PORNOGRAPHY AS A TOOL FOR PERPETUATION OF GENDER HIERARCHY: THE UNITED STATES AS A CASE STUDY

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I. INTRODUCTION

In this article I will discuss the legal status of pornography in American law as a case study as well as British and Canadian Law as a comparative source. I will also present, as a case in point, the arrangements used in Canadian Law, which has established a different doctrine for dealing with pornography that is not moralistic but harm-based. I will present additional reasons for the imposition of criminal restrictions on pornography (at least in certain categories) that do not relate to its violation of the prevailing social morality but to its potential harm to society. I will present empirical evidence supporting the potential of certain pornographic publications to encourage violence against women. I will review the main ideas of feminist writers on the role of pornography in the design and perpetuation of gender inequality.

II. FEMINISM AND PORNOGRAPHY

A. "Sex" and Gender"

The central claim at the basis of the approach of radical feminism,[1] as presented in the writings of one of its most prominent and influential representatives, Catharine MacKinnon, is based on a distinction between "sex" and "gender." The sex of each living creature is a biological fact that defines them as male or female. Gender is a social and cultural phenomenon unique to the human race, which defines individuals in society as "men" or women." Affiliation with the group of men or women defines individuals' social roles. The character traits seen as ideal and desirable male and female traits are derived from their social roles. Gender is a phenomenon so inherent to human society that people struggle to distinguish between gender and sex. Gender traits, created by humans, are seen as no less natural and authentic than biological traits, created by nature. For example, there is a prevalent societal perception that raising children is "naturally" the work of the female sex, just like carrying the fetus in the uterus. While the latter role is a biological fact, as men are incapable of being pregnant, nature did not deprive men of any character trait or organ which prevents them from taking part in the work of raising children, and the "unsuitability" of men to this role is a social convention.

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1. Radical feminism is distinct from other groups in the political feminism movement, including liberal feminism, developed by John Stuart Mill. *See, e.g.*, JOHN STUART MILL, THE SUBJECTION OF WOMEN (THE FLOATING PRESS 2009) (1869). Radical feminism is also different than cultural feminism, Marxist and socialist feminism, and more, as presented in the writings of Carol Gilligan. *See, e.g.*, CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

According to the approach of radical feminism, the division of gender roles is not arbitrary. In almost every existing human society, the female's roles and desirable female traits were designed by men with the intention of creating and perpetuating male dominance. The role of women in society was designed to serve men: taking care of his house, bringing up his children, and providing for his sexual needs. The desirable female traits were also designed in accordance with the designated role of women in society and with the intention of neutralizing her ability to object to her role. The ideal female characteristics are warmth, tenderness, sensitivity, and emotion, while traits such as belligerence, aggressiveness, assertiveness, and rational thinking are seen as unfeminine. It is not without reason, the adherents of radical feminism claim, that these characteristics could help the female sex discover the gender hierarchy and fight to change it.[2]

B. The Eroticization of Gender Inequality

Radical feminism sees pornography as an extreme expression of the gender hierarchy expressed in all aspects of life that plays a key role in entrenching and perpetuating this hierarchy. In the words of MacKinnon, pornography is male propaganda.[3] The pornography industry instills in its viewers the view of a female figure who underwent objectification. She becomes an object devoid of desires, identity, or opinions. In many pornographic movies, the filming focuses exclusively upon the woman's sex organs or breasts and on the mechanics of the sexual act, to the extent that it is possible to forget that these organs are part of the body of a flesh-and-blood woman and not an inanimate object.

The women depicted in pornography are constantly available and willing to have sexual relations. They are sexually aroused by a dominant and assertive male model and enjoy sexual relations which put them in the role of being controlled. The impact of the pornographic female model, radical feminism claims, is extensive and not limited to the bounds of the pornographic industry.[4] It forms the manner in which men understand the terms "masculinity" and "femininity" and the hierarchy between men and women. It affects the views and opinions of men about the aspirations and capabilities of women. Pornography also has an impact upon women, who internalize their place in society and societal expectations, either directly or

2. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987).

3. Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 807 (1991).

4. *See* CATHERINE ITZIN, PORNOGRAPHY: WOMEN VIOLENCE & CIVIL LIBERTIES 67 (Catherine Itzin ed., 1992).

by means of daily contact with men exposed to pornography. It also indirectly impacts the status of homosexual men, whose "feminine" image places them in the submissive and controlled side of the gender hierarchy, alongside women.[5] Pornography is marked in feminist writings as an especially powerful tool for perpetuating the gender hierarchy, as it eroticizes gender inequality. It creates among its consumers, in the long term, a type of Pavlovian conditioning that connects female inferiority and sexual stimulation. When consumers of pornography experience prolonged sexual arousal while watching a crude graphic illustration of female inferiority in comparison to men, gender hierarchy becomes "sexy" and sexually arousing.[6]

A common claim found in the writings of radical feminism is that pornographic publications and racist publications have a broad common denominator. Both types of publications mark a certain group in society as inferior to other groups due to ingrained characteristics that cannot be changed or chosen. Their purpose is to market and instill a social hierarchy between inferior and superior, sub-humans and super-humans. This hierarchy is often described as natural, scientifically based, and indisputable. The creators of both types of publications are aware of the tremendous power of visual communication. They communicate, through pictures and movies, to both the stronger and weaker group, images that strengthen feelings of superiority among the stronger group and maintain the feeling of inferiority among the weaker group. Above all, both types of publications eventually lead to violence toward the weaker group.[7]

C. The Ordinance

In this context, it is relevant to mention a famous attempt to create a legal arrangement that aimed to use private law to deal with the phenomenon of violence against women as the result of consumption of pornography by men. The Antipornography Civil Rights Ordinance was a legislative initiative inspired by the influential feminist writers Catharine MacKinnon and Andrea Dworkin. The pair sought to create a far-reaching tortious cause of action for women exposed to the harmful effects of pornography upon their social status, their reputation, or their lives and integrity.[8] Among other things, they

5. ORIT KAMIR, KAVOD ADAM V'CHAVA [THE DIGNITY OF ADAM AND EVE] 181-202 (2007); *see* MacKinnon, *supra* note 3, at 798.

6. *See* Andrea DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN, at xxxix (Penguin Books 1989) (1981); *see also* Itzin, *supra* note 4, at 57, 67; KAMIR, *supra* note 5.

7. MacKinnon, *supra* note 3, at 800-01.

8. ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 138 (1988).

proposed that every woman will have a tortious cause of action against creators and distributors of pornography due to injury to the reputation and social status of all women.[9] They proposed that any woman who experienced physical violence by a man after he viewed pornographic material could file a claim against the creators and circulators of the specific movies which led to the violence toward her.[10]

This legislative initiative caused an extensive public debate. Versions based upon it were taken as local legislation ("Ordinance") in a few cities in the United States.[11] However, in all cases, without exception, enactment of the law led to an appeal to the court, which declared it unconstitutional for reasons of violating freedom of speech, as the legal definition of pornography based upon the proposal of Dworkin and MacKinnon was considerably broader than that determined in the *Miller* test.[12]

Therefore, any attempt to create an inference between the ruling of the American courts regarding the Ordinance and the chances of a provision of criminal law regarding the effect of pornography on the status of women being adopted as part of a law should be done with caution. First, it should be remembered that even though freedom of speech is considered a first-degree constitutional right in western law as well, the scope of the constitutional protection it receives differs from the standard in American law. Second, the Ordinance sought to create a tortious cause of action for women injured by pornography, and not a criminal offense. The foundation of such a broad tortious cause of action is incomparably damaging toward freedom of speech in comparison to a criminal offense. The defense a defendant receives in a tortious action is considerably weaker than the defense received by one accused in a criminal proceeding, regarding ease of initiating legal proceedings, burdens of proof and persuasion, evidentiary laws, and procedure. There is no comparison between a legal situation in which any woman can sue any pornography producer in the name of womankind and a damage-based criminal offense.

