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Compensating Pornography's Victims: A First Amendment Analysis

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Essay

COMPENSATING PORNOGRAPHY'S VICTIMS: A FIRST AMENDMENT ANALYSIS

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I. INTRODUCTION

The social regulation of pornography, or material containing graphic depiction of sexual anatomy and sexual acts, has taken a new turn. Historically, American society has sought to suppress pornography through public enforcement of criminal obscenity statutes. A new breed of legislation, in contrast, relies on private tort litigation against the pornography industry as a means of social control. This new legislation reflects, in part, a new understanding of the harms of pornography. Traditional obscenity legislation was concerned with pornography's offensive nature and its tendency to corrupt public morals. In contrast, the new legislation addresses pornography's alleged role in promoting sexual violence.

In particular, both the federal government and state governments recently have sought to impose tort liability upon producers, distributors, and sellers of pornographic material that substantially contributes to the commission of a criminal sexual offense. For example, an Illinois statute grants victims of criminal sexual offenses a civil remedy against manufacturers, producers, and wholesale distributors of obscene material, when that material proximately causes the offender's criminal act.[1] The United States Senate has considered a similar bill, the Pornography Victims Compensation Act, or PVCA for short.[2]

Such legislation creates a private cause of action when criminal sexual offenders: (1) commit "copycat" crimes, in which they re-enact upon their

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1. 720 ILL. COMP. STAT. ANN. § 5/12-18.1 (West 1993).

2. S. REP. NO. 1521, 102d Cong., 1st Sess. (1991). The bill, however, never progressed beyond a favorable committee vote. The committee report appears in S. REP. NO. 372, 102d Cong., 2d Sess. (1992) [hereinafter REPORT].

victims violent pornographic scenes to which they have been exposed;[3] (2) use pornographic material as part of deliberate, pre-offense preparation;[4] or (3) use pornographic material in the course of the offense, viewing or forcing their victims to view this material.[5] The proposed cause of action offers some distinct advantages over the current means of regulating pornography. First and foremost, it creates a compensatory scheme for plaintiffs who can establish that some particular pornographic product substantially contributed to their injuries. Second, such tort liability can have a significant deterrent effect, by encouraging producers, sellers, and distributors of pornography to minimize the likelihood that their products will substantially contribute to such injuries. Third, given the scarcity of public law enforcement resources, private litigation offers a much cheaper way to regulate pornography.

As yet, no court has issued a direct ruling on the constitutional validity of pornographers' tort liability for injuries caused by their consumers. However, state and federal courts have ruled on an analogous set of cases. These are cases in which plaintiffs allege that their injuries were caused by their attackers' exposure to film or television violence.[6] In those cases, courts generally have raised the First Amendment as a bar to civil suit, citing concerns about the potential for chilling media exploration of serious social issues.

This Essay draws on First Amendment jurisprudence in order to analyze the constitutional status of tort liability for pornography-caused harms. The Essay argues that under current obscenity law, pornography does not enjoy the same constitutional immunity from tort liability for injuries to third parties enjoyed by media violence in general. Current obscenity law itself, however, both undervalues obscene speech and unduly tolerates state censorship. In addition, the provision of tort remedies for pornography-caused harms can have a substantial chilling effect on valuable speech, well in excess of that posed by current, criminal regulation of obscenity. Consequently, this Essay suggests severely limiting the class of materials to which tort liability may attach.

The argument proceeds as follows. Part II explores the First Amendment defense to tort liability for media violence in general. Part III explains why the

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3. *See* REPORT, *supra* note 2, at 9; *see also* ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 1-25 (1981).

4. *See* REPORT, *supra* note 2, at 7-9.

5. *See id.*

6. *See* Olivia N. v. National Broadcasting Co., 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982) (involving juveniles' re-enactment of a rape scene on a nine-year-old girl); *see also* Bill v. Superior Court, 187 Cal. Rptr. 625 (Cal. Ct. App. 1982) (involving a girl who was shot after leaving a theater that showed "gang movies"); Zamora v. Columbia Broadcasting Sys., 480 F. Supp. 199 (S.D. Fla. 1979) (involving a teenager who killed a neighbor while "intoxicated" by television violence).

law of obscenity denies such a defense to the pornography industry in particular. Part III, however, also criticizes the Court's obscenity jurisprudence in light of broader First Amendment concerns. Part IV examines the prospective chilling effect of a tort remedy for pornography-caused harms and proposes a way of narrowing the class of materials regulated so as to minimize this effect.

