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The Civil Rights Pornography Ordinances--An Examination Under the First Amendment

Valerie J. Hamm
University of Kentucky

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Ordinances—An Examination
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INTRODUCTION

Pornography in America is an estimated seven billion dollar a year industry.¹ Recent years have witnessed an increase in “aggressive-erotica,”² or pornography containing sexual violence against women.³ Alarmed about the harmful effects of this trend,⁴ feminists⁵ have sought to persuade city governments⁶

² Aggressive-erotica and violent pornography are synonymous terms. See note 3 infra. However, neither should be confused with the term “obscenity,” which has a more precise legal meaning. For a discussion of the definition of obscenity, see text accompanying notes 55-68 infra.
³ Violent pornography is depicted in films, magazines, books and, most recently, rock music videos. One group concerned about the impact of this trend reported that the lyrics of rock music are 115% more violent than they were 20 years ago. The National Coalition on Television Violence found an average of 18 depictions of sexual violence in one 24 hour period on MTV, Warner Communications’ Music Television cable channel. It concluded that 35% of all violence on MTV is of a sexual nature. Michaelson, Sexual Violence and the Media, L.A. Times, Feb. 8, 1983, § VI, at 8, col. 1.
⁴ Violent pornography . . . portrays women as victims and depicts violence against women as permissible or entertaining. . . . As the surrounding environment becomes inundated with violent pornography, our society comes to accept the view that women are objects to be brutalized. . . . [Women] are posed in submissive positions, on the receiving end of sado-masochistic acts of all varieties. Sex and aggression have become inextricably intermingled in our society. The exhibition of erotic material elicits aggressive acts.

⁵ The civil rights ordinances, or amendments thereto, which are discussed in this Note were drafted by Catherine MacKinnon, Associate Professor of law at the University of Minnesota, and Andrea Dworkin, a well-known feminist writer.
⁶ To date, Minneapolis, Minnesota and Indianapolis, Indiana have tried to enact civil rights pornography ordinances.
to enact legislation creating a civil cause of action for

The Minneapolis City-Council approved the ordinance by a 7-6 vote, however, Mayor Donald M. Fraser later vetoed the measure. The Council, after failing to override the veto, enacted a competing ordinance which merely strengthened existing obscenity laws. See MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 15, ch. 385 (1984).

The Indianapolis City-County Council enacted the civil rights pornography ordinance on April 23, 1984 and amended it on June 11, 1984. The ordinance was preliminarily enjoined pending the outcome of a suit filed by several national publishing trade associations, a local bookseller and a local videotape dealer. See American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984). The district court declared the ordinance unconstitutional because it was vague and overbroad and because the state had failed to demonstrate such a compelling interest in reducing sex discrimination as would authorize the regulation of speech. Id. In affirming the district court, the Seventh Circuit concluded that the entire ordinance was invalid because its definition of pornography was unconstitutionally broad. American Booksellers Ass'n v. Hudnut, No. 84-3147, slip. op. (7th Cir. 1985).

The Minneapolis City Council passed a Resolution on July 13, 1984 declaring its intention to enact the civil rights pornography ordinance pending the outcome of American Booksellers "when and if it is determined to be legally feasible to do so." Minneapolis, Minn. Resolution (July 13, 1984).

It is reported that at least 10 other city governments may attempt to enact the civil rights pornography ordinances. ABC News Transcript Nightline Show No. 867, Women and Pornography, at 3 (Sept. 18, 1984) [hereinafter cited as Nightline].

INDIANAPOLIS, IND., CITY-COUNTY GENERAL ORDINANCE ch. 16 (1984) [hereinafter cited as INDIANAPOLIS ORD.] states in relevant part:

§ 16-3. Definitions.
As used in this chapter, the following terms shall have the meanings ascribed to them in this section:

(g) Discriminatory practice shall mean and include the following:

(4) Trafficking in pornography: The production, sale, exhibition, or distribution of pornography.
   (A) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography, but special display presentations of pornography in said places is sex discrimination.
   (B) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.
   (C) This paragraph (4) shall not be construed to make isolated passages or isolated parts actionable.

(5) Coercion into pornographic performance: Coercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography, which injury may date from any appearance or sale of any product(s) of such performance.
   (A) Proof of the following facts or conditions shall not constitute a
defense:
  I. That the person is a woman; or
  II. That the person is or has been a prostitute; or
  III. That the person has attained the age of majority; or
  IV. That the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
  V. That the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
  VI. That the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or
  VII. That anyone else, including a spouse or other relative, has given permission on the person's behalf; or
  VIII. That the person actually consented to a use of the performance that is changed into pornography; or
  IX. That the person knew that the purpose of the acts or events in question was to make pornography; or
  X. That the person demonstrated no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or
  XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; or
  XII. That no physical force, threats, or weapons were used in the making of the pornography; or
  XIII. That the person was paid or otherwise compensated.

(6) Forcing pornography on a person: The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.

(7) Assault or physical attack due to pornography: The assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography.

(8) Defenses: Where the materials which are the subject matter of a complaint under paragraphs (4), (5), (6), or (7) of this subsection (g) are pornography, it shall not be a defense that the respondent did not know or intend that the materials were pornography or sex discrimination; provided, however, that in the cases under paragraph (g)(4) of § 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of § 16-3, no damages or compensation for losses shall be recoverable unless the complainant proves that the respondent knew or had reason to know that the materials were pornography. Provided, further, that it shall be a defense to a complaint under paragraph (g)(4) of § 16-3 that the materials complained of are those covered only by paragraph (q)(6) of § 16-3.

(q) Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:
  (1) Women are presented as sexual objects who enjoy pain or humiliation; or
  (2) Women are presented as sexual objects who experience sexual pleasure in
being raped; or
(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or
(4) Women are presented being penetrated by objects or animals; or
(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual;
(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.
The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

§ 16-17. Grounds for complaint; persons who may file; persons against whom complaint may be made.
(a) A complaint charging that any person has engaged in or is engaging in a discriminatory practice ... may be filed with the office by any person claiming to be aggrieved by the practice, or by one or more members of the board or employees of the office who have reasonable cause to believe that a violation ... has occurred, in any of the following circumstances:

(6) In the cases of trafficking in pornography, coercion into pornographic performances, and assault or physical attack due to pornography (as provided in § 16-3(g)(7)) against the perpetrator(s), maker(s), seller(s), exhibitor(s), or distributor(s).
(7) In the case of forcing pornography on a person, against the perpetrator(s) and/or institution.
(b) In the case of trafficking in pornography, any woman may file a complaint as a woman acting against the subordination of women and any man, child or transsexual may file a complaint but must prove injury in the same way that a woman is injured in order to obtain relief under this chapter.
(c) In the case of assault or physical attack due to pornography, compensation for losses or an award of damages shall not be assessed against (1) maker(s), for pornography made, (2) distributor(s), for pornography distributed, (3) seller(s), for pornography sold, or (4) exhibitor(s) for pornography exhibited, prior to the effective date of this act.

