
Sticks and Stones May Break My Bones, but Your Words Are Sure to Kill Me: A Case Note on *United States v. Alkahabaz*

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**STICKS AND STONES MAY BREAK MY BONES, BUT
YOUR WORDS ARE SURE TO KILL ME: A CASE
NOTE ON *UNITED STATES V. ALKHABAZ*.***

When we feel, we will feel the emergency:
when we feel the emergency, we will act:
when we act, we will change the world.¹

INTRODUCTION

Traditionally, under the Supreme Court's constitutional standard, the regulation of obscenity² remains the domain of state and local authorities.³ Theoretically, states and municipalities have the ability to police the retail distribution of obscenity in their jurisdictions.⁴ However, the regulation of obscenity has proven problematic given the national and worldwide distribution of sexually oriented magazines and videos. Similarly, the advent of the Internet has virtually eliminated jurisdictional regulation. Thus, it is apparent that only federal regulation of obscenity will have the ability, even theoretically, to regulate the national distribution of obscenity on the Internet.

The urgent need to regulate obscene speech on the Internet is a matter of common sense in a nation that claims to value equality. The imperative need to fight the battle against the continued subordination of women is a matter of life and death in a nation whose prosperity depends on women.⁵ An unregulated Internet, and its vast

* Warning: This Note contains sexually graphic material.

The author would like to acknowledge the generous support and insatiable curiosity of her family and friends.

1. ANDREA DWORKIN, *WOMAN HATING* 91 (1974) (quoting JULIAN BECK, *THE LIFE OF THE THEATER: THE RELATION OF THE ARTIST TO THE STRUGGLE OF THE PEOPLE* (1972)).

2. See *infra* notes 88-117 and accompanying text (explaining the standards and general definition of obscenity).

3. *Miller v. California*, 413 U.S. 15, 19-20 (1973) (recognizing that a "state may regulate [obscene material] without infringing on the First Amendment . . .").

4. *Id.* at 25.

5. See U.S. DEP'T OF STATE, *Who are the Women of the U.S.*, at http://dosfan.lib.uic.edu/ERC/intlorg/Status_of_Women/s2.html (last visited Nov. 18, 2000).

The Census Bureau of the United States Department of Commerce provided baseline data from the 1990 Census for measuring the status of women and for designing policy, legislation, and programs that have advanced the status of America's women. *Id.* "The 1990 Census found historic changes in the characteristics of women: . . . women have become a majority of professional workers." *Id.* For an expansive view on the percentage of women working in individual sectors of employment, for example, elective offices, appointive offices, the international public

capabilities, allows for the subordination of women to continue by permitting its users to freely transmit obscene speech. The amount of obscenity transmitted through the Internet is truly abominable.⁶ The fact that the United States Congress has done nothing to curb the amount of obscenity on the Internet is repugnant and worthy of criticism.

The United States Congress deserves criticism for not immediately enacting a federal statute regulating Internet obscenity after the United States Court of Appeals for the Sixth Circuit decided *United States v. Alkhabaz*.⁷ Jacob Alkhabaz was responsible for various Internet transmissions that described, in sexually explicit detail, plans to rape, torture, and murder women.⁸ The *Alkhabaz* court did not directly address the First Amendment issues regarding protected speech when it analyzed Alkhabaz's e-mail transmissions and Internet stories.⁹ The court ignored, by way of bypassing, all possible First Amendment issues inherent within Alkhabaz's Internet speech and strictly declared that the e-mail and Internet stories were mere fantasies and not true threats.¹⁰ As such, the e-mails and Internet stories were not violations of Title 18, section 875(c) of the United States Code (18 U.S.C. § 875(c)).¹¹ The relevant section of 18 U.S.C. § 875(c) states that "whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both."¹²

Through a close analysis of the *Alkhabaz* case, this Note will demonstrate that there is a dire need for the federal government to regulate obscenity on the Internet. To better understand the intricacies of obscenity on the Internet, Part II of this Note will provide a historical background on the Internet and the First Amendment in

sector, the judicial system, the private sector (corporate managers, executive, directors) and the media, see *supra*.

6. The effects are anecdotal because there is currently no scientific data linking violence to obscenity. See *infra* note 332 and accompanying text.

7. 104 F.3d 1492 (6th Cir. 1997).

8. *Id.* at 1493.

9. See *id.* ("Accordingly, we decline to address the First Amendment issues raised by the parties.").

10. *Id.* at 1493.

11. *Id.*

12. 18 U.S.C. § 875(c) (1999). The law that was eventually passed as 18 U.S.C. § 875(c) was first passed in 1932, as Public Law Number 72-274, and criminalized the use of the mails to transmit a threat to injure or kidnap any person, or to accuse a person of a crime or demand ransom for a kidnapped person. See H. R. REP. NO. 692, at 3, 72 Congress, 1st Sess. (1932).

relation to obscenity and pornography.¹³ Part II will also discuss the current standards of review for obscenity under the First Amendment.¹⁴ Part III will provide a background and full summary of the *Alkhabaz* case, including Alkhabaz's "Jane Doe" Story.¹⁵ Part IV will analyze both Alkhabaz's e-mails and the "Jane Doe" story, as well as argue that the court should have concluded that Alkhabaz's e-mails were obscene speech containing true threats under 18 U.S.C. § 875(c).¹⁶ Part V will examine the impact that obscene Internet transmissions have on women as well as on society as a whole, and discuss why the United States Congress must produce a federal statute denying First Amendment protection to obscene speech on the Internet.¹⁷ This part will also provide suggestions on what material the federal statute should include.¹⁸ Part V will also examine current Internet regulations and the viability of their enforcement.¹⁹ In the furtherance of federal regulation, Part VI will question the constitutionality of a federal statute that would deny all transmissions of obscenity over the Internet.²⁰ In conclusion, Part VII of this Note will explain that the value of obscene materials transmitted through the Internet that describe the horrid rape, mutilation, and overall subordination of women does not outweigh the societal costs of inaccessibility to such obscene ideas.²¹ Thus, this Note will conclude that the federal government must regulate Internet speech that contains sexually violent and obscene e-mails and stories.

II. THE INTERNET, THE FIRST AMENDMENT, AND OBSCENITY: AN OVERVIEW

Over the past thirty years, technological innovations have revolutionized the way people acquire information and communicate with others. Through the use of computers and the Internet, people possess the means for faster and more direct communication.²² "Today, through the use of computers and the Internet, more people than ever have direct access to an increasing amount of information The

13. See *infra* notes 22-117 and accompanying text.

14. See *infra* notes 88-117 and accompanying text.

15. See *infra* notes 118-160 and accompanying text.

16. See *infra* notes 161-245 and accompanying text.

17. See *infra* notes 246-299 and accompanying text.

18. See *infra* notes 246-299 and accompanying text.

19. See *infra* notes 300-310 and accompanying text.

20. See *infra* notes 311-347 and accompanying text.

21. See *infra* Part VII.

22. Jeffrey M. Taylor, *Liability of Usenet Moderators for Defamation Published by Others: Flipping the Law of Defamation into Cyberspace*, 47 FLA. L. REV. 247, 248-49 (1995).

advent of complex information systems . . . have made direct communication between individuals more accessible, more rapid, and more powerful."²³ This "heightened ability to communicate,"²⁴ however, has created a new medium for the production and transmission of obscenity. The Internet has revolutionized communication to an extent utterly unimaginable to the inventors of this complex information system, and to the Framers of the United States Constitution who drafted the First Amendment.

In order to fully examine the application of the First Amendment to obscene materials on the various mediums of the Internet, such as newsgroups, bulletin board stories, and private e-mail transmissions, the operations of the Internet must be analyzed. Furthermore, in order to comprehend the serious impact that obscene materials have on women and society, the laws regulating our freedom of speech, and in particular, the law in regard to obscenity, must be brought to light and fully examined.

A. *The Internet*

In the 1960s, at the height of the Cold War, the United States Department of Defense (Defense Department) questioned whether military orders could "be issued to the armed forces if the United States were ravaged by a nuclear attack."²⁵ As a result, in 1966, the Defense Department's Advanced Research Project Agency (ARPA) introduced ARPAnet as the first transcontinental, high-speed computer network built and developed to link communications among military installations and to survive a nuclear exchange.²⁶ In 1969, ARPA expanded the scope of ARPAnet, introducing its viability and application to universities, defense contractors, and research laboratories.²⁷ This network soon became a vast information superhighway, referred to as the Internet.²⁸ Thirty years later, the Internet community ex-

23. *Id.* at 248-49.

24. *Id.* at 248.