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9. *Id.* at 139-40.

10. DWORKIN & MACKINNON, *supra* note 8, at 140.

11. *Id.* at 99-132. Specific ordinances reviewed in the appendix of this book include Minneapolis, Indianapolis, and Cambridge.

12. Local legislation in the spirit of the proposal was enacted in Indianapolis, Indiana in 1984 but was declared unconstitutional by the Federal Court of Appeals in *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), and in Bellingham, Washington in 1988, where it was declared unconstitutional by a district judge. *See* Vill. Books v. City of Bellingham, No. C88-1470D (W.D. Wash. Feb. 9, 1989).

D. Damage-Based Wording or Moralistic Wording?

The prominent and intuitive advantage of a damage-based wording over a moralistic wording is its more natural and simple integration into the punitive policy of a liberal legal system. Damage-based wording does not lead to complex questions about a state's authority to activate the criminal enforcement system against its citizens. That is, a wording that allows the State to activate criminal penalties against an individual who causes damage to other individuals—endangers their lives, integrity, property or reputation––represents a much more modest approach toward the authority the State bears toward the citizen than a wording allowing prevalent moral views to be protected by criminal law. Preventing harm of individuals is the fundamental requirement for cooperation and flourishment between individuals in society. It is therefore a justified and fundamental reason for the existence of the framework and authority of the State to exercise power over its citizens, even according to the most fervent liberals.[13] It was identified as such years before the liberal philosophy developed by John Stuart Mill, for example in ideas presented in the famous "State of Nature" theory coined by Thomas Hobbes, or in the writings of John Locke and Jean-Jacques Rousseau.[14] Even without requiring a decision to be reached or a position to be taken on the eternal dispute between Devlin and Hart about the authority of a liberal country to enforce accepted morals, choosing a punitive policy which emphasizes the authority of the State to activate criminal penalties to prevent damage from being caused is a definitive common denominator of any liberal doctrine of punishment (and presumably of most of the non-liberal punitive doctrines). Furthermore, later in the article we will describe the gradual transition of many common law legal systems from a moral wording of the offenses of obscenity to a damage-based wording. This transition is clear both regarding all types of pornography in an encompassing manner, such as in Canadian law following the *Butler* ruling, and in a partial manner, such as seen in the British Criminal Justice and Immigration Act regarding "extreme" pornographic expression and in many other legal systems regarding child pornography.

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13. DANIEL LINZ & NEIL MALAMUTH, PORNOGRAPHY 10 (Megan M. McCue ed., 1993).

14. *See generally* RICHARD ASHCRAFT, LOCKE'S TWO TREATIES OF GOVERNMENT (Allen & Unwin 2010) (1987); THOMAS HOBBES, LEVIATHAN (E.P. Dutton & Co., Inc. 1950) (1651); JOHN STUART MILL, THE SUBJECTION OF WOMEN (Frederick A. Stokes Co., 2nd ed. 1911) (1869).

III. THE CONNECTION BETWEEN PORNOGRAPHY AND VIOLENCE TOWARD WOMEN

Even though pornography is a phenomenon as old as written communication, only in the last four decades have studies been conducted examining the impact of pornographic consumption upon the worldview and behavioral tendencies of the consumer.

Studies examining the connection between consumption of pornography and an increased risk of violence toward women may be distinguished by the research methods and the hypotheses they seek to refute or confirm. Some researchers examine statistical analyses in various cross sections to check possible symmetry between the level of pornography consumption and the likelihood of violence. Others create laboratory conditions in which they expose subjects to pornographic contents and examine their responses through biological indicators, questionnaires, or opportunities to express violence toward women in a secure environment.

Some studies examine the hypothesis that certain types of pornography encourage sexual violence or violence in general. Other studies examine the hypothesis that watching pornography contributes to sexual callousness. Objectification of the female sex, perpetuation of myths about women as inherently sexually promiscuous (and whose objection to sexual relations is dismissed as "hypocrisy" or "a game") and whose sexuality is exhausted by the desire to fulfill the sexual needs of men are traits of sexual callousness that increase the risk of sexual violence. Some researchers sought to verify precisely the opposite hypothesis, namely that watching pornography and masturbation constitutes "controlled release" of sexual energy,[15] which could have been expressed in violence toward women, and pornography therefore has a positive effect on reducing the risk of sex offenses being committed.

A. The President's Commission on Obscenity and Pornography

The first significant study published on the topic was commissioned by the American government. The President's Commission on Obscenity and Pornography ("Commission") was convened on the initiative of then-President Lyndon Johnson.[16] It was comprised of researchers from the fields of sociology and criminology, religious figures, jurists, and politicians.[17] The Commission assessed the degree of social benefit of imposing statutory

15. *See* James Weaver, *The Social Science and Psychological Research Evidence*, *in* PORNOGRAPHY: WOMEN, VIOLENCE & CIVIL LIBERTIES 284, 285 (Catherine Itzin ed., 1992).

16. COMM'N ON OBSCENITY AND PORNOGRAPHY, THE REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY, at 1 (1970).

17. *Id.* at 634-39.

restrictions on pornography.[18] Their conclusions, published in 1970, were unequivocal: as of that time, there were no published studies indicating that consumption of pornography impacts the moral outlook and worldview of the consumer regarding sex and sexuality nor increases the risk of sex crimes being committed.[19] Therefore, the President's Commission found no social benefit in legislation restricting consumption of pornography.

Other studies published in the years following publication of the Commission's report confirmed its conclusions. The 1973 study by Kant and Goldstein, for example, examined three groups: convicted sex offenders who had served their sentences, persistent pornography consumers who were not sex offenders, and arbitrary consumers of pornography who were not sex offenders.[20] All three groups received a questionnaire with two questions: "'[a]s an adolescent, how much pornography did you see?'" and inquired about how much pornography they were exposed to over the previous year.[21] All the sex offenders reported having consumed less pornography than the other two groups, in both time frames.[22] The main conclusion of the study was that sex offenders tend to consume less pornography than normative consumers.[23] A less cautious conclusion was that pornography consumption could have a positive effect on reducing the risk of the consumer committing sex crimes.[24]

The report of the President's Commission did not remain in the consensus for long, and its conclusions were criticized on several fronts. First, it was claimed that the nature of pornography underwent a dramatic

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18. *Id.* at 1.

19. *See* STEPHEN T. HOLMES & RONALD M. HOLMES, SEX CRIMES: PATTERNS AND BEHAVIORS 136 (2d rev. ed. 2002) (1991).

20. *Id.*

21. *Id.* at 137.