§ 16-26. Hearings, findings and recommendations when conciliation not effected.
(a) Hearing to be held; notice. If a complaint filed pursuant to this article has not been satisfactorily resolved ... the complaint adjudication committee may hold a public hearing thereon upon not less than ten (10) working days' written notice to the complainant or other aggrieved person, and to the respondent.
(b) Powers; rights of parties at hearing. In connection with a hearing ..., the complaint adjudication committee shall have power upon any matter pertinent to the complaint or response thereto, to subpoena witnesses and compel their attendance; to require the production of pertinent books, papers or other documents; and to administer oaths. The com-
plaintiff shall have the right to be represented by the chief officer or any attorney of his/her choice. The respondent shall have the right to be represented by an attorney or any other person of his/her choice. The complainant and respondent shall have the right to appear in person at the hearing, to be represented by an attorney or any other person, to subpoena and compel the attendance of witnesses, and to examine and cross-examine witnesses.

(c) Statement of evidence; exceptions; arguments. Within thirty (30) working days from the close of the hearing, the complaint adjudication committee shall prepare a report containing written recommended findings of fact and conclusions and file such report with the office.

(e) Appeal to the board. Within thirty (30) working days after the issuance of findings and conclusions by the committee, either the complainant or the respondent may file a written appeal of the decision of the committee to the board.

§ 16-27. Court enforcement.

(e) Trial de novo upon finding of sex discrimination related to pornography. In complaints involving discrimination through pornography, judicial review shall be de novo. Notwithstanding any other provision to the contrary, whenever the board or committee has found that a respondent has engaged in or is engaging in one of the discriminatory practices set forth in paragraph (g)(4) of Section 16-3 or as against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3, the board shall, within ten (10) days after making such finding, file in its own name in the Marion County circuit or superior court an action for declaratory and/or injunctive relief. The board shall have the burden of proving that the actions of the respondent were in violation of this chapter.

Provided, however, that in any complaint under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 no temporary or permanent injunction shall issue prior to a final judicial determination that said activities of respondent do constitute a discriminatory practice under this chapter.

Provided further, that no temporary or permanent injunction under paragraph (g)(4) of Section 16-3 or against a seller, exhibitor or distributor under paragraph (g)(7) of Section 16-3 shall extend beyond such material(s) that, having been described with reasonable specificity by the injunction, have been determined to be validly proscribed under the ordinance.

Minneapolis, Minn. Proposed Ordinance [hereinafter cited as Proposed Minneapolis Ord.] amending tit. 7, ch. 139 of the MINNEAPOLIS, MINN. CODE OF ORDINANCES, states in relevant part:

§ 1. That § 139.10 . . . be amended to read as follows:

(b) Declaration of policy and purpose. It is the public policy of the City of Minneapolis and the purpose of this title:

(4) To prevent and prohibit all discriminatory practices of sexual
§ 3. That § 139.20 . . . be amended . . . to read as follows:

(gg) Pornography. Pornography is a form of discrimination on the basis of sex.

(1) Pornography is the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following:

(i) women are presented dehumanized as sexual objects, things or commodities; or
(ii) women are presented as sexual objects who enjoy pain or humiliation; or
(iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
(iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
(v) women are presented in postures of sexual submission; or
(vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts; or
(vii) women are presented as whores by nature; or
(viii) women are presented being penetrated by objects or animals; or
(ix) women are presented in scenarios of degradation, injury, abuse, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

(2) The use of men, children, or transsexuals in the place of women in (1)(i-ix) above is pornography for purposes of subsections (l)-(p) of this statute.

§ 4. That § 139.40 . . . be amended . . . to read as follows:

(l) Discrimination by trafficking in pornography. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography:

(1) City, state, and federally funded public libraries or private and public university and college libraries in which pornography is available for study, including on open shelves, shall not be construed to be trafficking in pornography but special display presentations of pornography in said places is sex discrimination.

(2) The formation of private clubs or associations for purposes of trafficking in pornography is illegal and shall be considered a conspiracy to violate the civil rights of women.

(3) Any woman has a cause of action hereunder as a woman acting against the subordination of women. Any man or transsexual who alleges injury by pornography in the way women are injured by it shall also have a cause of action.

(m) Coercion into pornographic performances. Any person, including a transsexual, who is coerced, intimidated, or fraudulently induced (hereafter, "coerced") into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view.

(1) Limitation of action. This claim shall not expire before five years have elapsed from the date of the coerced performance(s) or from the last appearance or sale of any product of the performance(s), whichever date is later;

(2) Proof of one or more of the following facts or conditions shall not,
women\(^8\) offended by violent or abusive pornography. The measures would allow women to allege a violation of their civil rights, and seek damages or injunctions against the sale, distribution or display of pornographic material.\(^9\)

At the same time, many civil libertarians have expressed concern, and even outrage,\(^10\) at what they consider an in-

\(\text{without more, negate a finding of coercion;}\)
(i) that the person is a woman; or
(ii) that the person is or has been a prostitute; or
(iii) that the person has attained the age of majority; or
(iv) that the person is connected by blood or marriage to anyone involved in or related to the making of the pornography; or
(v) that the person has previously had, or been thought to have had, sexual relations with anyone, including anyone involved in or related to the making of the pornography; or
(vi) that the person has previously posed for sexually explicit pictures for or with anyone, including anyone involved in or related to the making of the pornography at issue; or
(vii) that anyone else, including a spouse or other relative, has given permission on the person's behalf; or
(viii) that the person actually consented to a use of the performance that is changed into pornography; or
(ix) that the person knew that the purpose of the acts or events in question was to make pornography; or
(x) that the person showed no resistance or appeared to cooperate actively in the photographic sessions or in the sexual events that produced the pornography; or
(xi) that the person signed a contract, or made statements affirming a willingness to cooperate in the production of the pornography; or
(xii) that no physical force, threats, or weapons were used in the making of the pornography; or
(xiii) that the person was paid or otherwise compensated.