25. Philip Elmer-Dewitt, *First Nation in Cyberspace*, TIME, Dec. 6, 1993, at 62.

26. Ian C. Ballon, *The Emerging Law of the Internet*, 547 PLI/PAT 169, 177 (1999); Taylor, *supra* note 22, at 251; Sudha Nagargi, *Hacking: Dangerous Liaison*, COMPUTERS TODAY, Apr. 30, 1999, at 46. "The Internet developed from a project conceived in 1966 by Bob Taylor, the director of the Computer Research Program at the United States Department of Defense's Advanced Research Project Agency . . ." Ballon, *supra*, at 177. Nonetheless, the inventor of the Internet may still be in dispute. See Elmer-Dewitt, *supra* note 25, at 62.

27. Taylor, *supra* note 22, at 251; Nagargi, *supra* note 26, at 46.

28. Taylor, *supra* note 22, at 251.

panded beyond government and academic use and is now used by over 200 million people worldwide.²⁹

The Internet provides its users with a wide range of communication possibilities. For example, users³⁰ can receive e-mail,³¹ participate in chat lines,³² and access the Internet's system of news and discussion groups known as Usenet.³³ Usenet is a public collection of electronic discussion groups, usually referred to as newsgroups.³⁴ The newsgroups serve as electronic bulletin boards (BBS)³⁵ for users to post universally accessible messages or articles, including questions, answers, and general information.³⁶ There are approximately 76,000 In-

29. *The Dawn of e-Life*, NEWSWEEK, Sept. 20, 1999, at 41. The United States alone has approximately 80 million people using the Internet. *Id.* See also Ballon, *supra* note 26, at 178 (discussing the increase of individuals using the Internet throughout the past decade). Although it is difficult to obtain the exact number of Internet users, approximately 25 million individuals had access to the Internet in mid-1994, and the audience then was predicted to double each year. *Id.* In September 1995, a survey concluded that there were only 5.8 million individual Internet users in the United States in addition to 3.9 million commercial users. *Id.* In 1996, however, it was estimated that there were more than 26.7 million people using a web browser. *Id.* Furthermore, in 1998, a survey "concluded that by the year 2000 more than 50 million people would be online, or alternatively as many as 142 million worldwide (including 71 million in the United States)." *Id.* It should be noted that the number of individuals with access to the Internet has already surpassed the projections. *Id.*

30. There are two types of users: (1) professional, and (2) "end users." This Note will discuss "end-users," individuals who are "without much technical knowledge of information technology who use computers for entertainment, education, or work related tasks." USING INFORMATION TECHNOLOGY: A PRACTICAL INTRODUCTION TO COMPUTERS & COMMUNICATIONS 10 (Brian K. Williams et al. eds., 2d ed. 1997)[hereinafter USING INFORMATION TECHNOLOGY]. "An information technology professional [user] is a person who has a formal education in the technical aspects of using a computer-and-communications system." *Id.*

31. *Id.* at 26 (defining e-mail as "a software-controlled system that links computers by wired or wireless connections . . . allow[ing] users, through their keyboards, to post messages and to read responses on their computer screens"). The second most convenient way for people to communicate across state lines is by e-mail. *Id.* Forty-six percent of Americans send or receive e-mail everyday. See Jared Sandberg, *Losing Your Good Name Online*, NEWSWEEK, Sept. 20, 1999, at 57. E-mail is convenient, saves time, brings people closer together, and helps people manage their complex lives. See Andrew Leonard, *We've Got Mail-Always*, NEWSWEEK, Sept. 20, 1999, at 58. E-mail aids its users in writing books, conducting political campaigns, and committing crimes. *Id.*

32. See USING INFORMATION TECHNOLOGY, *supra* note 30 at 341. Chat lines, otherwise known as chat rooms, are discussion areas in which a user may participate with others in a real-time conversation through keyboard use with the collective chat room conversation scrolling across the screen. *Id.*

33. HARLEY HAHN & RICK STOUT, THE INTERNET COMPLETE REFERENCE 158-60 (1994). Usenet is an abbreviation for "users network." *Id.* at 161.

34. *Id.* at 161; USING INFORMATION TECHNOLOGY, *supra* note 30, at 348 (defining newsgroups as "electronic discussions held by groups of people focusing on a specific topic"). See also Taylor, *supra* note 22, at 253.

35. "A electronic bulletin board system (BBS) is a centralized information source and message switching system for a particular computer-linked interest group. A BBS is usually run by a sysop, or system operator." USING INFORMATION TECHNOLOGY, *supra* note 30, at 342.

36. See *id.* at 348.

ternet sites that collect and organize Usenet's newsgroup messages, while Usenet itself "boasts more than 11,000 newsgroups."³⁷ Most articles posted on Usenet newsgroups are not screened, thus, there are no restrictions or regulations by which to abide.³⁸ "A user may send an article to a moderated group in the same way as an unmoderated group," however, a moderated newsgroup employs the aid of moderators to determine and edit what articles will be posted via e-mail.³⁹ The role of the moderator is to read every user transmitted article and determine whether it meets certain predetermined requirements of the newsgroup.⁴⁰ The moderator has the ability to edit or ultimately refuse to post an article that does not meet these requirements.⁴¹

A BBS "is a centralized information source and message switching system for a particular computer linked interest group."⁴² Most BBSs are not easy to access because they require the subscriber to pay a fee by credit card and receive a password in order to upload or download certain data or post messages on relevant databases.⁴³

The available information acquired through Usenet and BBSs are only two of the many explanations for the dramatic increase in Internet users. The Internet is a convenient, simple, and affordable route of communication, opening access to a seemingly infinite amount of knowledge. In addition, computer networks abolish the limits of geography, as well as the laws and regulations that are mandated within a particular geographical and legal jurisdiction.⁴⁴ The

37. Taylor, *supra* note 22, at 253.

38. Taylor, *supra* note 22, at 254 (explaining the process of getting an article printed or posted on a moderated newsgroup). See also HAHN & STOUT, *supra* note 33, at 175.

39. Taylor, *supra* note 22, at 254.

40. *Id.*

41. *Id.*

42. *Id.* HAHN & STOUT, *supra* note 33, at 27 (noting that a BBS is a repository system for messages devoted to a particular topic).

43. Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 321, 339 (1997). Bilstad explains that after the user has paid the fee and obtained a password, he can gain access to a BBS by calling a separate number with his modem and communications software. *Id.* Therefore, it is implied that "BBSs are not areas of the Internet that one can just stumble onto." *Id.*

44. MIKE GODWIN, CYBER RIGHTS 8 (1998). But see Pamela A. Huelster, Note, *Cybersex and Community Standards*, 75 B.U. L. REV. 865, 876 (1995) (noting that in regard to issues of obscenity in electronic services such as BBSs, the community standard the court or jury must apply is that of the BBS provider, in other words, where the service originates). Some commentators state that "all of the users of a particular bulletin board service form a community," thus implying that the community standard the court should apply is that of the entire world, because the bulletin board is potentially accessible to anyone worldwide. *Id.*

unregulated and limitless geographic domain of the Internet⁴⁵ allows users to experience an amorphous social freedom when they communicate. Internet users are allowed to communicate without their assigned social attributes of sex, race, or other characteristics of inequality, and remain anonymous, if they desire.⁴⁶ Anonymity and the social freedom provided by the safe harbor of cyberspace permits users to explore and speak without restraint on topics considered taboo in the real world.⁴⁷

These forbidden or socially taboo acts of expression are not understood within the Internet's infrastructure.⁴⁸ The Internet's infrastructure allows every user to build a range of information services and forums of expression and association.⁴⁹ Since the Internet is built on the philosophy of openness and free communication, "its users hold the potential to change not only how [they] get things done, but [also their] thinking patterns and behaviors" regardless of whether the

45. Cyberspace is defined as "a virtual reality comprised of electronic data and information . . . [and] is generally accessed through a computer and seen through a video display or other visual output device." Taylor, *supra* note 22, at 250 n.16. Cyberspace has also been defined as "the computer online world and the Internet in particular, but it is also used to refer to the whole wired and wireless world of communications in general." USING INFORMATION TECHNOLOGY, *supra* note 30, at 333. When the term "cyberspace" is mentioned in this Note, it is meant to refer to the Internet in particular so as to demonstrate the vast amount of connections and interactions available to computer users.

46. Margaret Chon, *Symposium: Towards a Radical and Plural Democracy: Radical Plural Democracy and the Internet*, 33 CAL. W. L. REV. 143, 143 (1997); Timothy Zick, *Congress, The Internet, and the Intractable Pornography Problem: The Child Online Protection Act of 1998*, 32 CREIGHTON L. REV. 1147, 1158 (1999). "In cyberspace, we have the ability to hide absolutely who we are. Thus, [c]yberspace is a place that maximizes both social and individual plasticity, which means it is a place that determines very little about what others must know about you." *Id.*

47. Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, TIME, July, 3, 1995, at 38. "Cyberspace is a safe place in which to explore the forbidden and the taboo It offers the possibility for genuine, unembarrassed conversation about accurate as well as fantasy images of sex." *Id.* at 45. The idea that particular topics of conversation are taboo has decreased over the past decade, although there is one area of conversation that is still widely considered "taboo" by members of society. Gad Horowitz and Michael Kaufman note in their article *Male Sexuality: Toward A Theory of Liberation*, that the attraction to pornography is in itself the attraction to conversation that is socially taboo, the expressed idea of male dominance and female subservience is often considered taboo. Gad Horowitz & Michael Kaufman, *Male Sexuality: Toward A Theory of Liberation*, in BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE 81, 98 (1987).

48. Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J. L. & TECH. 465, 466 (1997). Goodman comments on how the Internet's infrastructure, which is composed of electronic bits which have no color, size, or weight, and travel at the speed of light, does not understand its users' acts of expression. *Id.* Nonetheless, millions of these electronic bits represent atom-based objects or analog forms of information such as speech and are clearly understood by the human brain. *Id.*

49. GODWIN, *supra* note 44, at 8.

changes are for the better or the worse.⁵⁰ Yet, despite the Internet's vast size, increasing usage worldwide, and ability to influence its users, the Internet remains largely unregulated. Therefore, along with introducing a new medium of communication, the Internet provides a unique forum for the distribution of obscenity and other forms of hate speech.⁵¹

B. *The Shield of the First Amendment*

The United States Constitution's most majestic guarantee provides that "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 of the right of the people peaceably to assemble, and to petition the government for a redress of grievances."⁵² Historically, courts have rarely strayed from according the First Amendment preferred treatment because it restrains the government's power to limit the freedom of expression based on the message, idea, subject matter, or content of speech regardless of how repugnant it may be.⁵³ Some American historians and legal scholars believe that the development of First Amendment jurisprudence began with several cases in the early Twentieth Century.⁵⁴ During this period, shortly after World War I, the courts were faced with a number of cases brought under the Espionage Act⁵⁵ of 1917.

50. *The Dawn of e-Life*, *supra* note 29, at 41.

51. Taylor, *supra* note 22, at 249. See also John Leland, *More Buck for the Bang*, *NEWSWEEK*, Sept. 20, 1999, at 61 (commenting on how adult Internet sites were a one billion dollar industry in 1998 and that more than one-half of all requests made on Internet search engines are adult-oriented).

52. U.S. CONST. amend. I.

53. See e.g. *Byers v. Edmondson*, 712 So. 2d 681, 689 (La. Ct. App. 1st Cir. 1998) (questioning whether the movie *Natural Born Killers* is protected speech "because it falls into two of the exceptions to the First Amendment guarantee of free speech: the obscenity exception and the incitement to imminent lawless activity exception").

54. Michael J. Mannheim, *The Fighting Words Doctrine*, 93 *COLUM. L. REV.* 1527, 1530 n.19 (1993) (noting that the "development of modern First Amendment doctrine began with several cases . . . that interpreted . . . the Espionage Act of 1917 . . ."). But see David M. Rabban, *The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History*, 45 *STAN. L. REV.* 47, 48-49 (1992) (illustrating that the assumption that the Espionage Act of 1917 provoked the first modern controversy over free speech is incorrect because, through the investigation of the pre-war period, "controversies over free speech arose in an enormous variety of settings, ranging from the activities of political radicals to disputes over commercial and movie censorship").

55. The Espionage Act of 1917 stated that the constitutional freedom of speech and press was not infringed by the provisions of the Espionage Act of 1917 under which

convictions may be had for conspiring when the United States was at war with Germany, unlawfully to utter, write, and publish disloyal, scurrilous, and abusive language about the form of government of the United States, or language intended to bring the form of government of the United States into contempt, scorn, contumely, and disre-

Nonetheless, the dominant justification for the special protections guaranteed by the First Amendment freedom of speech is the belief that a free marketplace of ideas will foster liberty and democracy.⁵⁶ Similarly, John Stuart Mill's *On Liberty* defends the concept underlying the freedom of speech and the marketplace of ideas by arguing that allowing all speech into the marketplace, both good and bad, will result in the discovery of truth.⁵⁷ Despite the fact that a free marketplace of ideas will often permit the communication of information that may endanger society, courts have found that a free marketplace of ideas will serve liberty well and therefore outweighs the costs that society will undoubtedly endure as a result of the dangerous speech.⁵⁸ Many courts have reasoned that it would be dangerous for a democratic government to decide what speech is permissible.

The United States Supreme Court has held that freedom of speech is not an absolute right, despite the plain language and absolute tone of the First Amendment.⁵⁹ The Court has realized that regardless of the absolute language of the First Amendment, the "Framers did not intend to provide constitutional protection for false testimony [given] under oath, or for oral contracts that are against public policy, such as

pute, or intend to incite, provoke, and encourage resistance to the United States in said war or unlawfully and willfully, by utterance, writing, printing, and publication, to urge, incite, and advocate curtailment of production of things necessary and essential to the prosecution of the war.

40 Stat. 451 (1917); *Abrams v. United States*, 250 U.S. 616, 616 (1919). For a short and precise historical account of President Woodrow Wilson's 1917 Espionage Act, see Paul Murphy, *Espionage Act*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 652-53 (1986).

56. For a discussion of the marketplace theory, see *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting) (maintaining that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

57. JOHN STUART MILL, *ON LIBERTY AND UTILITARIANISM* (Bantam Classic Books) (1993) (discussing the importance of a free market and exchange of ideas in a democratic society).

58. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1019 (5th Cir. 1987).

59. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1943). The *Chaplinsky* Court recognized that the right to free speech was not absolute under all circumstances:

There 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. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-72; *Schenck v. United States*, 249 U.S. 47 (1919); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring). *But see* The Honorable John Paul Stevens, *The Freedom of Speech*, Address at the Yale Law School as the Inaugural Ralph Gregory First Amendment Lecture (Oct. 27, 1992), 102 *YALE L. J.* 1293, 1295-96 (1993) ("The plain language of the First Amendment indicates that the Framers intended to establish a rule of absolute immunity."). However, Justice Stevens realized that the First Amendment is rarely understood in such a way as to protect all speech. See *id.* at 1296.

wagers or conspiracies . . . to fix prices.”⁶⁰ In addition, recently established case law has held that speech aiding and abetting criminal activity does not enjoy First Amendment protection since the “[a]mendment has never been understood to protect all oral communication, no matter how unlawful, threatening, or vulgar it may be.”⁶¹ Other examples of speech not protected by the First Amendment are fighting words,⁶² gross libel,⁶³ unlawful agreements,⁶⁴ and defamation.⁶⁵ As these examples suggest, the type of speech that is often unprotected by the First Amendment can be characterized as harmful. Nonetheless, the First Amendment protects political and societal opinions that are portrayed through pornographic material, however, such protection does not extend to those ideas demonstrated in obscene materials.⁶⁶ Obscenity and pornography differ, not only in their definitions, but also in the court’s standard of review.⁶⁷

60. Stevens, *supra* note 59, at 1296. See also *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (reaffirming the idea that agreements to engage in illegal conduct may be banned by the state without encroaching on any First Amendment right, thus the ability to illegally exchange goods for private profit may be prohibited).

61. *Rice v. Paladine Enterprises*, 128 F.3d 233, 243 (4th Cir. 1997); Stevens, *supra* note 59, at 1296.

62. *Chaplinsky*, 315 U.S. at 572 (claiming that fighting words “by their very utterance inflict injury or tend to incite an immediate breach of the peace”). Fighting words do not play an integral part of the exposition of ideas in a community and have such a low amount of social value that a society’s interests in morality and order are more important. *Id.* See also ZECHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 149 (1941) (stating that free speech guarantees do not apply to some classes of speech because the utterance of such words injures listeners and may breach the peace). Chafee commented on the fact that fighting words do not offer listeners the ability to engage in counter-arguments and that “the harm is done as soon as they are communicated, or is liable to follow almost immediately in the form of retaliatory violence.” *Id.* at 150.

63. For an extensive review of the cases regarding the protection of gross libelous speech see GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 132-156 (1999).

64. See *Brown v. Hartlage*, 456 U.S. 45, 54-55 (1982). The mere fact that an unlawful agreement is composed of speech (i.e., words) does not automatically confer upon it the immunities granted by the First Amendment. *Id.* at 55.

65. See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (holding that a public figure may hold a speaker liable for damage to one’s reputation caused by publication of a defamatory falsehood if the statement was made with actual malice, or in other words, with the knowledge that the statement was false or made with reckless disregard as to whether the statement was true or false). See also *Byers*, 712 So. 2d at 689.