22. *Id.*

23. *Id.*

24. *Id.* It is interesting to compare the results of the study to the results of another study conducted in the same year by Goldstein and Kant in 1973, which presented identical questionnaires to subjects from different groups. MICHAEL J. GOLDSTEIN & HAROLD SANFORD KANT, PORNOGRAPHY AND SEXUAL DEVIANCE 73 (1973). The groups consisted of convicted rapists and diagnosed pedophiles who had never committed an act of rape and a control group, and discovered that while most of the subjects who had never committed rape reported that their first significant exposure to pornography took place between the ages of sixteen and eighteen (73% of the control group, 63-67% of the group of pedophiles who are not rapists), 75% of the group of rapists reported that their first significant exposure to pornography took place between the ages of ten and fifteen. *Id.* The results of the study showing that sex criminals consume less pornography (and that therefore pornography does not increase the risk for committing sex crimes, and perhaps reduces it) can be challenged by the conclusion of the Goldstein and Kant study with the claim that even if sex offenders consume less pornography, they are first exposed to it at a younger age and therefore it has a greater effect on them. *See id.*

change during the 1970s: it became more violent and extreme, and therefore, even if the conclusions the Commission reached were correct at the time, they should be re-examined.[25] Second, it claimed that the Commission ignored important studies conducted during the time the Commission was carrying out its research, which reached opposite conclusions.[26] The study by Tannenbaum in 1970, for example, examined how exposure to sexual content impacts aggressiveness.[27] The study participants (all male) were divided into three groups, and all watched the same erotic movie with different dubbing.[28] The first group heard dubbing of an erotic but non-violent nature; the second group heard dubbing of an erotic and violent nature; and the third group heard dubbing of an extremely violent and erotic nature.[29] After watching the movie, the subjects met an actress (a member of the research team) who attempted, by means of various provocations, to cause them to react angrily.[30] The subjects had a device which they were told would deliver electric shocks.[31] In reality, the device had no effect, but the actress recoiled as if in pain whenever one of the subjects pressed the button.[32] The results of the study found the subjects who watched an erotic movie while listening to violent dubbing were more likely to display violence using the device.[33] Despite being ignored by the President's Commission, to this day the Tannenbaum study is considered strong proof of the existence of a connection between consumption of content combining violence and sex and encouragement of violent male behavior toward women.[34]

B. The Meese Report

Following this criticism, it was decided in 1986 to convene a new commission on behalf of the U.S. Attorney General, which would re-examine the conclusions reached by the President's Commission. The report of the Attorney General's Committee, known as the Meese Report, included separate conclusions regarding violent and non-violent pornography. This

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25. *See* HOLMES & HOLMES, *supra* note 19, at 137.

26. LINZ & MALAMUTH, *supra* note 13, at 35.

27. *Id.*

28. *Id.*

29. *Id.*

30. Percy H. Tannenbaum, *Emotional Arousal as a Mediator of Erotic Communication Effects*, *in* 8 TECHNICAL REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 326, 339-40 (1971).

31. *Id.*

32. *Id.*

33. LINZ & MALAMUTH, *supra* note 13.

34. Dana A. Fraytak, *The Influence of Pornography on Rape and Violence Against Women: A Social Science Approach*, 9 BUFF. WOMEN'S L.J. 263, 286 (2000-2001).

committee identified a causal relationship between certain types of pornography (including, but not solely, violent pornography) and an increase in the risk of violence toward women.[35] The Meese Report was even more harshly criticized than the President's Commission Report. While many researchers agreed with the conclusions of the Attorney General's Committee regarding the connection between violent pornography and violence toward women, few agreed to commit themselves to the conclusions the Commission reached pertaining to non-violent pornography. Among the opponents were researchers whose findings ostensibly formed the basis for some of the conclusions reached by the Commission.[36] Some of the criticism of the Meese Report related to the limited time and budget allocated to the study. Critics noted jumps of logic in its conclusions and a mixture of moral worldviews and empiric conclusions.[37] In contrast with the reception the Meese Report received, another document on the matter published in the same year, the Surgeon General's Report on Pornography, received a wide consensus for its conclusions, which were more modest than those of the Meese Report but broader than those of the President's Commission. This report determined that there were sufficient empirical studies to establish a possibility that there is a causal connection between pornography consumption of certain types and an increase in the risk of sexual violence.[38] The most problematic types of pornography are violent pornography and pornography that depicts sexual relations with elements of exploitation and coercion of a submissive female figure.[39]

C. The "Rape Myth"

As mentioned, throughout the 1970s and 1980s, a definitive research consensus began to form that when examining the impact of consumption of pornography upon violent male behavior toward women, pornography should not be addressed as one unit, and a distinction should be made (at least) between violent pornography and non-violent pornography. Many studies published during the 1970s and 1980s support the conclusions

35. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY: FINAL REPORT 324 (1986).

36. EDWARD DONNERSTEIN ET AL., THE QUESTION OF PORNOGRAPHY: RESEARCH FINDINGS AND POLICY IMPLICATIONS 72, 73 (1987); *see* Irene Nemes, *The Relationship Between Pornography and Sex Crimes*, 20 J. PSYCHIATRY & L. 459, 464, 474-76 (1992).

37. Selene Mize, *A Critique of a Proposal by Radical Feminists to Censor Pornography Because of Its Sexist Message*, 6 OTAGO L. REV. 589, 605-06 (1988).

38. EDWARD P. MULVEY & JEFFREY L. HAUGAARD, REPORT OF THE SURGEON GENERAL'S WORKSHOP ON PORNOGRAPHY AND PUBLIC HEALTH 23 (1986).

39. *See id.* at 19-23; Nemes, *supra* note 36, at 464-65.

reached by the Meese Report and the Surgeon General's Report and indicate the possibility of a causal connection between consumption of violent pornography and violence toward women. Some of the studies focused upon the manner in which long-term exposure to violent pornography causes dulling of sensitivity among the viewers and a gradual decrease in their ability to feel empathy toward the victim.[40] One study examined how a group of normative students were impacted by watching pornographic movies depicting rape scenes for six weeks, and discovered that even subjects who did not initially find the movies sexually stimulating and reported unpleasant emotions after viewing them, changed their reaction as the experiment developed.[41] The students reported fewer negative emotions following the viewing and described watching the movies as enjoyable and sexually arousing.[42]

Other studies indicated that violent pornography reinforces the "rape myth" where even if a woman initially objects to having sexual relations, if the man shows assertiveness she will eventually give in, enjoy the act, and even experience an orgasm. This phenomenon is attributed to pornographic movies that present sexual relations that begin with coercion, but in which the victim "changes her mind" during the act and cooperates.[43] The dramatic impact of exposure to pornographic movies which instill this "rape myth" about violence toward women is evidenced by a study conducted in 1981 by Donnerstein and Berkowitz. The subjects were divided into four groups.[44] The first group was shown a non-violent erotic movie, the second group was shown an erotic and violent movie which included a scene of rape that turned into consensual sexual relations, the third group was shown an erotic violent movie with no element of willingness, and the fourth group did not watch any movie.[45] After watching the movie, subjects were given an opportunity to express violence toward an actress from the experiment team (similar to the method used in the Tannenbaum experiment).[46] The subjects who watched violent pornography demonstrated more severe violence toward the

40. *See* Daniel Linz et al., *Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women*, 55 J. PERSONALITY & SOC. PSYCHOL. 758, 759 (1988).

41. *See* MULVEY & HAUGAARD, *supra* note 38, at 17-18.

42. *See* Linz et al., *supra* note 40, at 765.

43. *See* Edna F. Einsiedel, *The Experimental Research Evidence: Effects of Pornography on the 'Average Individual,' in* PORNOGRAPHY 248, 265-66 (Catherine Itzin ed., 1992); *see also* Neil M. Malamuth & James V. P. Check, *The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences*, 19 J. RES. PERSONALITY 299, 315 (1985).