\(\text{(n) Forcing pornography on a person.}\) Any woman, man, child, or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution.

\(\text{(o) Assault or physical attack due to pornography.}\) Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography's further exhibition, distribution, or sale. No damages shall be assessed (A) against maker(s) for pornography made, (B) against distributor(s) for pornography distributed, (C) against seller(s) for pornography sold, or (D) against exhibitors for pornography exhibited prior to the ENFORCEMENT date of this act.

\(\text{\textsuperscript{x} Men, transsexuals and children may also be plaintiffs. However, this Note will refer only to female plaintiffs, since the ordinances were drafted primarily to protect women. See INDIANAPOLIS ORD. ch. 16, § 16-3(g)(5)-(7), -3(q)(6); Proposed Minneapolis Ord., § 3, (gg)(2), § 4(l)(3).}\)

\(\text{\textsuperscript{y} Wehrwein, supra note 1.}\)

\(\text{\textsuperscript{z} "This ordinance . . . remains a serious, misguided threat to civil liberties. To}\)
fringement of the first amendment guarantee of freedom of expression. They have argued that the civil rights pornography ordinances are unconstitutionally vague and overbroad. This Note examines the constitutionality of the ordinances from a first amendment freedom of speech perspective and concludes that the ordinances are constitutional.

I. PAST TREATMENT OF PORNOGRAPHY AND OBSCENITY

Historically, state and local governments have sought to curb sexually explicit material in various ways, with mixed results. Some have enacted public nuisance statutes which impose criminal or civil sanctions against the purveyors of obscenity. Based upon the common law idea that sexually explicit material is a danger to the morals of the general public, these statutes have met with limited success. Courts have held the sweeping nature of some of the statutory sanctions—for example, padlock orders closing stores or theatres for a specified length of time, and blanket injunctions prohibiting the future distribution of unnamed films or books—unconstitutional as prior restraints on free

punish fantasy, however vile or violent, is to do violence to the First Amendment.” Osterman, The Censor’s Pen is Not Women’s Best Protection, L.A. Times, June 17, 1984, § IV, at 5, col. 5.

See U.S. Const. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

12 “[T]he vagueness in such a measure is exceeded only by its breadth. Just where is the line? When it equates depictions with discrimination, the ordinance indiscriminately sweeps before it not just historical, scientific and scholarly material of great value, but also a staggering litany of art and literature . . .” Osterman, supra note 10.

13 There were two kinds of nuisances at common law—private and public. Private nuisance, a tort, covered activities of a property owner who interfered with property use or enjoyment of another property owner. Public nuisance was at common law a crime, and generally included any activity that might endanger the safety, health or morals of the general public. Activities such as prostitution, gambling or obscene displays were labelled “nuisances per se” and were generally prohibited at common law. See Note, Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power, 58 N.Y.U. L. Rev. 1478, 1484 (1983).

See, e.g., N.Y. PENAL LAW § 240.45 (McKinney 1979).


See note 13 supra.


See note 19 infra. For a discussion of prior restraint, see text accompanying notes 132-37 infra.
Moreover, courts and legislatures have struggled with defining what is obscene,²⁰ resulting in the imprecise application of obscenity laws.²¹

Other cities have used zoning laws and building code enforcement to restrict the areas in which sexually explicit material may be displayed or sold.²² These laws do not, however, eradicate sexually explicit material. They merely contain its availability. The material is still accessible to those wishing to enter the "combat zones."²³ The courts have generally upheld such statutes²⁴ provided that they do not have "the effect of suppressing, or greatly restricting access to, lawful speech."²⁵

²⁰ For a discussion of obscenity, see text accompanying notes 55-68 infra.
²¹ Obscenity laws, besides allowing inconsistent, ill-conceived or politically motivated criminal prosecutions, created a lot of confusion about pornography by misidentifying the harm. . . . Obscenity is a social value judgment. . . . Everybody may have an idea of what is or is not obscene, especially given the myriad inconsistent legal definitions over the last [200] years.

Memorandum to Minneapolis City Council by Catherine A. MacKinnon and Andrea Dworkin, at 6 (Dec. 26, 1983) [hereinafter cited as Memorandum].
²² See, e.g., DETROIT, MICH., ZONING ORDINANCE § 66.000.
²³ Legislators frequently overlook the detrimental effect of zoning on lower-class neighborhoods. Too often city councils are tempted to zone sex shops and "adult" bookstores in the poorer sections of town, without fully considering the harm suffered by the elderly and poor who are unable to move elsewhere. See Memorandum, supra note 21, at 8.
²⁴ In Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), the Supreme Court upheld a Detroit zoning law which required adult theatres to be located at prescribed distances from each other. See id. at 52-53. Justice Stevens, writing for a plurality, noted that even though the films shown by the theatres were protected by the first amendment, the zoning ordinance served the important interest of preventing urban decay and had only a de minimus impact on the availability of adult films to the general public. See id. at 62-63.
²⁵ Id. at 71 n.35.
Proponents of the civil rights pornography ordinances maintain that these other methods have not effectively dealt with what they perceive as a growing national problem. The ordinances are the first to recognize pornography as a violation of women’s civil rights. Designed primarily to afford a cause of action to women who have pornography "forced on them" in stores, at newsstands or in their homes, the ordinances also apply to women coerced into performing pornographic acts and to women physically harmed as a direct result of pornography. The ordinances also prohibit trafficking in pornography.

26 The proposed ordinance differs from past approaches by going significantly beyond any existing law that regulates acts committed against women. Now, before this law, people who are coerced into pornography have no effective way to reach the pornography made by coercing them. The profit incentive to coercing more and more women remains. If they complain, they are not believed, in part because pornography in general convinces people that women love doing it and in part because the specific pornography they are forced to make is often convincing in depicting their simulated enjoyment. Now, before this law, when women are sexually assaulted, because the society is saturated by pornography, they are unlikely to be believed in court and are continually asked pornographic questions like, did you like it?...

Unlike all other previous approaches to the growing social problem of pornography... this law stands against the real traffic in real women. It is a civil law against pornography, but is also for the equality of the sexes, women's rights, and the integrity and dignity of all persons regardless of sex. And it will do something: empower people and call into question the legal immunity of the exploiters for the first time.

Memorandum, supra note 21, at 7-8 (emphasis in original).

