.
[170] 18 U.S.C. § 1465 (2006).
[171] *Roth*, 354 U.S. at 488 n.20.
[172] MODEL PENAL CODE § 251.4.
[173] Campaign Briefing, *supra* note 14.
[174] MODEL PENAL CODE § 251.4.

recognize the actresses are not minors but who are excited by sexual domination and penetration regardless of scenario, or (3) any group with a shameful or morbid interest in the rape of young girls.[175]

Under the second prong of *Miller*, the finder of fact would probably find that the average person, applying contemporary community standards, would think that graphic depictions of rape, taken as a whole, and which are advertised as such, are patently offensive because rape is illegal, has historically been a tool of oppression and violence against women,[176] and many women have been raped or are likely to be victims rape today.[177]

Under the third prong of *Miller*, the finder of fact would probably find that a reasonable person would consider viewing depictions young girls being raped, which contain actual sexual penetration, taken as a whole, to lack serious literary, artistic, political or scientific value because such depictions reinforce dangerous distortions of sex—for example, that rape is enjoyed or consent is unimportant, which viewing may be coupled with a sexual response by the viewer, that is, through masturbation.[178] Such depictions have no artistic value because their purpose is solely for sexual arousal and gratification. They do nothing to support a political cause since there are no pro-rape/anti-consent caucuses that attempt to garner political support for the such interests. Furthermore, any scientific value in studying the effects of such viewings would necessitate the furtherance of a potential harm against the view in order to gather reliable data.

Therefore, violent pornography, which depicts acts of violence, rape, or aggression, combined with graphic depictions of sexual penetration would be probably found obscene under the *Miller* test and, therefore, subject to the statutory provisions under 18 U.S.C. § 1460,

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[175] *Id.*

[176] *See, e.g.*, STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 8743–8874 of 21809 (Viking, Kindle Edition, 2011).

[177] *See* Diane L. Rosenfeld, *Who Are You Calling a 'Ho'?: Challenging the Porn Culture on Campus*, *in* BIG PORN INC: EXPOSING THE HARMS OF THE GLOBAL PORNOGRAPHY INDUSTRY 41, 43 (Melinda Tankard Reist & Abigail Bray eds., 2011) ("Government studies in the United States estimate that 1-in-4 or 1-in-5 women will be sexually assaulted during her time in college").

[178] *See* Mary Ann Layden, *Pornography and Violence: A New Look at the Research*, *in* THE SOCIAL COSTS OF PORNOGRAPHY: A COLLECTION OF PAPERS 1355, 1357–1396 of 6139 (Witherspoon Institute, Kindle Edition, 2010).

which prohibits the production, distribution, or possession with intent to distribute any obscene material.[179]

However, the federal statutory provision prohibiting the production, distribution, or possession with intent to distribute obscene material,[180] and corresponding state statutes, do not appear to have been passed for the purpose of reaching "mere possession"[181] of obscenity.[182] Therefore, for a prohibition on the possession of violent pornography, another standard must apply. Such a prohibition must be upheld through an exception to the traditional *Miller* standard, as in *New York v. Ferber*,[183] where the Court held that child pornography is unprotected by the First Amendment,[184] even though "the test for child pornography is separate from the obscenity standard enunciated in *Miller*."[185]

B. Even if Violent Pornography Failed Under Miller, *It is Unprotected Speech under* New York v. Ferber *as Analogous to Child Pornography*

In *New York v. Ferber*,[186] the Supreme Court held child pornography to be unprotected speech under the First Amendment because 1) the State had a compelling interest in protecting minors from victimization of child pornography,[187] 2) child pornography is "intrinsically related" to the sexual abuse of children,[188] 3) the availability of child pornography provides an "economic motive" for "conduct in violation of a valid criminal statute,"[189] 4) the "value" of permitting the conduct prohibited by statute "is exceedingly modest, if not *de minimis*,"[190] 5) the content of the speech, "as an evil to be

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[179] 18 U.S.C. § 1465 (2006).
[180] *See* 18 U.S.C. §§ 1460–65 (2006).
[181] *Stanley*, 394 U.S. at 568.
[182] Such overt legislative intent would presumably violate the rule laid down in *Stanley v. Georgia*, 394 U.S. 557 (1969).
[183] Ferber, 458 U.S. 747.
[184] *Id.* at 764.
[185] *Id.*
[186] *Id.* at 747.
[187] *See* Ferber, 458 U.S. 756–58.
[188] *See id.* at 759–61.
[189] *See id.* at 761–62.
[190] *See id.* at 762–63.

restricted . . . outweighs the expressive interests,"[191] and 6) restrictions on child pornography are not unconstitutionally overbroad because the "legitimate reach" of the statute "dwarfs its arguably impermissible applications."[192]

Violent pornography is analogous child pornography insofar as the nation and the states have a compelling interest in "maintain[ing] a decent society,"[193] which includes protecting children and unsuspecting adults from exposure violent pornography possessed by another but advertised in a public forum like the internet, as well as the victims who have been made to be part of the production of violent pornography,[194] which includes victims of sex trafficking, forced prostitution, and domestic sexual abuse.