44. Edward Donnerstein & Leonard Berkowitz, *Victim Reactions in Aggressive Erotic Films as a Factor in Violence Against Women*, 41 J. PERSONALITY & SOC. PSYCHOL. 710, 713 (1981).

45. *Id.*

46. *Id.* at 712.

actress, and the most severe violent behavior was seen in the subjects from the second group.[47]

Following the conclusions of the Meese Report, researchers such as Donnerstein, Linz, and Pernod voiced reservations about the manner in which violent pornography could impact violence toward women.[48] They claimed that while many studies indeed indicate that consumption of violent pornography could impact the tendencies and behavior of consumers, it is important to remember that these are still merely tendencies.[49] The study of human behavior is a complex science, and the manner in which consumption of violent pornography could impact the behavior of a consumer is highly dependent upon the structure of his personality and the circumstances of the case. Even an experiment which manages to show, under laboratory conditions, aggressive behavior of a representative sample of men toward women after watching violent pornography does not necessarily attest to the impact that watching such pornography will have outside of laboratory conditions.

An additional factor insufficiently emphasized when quoting studies on this matter is the manner in which proper sexual education and explanations could neutralize the harmful impact of watching violent pornography. Subjects exposed to violent pornography over a prolonged period of time, in a manner which detracts from their ability to feel empathy toward the victim, showed an improvement in their attitude toward rape victims, and women in general, when the viewing was accompanied by explanations refuting the "rape myth" and emphasizing the severity of sex crimes.[50]

D. Non-Violent Pornography

The conclusion that consumption of violent pornography has an impact on the probability of violence toward women (at least in the short term) has gained consensus over the years. In contrast, studies that examined the impact of non-violent pornography on the behavior of the viewers, in both long-term and short-term exposure, struggled to come up with unequivocal

47. Donnerstein & Berkowitz, *supra* note 44, at 716.

48. *See* Nadine Strossen, *A Feminist Critique of "the" Feminist Critique of Pornography*, 79 VA. L. REV. 1099, 1179 (1993).

49. *Id.* at 1180.

50. *See id.* at 1185.

results.[51] Many studies did not manage to show a connection between watching non-violent pornography and violence toward women.[52]

Other studies identified certain influences of watching non-violent pornography on the worldview and behavioral tendencies of the viewers. For example, the study by Check (1985), conducted for the Canadian government, revealed that subjects exposed to non-violent pornography revealed a stronger tendency to give a positive response to the question, "how likely they would be to commit rape if they could be assured that no one would know and that they could in no way be punished[.]"[53] The study by Zillmann and Bryant (1982) revealed that even exposure to non-violent pornography contributes to creating sexual callousness and entrenching the "rape myth" among its viewers.[54] In an article from 1992, which compares the results of many studies about the impact of violent and non-violent pornography upon its viewers, Einsiedel proposed that the lack of uniformity in research about the impacts of non-violent pornography is not because the impact is negligible or non-existent.[55] She offers two explanations. First, there are considerably more differences within the category of pornographic movies than just between those which are violent or non-violent.[56] Pornographic movies are spread over a wide spectrum, which includes movies that are more or less violent, movies that depict the character of a more or less submissive woman, and so forth. This does not enable an effective comparison to be made between the results of the studies. Second, while the impact of violent pornography upon violent behavior toward women is intuitive and clearly visible, the effects of non-violent pornography is more varied and less dramatic, and therefore harder to identify.[57]

E. A Timeline of Rape—The Four Stages

A radical and critical theory regarding the manner in which non-violent pornography could have an impact upon violence toward women was proposed by Russell in 1992.[58] Her article reviews the conclusions of various

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51. Nemes, *supra* note 36, at 464-66.

52. *See, e.g.*, HOLMES & HOLMES, *supra* note 19, at 141; Daniel Linz, *Exposure to Sexually Explicit Materials and Attitudes Toward Rape: A Comparison of Study Results*, 26 J. SEX RES. 50, 66 (1989).

53. Linz, *supra* note 52, at 67.

54. Dolf Zillmann & Jennings Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32 J. COMM. 10, 18-19 (1982).

55. Einsiedel, *supra* note 43, at 274.

56. *See id.* at 274-75.

57. *Id.*

58. Diana E. H. Russell, *Pornography and Rape: A Causal Model*, 9 POL. PSYCHOL. 41 (1988).

studies on the topic and compares them. Russell, in essence, divides the occurrence of an incident of rape into a timeline consisting of four stages: creation of desire to rape, overcoming internal restraints not to commit rape (morals and conscience against rape), overcoming social restraints not to rape (fear of criminal penalties or social exclusion), and finally belief in the ability to physically overcome the victim.[59] She claimed that most of the studies which examine the existence of a causal relationship between non-violent pornography and violence toward women make the mistake of only examining the first stage—the connection between pornography consumption and creation of the desire to rape—while the main impact of pornography is not in the creation of the desire to rape but in the weakening and degeneration of the internal and external restraints among men who already have the desire to commit rape.[60]

Internal restraints are weakened when the image of a woman as submissive, sexually promiscuous, and whose sexuality amounts to satisfying the needs of a man take root in the outlook of men. This is the classic figure of women in pornography. There is no need for a man to be exposed specifically to violent pornography to adopt this in his worldview. The impact of violent pornography, Russell claimed, is primarily seen in removal of the external barriers—the fear of criminal penalties or social exclusion.[61] According to the studies she cited, fear of punishment decreases because in 97% of the pornographic movies in which rape is depicted, the rapist does not suffer any negative consequence for his actions.[62] This imbues the viewer with a sense of confidence in his ability to carry out the action and avoid punishment.[63] Fear of social exclusion decreases because prolonged viewing of violent pornography causes the potential rapist to believe that rape is a prevalent, legitimate, and socially acceptable act.[64] As stated above, in a significant portion of these movies, the rapist receives legitimacy for his actions from the victim of rape herself.

In summary, over forty years of research on the issue has led to a consensus that a connection does indeed exist between consumption of certain types of pornography and an increase in the risk of demonstrations of violence toward women by the consumer. A stronger connection is identified

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59. *See id.* at 49.

60. *See id.* at 48-49. Russell notes a statistical study whereby 25–60% of a representative sample of men answered in the affirmative that they would commit a rape if they were not caught. *Id.* at 48.

61. *Id.* at 62.

62. *See id.* at 63.

63. *Id.*

64. *Id.*

in the context of violent pornography, especially violent pornography which imbues the viewer with the feeling that rape is a socially accepted act. In contrast, no unequivocal answer has been provided to the question of whether there exists a connection between non-violent pornography consumption and violence toward women. In any event, it is currently extremely difficult to defend the position expressed by the President's Commission report of 1970, which claimed there is no research foundation supporting a connection between any type of pornography and violence toward women.

IV. PORNOGRAPHY IN AMERICAN LAW

When examining the legal status of pornography in American law, it is important to remember that the majority of criminal prohibitions related to pornography are found in state law and vary significantly from state to state. There is not one answer to the question of the legal status of pornography in the United States, but fifty different answers. A comparison of the laws applicable in each of the states and the circumstances that caused them to develop in these directions is fascinating.[65] We will focus on the discussion about the constitutional status of pornography in U.S. federal law.