27 The drafters of the Minneapolis ordinance reflected the basis for the statute in a section marked "Special Findings on Pornography:"

[Pornography is central in creating and maintaining the civil inequality of the sexes. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harm women's opportunities for equality of rights in employment, education, property rights, public accommodations and public services; create public harassment and private denigration; promote injury and degradation such as rape, battery and prostitution and inhibit just enforcement of laws against these acts; contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods; damage relations between the sexes; and undermine women's equal exercise of rights to speech and action guaranteed to all citizens under the constitutions and laws of the United States and the state of Minnesota.

Proposed Minneapolis Ord. § 1, (a)(1).

28 See INDIANAPOLIS ORD. ch. 16, § 16-3(g)(5)-(7); Proposed Minneapolis Ord. § 4, (m)-(o).

29 See INDIANAPOLIS ORD. ch. 16, § 16-3(g)(4); Proposed Minneapolis Ord. § 4, (l).
The civil rights ordinances raise a possible conflict between the civil rights of the aggrieved plaintiffs and the first amendment rights of the defendants. Moreover, the interests and rights of the general public must also be considered.

II. SPEECH UNPROTECTED BY THE FIRST AMENDMENT

The first amendment guarantees a right of free speech. However, "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." The Supreme Court has recognized four categories of unprotected speech relevant to this Note: words that pose a "clear and present danger" to the public welfare; speech that is abusive or threatening; obscenity; and child pornography. The following section defines these categories of unprotected speech and discusses whether pornography as defined by the civil rights ordinances could conceivably fit into each category.

A. Words Posing A Clear and Present Danger

The clear and present danger category of unprotected speech originated in the Brandeis-Holmes concurrence in Whitney v. California. Justice Brandeis, although recogniz-

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30 See note 27 supra.
32 Other categories of unprotected speech, such as defamation, are beyond the scope of this Note. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-1 (1978).
34 See 315 U.S. at 573.
37 274 U.S. 357 (1927). In Whitney, the Court upheld the conviction of the appellant for violating the California Criminal Syndicalism Act which prohibited "advocating . . . crime, sabotage . . . or unlawful acts of force and violence." Id. at 359-60. The appellant was a member of the Communist Labor Party of California which advocated social change through violence and terrorism. Id. at 363-66.

Justice Brandeis' concurrence in Whitney was actually more a dissent. He upheld the appellant's conviction, but only on the procedural ground that she had failed to allege that no clear and present danger actually existed. Drawing heavily on Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919), Justice Brandeis maintained that "the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." 274 U.S. at 375 (Brandeis, J., concurring).
ing the danger that could result from allowing the unfet-
tered advocacy of unlawful acts, observed:

But even advocacy of [law] violation however reprehensi-
ble morally, is not a justification for denying free speech
where the advocacy falls short of incitement and there is
nothing to indicate that the advocacy would be immedi-
ately acted on....

[N]o danger flowing from speech can be deemed clear
and present, unless the incidence of the evil apprehended
is so imminent that it may befall before there is oppor-
tunity for full discussion.38

After adopting the Brandeis-Holmes doctrine of clear and
present danger in Herndon v. Lowry,39 the Supreme Court
wavered on the precise application of the doctrine.40 Finally,
in Brandenburg v. Ohio,41 the Court outlined the modern

38 274 U.S. at 376-77.
right of free expression violated by Georgia House of Representatives' refusal to admin-
ister oath of office to petitioner for allegedly subversive comments); Scales v. United
States, 367 U.S. 203, 219-30 (1961) (upholding petitioners' convictions under the Smith
Act); Yates v. United States, 354 U.S. 298, 326-27 (1957) (reversing petitioners' con-
victions under the Smith Act); Dennis v. United States, 341 U.S. 494, 515-17 (1951)
(upholding petitioner's conviction under the Smith Act, 18 U.S.C. § 2385 (1948));
Terminiello v. Chicago, 337 U.S. 1, 3-5 (1949) (reversing appellant's conviction under
Chicago breach of peace ordinance); Craig v. Harney, 331 U.S. 367, 377-78 (1947)
(reversing appellant's contempt conviction for publishing news articles criticizing Texas
court); Pennekamp v. Florida, 328 U.S. 331, 348-50 (1946) (reversing appellant's con-
tempt conviction for publishing editorials and cartoons criticizing Florida trial court);
Bridges v. California, 314 U.S. 252, 277-78 (1941) (reversing appellant's conviction for
contempt of court based upon his publication of a letter criticizing the decision of a
judge); Cantwell v. Connecticut, 310 U.S. 296, 310-11 (1940) (reversing appellants' con-
victions under Connecticut law forbidding the solicitation of money for religious
causes without a license); Thornhill v. Alabama, 310 U.S. 88, 105-06 (1940) (reversing
appellant's conviction under a Tuscaloosa County, Alabama loitering statute); DeJonge
v. Oregon, 299 U.S. 353, 366 (1937) (reversing appellant's conviction under Oregon
Criminal Syndicalism Act).

41 395 U.S. 444 (1969) (per curiam). In Brandenburg, the Court reversed the
conviction of a Ku Klux Klan leader convicted under an Ohio criminal syndicalism
statute for advocating "crime, sabotage, violence, or unlawful methods of terrorism."
The Court invalidated the statute, since it punished "mere advocacy not distinguished
from incitement to imminent lawless action." Id. at 449.
The appellant Ku Klux Klan leader had invited newsmen to a rally in which he and
several other Klan members attended. The film reports of the rally showed twelve hooded
figures, some armed, burning a cross. The appellant made a speech describing the
group's plan to march on Washington, D.C. and noted "there might have to be some
revengeance [sic] taken." Id. at 446. A number of racial slurs were also uttered. Id. at
444-47.
formulation of the clear and present danger category. The Court stated that for words to constitute a clear and present danger, they must be "directed to inciting or producing imminent lawless action and be likely to incite or produce such action."\(^{42}\)

Even assuming there is a causal connection between violent or abusive pornography and the perpetration of violence against women,\(^{43}\) it is doubtful that pornography as defined by the civil rights ordinances falls into the clear and present danger category of unprotected speech. Some examples of pornography as defined by the civil rights ordinances obviously advocate the perpetration of crime, yet lack the immediacy element required by Brandenburg. For example, an article entitled "The Joy of Rape: How To, Why To, Where To"\(^{44}\) providing an illustrated guide (complete with regional maps) on how to rape a woman and get away with it, constitutes violent pornography as defined by the civil rights ordinances. Such an article advocates an unlawful action (rape) and it is arguably likely to incite or produce such action. However, "it amount[s] to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to . . . punish . . . speech."\(^{45}\)

B. Abusive Speech

The Supreme Court stated in Chaplinsky v. New Hampshire\(^{46}\) that for words to be considered "abusive speech," they must be addressed to a person in a public place.\(^{47}\) The Court recognized that "[T]he states are free to

\(^{42}\) Id. at 447 (emphasis added).