66. See *Chaplinsky*, 315 U.S. at 572. In *Chaplinsky*, the Court explained that lewd and obscene utterances are not an essential part of any exposition of ideas and are of such slight social value that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. *Id.*

67. See generally James Lindgren, *Defining Pornography*, 141 U. PA. L. REV. 1153, 1159 (1993) (noting that the concept of pornography differs from that of obscenity). “Obscenity [is defined] as dirty sexual matter that lacks value, while pornography [is defined] as explicit sexual material that harms women.” *Id.* Pornography includes “currently constitutionally protected works with literary or social value.” *Id.*

1. Pornography and the First Amendment

There is no one accepted definition of pornography, however, pornography is most commonly defined as graphic, sexually explicit work, which the dissemination of, in context, tends to subordinate women.⁶⁸ Pornographic materials include depictions of sexualized rape, battery, sexual torture, and prostitution or servility.⁶⁹ In short, pornography propagates the societal promotion and political legitimization of the continued sexual subordination of women.⁷⁰

Notwithstanding the impact that pornography has on women, the United States Supreme Court has held that pornographic speech is protected by the First Amendment.⁷¹ The Court, based on its interpretation of the First Amendment, has not yet found justification for denying pornography protection, and continues to state that the quality of speech “cannot be invoked as a basis for government control

68. This is the definition relied upon in this Note. See also ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 128 (1989) [hereinafter *PORNOGRAPHY*]. The MacKinnon-Dworkin model definition of pornography states as follows:

Pornography is the graphic sexually explicit subordination of women, 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 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, servility or display; or women's body parts – including but not – limited to vaginas, breasts, and buttocks – are exhibited, such that women are reduced to those parts; or (vi) women are presented as whores by nature; or (vii) women are presented being penetrated by objects or animals; or (viii) women are presented in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.

Id. See also Catharine MacKinnon, *Not a Moral Issue*, in *FEMINISM UNMODIFIED* 146, 146 n.1 (1987); Myrna Kostash, *Second Thoughts*, in *WOMEN AGAINST CENSORSHIP* 32, 34 (1985). Kostash defined

[p]ornography [a]s a presentation, whether live, simulated, verbal, pictorial, filmed or videotaped, or otherwise represented, of sexual behaviour in which one or more participants are coerced, overtly or implicitly, into participation; or are injured or abused physically or psychologically; or in which an imbalance of powers is obvious, or implied by virtue of the immature age of any participant or by contextual aspects of the presentation, and in which such behaviour can be taken to be advocated or endorsed.

Id.

69. *PORNOGRAPHY*, *supra* note 68, at 128 (examining the MacKinnon-Dworkin model definition of pornography).

70. Catharine MacKinnon, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 325, 325 (Mary Becker et al. eds., 1994).

71. Thomas I. Emerson, *Pornography and the First Amendment: A Reply to Professor MacKinnon*, 3 *YALE L. & POL'Y REV.* 130, 130-39 (1984) (addressing MacKinnon's theory that pornography is “central to the institutionalization of male dominance” and proceeds upon the premise that pornography plays a role in societal male supremacy).

. . . .⁷² In *American Booksellers Association Incorporated v. Hudnut*, the United States Supreme Court affirmed the judgment of the United States Court of Appeals for the Seventh Circuit, holding that pornographic speech was protected by the First Amendment.⁷³

In *Hudnut*, the Indianapolis City Council enacted a version of Andrea Dworkin's and Catharine MacKinnon's 1983 Minneapolis anti-pornography ordinance that defined pornography as discrimination against women.⁷⁴ The ordinance prohibited sexually-explicit speech that treated women in a disapproved way, as submissive or humiliated

72. Emerson, *supra* note 71, at 132-33 ("The state must seek to achieve its social goals by methods other than the suppression of expression."). It is interesting to note that Emerson based his argument on the belief that the Framers did not intend the First Amendment to allow the government to prohibit all speech that supported male domination. *Id.* at 130-33. *But see* Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1025 (1993). Professor Becker argues that at the time of the Framers and the creation of the Constitution "[W]omen, though a majority group, did not participate in the relevant constitutional moments Women were excluded entirely from the drafting of the original Constitution and Bill of Rights and were only rarely admitted to significant discussions. Indeed, at these most basic constitutional moments, [as a matter of social policy] women were not permitted to speak in public." *Id.* This fact begs the question of whether the First Amendment should in fact continue to be interpreted by looking at the "framers' intent" since it can be argued that the framers' intent is seriously outdated.

73. 771 F.2d 323, *aff'd mem.*, 475 U.S. 1001 (1986).

74. *Hudnut*, 771 F.2d at 324. The ordinance was built upon Dworkin's work opposing pornography and MacKinnon's women's rights background. Lindgren, *supra* note 67, at 1156. Dworkin and MacKinnon created a civil rights statute that allowed women to sue purveyors of pornography. "A version of the statute was adopted by the Minneapolis City Council in 1983 and 1984, but [was] later vetoed by liberal mayor Donald Fraser." *Id.* at 1156. The Minneapolis statute reads as follows:

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, servility or display; 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, 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 (1)(p) of this statute.

MINNEAPOLIS, MINN., CODE OF ORDINANCES tit. 7, ch. 139.20(gg) (passed Dec 30, 1983; vetoed Jan. 5, 1984). *See also* Randall D. B. Tigue, *Civil Rights and Censorship-Incompatible Bedfellows*, 11 WM. MITCHELL L. REV. 81, 85 n.24 (1985) (arguing that the ordinance and "its substantive provisions could be used to combat pornography").

in sexual activity, regardless of any positive attributes of the work.⁷⁵ However, the city ordinance permitted sexually-explicit speech that treated women in the approved way, as an equal to her sex partner, notwithstanding its explicitness.⁷⁶ The Seventh Circuit struck down the anti-pornography ordinance as unconstitutional because it discriminated “on the ground of the content of the speech.”⁷⁷

The Seventh Circuit stressed the danger of allowing a state to ordain preferred viewpoints.⁷⁸ The court explained that the Constitution forbids a state to declare one perspective of speech “holy,” while silencing the opposite viewpoint.⁷⁹ For example, speech dealing with the pernicious beliefs of Nazis or the Ku Klux Klan has historically been considered part and parcel of the impassioned criticism of laws, policies, and government which is indispensable in a free society, and cannot be banned even though it advocates hate and violence.⁸⁰ Further, allowing the government to regulate speech on the basis of content, would be a step toward a totalitarian government.⁸¹ The court emphasized that the absolute right to propagate opinions that may be wrong or hateful was the key distinction between a free democracy and a totalitarian regime.⁸² The United States Supreme Court affirmed the Seventh Circuit’s decision without comment.⁸³

The *Hudnut* court accepted the premise that pornography exploits, subordinates, and furthers aggression and harm against women in the

75. *Id.*

76. *Hudnut*, 771 F.2d at 325.

77. *Id.* See also Lindgren, *supra* note 67, at 1156 (discussing how the Indianapolis statute, signed by Mayor William Hudnut, was struck down by the Seventh Circuit, and affirmed without comment by the United States Supreme Court). But see Catharine MacKinnon, *Speech, Equality, and Harm: The Case Against Pornography*, in *THE PRICE WE PAY* 301, 303 (Laura J. Lederer & Richard Delgado, eds., 1995) (asserting that *Hudnut* is an ideological barrier to the ordinance becoming law). MacKinnon claimed that the *Hudnut* decision gave “rise to the belief that the equality approach is unconstitutional” and in violation of the First Amendment. See *id.* Thus, *Hudnut* would never deem sex discrimination harmful enough to outweigh free speech. *Id.* Furthermore, the *Hudnut* decision departed from the ruling that “sex discriminatory child pornography is protected speech, when all child pornography is already constitutionally criminal.” *Id.* Thus implying that under *Hudnut*, a child may not sue a perpetrator for civil damages. *Id.*

78. *Hudnut*, 771 F.2d at 325.

79. *Id.*

80. *Id.* at 328-30 (demonstrating the political power of pornography by comparing it to Hitler’s propaganda and communist views). See also *Brandenburg v. Ohio*, 395 U.S. 444, 444-49 (1969) (holding that the Ohio Criminal Syndicalism Act violated the First and Fourteenth Amendments). In *Brandenburg*, the plaintiff, a leader of the Ku Klux Klan, was wrongfully convicted under the Ohio statute for advocating criminal behavior as a means of political reform. *Id.* at 444. The Court held that the statute violated the plaintiff’s rights to assembly and free speech. *Id.* at 449 n.4.

81. *Hudnut*, 771 F.2d at 329.

82. *Id.* at 328-29.