A. Freedom of Speech

First, we should mention the distinct perspective from which American legislators and judges examine the topic. Freedom of speech, the First Amendment to the Constitution of the United States of America,[66] is a primary constitutional right. It has received extensive interpretation by the Supreme Court, perhaps more than any other right. It is a source of pride for American jurists and is considered one of the characteristics that distinguishes American law from other legal systems.[67] It is seen as a right that expresses American history, values, and culture. A provision of law that imposes any restrictions on freedom of speech must pass the rigorous constitutional test of strict scrutiny. The provision of law must serve a "compelling government interest," be worded in the narrowest manner that enables proper protection of said interest (narrowly tailored), and must be the

65. For example, a comparative review of state law regarding the restriction on "Revenge Porn"—circulation of pornographic photographs or video clips usually filmed by a couple for purposes of revenge or extortion—may be found in Pam Greenberg, *The Newest Net Threat*, NCSL, at 5 (May 2017), http://www.ncsl.org/Portals/1/Documents/magazine/articles/2017/SL_0517-Trends.pdf.

66. U.S CONST. amend. I.

67. *See* Robert A. Sedler, *An Essay on Freedom of Speech: The United States Versus the Rest of the World*, 2006 MICH. ST. L. REV. 377.

"least restrictive means" of protecting said interest.[68] An American jurist who asks what test is relevant for identification of obscene publications is effectively asking what test is relevant to identify a publication so extreme it cannot possibly even be defended in the name of the super-principle of freedom of speech.

B. Obscenity

The term obscenity is first mentioned in American federal legislation in a law from 1873 which is referred to as the Comstock Act, which forbade purchase, sale, display, and publication of obscene materials by mail.[69] The law did not define the term. In a ruling issued twenty years later, the Supreme Court determined that the British *Hicklin* ruling is the relevant test for identification of an obscene publication.[70] This definition of obscenity remained unchanged for eighty years. Then in 1957, in the case of *Roth v. United States*, Justice Brennan overturned the *Hicklin* standard as unconstitutional and ruled that the test for identification of obscene material is whether an average person applying contemporary community standards would find that the work in its entirety appeals to "prurient interests."[71] Similar to the change which would take place in British law two years later, the *Roth* ruling softens the strict *Hicklin* ruling through a test which requires the work to be considered in its entirety. However, another element of the *Roth* ruling created a divergence between British and American law regarding obscene publications: the requirement to take community standards into consideration. This later became an important and central foundation in regulation of pornography in the United States.

In 1973, the U.S. Supreme Court published its opinion in *Miller*,[72] which serves to this day as the seminal ruling in identification of obscene publications. In this case, Miller, who worked in circulation of pornographic movies and books, was convicted by a court in California for sending out advertising pamphlets with sexual content.[73] The California Court of

68. A famous example of the implementation of the strict scrutiny test can be found in the ruling of *Roe v. Wade*, 410 U.S. 113 (1973). For a critical academic discussion on the strict scrutiny test, which focuses on an empirical examination of the (slim) chance of a provision of law conforming with it, see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 801 N.30 (2006).

69. Comstock Act, ch. 258, §§ 1-2, 17 Stat. 598-99 (1873).

70. *See* Rosen v. United States, 161 U.S. 29, 43 (1896).

71. Roth v. United States, 354 U.S. 476, 487 (1957).

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

73. *Id.* at 16.

Appeals dismissed his petition for an appeal.[74] Miller appealed to the Supreme Court with the claim that circulation of pornographic material is protected by freedom of speech, and it is unconstitutional to restrict it.[75] Justice Burger ruled in the majority opinion that obscene publications are not protected by freedom of speech.[76] This ruling created a three-faceted test for classification of a publication as obscene material: whether an average person applying community standards would find the work as a whole was meant to arouse the "prurient interest" (the *Roth* test); whether the work displays sexual relations in a crude manner (according to the standards of state law); and whether the work as a whole is devoid of any literary, artistic, political or scientific value.[77] The conclusion regarding the legal status of pornography following the *Miller* ruling is that pornography is protected in principle under freedom of speech, provided it is not obscene. Moreover, the federal criminal prohibition refers exclusively to circulation of obscene materials. Possession of obscene materials not for purposes of circulation is protected by the right to privacy and cannot be restricted by legislation.[78]

C. Child Pornography

While American law recognizes the applicability of freedom of speech to standard pornographic publications, it takes a completely different attitude towards child pornography. In the case of *New York v. Ferber* in 1982, the Supreme Court ruled that publication and circulation of child pornography is not entitled to protection of freedom of speech even when the publication does not constitute obscene material according to the *Miller* test.[79] In *Osborne v. Ohio* in 1990, the Court ruled that provisions of law forbidding possession of child pornography are not unconstitutional.[80] American legislation invests extensive efforts in an attempt to prevent production and

74. *Id.* at 16-18.

75. *Id.*

76. *Id.* at 20.

77. *Id.* at 24. Justice Burger states in the *Miller* opinion that "[t]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*

78. This is provided it is not child pornography, which will be discussed below. In the firm words of Justice Marshall: "[a]s we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." Stanley v. Georgia, 394 U.S. 557, 568 (1969).

79. New York v. Ferber, 458 U.S. 747 (1982).

80. Osborne v. Ohio, 495 U.S. 103 (1990).

circulation of child pornography. Creators of pornographic publications are required to document the identity of the participants in the publication to enable supervision and prevention of participation of minors in the industry.[81] An additional topic connected to restrictions on child pornography illustrates the ramifications of acknowledging freedom of speech as a super-principle in American law.

It took two attempts and many judicial discussions over almost twenty years to pass a provision of law in America that survived constitutional scrutiny. An initial attempt was made in 1999,[82] but it was invalidated by the Supreme Court as a violation of freedom of speech. The Court decided that computerized pornography that contains the figure of a child is not forbidden according to *Ferber* (since no minor was directly harmed in the creation of the publication) or according to the *Miller* test (provided it does not contain obscenity).[83] A second attempt was made in 2003, which contained a narrower definition: only pornography that contains a computerized image of a minor and conforms with the *Miller* test will be considered child pornography.[84] The law underwent constitutional scrutiny in the Appeals Court in 2007, which ruled it to be unconstitutional as its provisions are vague and overly general.[85] This ruling was overturned a year later by the Supreme Court, which approved the constitutionality of the law.[86]

Taking the moral standard of the community into consideration is a central principle in modern American case law, present both in the *Roth* test and in two of the three *Miller* test prongs. The commitment of the American judge to enforce the moral standard of the community can be understood in light of the federal-state tension that characterizes American constitutional law. It can be clearly seen that this is not mere lip service, but a principle which the Court has no qualms in applying practically. In 1998, for example, the Child Online Protection Act (COPA) was proposed as a law requiring websites that contain content unsuitable for children to adopt significant

81. The duty appears for the first time in the Child Protection and Obscenity Enforcement Act, 18 U.S.C. § 2257 (1998). In the original version of the law, failure to obey its provisions created a rebuttable presumption that minors also participated in preparation of the publication. However, in *Am. Library Ass'n v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989), it was decided that such a provision of law is unconstitutional.

82. Child Pornography Prevention Act, 18 U.S.C. § 2252 (2012).

83. Ashcroft v. Free Speech Coal. 535 U.S. 234, 256 (2002). An example of an academic criticism of the constitutionality of the Child Pornography Prevention Act may be found in Sarah Sternberg, *The Child Pornography Prevention Act of 1996 and the First Amendment: Virtual Antithesis*, 69 FORDHAM L. REV. 2783, 2791-92 (2001).

84. *See* Protect Act, 18 U.S.C. § 1466(a) (1988); 18 U.S.C. § 2252 (2012).