\(^{43}\) For a discussion of the causal link between depictions of violent pornography and the subsequent commission of crime, see text accompanying notes 105-11 infra.

\(^{44}\) Sex Now, publication date unavailable.

\(^{45}\) Hess v. Indiana, 414 U.S. 105, 108 (1973) (anti-war demonstrator's conviction for violation of disorderly conduct statute reversed because defendant's words were not intended or likely to produce imminent disorder).

\(^{46}\) 315 U.S. 568 (1942).

\(^{47}\) The appellant was convicted under a New Hampshire statute which prohibited any person from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place." Id. at 569. The appellant, a leader of a religious sect, addressed the City Marshall of Rochester, New Hampshire as "God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Id.
ban the simple use, without a demonstration of additional justifying circumstances, of so-called 'fighting words,' those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." The Court further narrowed the so-called "fighting words" exception when it set forth the requirement in Cohen v. California that the abusive public speech be directed at a particular person, rather than at some third person not present.

While some may believe that pornography as defined by the civil rights ordinances constitutes abusive epithets, it is doubtful that it could meet the particularity requirements of Chaplinsky and Cohen. Although it is conceivable that pornography could be used to provoke a woman into a violent reaction, it is unlikely that every sale, use or display of pornography "could reasonably [be] regarded ... as a direct personal insult." Moreover, the ordinances afford a cause of action to women offended by the pornography in their homes. This is clearly outside the scope of Chaplinsky. Therefore, pornography as defined by the civil rights ordinances does not constitute "fighting words."

C. Obscenity

It is more plausible to argue that pornography is unprotected speech because it is obscene. In Roth v. United States, the Supreme Court held that "obscenity is not within the area of constitutionally protected speech or

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48 Id. at 573.
49 403 U.S. 15, 20 (1971). The Court in Cohen reversed the conviction of the appellant who was convicted of violating a California statute prohibiting the disturbing of the peace by "offensive conduct." The appellant was arrested for wearing a jacket bearing the words "Fuck the Draft" in a Los Angeles courthouse. Id. at 26.
50 Id. at 20.
51 See Dialogue, supra note 4, at 188.
53 403 U.S. at 20.
54 See Indianapolis Ord. ch. 16, § 16-3(g)(6); Proposed Minneapolis Ord. § 4, (n).
55 354 U.S. 476 (1957). In Roth the Court upheld a conviction under a federal statute making criminal the mailing of "obscene, lewd, lascivious or filthy" materials. See id. at 476 n.1.
press." The Court stated that the test for obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." In *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, the Court sharply narrowed its definition of obscenity by requiring that: "(a) the dominant theme of the material taken as a whole [appeal] to a prurient interest in sex; (b) the material [be] patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material [be] utterly without redeeming social value." Finally, in *Miller v. California*, the Court devised a more workable obscenity test:

(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.

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56 *Id.* at 485.
57 Currently no states use a pure Roth standard for determining obscenity. See 458 U.S. at 755-56 n.7.
58 354 U.S. at 489.
59 383 U.S. 413 (1966). In *Memoirs* the Court overturned a Massachusetts obscenity statute conviction that was based on a finding that the book *Fanny Hill* was obscene. *See id.* at 421.
61 383 U.S. at 418.
62 413 U.S. 15 (1973). The appellant in *Miller* was convicted under a California statute for the mailing of unsolicited obscene brochures. *Id.* at 16-17. The Court vacated the appellant's conviction and remanded the case to the California courts for consideration under the new test. *See id.* at 37.
Most of what is prohibited by the civil rights pornography ordinances could arguably fit under the Miller definition of obscenity. For example, the ordinances describe pornography as graphically depicting women "as sexual objects tied up or cut up or mutilated or bruised or physically hurt." These portrayals could be considered patently offensive and appealing to the prurient interest. However, the Minneapolis ordinance also prohibits depictions of women "as whores by nature." This vague prohibition likely covers expressions that would not be obscene under Miller.

Most notably absent from the civil rights ordinances is any requirement that objectionable material be viewed as a whole before being judged pornographic. Moreover, no finding as to the artistic or scientific value of the material is required, nor is there any requirement that the pornography offend contemporary community values as applied by the average person. Perhaps the drafters believed that the incorporation of the Miller elements would lead to the same enforcement problems that have hampered obscenity law.


64 INDIANAPOLIS ORD. ch. 16, § 16-3 (q)(3); Proposed Minneapolis Ord. § 3, (gg)(I)(iv).

65 In Miller, the Court gave the following examples of patently offensive depictions:
"(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." 413 U.S. at 25.

66 The Court in Roth defined "prurient" as "material having a tendency to excite lustful thoughts," 354 U.S. at 487 n.20.


68 "Because the definition [of pornography] in the ordinance is concrete, specific, narrow, and describes what is actually there, is not vague, not overly broad, not about ideas that some people think are good or bad, moral or immoral, normal or abnormal, natural or unnatural. . . ." Memorandum, supra note 21 at 7.

D. Child Pornography

Child pornography\textsuperscript{69} is the most recently recognized category of unprotected speech. In \textit{New York v. Ferber},\textsuperscript{70} the Supreme Court held that states may prohibit child pornography if the statute in question\textsuperscript{71} proscribes the visual depiction of children engaged in sexual acts and includes scienter as an element of the offense.\textsuperscript{72} The Court based the decision on several factors. First, it noted that the states have a "compelling" interest "in safeguarding the physical and psychological well being of a minor."\textsuperscript{73} The Court recognized "the prevention of sexual exploitation and abuse of children" as an important governmental interest.\textsuperscript{74} Second, films and photographs depicting minors engaged in sexual acts serve as permanent reminders of the acts, thereby exacerbating the harm to the children involved.\textsuperscript{75} The Court stated that the distribution of such material must be halted to end the sexual abuse of children.\textsuperscript{76} Third, because the production of child pornography is necessarily illegal—requiring sexual abuse of a child—the economic impetus to make such materials should be removed.\textsuperscript{77} Fourth, the social


\textsuperscript{70} 458 U.S. 747 (1982).

\textsuperscript{71} In \textit{Ferber}, the appellant was convicted of violating N.Y. Penal Law § 263.15 (McKinney 1984) which states: "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." See 458 U.S. at 751.

