EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT PORNOGRAPHER LIABILITY (BUT WERE AFRAID TO ASK)

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I. INTRODUCTION

On March 7, 1995, a hardworking man named Bill Savage was shot dead in Mississippi.[1] This humble cotton gin manager was the victim of an apparently random murder.[2] A killing so random, in fact, that three months went by without a clue as to the culprit's identity, until an informant told police that another seemingly random shooting of a convenience store clerk in Ponchatoula, Louisiana, had a connection to the Savage murder.[3] The culprits were two teenage runaways from Muskogee, Oklahoma.[4] One half of the duo, Sarah Edmondson, is from a prominent Oklahoma political family.[5] The other half, Ben Darras, is a high school dropout.[6] After dropping seventeen

1. Jonathan Freedland, *Is Oliver Stone Responsible for the Consequences of this Film? Writer John Grisham Thinks So. Now the Maker of Natural Born Killers is Being Sued. But is a Film Subject to US Product-Liability Laws?*, THE GUARDIAN, June 19, 1996, at T12.

2. *Id.*

3. *Id.*

4. *Id.*

5. Members of her family include the current Oklahoma Attorney General, a former senator, and governor. Her father is a judge. *Id.*

6. *Id.*

tabs of LSD and repeatedly watching *Natural Born Killers*,[7] the two went on a spree of violence.[8]

It seems the duo set off on a disturbing imitation of the brutal events depicted in Oliver Stone's film, *Natural Born Killers*.[9] After Darras killed Bill Savage in Mississippi, the two moved on to Louisiana, where Darras drove Edmondson to stage an armed robbery at a convenience store, leaving clerk Patsy Byers a quadriplegic.[10]

Attorney and best-selling author John Grisham urged that lawsuits should be filed against the film's director, Oliver Stone, based upon products liability principles.[11] Bill Savage was a friend of Grisham.[12] Grisham wants Stone and his studio to share responsibility for the killing along with Edmondson and Darras.[13]

Just as Grisham suggests basing the imposition of liability on filmmakers for copycat violence in tort,[14] the same underlying legal principles can be applied to pornographers for third party injuries caused by sexually explicit

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7. NATURAL BORN KILLERS (Warner Bros. 1994). *Natural Born Killers* is the story of Mickey and Mallory, two young lovers played by Woody Harrelson and Juliette Lewis, who kill 52 people at random. Freedland, *supra* note 1, at T12.

8. Edmondson's father said that the teenagers had probably watched the film approximately two dozen times. In fact, he told *Vanity Fair* in an interview, "On one occasion, they watched it six times in one night, over and over, doing drugs." Freedland, *supra* note 1, at T12.

9. *Id.*

10. Edmondson said that Darras talked about taking over a farmhouse, killing its occupants, and then moving on—just like Mickey and Mallory did in *Natural Born Killers*. After killing Savage, Darras said he felt powerful and without remorse—just like Mickey. Darras also told Edmondson, "We're partners. . . . It's your turn." Edmondson further stated that when she shot Byers, she saw Byers as a demon, not a person—just like the demons Mickey and Mallory saw. *Id.*

11. Elizabeth Gleick, *A Time to Sue*, TIME, June 17, 1996, at 90, 90. Patsy Byers has retained an attorney, Joseph Simpson, and has filed suit against Oliver Stone and Warner Bros. for civil damages. *Id.* Byers' petition asserts that Stone, Warner Bros., Time Warner, and other co-defendants "knew or should have known that 'Killers' would cause and inspire people such as the defendants to commit crimes." *Grisham firmly backs $20M Suit vs. Oliver Stone*, BOSTON HERALD, July 10, 1996, at 17. Byers is suing for $20 million based on a negligence cause of action. *Id.* At the time of writing, the Byers' case is still pending.

12. Freedland, *supra* note 1, at T12.

13. *Id.* In fact, Jane Hamsher, one of the producers of *Natural Born Killers*, admitted that Warner Bros. has already relinquished its rights to distribute the more graphic "director's cut" video version of the film. Gleick, *supra* note 11, at 90.

14. Grisham proposes this new standard for tort liability:

> Think of a film as a product. Something created and brought to market, not too dissimilar from breast implants. Though the law has yet to declare movies to be products, it is only one small step away. If something goes wrong with a product, whether by design or defect, and injury ensues, then its makers are held responsible . . . .

Terry Glover, PLAYBOY, Nov. 1, 1996, at 43, 43.

materials. According to recent studies, pornographic materials cause measurable harm to women in both violent and nonviolent forms.[15] Holding pornographers liable for violent acts caused by persons viewing their material is similar to imposing liability on filmmakers and television broadcasters for violent copycat acts[16] caused by people watching the film or broadcast. Both raise serious First Amendment concerns that must be addressed.[17] In addition, both face the problem of establishing a sufficient causal nexus between the film or material and the offense that is later committed.[18]

This Note first examines the attempts that have been made to draft legislation to hold the producers and distributors of pornographic materials liable for third party injuries. Next, this Note addresses the two types of causation that must be proven in order to establish a sufficient link between causation and harm to hold pornographers liable for the violent effects of their material. Because pornography involves speech, this Note then discusses how courts have overcome the First Amendment obstacle in order to regulate sexually explicit material. It then concludes with a discussion of the proposed application of traditional tort principles to impose liability on the producers and distributors of pornographic material for injuries directly caused by these materials.

II. A HISTORICAL OVERVIEW OF ANTI-PORNOGRAPHY LEGISLATION

A. *The MacKinnon-Dworkin Model Anti-Pornography Law*

The idea behind imposing liability on pornographers whose materials cause injury to a third party initially was introduced by Catharine

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15. *See* Catharine A. MacKinnon, Commentary, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 52-53 nn.116-17 (1985) (citing many experimental studies).

16. There have been similar "copycat" cases in Utah and Georgia, with the murderers naming *Natural Born Killers* as their guide. Freedland, *supra* note 1, at T12. Another such copycat case took place in November 1995. Margaret Carlson, *The Real Money Train*, TIME, Dec. 11, 1995, at 93, 93. Two men sprayed a flammable liquid through the opening of a New York City subway-token booth and lit a match, setting clerk Harry Kaufman on fire. *Id.* This event mimicked a scene of *Money Train*, a film that had been released just before the crime occurred. *Id.*

17. *See* U.S. CONST. amend. I.

18. *See* discussion *infra* Part III.

MacKinnon[19] and Andrea Dworkin[20] in 1983.[21] Prompted by the concerns of a Minneapolis neighborhood committee, MacKinnon and Dworkin agreed to develop a civil rights solution to the pornography problem for proposal to the Minneapolis City Council.[22] According to MacKinnon and Dworkin, pornography is defined as "sex discrimination, a violation of women's civil rights."[23] The goal of the ordinance is "to hold accountable, to those who are injured, those who profit from and benefit from that injury."[24]

After conducting hearings concerning the harmful effects of pornography, the Minneapolis anti-pornography ordinance was approved twice by the city council.[25] The ordinance was vetoed twice by the mayor, who claimed that it violated the First Amendment.[26] The Minneapolis City Council did not override the mayor's second veto.[27]

Despite the ordinance's lack of success in Minneapolis, the Indianapolis City County Council adopted an ordinance[28] drafted by Catharine

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19. Catharine A. MacKinnon is a Professor of Law at the University of Michigan Law School. Her books include ONLY WORDS (1993), TOWARD A FEMINIST THEORY OF THE STATE (1989), and FEMINISM UNMODIFIED: DISCLOSURES ON LIFE AND LAW (1987). *See* Elizabeth Kirby Fuller, Note, *Holding Producers and Distributors Liable for the Harms of Sexually Violent Pornography Through Tort Law*, 5 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 125 n.3 (1994) (discussing MacKinnon).

20. Andrea Dworkin is a well-known theorist, novelist, and feminist activist. Her books include WOMAN HATING (1984), RIGHT-WING WOMEN (1983), and PORNOGRAPHY: MEN POSSESSING WOMEN (1981). Fuller, *supra* note 19, at 125 n.3.

21. Patricia G. Barnes, *A Pragmatic Compromise in the Pornography Debate*, 1 TEMP. POL. & CIV. RTS. L. REV. 117, 123 (1992) (citing Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 615 (1987)). In 1983, MacKinnon and Dworkin taught a course at the University of Minnesota Law School on pornography. *Id.* at 123 n.42. They drafted a complaint on behalf of Linda Marchiano—an actress who claimed she was forced to perform the leading role in a pornographic film—relying on their theory that pornography was a civil rights violation. *Id.*

22. *Id.* at 123.