II. PROTECTED SPEECH AND TORT LIABILITY

Legislation such as the PVCA imposes tort liability upon publishers, filmmakers, and broadcasters for the sexual violence inflicted by consumers of pornography. As a general rule, however, media depictions of violence have enjoyed, under the First Amendment, freedom from tort liability for bodily injuries inflicted by their consumers.[7] Therefore, the question that arises is what distinguishes pornography from these other cases.

As a preliminary step toward answering this question, this Part briefly analyzes one such media violence case: *Olivia N. v. National Broadcasting Co.*[8] In *Olivia*, juveniles re-enacted a fictional, televised rape scene on a young girl; however, the court dismissed the suit against the broadcaster. Analysis of this case reveals that the televised scene enjoyed First Amendment protection precisely because it appeared within a non-obscene program.

In *Olivia*, the NBC television network broadcasted a film which concerned the harmful effects of a state-run home upon an adolescent girl. The film included a violent rape scene, occurring in a shower, that showed four older girls wrestling the adolescent to the ground and forcing her legs apart, while one of them made intense thrusting motions with the handle of a toilet plunger. A group of juveniles who had "viewed and discussed" this scene subsequently used a bottle to commit an "artificial rape" of the plaintiff, a nine-year-old girl. The plaintiff sued NBC, alleging in part that NBC "had knowledge of studies on child violence and should have known that susceptible persons might imitate the crime enacted in the film."[9]

The *Olivia* court rejected the plaintiff's attempt to impose liability on NBC based on mere negligence or recklessness. Instead, the court ruled that because NBC's broadcast enjoyed First Amendment protection, the proper test of liability was *incitement* of the harmful conduct. To hold otherwise, the court believed, would force television stations to dilute and sanitize the content of their

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7. *See generally* Alan Stephens, Annotation, *First Amendment Guaranty of Freedom of Speech or Press as Defense to Liability Stemming from Speech Allegedly Causing Bodily Injury*, 94 A.L.R. FED. 26 (1989 & Supp. 1993); *see also supra* note 6.

8. 178 Cal. Rptr. 888 (Cal. Ct. App. 1981), *cert. denied*, 458 U.S. 1108 (1982).

9. *Id.* at 891.

broadcasts so as to "reduce the U.S. adult population to viewing only what is fit for children."[10] Because the plaintiff could not meet this more demanding standard, her case was dismissed.

Olivia provides an interesting comparison because one can imagine the same "plunger" scene appearing in a pornographic film rather than a network broadcast. Therefore, the question that arises is whether a pornographic film would enjoy the benefit of a similar, heightened tort liability standard.

Olivia makes clear, however, that the legal classification of the material in which the offending scene appeared determines the standard of tort liability for the scene itself. The *Olivia* court's ruling that "incitement" provided the proper standard of liability for the scene in question flowed from its preliminary determination that the television program constituted protected speech under the First Amendment.[11] By implication, had the same scene appeared in material that did not enjoy First Amendment protection, the court would have applied a lesser, more recovery-oriented standard of liability.

Indirect confirmation of this result comes from *Eimann v. Soldier of Fortune Magazine, Inc.*[12] and *Norwood v. Soldier of Fortune Magazine, Inc.*[13] In these cases, *Soldier of Fortune* magazine ran private advertisements which were "thinly veiled offers of the services of hit men."[14] Magazine readers contacted the persons advertising their services and hired them to kill other individuals. In both cases, the courts rejected the magazine's claim that the First Amendment protected its conduct from negligence liability. The opinions placed great emphasis on the fact that the advertisements involved *commercial* speech. While recognizing that even commercial speech enjoyed First Amendment protection, these opinions also ruled that commercial speech did not enjoy the full panoply of constitutional protection enjoyed by "core speech"—speech that is "integrally related to the exposition of thought."[15] These cases thus present the flip side to *Olivia:* where the First Amendment does not fully protect the print or broadcast media, less stringent liability standards will apply.