85. United States v. Williams, 444 F.3d 1286, 1300 (11th Cir. 2006).

86. United States v. Williams, 553 U.S. 285 (2008).

means to prevent children from accessing them.[87] When the law underwent constitutional scrutiny in the Appeals Court, it was ruled to be unconstitutional.[88] The wording of the law stated that community standards should be taken into consideration when defining content unsuitable for children.[89] However, technology enabling websites to be filtered by the geographical area of the viewer was not widespread at the time. Therefore, in reality, the operator of the website would be forced to impose the standard of the most stringent state upon viewers from all states, thereby causing an overly extensive restriction on freedom of speech.[90]

D. Revenge Pornography

Revenge pornography occurs when one publishes intimate photos or videos of the victim without his or her consent. Usually the victims were first documented within an intimate relationship, or at least with consent, but sometimes the victim was sexually harassed by the offender, who documented his acts.[91] The videos or photos are published either on pornography websites or on designated sites for uploading ex's photos to get revenge, sometimes making sure the photographed are identified by name.[92]

The American legislature recognized a need for a legislative act regarding the new phenomenon of the internet as early as 1996. 47 U.S.C. § 230 consists of a piece of legislation regarding opportunities and dangers in this "new" network. The law specifically protects the diversity of political

87. 47 U.S.C. § 231 (2012) *declared unconstitutional by* Am. Civil Liberties Union v. Mukasey, 478 F.3d 181 (3d Cir. 2008).

88. Am. Civil Liberties Union v. Reno, 217 F.3d 162, 166 (3d Cir. 2000).

89. *Id.* at 173.

90. *See id.* at 162. In 2002, the Supreme Court reversed the ruling of the appeals court and sent it back for another hearing. Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564 (2002). In 2003, the appeals court ruled once again that the encompassing applicability of the law constitutes an excessively broad violation of freedom of speech and is therefore unconstitutional. Am. Civil Liberties Union v. Ashcroft, 322 F.3d 240 (3d Cir. 2003). In 2004, the clauses of the law were discussed once again in the Supreme Court, which ruled that due to the technological developments which had taken place over the years since discussions had been held on the topic, and due to the concern of a "chilling effect" caused by implementation of the provisions of the law, it should be re-discussed in a lower court, which will also consider the technological developments in the field of website filtering. Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004). In 2007, a district court ruled, in a final manner, that the law contradicts the First Amendment and the Fifth Amendment of the Constitution and is therefore unconstitutional. Am. Civil Liberties Union v. Gonzales, 478 F. Supp. 2d 775 (E.D. Pa. 2007).

91. Amy Lai, *Revenge Porn as Sexual Harassment: Legislation, Advocacies, and Implications*, 19 J. GENDER RACE & JUST. 251, 252-53 (2016).

92. *Id.* at 252.

discourse and sees the network as an opportunity for cultural developments and intellectual activity.[93]

Since then, the internet changed in several ways, and nowadays many states within the U.S. enacted specific legislation that is aimed at protecting its citizens from the internet's potentially harmful content. As of 2015, ten states have criminalized revenge pornography while others are taking part in similar legislative efforts.[94]

First, Section 2C of New Jersey's Code of Criminal Justice, deals with invasion of privacy. It defines two third-degree offenses. The first is taking a photo or filming[95] another person's intimate parts or a person who engages in sexual contact without his consent, under circumstances in which a reasonable person is not supposed to be observed.[96] This is not necessarily helpful in "classic" revenge pornography cases, where the documentation was made with the consent of the victim, while being in an intimate relationship with the perpetrator. The second is disclosure of such a photo or film knowing that he is not licensed to do so and without consent of the person photographed.[97] Here, disclosure receives a wide interpretation and includes to publish, give, distribute and more.[98]

A fourth-degree offense is also described in this legislative act, for the passive "actor" in this scenario: observing another person's intimate parts of sexual contact without his consent and under circumstances where a person would not expect to be observed.[99]

In the Colorado Criminal Code, the offense is defined in a more specific way but receives a very narrow protection. According to Article 1(a), a person older than eighteen years old could be convicted for posting a photo displaying the intimate parts of another person older than eighteen.[100] This is only if a few conditions are applied such as intentional harassment, without the depicted person's consent, and damage to that person.[101] The punishment

93. *See* 47 U.S.C. § 230 (2012).

94. Adrienne N. Kitchen, *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, 90 CHI. KENT L. REV. 247, 292 (2015).

95. N.J. STAT. ANN. § 2C:14-9(b)(1) (2015) (amended 2019). "An actor commits a crime of the third degree if . . . he photographs, films, videotapes, records or otherwise reproduces in any manner, the image of another person." *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. N.J. STAT. ANN. § 2C:14-9(a) (2015).

100. COLO. REV. STAT. ANN. § 18-7-107 (West 2019).

101. *Id.*

for an offender would be up to $10,000 in compensation to the victim, who can also sue in a civil court.[102]

In New York, a new bill has been signed this year amending the penal law, the criminal procedure law, the family court act and the civil rights law, in relation to establishing the crime of unlawful dissemination or publication of an intimate image, effectively making revenge pornography a Class A misdemeanor, punishable by up to a year in jail and/or a $1,000 fine.[103]

Last will be the criminal law of California, which defines a few offenses as misdemeanors regarding privacy invasion through photography. The first offense consists of secretly taking an identifiable person's photo under or through his clothes, with intention to arouse the sexual desires of the offender.[104] Another offense is taking a photo of an identifiable person who is partially or fully naked, in a place where one would expect to have privacy, with the intent to invade his or her privacy.[105] In addition, the law criminalizes distribution of an image of an intimate body part of an identifiable person, or a picture of one's sexual activity, if the distributor knew that it would cause the photographed person emotional distress and in fact, it did.[106]

In *B.B. v. Grossman*, a couple filmed a sex video and took some nude pictures of a woman during a two-year-long relationship, agreeing that these pictures would stay private.[107] After they broke up, she got married, and the defendant uploaded the video to a pornography website, mentioning the woman's name.[108] She did not consent to the video publication and by the time someone else notified her of the video, it already had almost 7,000 views.[109] The plaintiff sued the defendant both for invasion of privacy and intentional infliction of emotional distress and received $25,000 in compensation in an offer-of-judgment procedure.[110]

In *Doe v. Doe*, during the plaintiff and defendant's relationship, the defendant took a video of himself and the plaintiff having sexual intercourse without her knowledge or consent and published it on the internet a few

102. *Id.*
103. Act of July 23, 2019, ch. 109, 2019 Sess. L. News of N.Y. ch. 109 (McKinney) (Westlaw).
104. CAL. PENAL CODE § 647 (West Supp. 2020).
105. *Id.*
106. *Id.*
107. B.B. v. Grossman (*In re* Grossman), 538 B.R. 34, 38 (Bankr. E.D. Cal. 2015).
108. *Id.*
109. *Id.*
110. *Id.*

months later.[111] He entered a guilty plea and was sentenced to three years of probation instead of imprisonment.[112]