23. MacKinnon, *supra* note 15, at 22. *See generally* Fuller, *supra* note 19 (discussing MacKinnon and Dworkin's views on the harms of pornography).

24. MacKinnon, *supra* note 15, at 22.

25. Barnes, *supra* note 21, at 124 (citing DONALD A. DOWNS, THE NEW POLITICS OF PORNOGRAPHY 61-65 (1989)). One Native American witness testified about being gang-raped as part of a reenactment of a videogame. MacKinnon, *supra* note 15, at 43. The witness testified that several men held her down while one man held a knife to her throat and said: "Do you want to play Custer's Last Stand? . . . You like a little pain, don't you, squaw? . . . Maybe we will tie you to a tree and start a fire around you." *Id.* at 44.

26. Barnes, *supra* note 21, at 124.

27. *Id.*

28. The Indianapolis ordinance is similar to the MacKinnon-Dworkin model ordinance. *Id.*; *see* Indianapolis-Marion County City Council General Ordinance No. 24, § 16-3(q) (Apr. 23, 1984) [hereinafter Indianapolis Ordinance].

MacKinnon in April of 1984.[29] Pornography is defined in the ordinance as:

> [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, 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.[30]

Another section of this ordinance allowed the victim of an "assault, physical attack, or injury . . . that is directly caused by specific pornography" to file a complaint against the "maker(s), seller(s), exhibitor(s) or distributor(s)" of the pornography.[31]

Just minutes after the Indianapolis Ordinance became law, a lawsuit was filed by the American Booksellers Association and other civil libertarian groups, challenging the ordinance as a violation of the First Amendment.[32]

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29. Elise M. Whitaker, Note, *Pornographer Liability for Physical Harms Caused by Obscenity and Child Pornography: A Tort Analysis*, 27 GA. L. REV. 849, 851 (1993) (citing Valerie J. Hamm, Note, *The Civil Rights Pornography Ordinances—An Examination Under the First Amendment*, 73 KY. L.J. 1081, 1082 n.7 (1985)).

30. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316, 1320 (S.D. Ind. 1984) (quoting Indianapolis Ordinance § 16-3(q)), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

31. *Id.* at 1323-24 (quoting Indianapolis Ordinance § 16-17).

32. Specifically, the American Booksellers Association (Booksellers) contended that the Ordinance is overly broad—that it "severely restricts the availability, display and distribution of constitutionally protected, non-obscene materials, in violation of the First and Fourteenth Amendments." *Id.* at 1327. Booksellers also argued that the Ordinance violates "established Supreme Court precedents which preclude the banning of speech simply because its contents may be socially or politically offensive to the majority." *Id.* at 1328. Booksellers argued next that the Ordinance is unconstitutionally vague, in violation of the Fifth and Fourteenth Amendments. *Id.* Also, Booksellers alleged that "the encroachment of the Ordi-

The United States District Court found that the Ordinance did in fact violate the United States Constitution by its regulation of speech protected under the First Amendment.[33] By "defining and outlawing 'pornography' as the graphically depicted subordination of women," which is also characterized as "sex discrimination," the City-County Council sought to suppress speech.[34] The court further held that "although the State has a recognized interest in prohibiting sex discrimination, that interest does not outweigh the constitutionally protected interest of free speech."[35]

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court.[36] The Seventh Circuit primarily based its decision on the definition of pornography.[37] This definition under the Ordinance did not meet the definition of obscenity as set forth in the United States Supreme Court case of *Miller v. California*.[38] It is possible that the Seventh Circuit may have found the Ordinance constitutional if the definition of pornography had attempted to proscribe only unprotected speech, such as obscenity as defined in *Miller*.[39] But the court did state that the section of the Ordinance that creates remedies in tort against pornographers

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nance into areas of protected expression has an unconstitutionally 'chilling effect' on the exercise by [Booksellers] of their rights to free speech under the First Amendment." *Id.* Another argument raised by the Booksellers was that,

> by providing for 'cease and desist' orders to enforce its proscriptions, constitutes a prior restraint which impermissibly allows a governmental board to act as censor in determining what is and is not protected material under the First Amendment, and to control what materials may be written, distributed, sold, viewed or read in Indianapolis.

Id. Finally, Booksellers argued that the "Ordinance interferes with the free flow of constitutionally protected books, periodicals, motion pictures, and television programs across state lines, in violation of the Commerce Clause" of Article I, section 8 of the United States Constitution. *Id.*

33. *Id.* at 1341.

34. *Id.* at 1342.

35. *Id.*

36. American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 334 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

37. *Id.* at 332.

38. Miller v. California, 413 U.S. 15, 24 (1973). "To be 'obscene' under *Miller v. California*, 'a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value.'" *Id.* at 324 (quoting Miller v. California, 413 U.S. at 24). The Seventh Circuit went on to note that "[t]he Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value." *Id.* at 324-25. Thus, the definition in the Ordinance includes materials that would not be considered obscene under *Miller*. *See* Barnes, *supra* note 21, at 125.

39. Fuller, *supra* note 19, at 142.

for actual injuries caused by pornography was "salvageable in principle."[40] The Seventh Circuit went on to explain that the remedy must be "very closely confined" to be held constitutional.[41] Perhaps if the Ordinance would have focused more on a cause of action based on tort principles against pornographers, instead of focusing on pornography as speech, the court may have held that the right to civil redress was more important than the First Amendment concerns.[42]

B. *Pornography Victims Compensation Acts*

In response to decisions like *Olivia N. v. NBC*[43] and *American Booksellers*,[44] there have recently been numerous legislative efforts aimed at remedying the outcome of these cases. The first federal undertaking was the Pornography Victim Compensation Act (PVCA)[45] which was initially introduced in 1991.[46] The Pornography Victims Compensation Act of 1992

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40. American Booksellers Ass'n v. Hudnut, 771 F.2d at 333.

41. *Id.*

42. "The First Amendment does not prohibit redress of all injuries caused by speech." *Id.* at 333; *see also* Barnes, *supra* note 21, at 127-28.

43. Olivia N. v. NBC, 178 Cal. Rptr. 888 (1981), *cert. denied sub nom.* Niemi v. NBC, 458 U.S. 1108 (1982). *Olivia N.* involved an action brought by a nine year old female against broadcasting companies for injuries allegedly inflicted by an "artificial rape" with a bottle. *Id.* at 891. She maintained that her attackers had viewed and discussed a television film that portrayed a young girl being sexually assaulted with the handle of a plunger. *Id.* She further contended that the viewing of this film caused her attackers to decide to commit a similar act on her. *Id.* The court held that liability could not attach without proof that the film constitutes an "incitement" within the meaning of *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). Olivia N. v. NBC, 178 Cal. Rptr. at 892-93. According to the court, this television film was "not directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 893 (quoting Brandenburg v. Ohio, 395 U.S. at 447. Otherwise, if liability were to be imposed in this case, the effect would be to reduce all United States viewers to watching only what is fit for children. Olivia N. v. NBC, 178 Cal. Rptr. at 893.

44. American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986).

45. Pornography Victim Compensation Act, S. 1521, 102d Cong. (1992).

46. The Pornography Victim Compensation Act (PVCA) was introduced in 1991 in the 101st Congress by Senator Mitch McConnell as Subtitle C to S. 472, and it established third-party liability for sexually explicit, violent materials. Morrison Torrey, *The Resurrection of the Anti-Pornography Ordinance*, 2 TEX. J. WOMEN & L. 113, 116 n.17 (1993). It was later reintroduced in the 102d Congress as S. 983, and expanded liability to include just sexually explicit materials. Jane M. Whicher, Feature, *Constitutional and Policy Implications of "Pornography Victim" Compensation Schemes: A Look at the Potential Impact of Statutorily-Created Third Party Liability Schemes*, 40 FED. B. NEWS & J. 360, 362 n.33 (1993). But the day before the Judiciary Committee hearings on S. 983 were to begin, Senator McConnell introduced the final version, S. 1521, 102d Cong. (1992), which limited liability to only obscene materials or child pornography. *Id.* The Women's Equal Opportunity Act of 1991 contained the House version. *See* H.R. 1149, 102d Cong., §§ 221-25 (1991); *see also* Torrey,

created a tort action that could be brought by victims of sex offenses against "producers, exhibitors, distributors, renters, and sellers of obscene material or child pornography."[47] For a plaintiff to prevail under the PVCA, he or she must prove by a preponderance of the evidence that:

> (1) the victim was a victim of a sex offense for which the sex offender was convicted;
> (2) exposure of the offender to obscene material or child pornography was a substantial cause of the offense;
> (3) in the case of obscene material, the defendant produced, distributed, exhibited, rented, or sold the material to the offender after the date the law is enacted or, in the case of child pornography, the defendant produced, distributed, exhibited, rented or sold the material to the offender after May 21, 1984;
> (4) the defendant was convicted of a criminal obscenity or child pornography law violation for the material that is alleged to have been a substantial cause of the sex offense;
> (5) in the case of obscene material, (a) the material is obscene beyond a reasonable doubt, (b) the defendant reasonably should have foreseen that exposure of a person to the obscene material . . . would be a substantial cause of the commission of a sex offense, and (c) the obscene material was of such a nature as to incite the criminal sexual behavior of the sex offender; and
> (6) the material at issue affects interstate or foreign commerce.[48]

The offender must be found guilty of a criminal sex offense, and then the pornographer must be found guilty under obscenity or child pornography laws.[49] Therefore, the PVCA requires two prior criminal convictions before a victim can bring a civil suit against the pornographer.[50] Although the MacKinnon-Dworkin Model Ordinance and the PVCA are similar in that both are based on the harms caused by pornography and both establish a civil tort remedy to collect damages, there is one major difference that should be noted.[51] The definition of pornography contained in the Model Ordinance is premised upon the suppression of women, whereas, the definition of pornography set forth in the PVCA includes only obscene materials and child

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supra, at 116 n.17. Representative Susan K. Molinari introduced the Act on February 27, 1991. *Id.* The Act became known as the "Bundy Bill" after the statement made by convicted serial killer Ted Bundy on the day before his execution. *Id.* Bundy stated that pornography instigated violent fantasies, which he later acted out. *Id.*

47. Pornography Victim Compensation Act, S. 1521, 102d Cong., § 2(b).
48. *Id.* § 4(c)(1)-(6).
49. *Id.*
50. *Id.*
51. Torrey, *supra* note 46, at 117.

pornography.[52] Because pornography as defined in the PVCA encompasses two categories of material previously denied First Amendment protection by the United States Supreme Court,[53] it may pass a constitutional challenge.[54]

Although the PVCA remains unenacted, the Illinois legislature passed a statute imposing civil liability against pornographers, which became effective on January 1, 1990.[55] Once a criminal conviction against the offender has been obtained,[56] victims of sex crimes can bring a cause of action for damages against pornography manufacturers, producers, or wholesale distributors, whose "obscene"[57] material was possessed or viewed by the offender and caused the offender to commit such an offense.[58] Today, the viability of this statute remains unchallenged, and its limits untested.[59]

C. *Military Honor and Decency Act of 1996*

Congress's latest assault on pornography was the Military Honor and Decency Act of 1996.[60] The Act prohibited stores and post exchanges on military bases from selling or renting sexually explicit material.[61] The Act

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52. *Id.* at 118.

53. *See* New York v. Ferber, 458 U.S. 747, 765 (1982) (upholding a criminal child pornography statute); Miller v. California, 413 U.S. 15, 36 (1973) (holding that obscene material is not protected by the First Amendment, thus it can be subject to criminal sanctions).

54. S. REP. No. 102-372, at 11 (1992). Compare *infra* Part IV discussing the applicability of the First Amendment to proposed pornography compensation statutes.

55. 720 ILL. COMP. STAT. ANN. 5/12-18.1 (West 1993).

56. This statute applies when the offender is convicted of either criminal sexual assault, aggravated criminal sexual assault, criminal sexual abuse, or aggravated criminal sexual abuse. *Id.* at 5/12-18.1(a).

57. Material is "obscene" if:

> (1) the average person, applying contemporary adult community standards, would find that, taken as a whole, it appeals to the prurient interest; and (2) the average person, applying contemporary' adult community standards, would find that it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or stimulated, or masturbation, excretory functions or lewd exhibition of the genitals; and (3) taken as a whole, it lacks serious literary, artistic, political or scientific value.

Id. at 5/11-20(b).

58. *Id.* at 5/12-18.1(a). In order to recover in such an action, the victim of the sex crime must prove by a preponderance of the evidence that the obscene material proximately caused the person convicted of the violation to commit such violation and that the defendant knew or had reason to know that the obscene material was likely to cause such a violation. *Id.*

59. No decisions based on this statute have been reported.

60. 10 U.S.C.A. § 2489a (West 1997). The Act became effective on December 22, 1996. *Id.*

61. *Id.* The Act defines sexually explicit material as an "audio recording, film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a

immediately came under constitutional attack as General Media International, the parent company of *Penthouse* magazine, and other publishing trade groups sought injunctive and declaratory relief from the Act.[62] Indeed, a federal district court judge ruled January 22, 1997 that the Defense Department could not enforce this law primarily because it violated First Amendment free speech protections.[63] Judge Scheindlin did suggest, however, that if Congress wanted to restrict the sale and rental of expressive materials on military property, it could be done in a manner that conforms to the Constitution.[64] "For example, Congress may choose to eliminate the sale and rental of all expressive material or all obscene material."[65] The substance of Judge Scheindlin's statement could be applied to a statute imposing civil liability on pornographers. This statement seems to indicate that such a statute could be constitutional if the material was confined to the legal definition of obscenity as set forth in *Miller*.[66] Furthermore, Congress or an individual state could adopt a statute that defined pornography even more narrowly than material that is legally obscene.[67] For example, a state could define pornography to include only the most violent depictions within a class of material determined to be obscene.[68] Therefore, because a state may ban obscenity entirely, there would be;

> [N]o significant danger of idea or viewpoint discrimination . . . . [A] [s]tate might choose to prohibit only that obscenity which is the most patently

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lascivious way." *Id.* The Act does not, however, restrict the possession of sexually explicit material on military property. General Media Communications, Inc. v. Perry, 952 F. Supp. 1072, 1075 (S.D.N.Y. 1997).

62. John Sullivan, *Judge Says Military Bases Can Sell Sex Material*, N.Y. TIMES, Jan. 23, 1997, at A18. It should be noted that adult magazines account for 20 percent of all magazines sold on military bases. *Penthouse Attacks Military Porn Ban*, U.P.I., Dec. 31, 1996.

63. General Media Communications, Inc. v. Perry, 952 F. Supp. at 1074. Judge Shira A. Scheindlin wrote, "While the majority of Americans may wish to ban pornography, in the final analysis, society is better served by protecting our cherished right to free speech, even at the cost of tolerating speech that is outrageous, offensive and demeaning." *Id.; see also* Sullivan, *supra* note 62, at A18.

64. General Media Communications, Inc. v. Perry, 952 F. Supp. at 1084.

65. *Id.*

66. *See* Miller v. California, 413 U.S. 15, 24 (1973).

67. General Media Communications, Inc. v. Perry, 952 F. Supp. at 1079 n.11 (discussing R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992)). "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." R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992).

68. *See* R.A.V. v. City of St. Paul, 505 U.S. at 388; *see also* Michael Kent Curtis, *"Free Speech" and Its Discontents: The Rebellion Against General Propositions and the Danger of Discretion*, 31 WAKE FOREST L. REV. 419, 440 (1996) (suggesting that a general and ideologically "neutral" statute banning violent obscenity could be written using the definition of obscenity found in *Miller*).

> offensive *in its prurience—i.e.*, that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example, only that obscenity which includes offensive *political* messages.[69]

Thus, this same rationale could be applied in the context of a statute imposing civil liability on producers of pornography (within the definition of obscenity) for the injuries of sex crime victims.

III. THE EFFECTS OF PORNOGRAPHY: IS THERE A SUFFICIENT LINK BETWEEN CAUSATION AND HARM?

In the last two decades much debate has surrounded the question of whether pornographic materials actually harm[70] society.[71] Not only are the harms of pornography at issue, but also the potential benefits or detriments from pornography regulation remain a hot topic.[72] A current example of this

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69. R.A.V. v. City of St. Paul, 505 U.S. at 388 (citation omitted).

70. This part of the Note focuses on physical harm. It should be noted that other harms of pornography have been identified. *See, e.g.*, SUSAN GRIFFIN, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE 83 (1981) (discussing the demeaning nature of pornography); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 136 (1987) (stating that some pornography expropriates the sexuality of women).