There is an intrinsic relationship between viewing violent pornography and sexual assault because 1) there is a strong correlation between viewing violent pornography and a subsequent sexual assault by the viewer[195] and 2) violent pornographic material is admissible in trial as evidence of a perpetrator's state of mind and relevant to crimes of sexual assault.[196]

The availability of violent pornography provides an economic motive for conduct in violation of a valid criminal statute because its production may be accomplished through adult-victim pornography, where the perpetrators commit crimes against others, videotape the acts, and sell the pornography in sex shops. For example, in 2012, two Miami men were convicted on sex trafficking charges for drugging women,

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[191] *See id.* at 763–64.

[192] *See id.* at 772–73.

[193] *Jacobellis*, 378 U.S. at 199.

[194] *See generally* MARY EBERSTADT & MARY ANNE LAYDEN, THE SOCIAL COSTS OF PORNOGRAPHY: A STATEMENT OF FINDINGS AND RECOMMENDATIONS, THE WITHERSPOON INSTITUTE 23–40 (2010); *see also* William K. Layman, *Violent Pornography and the Obscenity Doctrine: The Road Not Taken*, 75 GEO. L.J. 1475, 1488 (1987)

[195] *See* U.S. DEP'T OF JUST., 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 39–41 (1986); *see generally* EDWARD DONNERSTEIN, DANIEL LINZ, & STEVEN PENROD, THE QUESTION OF PORNOGRAPHY 86–107 (1987).

[196] *See, e.g.*, State v. McCormick, 37 Kan. App. 2d 828, 843 (2007) (videotapes showing bondage and gagging were admissible to show defendant's intent); State v. Caes, No. 17917, 2001 WL 227356 (Ohio Ct. App. Mar. 9, 2001) (photographs depicting women held in sexual bondage, nude and bound, were admissible to show intent and plan where the defendant was charged with kidnapping and rape similar to violent pornographic depictions).

raping them, videotaping the acts, and selling the pornography on the internet, to pornography stores, and to other businesses across the country.[197] This example highlights the problem with distinguishing violent pornography produced by actors and actresses with violent pornography produced by criminal acts.

CONCLUSION: MODEL STATUTE

Like the Scotland Act of 2010, a statute prohibiting the possession of violent and pornographic material must unambiguously define "violent" and "pornographic." The definition of pornography under the Scotland Act and the definition of prurience in U.S. jurisprudence are similar enough that the term "pornographic" could be introduced into a statute prohibiting the possession of violent pornography because it comports with traditional definitions of obscenity but would be more clearly defined, thus avoiding some of the traditional problems associated with regulating obscenity.

The term violent needs to be clearly circumscribed. The content especially difficult to define is that which contains words that indicate consent but clash with violent scenarios or acts. Violent pornography would be defined like "extreme pornography" in the Scotland Act, as pornography that depicts "in an explicit and realistic way any of the following—(a) an act which takes or threatens a person's life, (b) an act which results, or is likely to result, in a person's severe injury, (c) rape or other non-consensual penetrative sexual activity, (d) sexual activity involving (directly or indirectly) a human corpse, (e) an act which involves sexual activity between a person and an animal (or the carcass of an animal).

By clearly defining the material to be prohibited, a statute would not be found unconstitutional for overbreadth or vagueness. By defining pornography so it is the same as prurient interest in U.S. jurisprudence, any difficulty with introducing that term into a statute is avoided;

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[197] *Two Men Sentenced to Multiple Life Sentences for Enticing Women to South Florida to Engage in Commercial Sex Acts and Distributing Date Rape Pills*, Press Release, U.S. ATT'Y GEN. OFF. S. DIST. FLA. (Feb. 17, http://www.justice.gov/usao/fls/PressReleases/2012/120217-03.html.

likewise, the need to include in a definition of violent pornography the difficult term "obscene" is thereby obviated.