V. PORNOGRAPHY IN BRITISH LAW

The first prohibition against publication and distribution of obscenity in British law (and effectively in common law as a whole) is found in the Obscene Publications Act of 1857.[113] This law forbade possession of obscene materials for purposes of sale or dissemination. The term "obscene" is not defined in the law. It only received a concrete definition a decade later, in the well-known ruling of *R v. Hicklin*.[114] This ruling pertained to the case of a man named Henry Scott, who circulated pamphlets containing harsh criticism of the Catholic Church.[115] These pamphlets contained, among other things, a detailed description of acts that led people (especially women) to confess before their priest.[116] The pamphlets were classified as obscene materials, and an order was issued for their confiscation by the police.[117] Scott claimed, in his defense before the Court, that circulation of the pamphlets was not done with the intention of destroying public morals, but in a genuine attempt to point out severe problems in the conduct of the Catholic Church.[118] The litigation was conducted in several courts.[119] It was finally brought before the Queen's Bench, and the majority opinion of the judges upheld the decision to confiscate the pamphlets.[120] They ruled that publication of obscenity pertains to any publication that has the ability "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."[121] The *Hicklin* case law is a seminal ruling that still has a tangible effect on the way many legal systems understand the term obscenity 150 years after it was issued. The ruling was the first time a legal connection (which now seems obvious) was made between obscenity and sexual expressions. It also established the working assumption that materials should be classified as obscene by an

111. Doe v. Doe, No. 16 Civ. 0332 (NSR), 2017 WL 3025885, at *1 (S.D.N.Y. 2017).
112. *Id.* at *2.
113. Obscene Publication Act 1857, 20 & 21 Vict. C. 83 (Eng. and Wales) (repealed 1959).
114. R v. Hicklin [1868] 3 LRQB 360 at 365 (Eng.).
115. *Id.* at 362-63.
116. *Id.* at 360.
117. *Id.* at 362.
118. *Id.* at 368.
119. *Id.* at 360.
120. *Id.*
121. *Id.* at 371.

objective examination of the characteristics of the publication itself, and not by searching for hints attesting to the subjective intentions of the publisher.

The definition of obscenity in British law remained unchanged for ninety years. In 1959, an amendment was made to the Obscene Publications Act that comprehensively changed the prohibition against the publication and dissemination of obscene materials.[122] The amendment to the law coined a new legal definition of the term obscenity, which established the "work as a whole" test as an essential condition for classification of a publication as obscene.[123] Additionally, the amendment proscribed that the artistic, scientific, and educational value of a work must be considered when classifying it as obscene.[124] The first example of implementation of the new restriction appears in a famous and widely quoted ruling that dealt with the novel *Lady Chatterley's Lover*.[125] A no-less dramatic innovation in this amendment was that publication and circulation of obscenity was defined, for the first time, as a criminal offense.[126] It carried a possible sentence of three years imprisonment or a fine.[127]

The 1959 law created an innovative and groundbreaking regulation, which had a significant impact on the concurrent laws of countries with common law legal systems. Its provisions (with the addition of a minor amendment in 1964)[128] delineated the legal framework for assessing obscenity in publications for almost fifty years. In 2005, the applicability of the law was expanded to include obscene material in computerized format.[129]

Another significant development in the legal status of pornography in British law took place in 2008. This followed the case of the atrocious murder of Jane Longhurst, a thirty-two-year-old teacher who met her death while having sexual relations that included erotic strangulation where many

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122. Obscene Publications Act 1959, 7 & 8 Eliz. 2 c. 66 (Eng. and Wales).

123. *Id.* Material will be considered obscene if: "taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it." *Id.* It should be noted that the provision of the law which relates to the "work as a whole" test appeared in a law enacted four years earlier but pertained specifically to assessment of comic books meant for children. *See* Children and Young Persons (Harmful Publications) Act, 3 & 4 Eliz. 2 c. 28 (1955) (Gr. Brit.).

124. Obscene Publications Act 1959, 7 & 8 Eliz. 2 c. 66, § 4 (Eng. and Wales).

125. *See* C.B. Orr, *Case and Comment, R. v. Penguin Books, Ltd.*, 1961 CRIM. L. REV. 173, 176.

126. Obscene Publications Act 1959, 7 & 8 Eliz. 2 c. 66, § 3(8) (Eng. and Wales).

127. *Id.* § 2.

128. Obscene Publications Act 1964, 7 & 8 Eliz. 2 c. 74 (Eng. and Wales). This amendment to the law outlaws other actions connected to the process of creation and circulation of pornographic material, such as possession of pornographic materials of another person that are going to be circulated, and possession of equipment used for creation and circulation of pornographic materials (and so forth). *Id.*

129. Criminal Justice and Public Order Act 1994, c. 33, § 84(3)(b) (Eng. and Wales).

violent pornographic materials were discovered on her partner's computer.[130] Extensive public and political pressure followed the ruling, some of which was encouraged by the family of the victim, called for increased stringency in regulation of pornographic websites.[131] This pressure eventually led to the enactment of the Criminal Justice and Immigration Act in 2008,[132] as well as application of the 1959 law to computerized pornographic materials.[133] Section 63 of the Criminal Justice and Immigration Act outlaws possession of an "extreme pornographic image."[134] There are two cumulative tests for this new legal term. First, "pornography" is defined in the law as a publication whose nature leads to the conclusion that it was produced solely for the purpose of sexual arousal.[135] Second, an "extreme image" is defined as something "grossly offensive, disgusting or otherwise of an obscene character."[136] This includes materials depicting activities that endanger life; cause or could cause severe damage to the female or male sex organs, and sexual relations with a corpse or animal.[137] An "image" is defined in the law a depiction of moving or immobile figures as well as data of any type (such as computerized data) which can be converted into such images.[138]

A significant and pronounced innovation of the 2008 law is the outlawing of possession of extreme pornography, even when not for purposes of circulation. Another no less far-reaching innovation can be noted, hidden between the lines. By creating the new legal expression "extreme pornographic image," the law detached the interpretative umbilical cord between it and the *Hicklin* case law. It created a definition unrelated to the moral damage a pornographic image could cause to one who encounters it. Considering the painful circumstances that led to enactment of the law, it seems the definition of the extreme pornographic image, even though this was not expressly stated, was formulated with the intention of focusing on

130. *See* R v. Coutts [2006] UKHL 39, [7] [2006] 1 WLR 2154 (appeal taken from Eng.).

131. *See, e.g.*, Steven Morris, *Killer Was Obsessed by Porn Websites*, GUARDIAN (Feb. 5, 2004), http://www.theguardian.com/technology/2004/feb/05/newmedia.crime.

132. Criminal Justice and Immigration Act 2008, c. 4, § 63 (Eng., Wales and N. Ir.).

133. Obscene Publication Act of 1959, 7 & 8 Eliz. 2, c. 66 (Eng. and Wales).

134. Criminal Justice and Immigration Act 2008, c. 4, § 63 (Eng., Wales and N. Ir.). "An 'extreme pornographic image' is an image which is both—(a) pornographic and (b) an extreme image." *Id.* § 63(2)(a)-(b).

135. *Id.* "An image is 'pornographic' if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal." *Id.* § 63(3).

136. *Id.* § 63(5A)(b).

137. *Id.* § 63(7)(c).

138. *Id.* § 63(8)(a)-(b). "In this section 'image' means—(a) a moving or still image (produced by any means); or (b) data (stored by any means) which is capable into conversion into an image within paragraph (a)." *Id.* § 63(8)(a)-(b).

the tangible harm consumers of extreme pornography are likely to cause to themselves or others in their surroundings.