71. *See* Marianne Wesson, *Girls Should Bring Lawsuits Everywhere . . . Nothing Will Be Corrupted: Pornography as Speech and Product*, 60 U. CHI. L. REV. 845, 845-46 (1993); Edith L. Pacillo, Note, *Getting a Feminist Foot in the Courtroom Door: Media Liability for Personal Injury Caused by Pornography*, 28 SUFFOLK U. L. REV. 123, 123-24 (1994). Producers of pornography have fought back, insisting that the anti-pornography movement is merely a threat to the First Amendment guarantee of free speech, thereby avoiding the direct question of harm. *Id.* at 848. *See* Martin Karo & Marcia McBrian, Note, *The Lessons of* Miller *and* Hudnut*: On Proposing a Pornography Ordinance that Passes Constitutional Muster*, 23 U. MICH. J.L. REFORM 179, 179 n.4 (1989) (citing many experimental studies supporting a correlation between violent pornography, rape, or aggressive behavior towards women).

72. Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1103 (1993). For a variety of reasons, some feminists oppose a ban on pornography and argue that women's rights would be undermined by censoring pornography. *Id.* at 1140-72. Another reason some feminists disapprove of anti-pornography laws can be drawn from the consequences of an obscenity law that exists in Canada. Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 471 (1996). In 1992, the Canadian Supreme Court incorporated a procensorship feminists' definition of pornography into the obscenity law in *Butler v. The Queen*, 1 S.C.R. 452 (Can. 1992). *See* Strossen, *supra*, at 471 (citations omitted). The court held that "obscenity law would bar sexual materials that are 'degrading' or 'dehumanizing' to women." *Id.* Enforcement of this law has suppressed the writings of women, feminists, lesbians, and gay men. *Id.* at 472. In fact, "within the first two and a half years after the *Butler* decision, approximately two-thirds of all Canadian feminist bookstores had materials confiscated or detained by customs." *Id.* (citation omitted). Therefore, many feminists in the

ongoing controversy exists in the recently released film, *The People vs. Larry Flynt*,[73] which chronicles the creation and rise in popularity of *Hustler* magazine. This film glorifies Flynt as a hero—a defender of the First Amendment right to free speech.[74] However, missing from the film are some of the more violent images in *Hustler*—women being tortured, raped, and beaten.[75]

A. *Governmental Studies of Pornography*

Whether a lawsuit against the creators of pornography is statutorily based or rooted in tort principles, there should be some proof of the link between pornography and violence against persons.[76] Therefore, a brief history of the studies, cases, and other attempts at establishing a causal connection between sexually explicit materials and criminal behavior is appropriate.

In 1970, a Federal Commission on Obscenity and Pornography published its findings and recommendations.[77] The Commission reported that it "cannot conclude that exposure to erotic materials is a factor in the causation of sex crimes or sex delinquency."[78] Instead the Commission recommended continuing inquiry into human sexual behavior.[79]

Following a recommendation made by the 1970 Report, scientists have continued to conduct research on the effects of exposure to pornography.[80] Researchers conducting studies subsequent to the 1970 Report have recognized a major flaw in the 1970 studies: the lack of any investigations into the

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United States worry about restrictions on pornography—instead of achieving equality of men and women, women's viewpoints may be silenced. *Id.*

73. THE PEOPLE VS. LARRY FLYNT (Columbia 1996).

74. Gloria Steinem, *Hollywood Cleans Up Hustler*, N.Y. TIMES, Jan. 7, 1997, at A17.

75. The film leaves out pictures like the one published in January 1983, entitled "Dirty Pool." *Id.* It depicted a woman being gang-raped on a pool table. *Id.* In fact, a few months after publication, a woman was gang-raped on a pool table in New Bedford, Mass. *Id.* In response to the crime, Mr. Flynt published a postcard of a nude woman lying on a pool table. *Id.* The caption read, "Greetings from New Bedford, Mass. The Portuguese Gang-Rape Capital of America." *Id.* Another photo left out of the film is that of a naked woman in handcuffs, who is shaved, raped, and killed by guards in what appears to be a concentration camp. *Id.* Also absent from the film is "Chester the Molester," the cartoon character who stalks girls. *Id.*

76. Whitaker, *supra* note 29, at 849-50.

77. COMMISSION ON OBSCENITY & PORNOGRAPHY, THE REPORT OF THE COMM'N ON OBSCENITY & PORNOGRAPHY (1970) [hereinafter 1970 REPORT].

78. *Id.* at 27.

79. *See* UNITED STATES DEP'T OF JUSTICE, 1 ATTORNEY GENERAL'S COMM'N ON PORNOGRAPHY, FINAL REPORT 905 (1986) [hereinafter 1986 REPORT].

80. *Id.* at 905. There have been significant advancements in statistical techniques since the 1970 Report that have enabled researchers to study whether correlational data may indicate the possibility of causal linkages. *Id.* at 906-07. An increase in the number of research studies can also be attributed to the wider availability of pornographic material. *Id.* at 907.

effects of violent pornography.[81] Therefore, after fifteen years of research, the Attorney General's Commission on Pornography was formed to re-evaluate the effects of pornography in the mid 1980s.[82]

The 1986 Report found that "research . . . shows a causal relationship between exposure to" sexually violent materials[83] "and aggressive behavior towards women."[84] Based on that conclusion, the 1986 Report went on to infer "that substantial exposure to sexually violent materials . . . bears a causal relationship to antisocial acts of sexual violence and . . . possibly to unlawful acts of sexual violence."[85] The 1986 Report points out that:

> [a]lthough it is unclear whether sexually violent material makes a substantially greater causal contribution to sexual violence itself than does material containing violence alone, it appears that increasing the amount of violence after the threshold of connecting sex with violence is more related to increase in the incidence or severity of harmful consequences than is increasing the amount of sex.[86]

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81. *Id.* at 905. A possible explanation for this oversight can be discerned from the distinction between the sexual content of American culture in the early 1970s and today's culture. In the early 1970s, hard-core pornographic material was available only in "adult" bookstores and theatres in America's largest cities. Bruce A. Taylor, *Hard-Core Pornography: A Proposal for a Per Se Rule*, 21 U. MICH. J.L. REFORM 255, 258 (1987). In addition, 25 years ago, the total retail value of hard-core pornography in the United States was no more than $10 million and possibly less than $5 million. Eric Schlosser, *The Business of Pornography*, U.S. NEWS & WORLD REP., Feb. 10, 1997, at 42, 42. Today, violent pornography permeates our society. *Id.* From adult movies on videocassette and cable television to telephone sex services, the sex industry in the United States has boomed. *Id.* at 44. In fact, *Adult Video News*, an industry publication, estimates the number of hard-core video rentals in the United States rose from 75 million in 1985 to an all-time high of 665 million in 1996. *Id.* at 43-44. In 1996, "Americans spent more than $8 billion on hard-core videos, peep shows, live sex acts, adult cable programming, sexual vices, computer porn, and sex magazines." *Id.* at 44. The United States is now the world's leading producer of pornography—with about 150 new video titles being created each week. *Id.* Today, according to Paul Fishbein, editor of *Adult Video News*, finding a hard-core video is easy due to the 25,000 video stores in the United States that rent and sell these films. *Id.* at 45. Further, since 1970, the increase in violent pornography has been proportional to the increase in the number of sex crimes. Richard Stengel, *Sex Busters: A Meese Commission and the Supreme Court Echo a New Moral Militancy*, TIME, July 21, 1986, at 12, 14.

82. 1986 REPORT, *supra* note 79, at 901.

83. The 1986 Report defines violent pornography as that which depicts actual or simulated violence in "sexually explicit fashion with a predominant focus on the sexually explicit violence." *Id.* at 323. The 1986 Report also made the assumption that sexually violent pornography is "increasingly, the most prevalent form[ ] of pornography." *Id.*

84. *Id.* at 324.

85. *Id.* at 326 (relying on significant scientific empirical evidence).

86. *Id.* at 328.