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10. *Id.* at 892-93.

11. *Id.* at 892.

12. 680 F. Supp. 863 (S.D. Tex. 1988).

13. 651 F. Supp. 1397 (W.D. Ark. 1987).

14. *Eimann,* 680 F. Supp. at 864. The *Eimann* advertisement read: "EX-MARINES—'67-69 'Nam vets—ex-DI-weapons specialist . . . high risk assignments." *Id.* at 864. One of the *Norwood* advertisements read: "GUN FOR HIRE: 37 year-old—professional mercenary desires jobs. Vietnam Veteran. Discreet and very private." *Norwood,* 651 F. Supp. at 1398.

15. *Eimann,* 680 F. Supp. at 865 (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 779 (1976) (Stewart, J., concurring)). *See also Norwood,* 651 F. Supp. at 1398-99.

III. OBSCENITY AS UNPROTECTED SPEECH

Part II demonstrated that, not surprisingly, where the First Amendment protects a certain class of speech, courts will generally shield its proponents from tort liability. As *Olivia* shows, this protection applies even when the work contains shockingly violent, sexual material that is virtually indistinguishable from what might appear in a pornographic work. Conversely, the *Olivia* court made clear that it would not have shielded unprotected speech, such as legal obscenity, from liability under similar circumstances.

Olivia raises the question, however, of why non-obscene works should receive greater protection than obscene works, even when the two contain roughly similar depictions. Part III.A addresses this question by explicating the Supreme Court's obscenity jurisprudence. Part III.B, however, discusses some flaws in the Court's reasoning which undermine its persuasiveness.

A. The Law of Obscenity

In *Miller v. California*,[16] the Supreme Court made clear that it would not protect obscenity—in particular, "hard core" sexual material[17]—from state regulation. *Miller*'s legal definition of obscenity offers some clues as to why this material enjoys no constitutional protection. According to the *Miller* definition, obscenity is material that, taken as a whole, (1) appeals to the prurient interest, (2) depicts or describes sexual conduct in a patently offensive manner, and (3) lacks serious literary, artistic, political, or scientific value.[18]

This definition points to two distinct but interrelated reasons for placing obscenity beyond the pale of constitutional protection. The first, represented by elements (1) and (2) of the *Miller* test, is that American society has exhibited a strong historical interest in regulating sexual morality. Chief Justice Burger, for example, reflected this view in his wholehearted endorsement of the "stern 19th century American censorship of public distribution and display of material relating to sex."[19] To like effect, Justice Harlan stated bluntly that "[s]ince the domain of sexual morality is preeminently a matter of state concern, this Court should be slow to interfere with state legislation calculated to protect that morality."[20] Over the past several decades, state legislatures have fought a tug-of-war with the Court on the terrain of sexual morality, losing ground on

16. 413 U.S. 15 (1973).
17. *Id.* at 27.
18. *Id.*
19. *Id.* at 35.
20. Roth v. United States, 354 U.S. 476; 502 (1957) (Harlan, J., concurring).

contraception[21] and abortion,[22] but retaining it as to non-heterosexual intercourse.[23] In the realm of obscenity, the Court has seen no reason to intervene. By declaring obscenity "unprotected," the Court has given its blessing to continued state regulation.

The second reason, represented by element (3) of the *Miller* test, is the Court's belief that such material lacks sufficient value to merit constitutional protection. Justice Brennan emphasized this point when he stated that "[a]ll ideas having the slightest redeeming social importance . . . have the full protection of the guaranties" of free speech and free press.[24] Something has "redeeming social importance," in turn, if it forms an "essential part of any exposition of ideas,"[25] in particular ideas concerning social and political conditions. Because literature, art, science, and political speech all involve such an exchange of ideas, all come within First Amendment protection.[26] In the Court's view, however, material that involves *only* appeal to the prurient interest and has patently offensive depictions of sexual conduct does not contribute to this exchange.[27]

Thus, the constitutional protection offered to material such as the graphic rape scene in *Olivia* very much depends on the context in which it appears. When such graphic sexual violence appears within non-obscene material, as in *Olivia,* the Court is highly concerned with avoiding the possibility of chilling speech that may form an "essential part of any exposition of ideas." When graphic sexual violence appears within obscene material, in contrast, the Court has no such concern, because the chilling effect itself operates upon a class of materials that, in the Court's view, makes no essential contribution to social and political deliberation. Therefore, such material is properly subject to state regulation, which may include tort liability of the kind current pornography legislation contemplates.