83. 475 U.S. 1001 (1986).

home, work place, and society.⁸⁴ Nonetheless, the court held that pornography is, for those very reasons, powerful political speech, and therefore protected by the First Amendment.⁸⁵ The marketplace of ideas affects how people view the world, form opinions regarding politics and social ideals, influence change in their culture, and shape their socialization.⁸⁶ Therefore, since the Court has held pornography to be political speech, within the marketplace of ideas, it is likely that pornography will continue to be protected by the First Amendment, and ultimately by the Supreme Court, until it can be proven that pornographic material produces a grave and imminent danger to women.⁸⁷

2. *The History of Obscenity and the First Amendment*

Throughout the history of the legal system, courts have assumed that obscenity was not protected by the First Amendment.⁸⁸ The current approach to obscenity is delineated in three landmark cases: the

84. *Hudnut*, 771 F.2d at 329 "Depictions of subordination tend to perpetuate subordination [which] in turn leads to affront and lower pay at work, insult and injury at home, battery and rape in the streets." *Id.*

85. *Id.*

86. See *supra* notes 43-44 and accompanying text. For the historical use of pornography in political and religious debates, see Nicholas Wolfson, *Eroticism, Obscenity, Pornography, and Free Speech*, 60 BROOK. L. REV. 1037 (1994). Professor Wolfson examined the use of pornography from the year 1500 to the end of the French Revolution when pornography was linked with serious political and religious change and revolution. See *id.* at 1055. In addition, Professor Wolfson noted the time as one in which "political and literary subversives used pornography as an effective weapon against the aristocracy, monarchy, and clergy." See *id.* See also LYNN HUNT, INTRODUCTION TO THE INVENTION OF PORNOGRAPHY 329-345 (1993) (explaining her theory that democracy was implemented against the monarchy through the use of pornography and the feminization of the aristocracy). This implementation accelerated through the use of horrid pornographic attacks against the queen. *Id.* It is ironic, as Hunt noted, that the pornographic depictions of women erased the monarchy and yet were in the end excluded from the democracy that their humiliation helped create. *Id.*

87. See *Brandenburg*, 395 U.S. at 448-449 (maintaining that the constitutional guarantees of free speech do not permit a state to forbid advocacy of the use of force or violation of the law except where advocacy is directed to inciting or producing imminent lawless activity). See also *Rice*, 128 F.3d at 242; *Herceg*, 814 F.2d at 1020; *United States v. Freeman*, 761 F.2d 549, 551-52 (9th Cir. 1985); *Byers*, 712 So.2d at 689 (stating that the First Amendment does not protect classes of speech that are obscene, slanderous, an integral part of conduct in violation of a valid criminal statute, or directed to inciting or producing imminent lawless action which is likely to incite or enact such action). Whether pornography, in fact, enacts grave and imminent danger to members of society will not be addressed in this Note. However, for an extensive review of pornography and its impact on women, see Lindgren, *supra* note 67, at 1153.

88. See *Miller*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957); *Regina v. Hicklin* 3 L.R.-Q.B. 360 (1868).

British case *Regina v. Hicklin*,⁸⁹ and the American cases *Roth v. United States*⁹⁰ and *Miller v. California*.⁹¹

Regina v. Hicklin, a Nineteenth Century British case, was given great consideration by the American courts in defining obscenity.⁹² In *Hicklin*, the issue was whether anti-religious pamphlets which included references to intercourse and discussed the sexual nature of questions asked by priests were obscene.⁹³ In this case, Lord Chief Justice Cockburn set forth the first test used by the Queen's Bench to judge obscenity.⁹⁴ The *Hicklin* test questions "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."⁹⁵ The Queen's Bench found that the pamphlets were calculated to produce a pernicious effect on its readers, depraving and debauching their minds, and were therefore, obscene.⁹⁶ The early American courts adopted the *Hicklin* test, and its wide usage "led to the passage of numerous statutes concerning obscene materials in this country."⁹⁷

In 1957, amidst the standards of review brought forth by various courts, the United States Supreme Court refined the definition of obscenity in *Roth v. United States*.⁹⁸ In *Roth*, the Court held that obscenity did not have First Amendment protection,⁹⁹ and that the federal

89. 3 L.R.-Q.B. 360, 360 (1868). See also *Sydlyes Case*, 83 Eng. Rep. 1146 (1663) (considered the first reported obscenity case). Cf. *Commonwealth v. Sharpless*, 2 Serg & Rawle 91 (Pa. 1815) (considered the first reported obscenity case in the United States); *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) No. 14571 (noting to be one of the first cases in the United States to refer to the obscenity test noted in *Hicklin*).

90. 354 U.S. 476 (1957).

91. 413 U.S. 15 (1973).

92. LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-16, at 658 (1978). See also P. Heath Brockwell, Comment, *Grappling With Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 CUMB. L. REV. 131, 131 (1993) (describing how American courts adopted the original obscenity test from *Hicklin*).

93. *Hicklin*, 3 L.R.-Q.B. at 362-63.

94. *Id.*

95. *Id.* at 371. See also *Parmellee v. United States*, 113 F.2d 729, 731 (D.C. Cir. 1940) (questioning whether the book 'Nudism in Modern Life' was obscene in the light of the obscenity test set forth and applied in *Hicklin*).

96. *Id.* See also *United States v. Bennett*, 24 F. Cas. 1093, 1104 (C.C.S.D.N.Y. 1879) No. 14571 (relying on *Hicklin*).

97. Brockwell, *supra* note 92, at 131. Although the American courts adopted the *Hicklin* test, it has since been repudiated and the struggle to regulate obscenity with a sound and constitutional standard continues. *Hicklin* was the foundation upon which our current standard of review rests. However, the *Roth* Court rejected *Hicklin* because it judged "obscenity by the effect of isolated passages upon the most susceptible persons" thus, it was "unconstitutionally restrictive of the freedoms of speech and press." *Roth*, 354 U.S. at 489.

98. Brockwell, *supra* note 92, at 133.

99. *Roth*, 354 U.S. at 492-93.

statute, which punished the sending of "obscene, lewd, lascivious or filthy materials" through the mail, was constitutional.¹⁰⁰ Justice William Brennan explained that obscene material is "material which deals with sex in a manner appealing to prurient¹⁰¹ interests," is patently offensive, and lacks serious value.¹⁰² Furthermore, the Court held that the issue of whether material is obscene should be determined by asking if the average person, within the present day standards of the community, would consider the dominant theme of the material, as a whole, appealing to prurient interests.¹⁰³ The *Roth* Court reiterated the Twentieth Century notion that all ideas, even those of trivial social importance, have the full protection of the First Amendment, however, the Court maintained that obscenity is outside the realm of protection since it damages the traditional moral fabric of society.¹⁰⁴

The Court's current standard of review for obscenity was introduced in *Miller v. California*.¹⁰⁵ In an opinion by Chief Justice Warren Burger, the Court affirmed a conviction based on conduct that was in violation of a state statute that made it a misdemeanor to knowingly distribute obscene matter.¹⁰⁶ The defendant had conducted a mass mailing campaign, in which he mailed unsolicited brochures contain-

100. *Id.* at 493. Roth conducted a business publicizing the sale of books, photographs, and magazines and used circulars to solicit sales of products that were obscene and thus, in violation of 18 U.S.C. § 1461. *Id.* at 480. In short, 18 U.S.C. § 1461 provides that obscene, lewd, lascivious, filthy, or indecent material is unmailable, and that whoever knowingly deposits such material for mailing or delivery is criminally punishable. See 18 U.S.C. § 1461 (1994).

101. Although there is much debate in regard to the definition of prurient, the most common definition of prurient material is that which incites lasciviousness or lust. *Miller*, 413 U.S. at 24. Furthermore, in *Roth v. United States* and *Brockett v. Spokane Arcades*, the Court held that prurience could be constitutionally defined "as that which appeals to a shameful or morbid interest in sex." *Roth*, 354 U.S. at 487 n.20; *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985).

102. *Roth*, 354 U.S. at 487 n.20.

103. *Id.* at 490. For the purpose of simplicity, the *Roth* Court assumed that the community is composed of the twelve jurors. In his jury instruction, the trial judge in *Roth* stated as follows:

[L]adies and gentlemen of the jury, you . . . are the exclusive judges of what the common conscience of the community is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious—men, women, and children.

Id. at 490. See also *Miller*, 413 U.S. at 33-34 (holding "that the jury evaluate the materials with reference to 'contemporary standards of the State . . .'"). The *Miller* Court upheld a statewide definition of community which prohibited the use of a national standard on the ground that "it [was] neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept a public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32. For further instruction on what constitutes community standards see Huelster, *supra* note 44, at 865-88.

104. *Roth*, 354 U.S. at 484. See also *Chaplinsky*, 315 U.S. at 572 (maintaining that the social interest in order and morality may outweigh certain types of speech).

105. 413 U.S. 15 (1973).