The release of the 1986 Report again spawned public debate about the issue of pornography, the Commission's findings, and its recommendations.[87]

In addition, in 1986 the United States Surgeon General issued a report summarizing evidence gathered by scientists on the effects of pornography on public health.[88] The Surgeon General concluded that "[i]n laboratory studies measuring short term effects, exposure to violent pornography increases punitive behavior toward women."[89] The Surgeon General, however, failed to make any conclusion that sexually violent material leads to aggressive behavior outside the laboratory.[90]

B. *Other Social Science Studies*

The conclusions reached by the 1986 Report became the subject of a study conducted by three psychologists who have analyzed the effects of sexually violent material.[91] Daniel Linz, Edward Donnerstein, and Steven Penrod determined that research relied upon in the 1986 Report seems to support "a more general emphasis on the potentially harmful effects of depictions of violence against women (sexually explicit or not)" instead of its conclusion that there is a causal link between pornography and sexually violent behavior.[92] The Linz Study rejected the idea of strengthening obscenity laws in favor of recommending the development of educational programs "that would teach viewers to become more critical consumers of mass media programming."[93] Linz, Donnerstein, and Penrod also criticized the 1986 Report and the Surgeon General's Report because they were based on laboratory studies.[94] In particular, the Linz Study found that the Commission failed to "exercise proper caution in generalizing the results . . . outside the

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87. Stengel, *supra* note 81, at 12. Divergent commission members also voiced their concerns. *Id.* at 12. Judith Becker, director of the Sexual Behavior Clinic at the New York State Psychiatric Institute, and Ellen Levine, editor of *Woman's Day*, wrote a rebuttal to the 1986 Report. *Id.* They argued that evidence does not support the premise that there is a causal link between pornography and violence. *Id.*

88. Barnes, *supra* note 21, at 133.

89. *See* Daniel Linz et al., *The Findings and Recommendations of the Attorney General's Commission on Pornography: Do the Psychological "Facts" Fit the Political Fury?*, 42 AM. PSYCHOLOGIST 946, 950 (1987) (citing E.P. MULVEY & J.L. HAUGAARD, UNITED STATES PUBLIC HEALTH SERVICE, REPORT OF THE SURGEON GENERAL'S WORKSHOP ON PORNOGRAPHY AND PUBLIC HEALTH (1986)).

90. *Id.* at 950.

91. *Id.* at 946.

92. *Id.* at 950. The Linz Study also expressed concern "about the detrimental effects of exposure to violent images both in pornography and *elsewhere*—particularly material that portrays the myth that women enjoy or in some way benefit from rape, torture, or other forms of sexual violence." *Id.* at 952.

93. *Id.* The Linz Study cautioned that laws directed at suppressing even sexually violent material would have the effect of suppressing other speech. *Id.*

94. *Id.* at 950.

laboratory."[95] Although generalizing about effects of pornography outside the lab is a genuine concern, scientists must still rely on laboratory studies because actual experiments outside the laboratory cannot be performed.[96]

In addition, there are other studies that suggest a link between pornography and violent behavior.[97] Other studies claim that no direct causal link can be ascertained from pornographic materials.[98] However, there is an abundance of anecdotal evidence concerning specific instances of violent behavior and pornography.[99] Therefore, it is premature to conclude that

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95. *Id.*

96. Barnes, *supra* note 21, at 133-34.

97. *See* Diana E.H. Russell & Karen Trocki, *Evidence of Harm, in* MAKING VIOLENCE SEXY: FEMINIST VIEWS ON PORNOGRAPHY 194, 211-13 (Diana E.H. Russell ed., 1993) (summarizing survey results); Edward Donnerstein, *Pornography and the First Amendment: What Does the Research Say?*, 4 LAW & INEQ. J. 17, 19 (1986) (citing research indicating that men's likelihood of raping women is increased by viewing pornography); Torrey, *supra* note 46, at 113 n.1 (citing numerous studies discussing the relationship between pornography and sexual violence).

98. MARCIA PALLY, SEX AND SENSIBILITY: REFLECTIONS ON FORBIDDEN MIRRORS AND THE WILL TO CENSOR 25-61 (1994) (surveying laboratory studies and concluding that no credible evidence substantiates a clear causal connection between any type of sexually explicit material and any sexist or violent behavior); NADINE STROSSEN, DEFENDING PORNOGRAPHY 251 (1995) (citing the National Research Council's Panel on Understanding and Preventing Violence conclusion in 1993 that empirical links between pornography and sex crimes in general are weak or absent); F.M. Christensen, *Elicitation of Violence: The Evidence, in* PORNOGRAPHY: PRIVATE RIGHT OR PUBLIC MENACE? 221, 239 (Robert M. Baird & Stuart E. Rosenbaum eds., 1991).

99. *See, e.g.*, State v. Herberg, 324 N.W.2d 346, 347-50 (Minn. 1982) (affirming defendant's conviction for assault and criminal sexual conduct involving a 14 year old girl). In upholding the conviction, the court noted, "It appears that in committing these various acts, defendant was giving life to some stories he had read in various pornographic books." *Id.* at 347. These books were taken from the defendant following his arrest. *Id.* In 1992, Delaware executed Steven Pennell who was convicted of murdering four women after torturing them. Whitaker, *supra* note 29, at 849 (citing *Delaware Executes Murderer*, UPI, Mar. 15, 1992, *available in* LEXIS, News Library, UPI File). The police confiscated a pornographic video, *The Taming of Rebecca*, from Pennell's home. *Id.* (citing State v. Pennell, No. 88-12-0051, 1989 WL 112557, at *2 (Del. Super. Ct. Sept. 25, 1989)). The video was cued to a scene that depicted torture techniques similar to those used on Pennell's victims. *Id.* The Superior Court of Delaware admitted this scene into evidence because of the probative value of the similarity. *Id.* In addition, the Supreme Judicial Court of Massachusetts upheld the first-degree murder conviction of Wilbert Scott. Commonwealth v. Scott, 564 N.E.2d 370, 380 (Mass. 1990). At trial a neighbor testified that he saw several pornographic magazines in the defendant's apartment shortly after the murder of a 19 year old girl. *Id.* at 373. One of the magazines contained an article about a "serial killer who had killed several young women by stuffing pieces of cloth into their mouths, gagging and eventually strangling his victims." *Id.* The court ruled that admission of this testimony was proper. *Id.* at 380. This testimony served as evidence of a modus operandi and of the defendant's sexual desire—the way in which the serial killer in the article murdered his victims, and the way in which the victim in the instant case

violent pornography has a causal connection to violent behavior. The controversy surrounding the harms of pornography will surely continue into the future as pornography on the internet becomes more prevalent.[100] It is best to conclude only that evidence coexists on both sides of the question, and arguments can certainly be made to support either assertion.[101]

IV. FIRST AMENDMENT ANALYSIS

The First Amendment guarantees of freedom of speech and of the press[102] present an obstacle that must be overcome in order to impose civil liability on pornographers regardless of whether it is based on a statute or grounded in a common-law principle, such as negligence;[103] because visual images are considered speech for First Amendment purposes.[104] The First Amendment bars the imposition of civil liability on pornographers unless the material at issue falls within one of the well-defined and narrowly limited classes of speech that are unprotected by the First Amendment.[105] The classes of speech that "receive little or no First Amendment protection" include:

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died, were sufficiently similar. *Id.*; *see also* MacKinnon, *supra* note 15, at 1 (recounting pornography victims' testimony at the hearings on the proposed anti-pornography ordinance in Minneapolis); *supra* note 46 (discussing the "Bundy Bill").

100. Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories*, 83 GEO. L.J. 1849, 1851 (1995). Pornographers have taken advantage of computer networks to enter markets that have historically been isolated from pornography. *Id.*; *see, e.g.*, *China Executes Man for Selling Pornographic Books*, Reuters World Service (Beijing), Feb. 25, 1995, *available in* LEXIS, News Library, Reuters File (stating that publisher was sentenced to death for profiteering and for creating and distributing pornographic materials); *Mandatory Jail Sentence for Porn Publishers Proposed*, NEW STRAITS TIMES (Malaysia), Dec. 1, 1995, at 8 (discussing a proposed law that would impose a mandatory jail sentence for publishers and distributors of pornography). The Carnegie Mellon research team ultimately found that due to wide demand and market forces, pornography in cyberspace includes such images as bestiality and pedophilia. Rimm, *supra*, at 1857; *see* Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1959-60 (1995) (noting that Carnegie Mellon's study is the first large-scale study of the consumption of pornography in a natural setting).

101. *See supra* Part III.A.

102. U.S. CONST. amend. I.

103. Fuller, *supra* note 19, at 146.

104. General Media Communications, Inc. v. Perry, 952 F. Supp. 1072, 1076 (S.D.N.Y. 1997) (citing Bery v. City of New York, 97 F.3d 689, 695 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2408 (1997)).

105. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

(1) obscenity;[106] (2) fighting words;[107] (3) libel;[108] (4) words likely to incite imminent lawless action;[109] and (5) child pornography.[110] In addition, commercial speech receives only limited First Amendment protection.[111]

Proponents of statutes similar to the PVCA, which limit the definition of pornography to obscene material or material that involves child pornography, claim that by basing liability on a class of speech that is without First Amendment protection, the First Amendment hurdle should disappear.[112] Unfortunately, this view may not be entirely correct.[113] Unless the material meets the legal definition of obscenity,[114] plaintiffs may be forced to argue

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106. Rice v. Paladin Enterprises, Inc., 940 F. Supp. 836, 841 (D. Md. 1996) (citing Miller v. California, 413 U.S. 15, 24 (1973)).

107. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. at 572). "'[F]ighting' words [are] those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. at 572 (citation omitted).

108. Rice v. Paladin Enterprises, Inc., 940 F. Supp. at 841 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 267 (1964)).

> The constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

109. Rice v. Paladin Enterprises, Inc., 940 F. Supp. at 841 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

110. New York v. Ferber, 458 U.S. 747, 764 (1982). This exception is completely separate from the definition of obscenity and is not dependent on *Miller*. Whitaker, *supra* note 29, at 856. Whether the material is obscene or not, visual depictions of a minor engaged in sexually explicit conduct are unprotected under the First Amendment. *Id.* This Note, however, does not address the issue of imposing civil liability upon those engaged in child pornography.

111. Rice v. Paladin Enterprises, Inc., 940 F. Supp. at 841 (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)). While not entirely unprotected by the First Amendment, the Court "afforded commercial speech a *limited* measure of protection, commensurate with its subordinate position in the scale of First Amendment values." Ohralik v. Ohio State Bar Ass'n, 436 U.S. at 456 (emphasis added). Commercial speech consists of speech which does "no more than propose a commercial transaction." Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 385 (1973). Commercial speech also includes information that invites people to buy goods or services. Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976).

112. Whicher, *supra* note 46, at 363.

113. *See infra* notes 114-30 and accompanying text.

114. Depending on the material at issue, plaintiffs could have a difficult time obtaining a judicial determination of obscenity to take the material outside First Amendment protections. *See* Whicher, *supra* note 46, at 363-64. A clear example of this uncertainty involved the musical group "2 Live Crew." *Id.* at 363. The group was charged with obscenity after a concert in Florida but was acquitted at trial. *Id.* Just a few months later, however, a store sold a recording of the same music by "2 Live Crew." *Id.* The sale ultimately resulted in the obscenity convic-

that the harmful speech constituted incitement.[115] Generally, courts have denied recovery in tort cases involving media depictions of violence because the incitement test in *Brandenburg v. Ohio*[116] was not met.[117]

Although the majority in *Herceg v. Hustler Magazine, Inc.*[118] held that the magazine article could not be considered an incitement to unlawful act, Judge Edith Jones disagreed with the majority's application of *Brandenburg*.[119] Judge Jones differentiated the case at bar from *Brandenburg* in part because the latter "addressed prior restraints on public advocacy of controversial political ideas," and by analogizing the facts in *Herceg* to those in *Brandenburg*, the majority has rested its holding "in the

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tion of the store owner. *Id.* (citing M. HEINS, SEX, SIN, AND BLASPHEMY, A GUIDE TO AMERICA'S CENSORSHIP WARS 77-80 (1993)).

115. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987). This case involved a boy who died while imitating an article in *Hustler* describing the practice of autoerotic asphyxia. *Id.* at 1018. Originally, the plaintiffs alleged that *Hustler* was responsible for the victim's death on grounds of negligence, products liability, dangerous instrumentality, and attractive nuisance. *Id.* at 1019. The plaintiffs later amended the complaint to include incitement to avoid a summary judgment ruling. *Id.* The court did not find the *Hustler* magazine obscene, even though counsel for *Hustler* basically conceded its obscenity in the trial court. *Id.* at 1026 (Jones, J., concurring in part and dissenting in part); *see, e.g.*, Olivia N. v. NBC, 178 Cal. Rptr. 888, 891-93 (1982) (refusing to allow the plaintiffs to recover based on a negligence claim because the incitement test was not met), *cert. denied sub nom.* Neimi v. NBC, 458 U.S. 1108 (1982); DeFilippo v. NBC, 446 A.2d 1036, 1040 (R.I. 1982) (asserting that incitement as a theory of liability was the only proscribed class of speech that plaintiffs could argue).

116. Brandenburg v. Ohio, 395 U.S. 444 (1969). The Court allowed speech to be proscribed if the speech is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

117. *See, e.g.*, Herceg v. Hustler Magazine, Inc., 814 F.2d at 1021-23 (finding that an article describing the methods and dangers of autoerotic asphyxia was neither advocacy nor incitement under *Brandenburg*); Rice v. Paladin Enter. 940 F. Supp. 836, 844-48 (D. Md. 1996) (holding that a book on how to be a "hit man" constituted advocacy and was not an incitement to imminent lawless action); Zamora v. CBS, Inc., 480 F. Supp. 199, 206 (S.D. Fla. 1979) (holding that television depictions of violence, even if advocacy, do not rise to the level of incitement and are protected under *Brandenburg*); McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 193-94 (Ct. App. 1988) (finding that music containing lyrics about suicide failed the incitement test because they were not tantamount to a command to commit an "immediate suicidal act"); Olivia N. v. NBC, 178 Cal. Rptr. 892-93 (finding no incitement in a movie depiction of gang rape); Yakubowicz v. Paramount Pictures Corp., 536 N.E.2d 1067, 1071 (Mass. 1989) (finding that a movie depicting gang violence did not constitute incitement as it did not "at any point exhort, urge, entreat, solicit, or overtly advocate[] or encourage[] unlawful or violent activity on the part of viewers"); DeFilippo v. NBC, 446 A.2d at 1040-42 (concluding that no incitement existed in an action brought for wrongful death of a boy who hanged himself while imitating a stunt on Johnny Carson's *The Tonight Show*).

118. Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987).

119. *Id.* at 1029-30 (Jones, J., dissenting).

core values protected by the first amendment."[120] First, Judge Jones expressed despair concerning the "majority's broad reasoning which appears to foreclose the possibility that any state might choose to temper the excesses of the pornography business by imposing civil liability for harms it directly causes."[121] In her view, the majority erred by automatically according *Hustler*'s article full First Amendment protection after concluding that it did not fall into one of the categories[122] of either entirely unprotected speech or speech with limited protection.[123] Instead of refusing to "judge," the majority, in light of the hierarchy of First Amendment speech classifications that have recently developed, should have balanced the "interest sought to be protected by the state against the level of first amendment interest embodied in the communication."[124] Judge Jones analogized the level of protection of the *Hustler* article to that of commercial speech,[125] and concluded that "state regulation by means of tort recovery for injury directly caused by pornography is appropriate when tailored to specific harm and not broader

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120. *Id.* at 1029.

121. *Id.* at 1025.

122. *Id.* at 1026 (citing the following categories: child pornography, fighting words, incitement to lawless conduct, libel, defamation or fraud, obscenity, or commercial speech).

123. *Id.* ("Any effort to find a happier medium, they conclude, would not only be hopelessly complicated but would raise substantial concerns that the worthiness of speech might be judged by 'majoritarian notions of political and social propriety and morality.'").

124. *Id.* at 1027 (noting that the Supreme Court used this type of balancing in deciding a novel First Amendment issue in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985)). In *Dun & Bradstreet*, the Court concluded that the victim of a negligently erroneous credit report distributed to merchants might recover punitive damages from the publisher in this defamation action. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 751, 761 (1985). The Court determined that the credit report was a matter of "private concern," in that it was prepared solely for the individual interest of the speaker and a specific business and, like advertising, it represented a form of speech unlikely to be deterred by incidental state regulation. *Id.* at 762-63.

125. Judge Jones also borrowed the analysis from *Dun & Bradstreet*, which characterized speech as a matter of either "public concern" or a matter of "private concern." Herceg v. Hustler Magazine, Inc., 814 F.2d at 1028 (Jones, J., concurring in part and dissenting in part) (citing Dun & Bradstreet, Inc. v. Greenmoss, 472 U.S. at 762-63). Thus, different types of speech would be assigned different levels of protection based on whether the speech was a matter of "public concern" or a matter of "private concern" or whether it fell somewhere in between. Fuller, *supra* note 19, at 147 n.155 (citing Andrew B. Sims, *Tort Liability for Physical Injuries Allegedly Resulting from Media Speech: A Comprehensive First Amendment Approach*, 34 ARIZ. L. REV. 231, 267 (1992)). Using this "concern" standard, Judge Jones determined that *Hustler* magazine, the "Orgasm of Death" article in particular, deserved limited First Amendment protection. Herceg v. Hustler Magazine, Inc., 814 F.2d at 1028. Judge Jones resolved that because of the "solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation." *Id.*

than necessary to accomplish its purpose."[126] Thus, the *Brandenburg* test should not have been a bar to recovery in this case.[127]

To create a sustainable statute imposing civil liability on pornographers, the safest alternative may be to define pornography as including only those materials meeting the legal definition of obscenity.[128] In the absence of a civil statute, victims seeking recovery based on tort principles similarly will be more likely to succeed if the material at issue is legally obscene.[129] If the material fails to constitute obscenity, a court may apply the incitement test found in *Brandenburg*.[130] The use of the incitement test, however, may not render the tort claim fatal if a court is willing to balance the interests involved, and conclude that although the material does not meet any recognized exception to the First Amendment, it should be afforded something less than full protection.[131]

V. USING TORT PRINCIPLES TO HOLD PORNOGRAPHERS LIABLE

A. *Public Policy Considerations*

By providing victims with compensation for their losses, traditional tort policies will be furthered.[132] Creators and distributors of pornography will be encouraged to use greater care to make sure that materials that could constitute obscenity in the legal sense are not made available to the public.[133] Pornographer liability also furthers the public policy that the negligent pornographer, rather than the innocent victim, should bear the cost of such crimes.[134] The enforceability of criminal statutes, such as obscenity laws, will

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126. Herceg v. Hustler Magazine, Inc. 814 F.2d at 1029. Judge Jones explained that allowing damage recovery for tort victims imposes an insurable responsibility on pornographers. *Id.*

127. *Id.* at 1029-30.