\textsuperscript{72} See 458 U.S. at 764-65 (citing Smith v. California, 361 U.S. 147 (1959), and Hamling v. United States, 418 U.S. 87 (1974)).

\textsuperscript{73} \textit{Id.} at 756-57 (quoting Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596, 607 (1982)).

\textsuperscript{74} See \textit{id.} at 757.

\textsuperscript{75} \textit{Id.} at 759.

\textsuperscript{76} See \textit{id.} at 757-58. \textit{See also} Comment, \textit{supra} note 69, at 814-17 (study finding that large amounts of child pornography are seized by police when making child molestation arrests and that law enforcement officials are, consequently, convinced of a direct link between child pornography and child abuse).

It is interesting that courts and law enforcement officials recognize the link between child pornography and the subsequent abuse of children, but refuse to acknowledge the same link between pornography and the abuse of women. For a discussion of causality, see text accompanying notes 105-11 \textit{infra}.

\textsuperscript{77} See 458 U.S. at 761-62.
value of live performances and depictions of minors engaged in sex acts was found to be de minimus.\(^7\) Fifth, the evil to be restricted “overwhelmingly outweigh[s] the expressive interests . . . at stake.”\(^7\)

All pornography is not, of course, child pornography.\(^8\) The civil rights ordinances proscribe the violent and abusive sexual depictions of women as well as children. It is interesting to note, however, that several of the justifications recognized by the Court in *Ferber* are similar to those argued by the proponents of the civil rights ordinances.

The first reason cited by the Court could be applied to women as well. Just as a city or state has an important governmental interest in preventing the abuse of children, it should have a similar interest in preventing the abuse of women. The Court in *Ferber* recognized that the use of minors in pornographic acts is injurious to the physiological, emotional and mental health of the children.\(^8\) The Court noted that abused children have difficulty in maintaining healthy relationships later in life and that they are predisposed to self-destructive behavior including drug and alcohol abuse as well as prostitution.\(^8\) The proponents of the civil rights ordinances maintain that the women used to make pornography are often the victims of abuse themselves.\(^8\) Women have testified that they were tricked, forced or blackmailed into performing pornographic acts.\(^4\) Moreover, the link between pornography and prostitution is well-documented.\(^8\)

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\(^7\) See id. at 762 (value of such depiction “is exceedingly modest, if not de minimus”).

\(^8\) See id. at 763-64.

\(^9\) For a list of states that have enacted laws regulating child pornography, see id. at 749 n.2.

\(^10\) See id. at 758 n.9.

\(^11\) See id.

\(^12\) See Allred, supra note 52. The civil rights ordinances specify that a woman’s apparent consent to the performance of pornographic acts does not constitute a defense to a charge of coercion into pornographic performances. See INDIANAPOLIS ORD. ch. 16, § 16-3 (g)(5)(A)(I)-(XIII) (1984); Proposed Minneapolis Ord. § 4, (m)(2)(I)-(xiii) (1983).


\(^14\) See S. GRIFFIN, supra note 84, at 112.
The second justification noted by the Court—that the permanency of the depictions exacerbates the harm to the abused children—is equally persuasive with respect to women portrayed in pornography. The Court's recognition that the privacy interests of child models is invaded by the recording and distribution of pornographic materials could easily be extended to women.

The Court also noted that the distribution of child pornography was prohibited, since it inherently involved an illegal act—the production of child pornography. The production of adult pornography, however, is legal in every state, unless it involves the actual murder, rape, sodomy or battery of a woman.

The Court found the value of child pornography to be de minimus. Many opponents of pornography argue that there is also little, if any, redeeming value to depictions of rape, torture and mutilation of women. Moreover, the Court suggested in Ferber that a person over the statutory age could be used to depict children performing sexual acts "if it were necessary for literary or artistic value." This caveat retains a focus on the illegality of the specific underlying act, while the civil rights ordinances would take the broader perspective of recognizing that any portrayal of the degradation of women is itself an evil affecting women, whether as participants, viewers, or victims of behavior precipitated by pornography. Throughout Ferber, the Court referred to the victims of child pornography as the children actually used in the depictions, and not children as a class. The civil rights ordinances would extend the class of plaintiffs further—to all persons offended by the pornography,

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86 See 458 U.S. at 758 nn.9-10.
87 See id. at 761 (the production of child pornography is "an activity illegal throughout the Nation").
88 The movie "Snuff," for instance, depicted the actual murder of a woman. Although produced in South America, the movie has been shown extensively throughout the United States. See Fritz, Pornography as Gynocidal Propaganda, 8 N.Y.U. REV. L. & SOC. CHANGE 219, 219 (1978-79).
89 458 U.S. at 762.
90 See S. GRIFFIN, supra note 84, at 36.
91 See 458 U.S. at 763.
92 See id. at 758.
not just those depicted in it. The proponents of the civil rights ordinances emphasize that pornography has a discriminatory effect and injures the public welfare.

The Court balanced the competing interests involved in the regulation of child pornography—the interests of society and the children versus the first amendment protection of freedom of expression. This balancing of interests is the very point that the proponents of the civil rights pornography ordinances have emphasized. "Free speech involves balancing the rights of everyone, and at some point the rights of the victim should limit the rights of the pornographer."

In Ferber, the Court specifically limited its holding to statutes that prohibit the distribution of visual depictions of child pornography. The Court refused to expand the prohibition to "descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances." The civil rights ordinances contain no such limitation, prohibiting pornography "in pictures or in words."

The Court did specify that all statutes imposing criminal sanctions for the dissemination of child pornography con-

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93 See Indianapolis Ord. ch. 16, § 16-17(b); Proposed Minneapolis Ord. § 4, (l)(3).
94 See note 27 supra and accompanying text.
95 See 458 U.S. at 763-64.
96 Women's struggle to achieve and preserve individual identity and self-respect has been a long one. Courts at times have advanced this endeavor and at times have held it back. As the ultimate arbiter of social control and social relations, our legal system is faced with the contradictory role of protecting the property interests of the powerful and the individual rights of the weak. This contradiction often results in a balancing process whereby competing social interests are weighed. . . . Constitutional analysis . . . has evolved into a continual weighing of interests between the individual and the state, and between conflicting constitutional rights.