106. *Id.* at 16 (holding that Miller violated California Penal Code § 311.2(a)). In 1969, section 311.2(a) of the California Penal Code read in relevant part as follows:

ing pictures and drawings depicting sexual activities, to advertise the sale of illustrated adult books.¹⁰⁷ In examining these brochures, the question presented to the Court was whether the mailed material was obscene and could, therefore, be regulated by the states without violating the First Amendment.¹⁰⁸

The *Miller* Court determined whether material should be considered obscene by applying a three-prong test (*Miller* test).¹⁰⁹ Under the *Miller* test, the trier of fact must ask whether:

- (a) the 'average person, applying contemporary community standards,'¹¹⁰ would find that the work, taken as a whole, appeals to the prurient interests;¹¹¹ (b) whether the work depicts or describes, in a patently offensive¹¹² way, sexual conduct specifically defined by the applicable state law, [as written or authoritatively construed]; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value; [there is no requirement that the material must be shown to be utterly without redeeming social value.]¹¹³

The *Miller* Court used this test to affirm the lower courts decision, despite a powerful dissent by Justices William Brennan and William Douglas, and held that alleged obscene materials may only be upheld as constitutional under the First Amendment standards concurrently established.¹¹⁴ Thus, the *Miller* test provided fair notice to purveyors of obscene materials that First Amendment protections would not be granted to materials which fall within its boundaries.¹¹⁵ Furthermore,

Sending or bringing into state for sale or distribution; printing, exhibiting or possessing within the state (a) every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, or offers to distribute, or has in his possession with the intent to distribute or to exhibit or offer to distribute, any obscene material is guilty of a misdemeanor.

CAL. PENAL CODE § 311.2(a) (West 1969). See also *Miller*, 413 U.S. at 16 n.1 (recognizing that the offense was prior to June 25, 1969, when section 311.2(a) was amended).

107. *Miller*, 413 U.S. at 16. The brochures advertised four books respectfully titled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography." *Id.* at 18. In addition, there was a movie entitled "Marital Intercourse." *Id.* The brochures and the movies explicitly and sexually depicted pictures of "men and women in groups of two or more engaging in a variety of sexual activities with genitals often prominently displayed." *Id.*

108. *Id.* at 20.

109. *Miller*, 413 U.S. at 24.

110. See *supra* note 103 and accompanying text.

111. See *Roth*, 354 U.S. at 489.

112. "Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than 'normal, healthy, sexual desires' are essential elements of obscenity." *Hudnut*, 771 F.2d at 324 (citations omitted).

113. *Miller*, 413 U.S. at 24. For problems concerning the *Miller* test, see Brockwell, *supra* note 92, at 136-39 (addressing the vagueness and shortcomings of the *Miller* test).

114. *Miller*, 413 U.S. at 37 (holding that obscene materials will be subject to the *Miller* test).

115. *Id.* at 27.

the *Miller* Court stressed the notion that obscene speech be regulated by states, subject only to the three standards enumerated within the test. The *Miller* test continues to apply today and has become one of the more influential doctrines in First Amendment jurisprudence.¹¹⁶ Unfortunately, when a court decides a case on grounds other than obscenity, the *Miller* test is inapplicable.¹¹⁷

III. UNITED STATES V. ALKHABAZ

Defendant Jacob Alkhabaz¹¹⁸ was a twenty year old linguistics major at the University of Michigan in Ann Arbor, Michigan, when his "repellently misogynistic"¹¹⁹ e-mails shocked the nation.¹²⁰ Alkhabaz was a consistent and loyal contributor of sadistic stories to the Internet, via Usenet electronic BBSs.¹²¹ Alkhabaz's e-mails chronicled in detail the desire to engage in the actual bondage, torture, humiliation, mutilation, rape, sodomy, and murder of women and young girls.¹²² The investigation of Alkhabaz was triggered when his e-mails and Internet stories traveled across the Internet's intercontinental information superhighway, with the aid of the Internet's public BBSs¹²³ and Usenet,¹²⁴ to a sixteen year old girl in Moscow.¹²⁵ On January 18, 1995, the girl's father sent one of Alkhabaz's stories to a University of Michigan alumnus, who reported the story to the Federal Bureau of Investigation (FBI).¹²⁶

116. Bilstad, *supra* note 43, at 367.

117. See *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997).

118. The United States Court of Appeals for the Sixth Circuit used the defendant's legal name, Abraham Jacob Alkhabaz, however, the United States District Court for the Eastern District of Michigan used Alkhabaz's preferred name, Jake Baker, as an alias during the trial proceeding. See *United States v. Baker*, 890 F. Supp. 1375 (E.D. Mich. 1995); *United States v. Alkhabaz*, 104 F.3d 1492 (6th Cir. 1997). *United States v. Alkhabaz* is often referred to as the Jake Baker case, however, for consistency, this Note will refer to the case as *Alkhabaz*, and to him as Alkhabaz throughout.

119. *Alkhabaz*, 104 F.3d at 1497. (Krupansky, J., dissenting) (characterizing Alkhabaz's articles as misogynistic because they "evinced an extreme and morbid fascination with the concept of the physical and psychological abuse and torment of women and young girls, described in lurid detail, and often culminating in murder").

120. GODWIN, *supra* note 44, at 119.

121. *Alkhabaz*, 104 F.3d at 1493.

122. *Id.* at 1498 (Krupansky, J., dissenting).

123. See *supra* notes 42-43 and accompanying text (describing BBSs).

124. See *supra* notes 33-42 and accompanying text (describing Usenet).

125. GODWIN, *supra* note 44, at 120.

126. *Alkhabaz*, 104 F.3d at 1498 (Krupansky, J., dissenting); GODWIN, *supra* note 44, at 120-21 (chronicling the case's triggering events: the sixteen year old girl in Moscow read Alkhabaz's story, and told her father about it, her father in turn told his friend Richard DuVal, who was by coincidence a University of Michigan alumnus, who then called up his alma mater and complained).

*A. The Jane Doe Story*¹²⁷

People can only recognize the impact that Internet obscenity has on the actions, behaviors, and opinions of our nation's citizens when they are confronted with the obscene material itself. The ability to demonstrate the intense and horrifying effect obscenity has on women is only possible when readers are confronted with obscene material and are able to picture or imagine themselves as the victim. The Jane Doe Story, about a woman in Alkhabaz's class, is an example of Alkhabaz's perverse and obscene desires, and reads as follows:

The premise is that my friend Jerry and I have broken into the apartment of a girl I know. (I = the protagonist). She is shaking with terror as Jerry and I circle her. She'd [sic] almost completely nude now—we've made her take off all of her clothes except for her bra and panties. As Jerry and I pass by her, we reach out and feel her velvety flesh, caress her breasts and ass through her underwear. Jerry and I snap pictures of her tiny trembling body from all angles.

She says in a terrified voice, "why are you doing this . . . I've never hurt you . . . p-please stop!" I pause in front of her. Jerry smiles at her terror. He laughs at her pitiful pleas. I say "Shut the fuck up, stupid whore!" and hit the side of her head, hard. She collapses onto the ground, crying, curling up into a little ball.

"Alright. Let's have some fun!"

I yank her up by the hair and force her hands behind her back. I quickly get them restrained with duck [sic] tape. Her little body struggles against me as she screams for help. Jerry tears off her panties and shoves them into her delicious mouth, securing them with a tight strip of rope. She'd [sic] still struggling, screaming into the makeshift gag. I let her drop, to take pictures of her as she struggles. As she's fighting there on the carpet, eyes wide with fear, Jerry and I strip. Jerry's got a hard on. I've got a hard on. We laugh.

I grab her bra and rip it off her. Holding her still for Jerry, he fondles her breasts, feeling up her entire body. As she moans into the gag, Jerry comments on how soft she is. I slap her face several times, enjoying the smacking sounds my hands make against her pink skin. Forcing her to her knees, I rub my cock into her face—over her cheeks and her eyes and her nose. She turns her head, closing her eyes with the humiliation, so I shove my prick as far as it will go into her ear. Her inner cannals [sic] warm; I force it in

127. This is an example of the sexually explicit nature inherent in the stories Alkhabaz posted on the Internet. This story is graphic and contains material of obvious prurient interest. Nonetheless, it ought to be noted that this is a mild story in comparison to the other stories written by Alkhabaz. Additionally, the true name and actual address of Jane Doe has been concealed to prevent her further fear, trauma, and humiliation. After this action took place, Jane Doe was referred to psychological counseling due to her severe emotional and physical trauma. See *Alkhabaz*, 104 F.3d at 1498 n.3.

harder, and my penis-head scrunches up to fit in the small hole, not quite making it. [First name omitted] groans into her gag.

Then Jerry and I tie her by her long brown hair to the ceiling fan, so that she's dangling in mid-air. Her feet don't touch the ground. She kicks trying to hit me, Jerry or the ground. The sight of her wiggling in mid-air, hands rudely tied behind her back, turns me on. Jerry takes a big spiky hair brush and start [sic] beating her small breasts with it, coloring them with nice red marks. She screams and struggles harder. I've separated her legs with a spreader-bar; now I stretch out her pussy lips and super-glue them wide open. Then I take a heavy clamp, and tighten it over her clit. Once its tight enough, I let go.

I stand back, to take pictures. She's really nice now: Dangling by her hair (I can see where its stretching her scalp), her breasts and belly are covered with bright red bruises. There's a heavy clamp stretching her cunt down. And best of all, her face is scrunched up in agonized grimace. Drool and loud squeaks escape through her gag. She's so beautiful like this. Just to add to the picture, I take a steel-wired wisk and beat her ass with it, making bright red cuts that drip blood.