128. Whitaker, *supra* note 29, at 856-57.

129. Because the material at issue could not be included in any of the categories of speech outside First Amendment protection, courts have refused to consider the merits of the claims based on tort principles. *See supra* note 117.

130. *See supra* note 116. For further analysis of the incitement test contained in *Brandenburg*, see David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the* Brandenburg *Test*, 29 GA. L. REV. 1 (1994).

131. *See supra* notes 124-25.

132. Whitaker, *supra* note 29, at 858. Although a victim could sue an attacker directly for money damages, in many cases, this action would be futile because the attacker has no money or assets to pay the judgment. *Id.* at 858 n.74. Therefore, holding a pornographer civilly liable is the next logical step in the "search for a solvent defendant." *Id.* (quoting Gary L. Urwin, *Tort Liability of Broadcasters for Audience Acts of Imitative Violence*, 19 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 315, 363 (1981)) (internal quotations omitted).

133. *Id.* at 858-59.

134. *Id.* at 859. The $8 billion sex industry can more than afford to compensate crime victims for their losses. *See, e.g.*, Schlosser, *supra* note 81, at 44.

also be enhanced by holding pornographers liable.[135] Furthermore, pornographer liability can be imposed without the fear that the sex offender will escape punishment.[136]

B. *Negligence*

Victims of sex crimes should be able to use negligence as a basis for imposing civil liability on pornographers for injuries suffered.[137] To sustain a cause of action rooted in negligence, plaintiffs have the burden of proving the following:

> 1. A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
> 2. A failure on his part to conform to the standard required. This is commonly called breach of the duty. . . .

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135. *See* Whitaker, *supra* note 29, at 859 n.77 (citing Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1028 (5th Cir. 1987) (Jones, J., concurring in part and dissenting in part)). "States already regulate the distribution of pornography to minors . . . and a remedy for the collateral consequences of unauthorized distribution, by way of civil action for damages, would only serve to reinforce that regulation." Herceg v. Hustler Magazine, Inc., 814 F.2d at 1028 (Jones, J., concurring in part and dissenting in part). Judge Jones' argument could be applied to state obscenity statutes as well. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964) ("The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

136. *See* Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992). The court denied the convicted defendant's argument that "his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong." *Id.* at 972-73. To allow this argument, the court would be advocating "a legal excuse to violence against women." *Id.* at 972. The court referred to the recognition in *American Booksellers Ass'n v. Hudnut*, 598 F. Supp. 1316, 1327 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd mem.*, 475 U.S. 1001 (1986), that pornography may lead to violence against women, and that "pornographers may be liable for rape." Schiro v. Clark, 963 F.2d at 973. But the court concluded that "*Hudnut* does not suggest that . . . the rapist is not also culpable for his own conduct." *Id.*

137. The Supreme Court has rejected the notion that the First Amendment requires that "publishers and broadcasters enjoy an unconditional and indefeasible immunity from [tort] liability." Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). Generally, in cases involving material meeting either the federal definition of obscenity in *Miller*, or the state statutory definition of obscenity, victims may be able to offer proof of the defendant pornographer's criminal conviction under the applicable obscenity laws. Whitaker, *supra* note 29, at 873. This type of proof would help the victim overcome the First Amendment barrier, and allow the victim to go forward with the negligence claim. *Id.* at 872-73. But see *supra* notes 112-17, for additional First Amendment concerns that may arise even if the pornographic material at issue is legally obscene. Regarding pornographic material that cannot be defined as obscene, a victim may be able to argue that the speech involved deserves only limited First Amendment protection. *See supra* notes 118-26.

3. A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as 'legal cause,' or 'proximate cause.'
4. Actual loss or damage resulting to the interests of another.[138]

The difficulty of establishing that the defendant pornographer owed a duty to the plaintiff lies in proving that the harm suffered by the plaintiff was foreseeable.[139] This is where the previous discussion on the harms of pornography becomes important.[140] If a plaintiff can persuade a court that pornography has detrimental effects on society, a court may find that the defendant pornographer owed the plaintiff a duty of care to avoid creating this unreasonable risk of harm. As discussed in Part IV, there are numerous studies on this topic, and a plaintiff could easily locate reports concluding that pornography causes harm. Whether or not such evidence will be sufficient for a court to determine that a duty exists, is a question of law for the court.[141]

A plaintiff must then prove that the defendant pornographer breached his duty.[142] This means that the plaintiff must prove that the defendant pornographer's conduct did not meet that of a "reasonable man of ordinary prudence."[143]

To satisfy the negligence standard, a plaintiff must also establish causation—both causation in fact, and proximate cause.[144] One formulation of the causation in fact requirement is the "but for" test: a plaintiff must prove that the sex offender would not have committed the crime "but for" the pornography.[145] The causation in fact requirement can be satisfied by applying a two-prong test. First, the plaintiff must produce "testimony and witnesses" at

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138. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 30 (5th ed. 1984).

139. *Id.* § 43. On the other hand, if a victim's suit against the pornographer was based on a third-party liability statute, such as the PVCA, the question of duty would have already been resolved by the legislature. Whitaker, *supra* note 29, at 882-83.

140. For a discussion of the effects of pornography, see *supra* Part IV.

141. *See, e.g.*, Weirum v. RKO General, Inc., 539 P.2d 36, 39 (1975) (stating that the determination of duty is primarily a question of law). *Weirum* was an action filed by the survivors of a motorist killed in a highway collision with a teenager who was following the car of a disc jockey handing out prizes to the first persons to find him at various locations that were being broadcast by the defendant radio station. *Id.* at 36. The court summarily dismissed the First Amendment arguments, and found that the radio station was civilly liable. *Id.* at 40, 51. The case turned on foreseeability—the broadcast created an undue risk of a high speed automobile chase that resulted in death. *Id.* at 40. Therefore, depending on the pornographic material at issue, a court could summarily dismiss a First Amendment argument in favor of finding that the material created an unreasonable risk of harm that should have been foreseeable to the defendant pornographer.

142. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965).

143. KEETON ET AL., *supra* note 138, § 41.

144. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 136 (8th ed. 1988).

145. KEETON ET AL., *supra* note 138, § 36.

trial that prove the sex offender actually viewed the pornographic material.[146] Second, a plaintiff would then need to "'demonstrate by testimony that the [sex offender] would probably not have harmed the victim in another way but for the [obscenity].'"[147] If the sex offender has already been convicted of violating the obscenity laws, then the first prong may be easier for plaintiffs to prove.

If the case involves a sex offender that injured the plaintiff in the same way as the pornographic material in question depicts—a copycat crime—then the second prong may not be as difficult to substantiate.[148] A clear example of such imitative behavior occurred in *State v. Pennell*.[149] In that case, the court admitted a pornographic videotape, *The Taming of Rebecca*, into evidence because a nipple mutilation scene in the video was imitated on the bodies of the victims.[150] In addition, the videotape found in the defendant's residence was "cued" to the nipple mutilation scene.[151] This seems to indicate that but for the pornography, this crime would not have happened in this manner. Another example of a "but for" cause occurred in *State v. Herberg*.[152] In *Herberg*, the defendant in this case was convicted of criminal sexual conduct and assault of a fourteen year old girl.[153] Chief Justice Amdahl wrote in the opinion, "It appears that in committing these various acts, defendant was giving life to some stories he had read in various pornographic books."[154] Thus, if the victim in *Herberg* were to bring a civil negligence action against the publisher of these pornographic books, "but for" causation may be established.[155]

Proximate cause is the second type of causation that must be proven to substantiate a negligence claim.[156] The focus in a pornographer liability case is on whether the criminal act of the sex offender is a superseding cause of harm that breaks the causal chain and relieves the pornographer from liabil-

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146. Whitaker, *supra* note 29, at 894 (citing Gary L. Ulwin, *Tort Liability of Broadcasters for Audience Acts of Imitative Violence*, 19 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 315, 355 (1981)).