Bryant, Sexual Display of Women's Bodies—A Violation of Privacy, 10 Golden Gate U.L. Rev. 1211, 1228 (1980) (citations omitted).
97 Allred, supra note 52.
98 See 458 U.S. at 764.
99 Id. at 765.
100 See Indianapolis Ord. ch. 16, § 16-3 (q); Proposed Minneapolis Ord. § 3, (gg)(1).
tain "some element of scienter on the part of the defendant." Since the civil rights ordinances authorize only civil actions, they do not have to comport with this requirement.

Thus, there are compelling arguments for extending the child pornography analysis to make unprotected pornography that subordinates women. However, the Court's present requirement of inherent illegality and visual representation make it unlikely that this analysis would be extended to validate the ordinance.

E. Violent Pornography As A New Category Of Unprotected Speech

Although pornography as defined by the civil rights ordinances may be protected speech under current definitions of the first amendment, perhaps violent pornography should be recognized as a new category of unprotected speech. The Supreme Court in Ferber indicated its willingness to expand the scope of unprotected speech, and the proponents of the civil rights ordinances hope that other courts will utilize the balancing approach of Ferber.

One of the strongest arguments against the enactment of the ordinances is that there is no proof that pornography leads to the commission of crimes against women. How-

101 458 U.S. at 765.
102 In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 (1973), the Supreme Court noted that the state had "broad power to regulate commerce and protect the public environment." The Court gave its general approval to the use of civil sanctions against obscenity. See id. at 55-70.
103 See 458 U.S. at 753-66. See also text accompanying notes 69-102 supra.
104 See Allred, supra note 52.
105 In 1970, the Presidential Commission on Obscenity and Pornography stated: [E]mpirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal behavior among youth or adults. The Commission cannot conclude that exposure to erotic materials is a factor in the causation of sex crime or sex delinquency.


The Commission concluded that sexually explicit materials might even have a "cathartic effect," thereby preventing sexual crimes. See id. at 23-27. However, the materials used in the studies on which the Commission based its conclusions would be considered mild erotica by contemporary standards. See Gerety, Pornography and Violence, 40 U. Pitt. L. Rev. 627, 641-42 (1979).
ever, convicted sex offenders have testified that violent pornography "fueled the fire" of their criminal tendencies.\textsuperscript{106} One study found that thirty-nine per cent of convicted sex offenders indicated that "pornography had something to do with [the perpetration of the crime] of which they were convicted."\textsuperscript{107} Opponents of the pornography legislation believe that these occurrences are few and isolated, and are inconclusive proof of a direct link between violent pornography and the commission of crimes against women.\textsuperscript{108} Nevertheless, it is important to note that, while reading or viewing violent pornography does not necessarily cause a person to immediately commit the specific act depicted, the attitudes of the person will be influenced, making the person more predisposed to commit violent acts towards women, and less sensitive to female victims of crime.\textsuperscript{109} As MacKinnon states:

\begin{quote}
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\textsuperscript{106} Edmund Kemper III was convicted for the murders of his grandparents at age 15, his mother at age 24, and six other women in between. Kemper stated that he often read magazines to find depictions of corpses and frequented snuff movies. \textit{See} Starr, \textit{The Random Killers}, \textit{Newsweek}, Nov. 26, 1984, at 104-05.

\textsuperscript{107} B. Leiser, \textit{Liberty, Justice and Morals} 180 (2d ed. 1979).

\textsuperscript{108} \textit{See} Nightline, \textit{supra} note 6 (interview with Gay Talese).

\textsuperscript{109} [T]he main evil of pornography is its general influence on attitudes, feelings, inclinations, emotional stability, and moral standards. The flow of causality is not: (a) Pornography (causes) anti-social or criminal conduct (always) but rather: (b) Pornography (causes) deviant moral/psychological attitudes (usually) (which in turn cause or predispose to) anti-social or criminal conduct (more often than such conduct would occur had attitudes not been predisposed to tolerate and even enjoy such conduct).

\end{quote}

This hypothesis was borne out in a study conducted by Dr. Neil M. Malamuth, a psychologist at the University of Manitoba. He conducted an experiment designed to test the attitudinal and behavioral changes of men who viewed violent pornographic films. A group of several hundred students watched a number of films including two depicting extremely violent sexual acts against women. An attitudinal survey was administered to the students both before and after they viewed the films. Specific questions about their attitudes toward violence and women were embedded in the questionnaire. The researcher found that "exposure to films portraying violent sexuality increased male subjects' acceptance of interpersonal violence against women." Feshback & Malamuth, \textit{Sex and Aggression: Proving the Link}, \textit{Psychology Today}, Nov. 1978, at 111.

For further discussion of the link between pornography and aggression, see, e.g., Court, \textit{Pornography and Sex-crimes: A Re-evaluation in the Light of Recent Trends Around the World}, 5 \textit{Int'l J. Criminology & Penology} 129 (1977); Gray, \textit{Exposure to Pornography and Aggression Toward Women: The Case of the Angry Male}, 4 \textit{Soc. Probs.} 387 (1982); Malamuth, \textit{Testing Hypotheses Regarding Rape: Exposure to Sexual}
Each time men are sexually aroused by pornography—the sexually explicit subordination of women—they learn to connect women's sexual pleasure to abuse and women's sexual nature to inferiority. They learn this in their bodies, not just their minds, so that it becomes a physical, seemingly natural, response. When real women claim not to want inequality or force, they are not credible compared with the continually sexually available "real women" in pornography. These men are the same normal men who make decisions that control much of women's lives and opportunities at every level of society. Until women achieve equal power with men, such men are in a position to control women's employment, educational advancement, social status and credibility in the media, on paper, on the street, in meetings, in court, in their own homes, and in public office.110

In sum, whether violent pornography falls outside the protection of the first amendment depends on the willingness of courts to recognize the connection between pornography and the commission of crimes against women.111

III. ANALYSIS UNDER THREE IMPORTANT FIRST AMENDMENT DOCTRINES

Assuming that pornography as defined by the civil rights pornography ordinances is held to be unprotected speech, the ordinances must still be scrutinized under three important doctrines to determine if they pass constitutional muster: the overbreadth doctrine; the void-for-vagueness doctrine; and the doctrine of prior restraint.