Jerry tells me the curling-iron's ready. Jerry unplugs it and bring [sic] it over. After taking her down and tying her hunched over a chair, Jerry strokes the device against her bleeding ass cheeks. I smile and stroke my cock as she screams in pain and horror. She shakes her head and moans, "Nooo . . . nooo" through the gag. I walk in front of her, and remove the gag. Before she can even breath in, I ram my cock in her tiny mouth. That's when Jerry ram [sic] the hot curling iron into her tight asshole. She tries to scream, but I shove my cock's [sic] down her throat and I start humping her face furiously. The pain of the hot curling iron in her tender asshole sent her whole body into convulsions; her throat clenched against my cock. God! This felt so good.

Leaving the iron up her asshole, Jerry took his knife, and cut her nipple off. She gags on my cock some more, and I pull out just in time to cum all over her pretty face. As I spew loads of hot white cum onto her face, Jerry continues to maul at her breasts. He pulls them as far as they'll go away from her body, twisting them to cause even more pain. Now that she doesn't have my cock down her throat, she howls out loud. It's not even a human sound. Her eyes glaze over from the pain and torture; a ball of my cum smacks her in the left eye. Spent, I go grab a beer and watch Jerry finish off play. When he pulls the curling-iron from her asshole, her sensitive skin is all burned. He pressed the head of his cock against the tortured opening. Jerry's got a savagely big dick, and would have hurt this girl even if her ass hadn't been burned. [First name omitted] let out a small scream, but was too weak at this point to make it really loud. She only made fierce grunts as my friend's cock tore apart the inside of her scorched asshole. Then he finally came inside her. Her eyes, barely human begged him to stop. "C'mon, man, lets go!" My friend said. So we got the gasoline and spread it all over her and

her apartment. It must have burned like hell when it came into contact with her cuts, but I couldn't tell. Her face was already a mask of pain and her body quivered fiercely [sic]. "Goodbye," I said, and lit a match.¹²⁸

B. United States v. Jake Baker: The Trial Court Decision of Alkhabaz

On February 9, 1995, federal agents arrested Alkhabaz for allegedly transmitting, through interstate or foreign commerce, communications containing threats to kidnap or injure the person of another under 18 U.S.C. § 875(c).¹²⁹ Alkhabaz appeared before a United States Magistrate Judge on February 10, 1995, and was thereafter detained as a danger to the community.¹³⁰ The district court judge approved this order and the United States Court of Appeals for the Sixth Circuit affirmed.¹³¹

On February 14, 1995, Alkhabaz was charged in a one-count indictment for violating 18 U.S.C. § 875(c).¹³² This indictment was based upon the Jane Doe story Alkhabaz had posted on the Internet and other "unspecified communications transmitted in interstate and foreign commerce" ¹³³ One month later, Alkhabaz and e-mail companion Arthur Gonda¹³⁴ were charged in a superseding indictment

128. *Alkhabaz*, 104 F.3d at 1497 n.1 (Krupansky, J., dissenting). See also *Doe by Jake Baker*, at <http://www.nostatusquo.com/ACLU/Porn/Baker/doe.html> (last visited Jan. 12, 2001); *EFF "Legal Cases- Jake Baker, the U. of Michigan, & the FBI" Archive*, at http://www.eff.org/pub/Legal/Cases/Baker_Umich_case/baker.story (last modified June 22, 1999); *Jake Baker Stories*, at <http://www.torture.net/content/literature/baker.htm> (visited Jan. 19, 2000).

129. See *Alkhabaz*, 104 F.3d at 1493. The statute under which Alkhabaz was arrested read: "Whoever transmits in interstate commerce any communication containing any threat to kidnap any person or any threat to injure the person of another shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 875(c) (1999). This Note will not examine in great detail whether Alkhabaz's stories and e-mails constituted a true threat. However, for detailed analysis of what constitutes a true threat under the First Amendment, see *Watts v. United States*, 394 U.S. 705 (1969); *United States v. Kelner* 534 F.2d 1020 (2d. Cir. 1976), cert. denied, 429 U.S. 1022 (1976); *Baker*, 890 F. Supp. at 1375.

130. *Baker*, 890 F. Supp. at 1379. Alkhabaz was jailed for twenty-nine days until a psychiatric evaluation, dated March 10, 1995, concluded that Alkhabaz presented no clear and present danger to the named student or to the community at large. *Id.* at 1379, 1379 n.5. To some people Alkhabaz's detainment of twenty-nine days is disturbing because psychiatric evaluations dated as early as January 20, 1995, February 7, 1995, and February 9, 1995, concluded that Alkhabaz did not display any risk factors for potential violence. *Id.* at 1379 n.5.

131. *United States v. Alkhabaz*, 48 F.3d 1220 (6th Cir. 1995).

132. *Baker*, 890 F. Supp. at 1380.

133. *Id.* The transmissions took place from December 2, 1994, through January 9, 1995. *Id.*

134. *Id.* at 1379. Arthur Gonda (Gonda) "sent and received e-mail through a computer in Ontario, Canada. Gonda's identity and whereabouts are [still] unknown." *Id.* at 1379. See also GODWIN, *supra* note 44, at 122 (reporting that it is still unclear whether Gonda is a real person or a fictitious person invented to spoof Alkhabaz because Canadian officials asserted that no such

with five counts of violating 18 U.S.C. § 875(c) because, in context, the e-mail messages exchanged between Alkhabaz and Gonda constituted threats.¹³⁵

Alkhabaz filed a motion to quash the superseding indictment.¹³⁶ The district court granted the motion and acknowledged the history behind First Amendment jurisprudence and its denial of protection to true threats.¹³⁷ However, the court failed to address the First Amendment issues clearly evident in Alkhabaz's Internet transmissions.¹³⁸ The court altogether ignored Alkhabaz's contention that the "application of 18 U.S.C. § 875(c) to the e-mail transmissions push[ed] the boundaries of the statute beyond the limits of the First Amendment."¹³⁹ On April 15, 1995, Judge Avern Cohn granted Alkhabaz's motion to quash and ruled that the e-mail transmissions between Alkhabaz and Gonda did not constitute true threats, but were merely shared fantasies, or private discussions of sexual desires, and thus protected under the First Amendment.¹⁴⁰ The government appealed.¹⁴¹

C. United States v. Alkhabaz

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision, with Circuit Judge Robert B. Krupansky dissenting.¹⁴² Writing for the majority, Chief Judge Boyce F. Martin, Jr., declined to use First Amendment analysis or principles and held that the "electronic messages between [the] defendant and [Gonda] expressing sexual interests in violence against women and girls, did not constitute 'communications containing a threat.'"¹⁴³ In furtherance of its holding, the court agreed with the United States Court of Appeals for the Eighth Circuit's analysis on what constituted a true threat, which concluded that a "literal interpretation of 18 U.S.C. § 875(c) would lead to absurd results not intended by Congress."¹⁴⁴ Thus, the court held that any intercontinental communication contain-

name was listed in Ontario tax records, but it was later discovered that there was someone named Gonda in the region).

135. *Baker*, 890 F. Supp. at 1378-79.

136. *Alkhabaz*, 104 F.3d at 1493.

137. For an extensive review of case law on what constitutes a true threat, see *supra* note 129.

138. *Alkhabaz*, 104 F.3d at 1493. The United States Court of Appeals for the Sixth Circuit followed suit and declined "to address the First Amendment issues raised by the parties." *Id.*

139. *Baker*, 890 F. Supp. at 1380.

140. *Alkhabaz*, 104 F.3d at 1493; *Baker*, 890 F. Supp. at 1381.

141. *Alkhabaz*, 104 F.3d at 1492.