147. *Id.* (quoting Gary L. Urwin, *Tort Liability of Broadcasters for Audience Acts of Imitative Violence*, 19 PUB. ENT. ADVERT. & ALLIED FIELDS L.Q. 315, 363 (1981)) (alterations in original).

148. *Id.*

149. State v. Pennell, No. 88-12-0051, 1989 WL 112557 (Del. Super. Ct. Sept. 25, 1989).

150. *Id.* at *2.

151. *Id.*

152. State v. Herberg, 324 N.W.2d 346 (Minn. 1982).

153. *Id.* at 347.

154. *Id.*

155. The first prong would be satisfied if the victim could prove that the defendant actually read the pornographic books that were found in the defendant's possession. The second prong may be established if the victim could prove that the injuries she sustained were the same as those described in the books. *See supra* notes 146-47 and accompanying text.

156. PROSSER ET AL., *supra* note 144, at 136.

ity.[157] The criminal act of the sex offender will not break the causal connection if the pornographer "at the time of his negligence conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a . . . crime."[158] Applying this rule to pornographer liability, the intervening criminal act of a sex offender will not relieve the pornographer of liability if the pornographer knew or should have known that their material would likely lead to a criminal act. Consequently, the concept of foreseeability again becomes important.[159] As the amount of literature on the impact of pornography on society grows, it should become easier for plaintiffs to show that the creators of pornography either knew or should have known that their product would likely lead to a criminal act.[160] The existence of both federal and state statutes prohibiting the distribution of obscenity also lends support to the proposition that a pornographer should know that its material could create a risk of harm to others.[161] The danger in making this risk assessment is that the actual harm inflicted on a victim "may lead jurors to believe that an extremely unlikely event was, in fact, likely to occur."[162] This concern is more likely to occur if the material at issue is not obscene. For example, if the jury had rendered a decision in *Olivia N. v. NBC*,[163] the jury may have exaggerated the foreseeability of the rape based upon the fact that the rape actually happened.[164] In contrast, if a civil suit on behalf of the victim in *Pennell* was brought against the maker of the videotape,[165] *The Taming of Rebecca*, the jury would not be as likely to exaggerate the foreseeability of the mutilation due to the pornographic, if not obscene, content of the video.

The final element of negligence that must be proved is damages.[166] Victims of sex crimes should have little difficulty proving that they suffered serious injuries.[167] Victims may be able to recover actual damages, medical

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157. RESTATEMENT (SECOND) OF TORTS § 447 (1965).

158. *Id.* § 448.

159. KEETON ET AL., *supra* note 138, § 44.

160. Fuller, *supra* note 19, at 153-54.

161. Whitaker, *supra* note 29, at 886 (citing state and federal statutes on obscenity).

162. Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Imitative Harm*, 94 Colum. L. Rev. 984, 1032 (1994).

163. Olivia N. v. NBC, 178 Cal. Rptr. 888 (1982), *cert. denied sub nom.* Neimi v. NBC, 458 U.S. 1108 (1982). See *supra* note 43 for a discussion of *Olivia N.*

164. Brill, *supra* note 162, at 1032 (arguing that "when a fact-finder is faced with a wealthy corporate defendant, a nine-year-old rape victim, and a movie that was obviously the subject of mimicry, the temptation to exaggerate the foreseeability of the third-party crime is almost irresistible.").

165. *See* State v. Pennell, No. 88-12-0051, 1989 WL 112557 (Del. Super. Ct. Sept. 25, 1989).

166. PROSSER ET AL., *supra* note 144, at 136.

167. Whitaker, *supra* note 29, at 898.

costs, court costs and attorneys' fees, and damages for emotional distress, depending on the jurisdiction.[168]

C. *Strict Products Liability*

Strict products liability can be defined as follows: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property . . . ."[169] Strict liability principles have developed to hold manufacturers liable for their defective products, in part, because of the difficulty of establishing fault or negligence in products liability cases.[170] An underlying theory of strict liability is that "[t]he costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products."[171] Some commentators have suggested that strict products liability could be applied as a theory of pornographer liability.[172] Although arguments can be made that the rationale of spreading the costs of injuries could be applied in any area, the cost-benefit analysis would be different if strict liability applied to words and ideas.[173] Free expression of words and ideas has always been a high priority in the United States.[174] "The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility) could seriously inhibit those who wish to share thoughts and theories."[175] Because of these First Amendment concerns, courts have declined to expand the scope of strict products liability to include "ideas and expression[s] in a book."[176]

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168. *See, e.g.*, ILL. REV. STAT. ANN. 720 5/12-18.1(b)(1)-(5) (West 1993) (listing the types of damages that a manufacturer, producer or wholesale distributor of obscene material shall be liable to the victim for, if the victim of an offense establishes that the manufacturer knew or had reason to know that the manufacture of such material was likely to cause an offense).

169. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

170. KEETON ET AL., *supra* note 138, § 98.

171. *Id.* § 98.

172. *See* Fuller, *supra* note 19, at 157 (suggesting that strict products liability may be used); Barnes, *supra* note 21, at 143-44 (advocating that strict liability as the most effective redress for the harms caused by violent pornography).

173. Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1035 (9th Cir. 1991). This suit was filed against a book publisher by mushroom enthusiasts that became severely ill from picking and eating mushrooms after relying on information in the publisher's book. *Id.* at 1034.

174. *Id.*; *see also* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

175. Winter v. G.P. Putnam's Sons, 938 F.2d at 1035.

176. *Id.* at 1036. In *Winter*, the court cited several cases that declined to apply products liability law to ideas and expressions. *Id.* at 1036 n.6; *see* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1217-18 (D. Md. 1988) (holding that RESTATEMENT (SECOND) OF TORTS § 402A did not extend to the dissemination of an idea of knowledge in a suit brought by a nursing student who was injured after treating herself with a remedy listed in a nursing textbook);

Therefore, unless the pornographic material is obscene, strict liability most likely would not be a successful theory of pornographer liability.[177]

VI. CONCLUSION

Although statutes imposing civil liability on pornographers for third party acts caused by their pornographic material have not been adopted by Congress or the legislatures of most states, victims of such crimes should not despair. Instead, they should consider initiating a civil suit based on negligence principles. There are a number of obstacles, however, that must be overcome in order to succeed on a negligence claim. The first impediment is causation: the victim must prove that it is foreseeable that a pornographer should have known that his or her material would likely cause harm, and the victim must establish that exposure to the pornographic material actually caused the sex offender to commit the offense. A victim must also contend with the First Amendment protection that courts have traditionally afforded pornographers in barring the imposition of liability. Whether or not a victim can prove causation and show that the First Amendment is not violated ultimately depends upon the strength of the facts involved in each case. The key point to keep in mind is that the absence of a pornographer liability statute may not foreclose the possibility of bringing a successful civil suit based on tort principles.

Jennifer C. Ford

Herceg v. Hustler Magazine, Inc., 565 F. Supp. 802, 803-04 (S.D. Tex. 1983) (holding that the contents of magazines are not within the meaning of RESTATEMENT (SECOND) OF TORTS § 402A); Walter v. Bauer, 439 N.Y.S.2d 821, 822-23 (Sup. Ct. 1981) (holding that the book was not a defective product for products liability law purposes because the intended use of the book is for reading and the plaintiff was not injured by reading, he was injured doing a science project described in the book), *aff'd in part and rev'd in part*, 451 N.Y.S.2d 533 (1981); Smith v. Linn, 563 A.2d 123, 126 (Pa. Super. Ct. 1989) (holding that a book is not a product under RESTATEMENT (SECOND) OF TORTS § 402A when the reader of diet book died from diet complications); *see also* Rice v. Paladin Enters., Inc., 940 F. Supp. 836, 848 (D. Md. 1996) (noting that it has grave reservations as to whether a theory of products liability would result in strict liability because courts have held that a book is not a product for purposes of products liability law).

177. If the material was obscene, then the First Amendment concern would most likely dissipate. *See supra* note 112 and accompanying text.