B. Some Criticisms of the Law of Obscenity

The Court's twin justifications for removing obscene materials from the

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21. *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

22. *See* Roe v. Wade, 410 U.S. 113 (1973).

23. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

24. *Roth,* 354 U.S. at 484.

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

26. *See* Roth v. United States, 354 U.S. 476, 484 (1957); *see also* David A. Logan, *Tort Law and the Central Meaning of the First Amendment,* 51 U. PITT. L. REV. 493, 528-34 (1990).

27. In Chief Justice Burger's words, "[T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene materials demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom." Miller v. California, 413 U.S. 15, 34 (1973).

scope of First Amendment protection face two long-standing criticisms. Both objections bear on the social desirability of tort liability for pornography-caused harms. The first criticism is that state regulation of obscenity amounts to a form of majoritarian thought control over those who wish to engage in deviant thought. According to this objection, the First Amendment should not permit such majoritarian thought control, regardless of whether the underlying material lacks "social value" or fails to contribute meaningfully to the public exchange of ideas on moral, social, or political conditions.[28]

Justice Marshall stated this view emphatically in *Stanley v. Georgia*,[29] which struck down a Georgia statute that criminalized possession of obscene material. To Georgia's protestation that, under the Court's previous obscenity rulings, the defendant had no right to possess the materials in question, Marshall responded:

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[30]

Marshall did not directly challenge the Court's prior rulings themselves, but his concern about "the power to control men's minds" voices a powerful criticism.

Tort liability for pornography-caused harms may seem a far cry from such thought control. The fact remains, however, that substituting private tort litigation for criminal prosecution simply represents an alternative means toward the same end: reducing the consumption of material that the state finds unacceptable.

The second criticism is that contrary to the Court's assertions, and notwithstanding its other noxious qualities, obscenity *does* relate to the exposition of ideas concerning social and political conditions. Hard core pornography, for example, is no doubt lurid, offensive, sexually subordinating, and even dull or anti-erotic; yet it is also inherently "political" in content. Granted, pornography ordinarily does not contain, nor intend to contain, a political statement, whether explicit or symbolic. Nonetheless, the content of pornographic material, and its very existence, constitutes a profound challenge

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28. This theme figures prominently in Justice Douglas' obscenity opinions. *See, e.g., id.* at 37-47 (Douglas, J., dissenting); Ginzburg v. United States, 383 U.S. 463, 483-92 (1966) (Douglas, J., dissenting); *Roth*, 354 U.S. at 508-14 (Douglas, J., dissenting).

29. 394 U.S. 557 (1969).

30. *Id.* at 565.

to the prevailing sexual and moral order. Pornography inherently rejects conventional assessments of social value: "Pornography seeks out society's rawest nerve, and then presses on it. The violation of social proscription is the basis for pornography's appeal."[31]

Some writers have responded to this objection by asserting that hard-core pornography contains no expressive content whatsoever. For example, Cass Sunstein writes that "[m]any forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection."[32] Similarly, Frederick Schauer characterizes pornography as material that does not engage the human mind, but simply produces physical stimuli, and is therefore not a form of speech.[33]

These responses no doubt capture much truth about hard-core pornography. However, they do not answer the critics' objection. Even granting that pornography mostly functions as a "masturbatory aid," pornography produces such an effect primarily by operating on the consumer's "mind," rather than the consumer's "body." People differ in their responses to pornography precisely because it engages the imagination of some, but bores or offends that of others. Thus pornography's effects cannot be purely "physical." By the same token, even if pornography largely functions as a "masturbatory aid," this fact need not preclude it from contributing to the exposition of ideas. Precisely because pornography touches on matters that polite company does not discuss, pornography has the power to stimulate thought about prevailing sexual mores, sexual roles, and the social construction or enforcement of those mores and roles.[34] This objection suggests that whatever rationale exists for shielding NBC in *Olivia* from tort liability for viewer-caused conduct, may apply with equal force to the pornography industry.