110 Memorandum, supra note 21, at 2.

111 Courts have sometimes hesitated to acknowledge the link between the viewing of violence and the perpetration of crime. See, e.g., Olivia N. v. National Broadcasting Co., 141 Cal. Rptr. 511, cert. denied, 435 U.S. 1000 (1978) (refused to recognize a nine-year-old girl's argument that her gang rape was a copycat of the depiction of a similar rape of a young girl in the television movie "Born Innocent"); Zamora v. State, 361 So. 2d 776, 779-82 (Fla. Dist. Ct. App. 1978) (disallowed defendant's insanity defense based upon the subliminal effect of viewing television violence).
A. The Overbreadth Doctrine

To be valid, the civil rights pornography ordinances must not be unconstitutionally overbroad. "As with all legislation in this sensitive area [i.e., free speech], the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed."112

Generally, a party to whom a statute is constitutionally applicable may not attack the statute because it may not always be applied constitutionally in situations not before the court.113 The first amendment overbreadth doctrine is a recognized exception to this general rule.114 It permits a party to challenge a statute not because his or her free speech has been violated, "but because of a judicial predication or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."115 However, the Supreme Court in Broderick v. Oklahoma held that the overbreadth of a statute must be "substantial" before the statute will be held unconstitutional on its face.116

The Court in Ferber sustained the statute in question as "not substantially overbroad."117 It held that "the possible impermissible applications of the statute amounted to a tiny fraction of the materials [conceivably] within the statute's reach."118 The same argument could be made for the civil

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113 Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973) (citing Austin v. The Aldermen, 74 U.S. (7 Wall.) 694, 698-99 (1869)) (holding an Oklahoma statute prohibiting political solicitation and campaigning by state employees not unconstitutional on its face since the statute gave adequate warning of proscribed behavior as applied to the appellants).
114 Id. at 612.
115 Id.
116 See id. at 615-16. The Court further stated:
Although . . . laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.
Id. at 615.
117 See 458 U.S. at 773. ("We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.").
118 Id.
rights pornography ordinance. For example, the ordinances would prohibit the depiction of body parts exhibited in such a way that women are reduced to these parts. This description could easily apply to medical textbooks. However, Justice O'Connor, in her concurrence in *Ferber*, dismissed a similar argument by stating that depictions in textbooks "might not trigger the compelling interests identified by the Court." Similarly, the depictions of women in textbooks would not trigger the same interests identified by the drafters of the civil rights ordinances. Although the ordinances could be applied impermissibly to protected speech, "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." 

**B. The Void-For-Vagueness Doctrine**

The void-for-vagueness doctrine is based upon the same rationale as the overbreadth doctrine. In *NAACP v. Button*, the Court held that statutes affecting first amendment rights must be drawn with "narrow specificity." In *Smith v. Goguen*, the Court held that the void-for-vagueness doctrine requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.

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119 See *INDIANAPOLIS ORD.* ch. 16, § 16-3 (q)(3) ("Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts"); Proposed Minneapolis Ord. § 3, (gg)(1)(vi) ("Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt").

120 458 U.S. at 775.

121 See note 27 supra.

122 458 U.S. at 773-74 (quoting Broadrick v. Oklahoma, 413 U.S. at 615-16).


125 *Id.* at 433 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940)).


127 *Id.* at 572-73 (citations omitted).
The drafters of the civil rights pornography ordinances claim to have avoided the void-for-vagueness doctrine by writing "an extremely concrete law." MacKinnon notes: "This is not like obscenity law, which is written in order to include a whole lot of possibilities for interpretation and local variation. This law is extremely concrete. It's not only ... narrow, but it's very specific. It doesn't give that kind of room." MacKinnon states that only sexually explicit subordinations of women are pornographic under the ordinance and that the term "sexually explicit" has substantial legal meaning. But, of course, the term "subordination" does not; it is subject to different interpretations. However, the examples listed in the statute do provide some degree of fair notice and warning to booksellers and arguably "convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

C. The Doctrine of Prior Restraint

"When speech is suppressed in advance of publication or distribution—instead of being permitted to enter the marketplace of ideas before being identified and regulated as unprotected speech—it has been subjected to a prior restraint." Prior restraint of speech is considered more serious than subsequent punishment.

The Supreme Court has held that obscenity, since it is unprotected speech, may be restrained before distribution. The Court in Freedman v. Maryland imposed certain procedural safeguards that must be incorporated into any statutory scheme authorizing prior restraint: (1) the person seeking to restrain speech has the burden of proving that the speech is unprotected; (2) an adversarial, prompt and

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128 Nightline, supra note 6, at 4 (interview with Catherine MacKinnon).
129 Id. at 4.
130 See id. at 5.
131 See United States v. Petrillo, 332 U.S. 1, 8 (1947).
132 Note, supra note 13, at 1493 (citations omitted).
133 Nowak, supra note 123, at 871.
final adjudication of obscenity must be imposed by statute or judicial construction; and (3) any prior restraint before judicial review should be limited in duration.\textsuperscript{136}

The civil rights pornography ordinances should comply with the \textit{Freedman} requirements. The Indianapolis Ordinance, for example, states that a public hearing before an investigative committee must be held within ten days after the filing of a complaint charging sex discrimination on the basis of pornography. The parties are allowed to subpoena and cross-examine witnesses. The committee must issue a report recommending findings of fact within thirty days of the hearing. Either party may appeal to an administrative board within thirty days. If the board determines that a discriminatory practice has occurred, it may file a complaint in circuit court. Judicial review of the board’s findings is de novo and the board bears the burden of proof. No injunctive relief will issue until a final judicial determination has been made.\textsuperscript{137}

This scheme meets all of the \textit{Freedman} requirements, except that a finding of unlawful sex discrimination on the basis of pornography, rather than a finding of obscenity, is sufficient to merit injunctive relief. However, if pornography is held to be unprotected speech, the ordinances should be held constitutional.

\textbf{Conclusion}

The proponents of stricter pornography laws insist that sanctions against violent pornography are "a necessary solution to an otherwise intractable problem."\textsuperscript{138} However, others have suggested that "educat[ing] the public on pornography’s dangers, and . . . rais[ing] ‘public awareness so that consumption of pornography is socially ostracized,’ may be more effective than isolated actions against certain publications and pornographers."\textsuperscript{139} This may be an admirable goal, but it is little more than wishful thinking. Violent

\textsuperscript{136} See id. at 58-59.

\textsuperscript{137} See \textsc{Indianapolis Ord.} ch. 16, §§ 16-17, 26-27.

\textsuperscript{138} Allred, \textit{supra} note 52.

\textsuperscript{139} \textsc{Dialogue, supra} note 4, at 204.
pornography in America has reached an unacceptable level and legislators are justified in their concern. The civil rights pornography ordinances should be recognized as constitutional means to end this social evil.

Valerie J. Hamm