Pornography depicting the figure of a child has a separate legal arrangement in British law. In 1978, the Protection of Children Act was enacted, which forbids filming, publication, circulation, or possession of "indecent" photographs or movies of minors.[139] The term indecent, which appears in similar provisions of British law (such as laws of customs and mail), was not defined in the Protection of Children Act. It was seen in case law as a matter to be decided by the jury in each case on its own merits, while considering only the nature of the photograph and not the subjective intention which led to its preparation.[140] The law was amended in 1994, when its applicability was expanded to apply to the form of a minor created or edited on a computer.[141]

VI. PORNOGRAPHY IN CANADIAN LAW

The prohibition against circulation and publication of obscenity appears in Section 163 of the Criminal Code of Canada.[142] The definition of the term "obscene" in this section replaces a previous definition based upon the *Hicklin* ruling.[143] It identifies an obscene publication as one whose main characteristic is the depiction of sexual relations that include exploitation, threats, cruelty, violence, or committing a crime.[144] Section 163 contains a reference to an exception of "public good."[145] Additionally, the motives of the publisher of obscenity are irrelevant.[146] The legal arrangement regarding child pornography appears in Section 163.1, which forbids circulation of such materials and possession of them for independent viewing.[147] It also applies to the figure of a minor created on the computer.[148] An interesting

139. Protection of Children Act 1978, c. 37, § 1 (Eng. and Wales).

140. *See* R v. Graham-Kerr (1988) 1 WLR 1098 (QB) at 1104, 1105 (Eng.).

141. Criminal Justice and Public Order Act 1994, c.33, § 84(3)(c)(7) (Eng. and Wales).

142. Criminal Code, R.S.C. 1985, c. C-46 § 163 (Can.).

143. *See* Lyne Casavant & James R. Robertson, *The Evolution of Pornography Law in Canada*, PARLIAMENTARY INFO. AND RES. SERV., (Libr. Of Parliament, Can.), Oct. 25, 2017, at 5, http://www.parl.gc.ca/information/library/PRBpubs/843-e.pdf [https://web.archive.org/web/20090411054428/http:/www.parl.gc.ca/information/library/PRBpubs/843-e.pdf].

144. Criminal Code, R.S.C. 1985, c. C-46 § 163(8) (Can.). "For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." *Id.*

145. *Id.* § 163(3). The exception is referred to in Canadian law as "public good." *Id.*

146. *Id.* § 163(5).

147. *Id.* § 163.1(2)-(4).

148. *Id.* § 163.1(1)(a).

provision illustrating the distinctive perspective of Canadian law regarding pornography is found in the section on defenses: it is not possible to convict a person of the crime of circulation or possession of child pornography if the publication under discussion does not create an undue risk of harm to minors.[149] Even though the prohibitions against obscenity are located in the chapter of the Criminal Code of Canada on "Offenses Tending to Corrupt Morals," this defense hints that at least one of the rationales behind the prohibition against obscenity in Canadian law is not moral, but refers to the potential harm from producing and watching certain types of pornography. Moreover, this is a rationale important enough that non-existence of potential harm could absolve the offender of criminal liability.

The harm rationale in the discussion about the status of pornography in Canadian law originates with the cited ruling of *R. v. Butler*, in which the owner of a video store who sold "hard core" pornography movies was tried.[150] Butler was convicted of some crimes in the lower court and appealed to the Supreme Court with the claim that prohibitions against obscenity are unconstitutional and contradict freedom of speech.[151] The Court eventually convicted him of all clauses in his indictment,[152] and issued a seminal ruling that re-shaped the perspective of Canadian law on prohibitions against obscenity. This ruling determined that a main consideration of the Court when assessing an obscene publication must be the potential harm the publication could cause to society.[153] "Harm to society" is the extent to which the publication could encourage anti-social conduct, such as men causing physical or emotional harm to women.[154] In consensus with all the judges on the panel, Justice Sopinka addressed three types of pornography in his ruling: violent pornography, non-violent pornography depicting sexual relations with degrading or dehumanizing elements, and "standard" pornography, which does not contain violence, degrading, or dehumanizing elements.[155] Justice Sopinka stated it can be accepted that pornography of the first type has a high probability of causing harm, pornography of the

149. *Id.* § 163(6)(b). "No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence . . . does not pose an undue risk of harm to persons under the age of eighteen years." *Id.*

150. [1992] 1 S.C.R. 452 (Can.).

151. *Id.* at 453.

152. *Id.* at 510-11.

153. *Id.* at 507.

154. *See id.* at 485. "The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. Harm in this context means that it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men." *Id.*

155. *Id.* at 484.

second type has a certain potential to cause harm, and pornography of the third type is usually devoid of potential harm.[156] The court acknowledged that research has not yet established a definitive connection between pornography and sexual offenses.[157] However, it claimed it is sufficient that a large portion of the public believes certain types of pornography have potential for harm to allow pornographic publications to be restricted.[158]

In the *R. v. Sharpe* ruling, issued a decade later, the court recognized the relevance of the potential harm rationale regarding child pornography.[159] Sharpe was arrested on his return to Canada after staying in Amsterdam in the company of a pedophile rights activist.[160] He was caught by Canadian customs authorities carrying disks containing text files describing child pornography.[161] A search later conducted in his apartment revealed a database of pornographic photographs of male minors, in which some of the minors had been forced to perform sexual acts with each other.[162] Sharpe was accused of illegal possession of child pornography and of possession with intent to sell or distribute child pornography.[163] Sharpe represented himself in court. His defense claim was based primarily upon the premise that the search of his apartment and the accusations against him violated his right to freedom of speech and creativity, and that he should be permitted to possess pornographic materials that sexually stimulate him.[164] He claimed that since his sexual tendency is toward young boys, he should be permitted, in the privacy of his own home, to possess and view material of this kind.[165] Sharpe further claimed that viewing such material prevents sexual abuse of young boys, as the viewer gets satisfaction from viewing the act and not from performing it.[166] The court ruled that there was indeed a violation of his freedom of speech, but that it was weighed, and found to be proportional and balanced against the consideration and objective of protecting children from sexual exploitation.[167]

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156. *Id.* at 485.

157. *Id.* at 501-02.

158. *Id.* at 504.

159. [2001] 1 S.C.R. 45 (Can.).

160. Bhavna Batra & Shivangni Srivastava, *The Reality and Legality of Child Pornography*, 6 INT'L J. EDUC. & PSYCHOL. RES. 1, 2 (2017), http://ijepr.org/panels/admin/papers/400ij1%20(3).pdf.

161. *Id.*

162. *Sharpe*, [2001] 1 S.C.R. at 122-23.

163. *Id.* at 122.

164. *Id.* at 62.

165. *Id.* at 73-74.

166. *Id.* at 99.

167. *Id.* at 105-06. Additionally, the court found that it is possible to broaden the term "person" and interpreted it as a flesh and blood person as well as the form of a person (for example in Japanese

VII. CONCLUSION

In conclusion, it is plain to see that there is a clear-cut connection between freedom of speech, pornography and the violence that derives from it. How can laws protect women and children without disregarding the First Amendment which reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[168] It is an uphill battle nowadays and will continue to be a struggle for free and open societies to identify harmful content while safeguarding the building blocks of freedom.[169] People have also changed over the years: what seemed scandalous and obscene in the 1950s today makes people giggle. The public today, and especially since the birth of the internet, has been continuously exposed to more graphic and violent images, which is the real challenge. How far is too far before the law intervenes? The law must tailor itself to the times and stay relevant in order to be accurate. "What postmodernism gives us instead is a multicultural defense for male violence—a defense for it wherever it is, which in effect is a pretty universal defense."[170]

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animation movies, manga, which depict sexual acts which are violent and/or with minors. These movies are illegal in the United States and Japan). *Id.* at 77.

168. U.S. CONST. amend. I.

169. *See* U.S. DEP'T OF JUSTICE, *supra* note 35, at 307-08.

170. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI. KENT L. REV. 687, 700 (2000).