IV. SOME CONCERNS ABOUT THE CHILLING EFFECT

To summarize the argument thus far, Part II suggested that the "unprotected" nature of obscenity supported a tort regime of a kind which courts have rejected for "protected" material. Part III.A presented the doctrinal

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31. Steven G. Gey, *The Apologetics of Suppression: The Regulation of Pornography as Act and Idea*, 86 MICH. L. REV. 1564, 1628 (1988).

32. Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807-08 (1993).

33. *See* Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 923-24 (1975).

34. *See, e.g.*, Nadine Strossen, *A Feminist Critique of "The Feminist Critique of Pornography,"* 79 VA. L. REV. 1099, 1130-33 (1993). Strossen argues that because pornography conveys the message "that sexuality need not be tied to reproduction, men or domesticity," it promotes sexual liberation of women rather than sexual subordination. *Id.* at 1132-33.

arguments for excluding obscenity from First Amendment protection. However, Part III.B also expressed skepticism concerning the soundness of these arguments.

Despite the criticisms voiced in Part III.B, the imposition of tort liability on the pornography industry for harms caused by its viewers clearly does not violate the First Amendment, as long as liability attaches only to legally obscene material. This conclusion, however, does not end the inquiry. Apart from the general concerns about state regulation of pornography raised in Part III.B, the potentially far-reaching effects of such tort liability also raise unique concerns about a chilling effect. Part IV.A discusses these concerns, while Part IV.B proposes and analyzes a possible solution.

A. The Far-reaching Effects of the PVCA

The Senate committee report on the PVCA denied that it would inhibit any constitutionally protected, socially-valuable speech. The committee reasoned:

> The bill complies with all requirements of the [F]irst [A]mendment. It is limited solely to obscenity and child pornography, two categories that the Supreme Court has held are without [F]irst [A]mendment protection. For this reason, the chilling effect . . . is inapplicable. The chilling effect is, at most, no greater than that created by criminal laws against the same materials, a chilling effect that is by definition constitutional.[35]

The committee's belief that the PVCA would have no greater chilling effect than existing criminal laws, however, seems dubious.

The PVCA provides victims of sexual crimes with a strong financial incentive to identify and seek recovery against as many "pornographic" influences on the underlying criminal conduct as possible. Consequently, as an initial matter, a PVCA plaintiff will name as a defendant any seller, distributor, or producer of sexually explicit material whose consumption she can reasonably attribute to her attacker. Some of the material in question ultimately will prove to be legally obscene, but some will not. In order to make such determinations, however, courts must examine the allegedly offending material on a case-by-case basis. Even when the court determines certain material to be non-obscene and, therefore, exempts it from tort liability, its manufacturers, sellers, and distributors may incur a substantial expense in defending their product.

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35. REPORT, *supra* note 2, at 11.

Moreover, defendants whose material is found legally obscene and causally implicated in the plaintiff's injury may be required to pay a considerable money judgment. This should strike greater fear in the pornography industry than does the existing regulation of pornography through the criminal law.[36] In many parts of the country, criminal obscenity statutes are notoriously under-enforced, and even where enforced, may result only in small fines. More importantly, given the interstate mobility of printed and audio-visual matter, producers, sellers, and distributors may be subject to civil suit in jurisdictions whose criminal laws could not reach them.

Consequently, the PVCA will chill the creative efforts of many businesses and individuals who do not consider their products legally obscene, but who do not wish to risk unaffordable attorney fees and ruinous judgments in order to vindicate their position. These parties, who may have little fear of the criminal law, cannot afford to become enmeshed in tort litigation. Their resultant self-censorship may result in heavily diluting the message they seek to convey, to public detriment.

B. A Proposed Solution

To avoid such over-deterrence, legislation such as the PVCA should define more precisely and more narrowly the scope of regulable material than by the mere use of the term "obscenity." Admittedly, the PVCA itself contains certain procedural safeguards that result in a fairly stringent standard of liability. For example, the PVCA applies only to material that is "obscene beyond a reasonable doubt,"[37] on the rationale that this limitation ensures that only those persons properly subject to criminal prosecution may suffer a civil judgment. However, the reasonable doubt standard still turns on the factfinder's discretion as to what material is legally obscene. The PVCA's failure to draw clear lines will leave many potential defendants guessing on which side of the line their material falls.

Instead, the PVCA could draw on standards initially proposed by Andrea Dworkin and Catherine MacKinnon to isolate the class of materials most likely to incite sexual violence. For example, the PVCA might state that it applies only to obscene material that, in addition to its obscenity, depicts men, women, or children:

(1) as enjoying sexual pleasure in being raped;

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36. "The fear of damage awards . . . may be markedly more inhibiting than the fear of prosecution under a criminal statute." New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).

37. REPORT, *supra* note 2, at 3.

> (2) as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered into body parts;
>
> (3) as penetrated by objects or animals; or
>
> (4) in scenarios of injury, torture, filth, or bleeding.[38]

This restriction would target the material most likely to cause sexual violence. At the same time, it would sufficiently limit plaintiffs' causes of action so as to prevent chilling of the borderline, but constitutionally protected material.

This restriction, however, faces a constitutional hurdle in the form of the Supreme Court's decision in *R.A.V. v. City of St. Paul.*[39] In *R.A.V.*, the Court struck down a city misdemeanor ordinance that applied to persons who publicly displayed a symbol, such as a burning cross, which they had reasonable grounds to know would cause racially based anger or alarm. The Court recognized that the government could regulate inflammatory speech or "fighting words" as a class. However, the Court ruled that the government could not pick and choose among particular kinds of fighting words so as to favor certain messages over others, such as non-racially inflammatory fighting words over racially inflammatory fighting words.

The restriction proposed by Dworkin and MacKinnon raises such a problem because rather than regulating obscenity as a whole, it picks out only a sub-class of obscenity. Nonetheless, this objection need not prove fatal. The *R.A.V.* Court itself concedes that "[w]hen 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."[40] In the present context, the PVCA's statutory objectives are to provide a compensatory remedy for, and deter dissemination of, materials whose consumption causes sexual violence. Hence the restriction in question should provide a "neutral" rather than viewpoint-discriminatory basis of distinction: it should operate not to discriminate against particular forms of pornography, but to regulate the material most closely connected with the social harms attributed to pornography.

This account should distinguish the present restriction from the Court's concerns in *R.A.V.* In *R.A.V.*, the Court apparently believed that even if

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38. These elements derive from an anti-pornography statute proposed by Dworkin and MacKinnon and adopted by the Indianapolis City Council. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

39. 112 S. Ct. 2538 (1992).

40. *Id.* at 2545.

racially tinged symbols present distinct social problems, they pose no inherently greater danger to the social order than do fighting words in general. Therefore, the city of St. Paul's content-discriminatory ordinance posed the risk of masking government intent to favor some messages over others without regard to their comparative social harmfulness. In the present instance, however, the intimate connection between "violent" or "degrading" pornography and sexual crime significantly reduces the risk that the restriction merely reflects a government predilection for non-violent, non-degrading pornography. The greater the degree of violence or degradation the material contains, the greater its contribution to sexual crimes, and hence the more strongly the rationale for its regulation applies.

V. CONCLUSION

Tort liability against pornographers for the acts of their viewers poses some conceptual problems. In particular, it makes depictions of sexual violence that appear within obscene material actionable, even though—as *Olivia*, discussed in Part II, shows—virtually the same depictions could appear in non-obscene, non-actionable material, with equally harmful results. As discussed in Part III.A, the Supreme Court has justified this difference in treatment on the grounds that obscene material does not contribute to the exchange of ideas on social and political conditions, and therefore it need not receive constitutional protection. As discussed in Part III.B, however, this position may seriously underestimate both the social value of pornography and the social harms of its regulation.

As matters stand, however, such tort liability is plainly constitutional. The compensatory and deterrent objectives of this regime, according to its proponents, may have pronounced, socially beneficial effects. Restriction of the statute's reach to material that plainly encourages sexual violence, however, can fulfill such compensatory and deterrent objectives, while avoiding undue censorship or inhibition of socially valuable but sexually explicit material.