142. *Id.*

143. *Id.*

144. *Id.* at 1494 (citing *United States v. Bellrichard*, 779 F. Supp. 454, 459 (D. Minn. 1991) *aff'd*, 994 F.2d 1318 (8th Cir. 1993)).

ing a threat to kidnap or injure another person is subject to criminalization under 18 U.S.C. § 875(c) only when the subject communicated was conveyed with the general intent¹⁴⁵ to effect a change or achieve a goal with intimidation.¹⁴⁶

In dissent, Judge Krupansky emphasized that the majority's decision was inconsistent with the congressional intent of 18 U.S.C. § 875(c), and "judicially legislat[ed] an exogenous element" into the statute that materially altered its plain meaning.¹⁴⁷ As Krupansky understood 18 U.S.C. § 875(c), Congress intentionally refused to include an element of intent when it drafted the section; "[t]he plain expressed statutory language commands only that the alleged communication . . . contain *any threat*, . . . made for *any reason* or no reason."¹⁴⁸ Thus, Judge Krupansky argued that the e-mails and stories transmitted by Alkhabaz met the requirements of section 875(c) and were consistent within the "scope of criminalized communications."¹⁴⁹ Judge Krupansky focused on the five-count superseding indictment against Alkhabaz and Gonda. Each of the counts characterized the communications as containing threats to injure or kidnap another person, thus meeting the elements expressed in section 875(c).¹⁵⁰ In part, the counts charged the following:

Count One (Transmitting Threatening Communications - 18 U.S.C. § 875(c)) . . . : [Alkhabaz] . . . stat[ed] I highly agree with the type of woman you like to hurt [I] want to do it to a really young girl first. [!]3[sic] or 14. There [sic] innocence makes them so

145. *Id.* at 1495 (holding that a reasonable person "would take the statement as a serious expression of an intention to inflict bodily harm"). "A 'general intent' to threaten exists where a reasonable person would objectively take the defendant's statement to be a 'serious expression of an intention to inflict bodily harm[.]' whereas a 'specific intent' to threaten exists only where the speaker subjectively intended, in fact, to threaten a person." *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992), *cert. denied*, 505 U.S. 1206 (1992) (discussing the particular standard to be applied to general or specific intent). *See also Alkhabaz*, 104 F.3d at 1503 (discussing controlling precedents that reflect the principle of what constitutes a true threat).

146. *Alkhabaz*, 104 F.3d at 1495 (illustrating that although threats may offend our senses, a communication objectively indicating a serious expression of an intention to inflict bodily harm cannot constitute a threat unless the communication is also conveyed for the purpose of furthering some goal through the use of intimidation). The court concluded that the communications between Alkhabaz and Gonda were mere messages through which they "attempted to foster a friendship based on shared sexual fantasies." *Id.* at 1496. Furthermore, the court held that "no reasonable person would perceive the communications as having the intention to change or reach a goal through intimidation." *Id.*

147. *Id.* at 1496-1497.

148. *Id.* at 1501 (Krupansky, J., dissenting) (explaining that "[t]he words in § 875(c) are simple, clear, concise, and unambiguous"). *See also DeAndino*, 958 F.2d at 148-49 (presuming "that the language of § 875(c) does not expressly require a heightened mental element in regard to the 'communication containing a threat'").

149. *Id.*

150. *Id.* at 1499-1501.

much more fun—and they'll be easier to control [Gonda responded]: . . . I would love to do a 13 or 14 year old. I think you are right . . . not only their innocence but their young bodies would really be fun to hurt. As far as being easier to control . . . you can control any bitch with rope and gag [to which Alkhabaz responded] . . . [Y]oung girls turn me on more. Likely to be nice and tight. Oh they'd scream nicely too! . . .¹⁵¹

Count Two and Three [same] (Transmitting Threatening Communications - 18 U.S.C. § 875 (c)): . . . [Alkhabaz] stated: . . . I've been trying to think of secluded spots . . . I don't want any blood in my room, though I have come up with an excellent method to abduct a bitch [Gonda replied: A dorm would be too populated for an abduction. The police, would surely come around asking questions].¹⁵²

Count Four (Transmitting Threatening Communications - 18 U.S.C. § 875 (c)): . . . Gonda stated: . . . I have been out tonight and I can tell you that I am thinking more and more about doing' [sic] a girl . . . I can think of no better use for their flesh. I HAVE to make a bitch suffer. [To which Alkhabaz responded]: Are [sic] tastes are so similar. it scares me:-) When I lay down at night. All I think of before sleep is how I'd torture a bitch I get my hands on¹⁵³

Count Five (Transmitting Threatening Communications - 18 U.S.C. § 875(c)): [Gonda stated]: . . . I had a great orgasm today thinking of how you and I would torture this very petite and cute, south american girl in one of my classes [Alkhabaz responded]: Just thinking about it anymore doesn't do the trick . . . I need TO DO IT¹⁵⁴

Judge Krupansky found that all five counts violated 18 U.S.C. § 875(c) because Alkhabaz and Gonda knowingly transmitted in interstate and foreign commerce, via e-mail messages and Internet stories, a threat to injure another person.¹⁵⁵ Judge Krupansky rejected the majority's interpretation that 18 U.S.C. § 875(c) required actionable threats against a specific person, and stated that a threat could in fact be made against an identifiable category of individuals.¹⁵⁶ Judge Krupansky further argued that Alkhabaz's threats of harm were against women, not necessarily any particular woman.¹⁵⁷

151. *Alkhabaz*, 104 F.3d at 1499.

152. *Id.* at 1500 n.5.

153. *Id.* at 1500.

154. *Id.* at 1501.

155. *See id.* (quoting section 875(c)).

156. *Id.* at 1504 n.10.

157. *Alkhabaz*, 104 F.3d at 1504 n.10. Nonetheless, one may argue that the e-mail threats were made against particular women and young girls. The language in Alkhabaz's and Gonda's e-mail transmissions made reference to a specific neighbor of Alkhabaz and targeted thirteen and fourteen-year-old girls who resided near Alkhabaz, multiple teenage girls who lived near Alkhabaz when he resided in Ohio, female students who resided in Alkhabaz's dormitory, and female classmates. *Id.*

In addition, Krupansky based his dissent on more than the statutory interpretations of section 875(c), and realized that Alkhabaz's articles were lurid e-mail discussions of co-conspirators.¹⁵⁸ Krupansky's inability to agree with the majority was based on his recognition that Alkhabaz's stories and e-mail messages were "misogynistic articles evinc[ing] an extreme and morbid fascination with the . . . physical and psychological abuse and [torture] of women and young girls"¹⁵⁹ Therefore, Krupansky stated that not only did the threatening speech, easily detected in Alkhabaz's e-mails and Internet stories, violate 18 U.S.C. § 875(c), but it also traveled beyond the boundaries of constitutional immunization.¹⁶⁰

IV. ANALYZING THE OBSCENITY AND THREATS WITHIN ALKHABAZ'S SPEECH

The large amount of societal concern surrounding the *Alkhabaz* case and the Sixth Circuit's prevailing concern for the right of men to foster relationships through the sharing of sexual fantasies¹⁶¹ has struck a cord of disappointment among many women. The reverberation from this disappointment has manifested itself into a proposal which suggests a dismissal of the theory that the truth will prevail in a marketplace of ideas, and the need for enacting a federal statute that will regulate obscenity on the Internet. Internet users have abused the newfound privileges of Internet communication and have taken for granted their ability to perform and communicate without being subject to strict regulation. Unless Congress takes action, the continuation of trafficking obscenity on the Internet, in any form, will perpetuate the continued subordination of women.

The Internet and the communication that it nurtures must be regulated and strictly limited when it interferes with the fundamental rights of other individuals and the community as a whole.¹⁶² Furthermore, the right to free speech must be understood in relation to the nation's developing conception of fundamental rights and the place

158. *Id.* at 1507.

159. *Id.* at 1497.

160. *Id.* 1506-507.

161. *Id.* at 1496 (viewing Alkhabaz and Gonda as merely "attempt[ing] to foster a relationship based on shared sexual fantasies").

162. Steven Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1279 (1998). "[T]his principle was widely held when [the] Amendments to [the United States Constitution] were adopted, [yet] no longer holds a central place in American constitutional theory or doctrine." *Id.* at 1299.

they hold in the social order of America.¹⁶³ As early as 1803, William Blackstone noted that “the principle aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature—the right to life, personal security, personal liberty, and private property.”¹⁶⁴ Thus, the freedom of speech must be federally regulated for the common good and the preservation of peace and social order. The Sixth Circuit, by permitting Alkhabaz’s speech on the Internet, has risked the preservation of peace between America’s men and women. In addition, the ruling has underestimated women and their power to unsettle the current societal order and fight for their right to personal security and against their continued subordination.

In analyzing the court’s decision in *Alkhabaz*, two primary issues must be addressed. The first question is whether the speech in Alkhabaz’s e-mails and BBS stories are considered obscene under the First Amendment.¹⁶⁵ The second question is whether the court erred in finding that Alkhabaz’s speech did not contain true threats in violation of 18 U.S.C. § 875(c).

A. *Applying the Miller Test to Alkhabaz’s Speech: Is the Jane Doe Story Obscene?*

Alkhabaz and his companion, Gonda, took the Internet for granted when they made use of the Internet’s broad capabilities to e-mail each other and post stories on BBSs which discussed the rape, torture, mutilation, and murder of young girls and women. The question becomes whether this type of speech, that dehumanizes women and subordinates them to men, constitutes obscene speech under the First Amendment. This question can be answered through the application

163. *Id.* at 1279. The government was established to protect rights, thus, the government has an obligation to its people to respect the liberty of free speech and ensure that this liberty is not used to violate the fundamental rights of others. *Id.* “It is important to note that those people who support or oppose the regulation of speech often vary from one issue to the next.” *Id.* at 1279 n.22. For example, some conservatives may support the prohibition of flag burning, while some liberals may oppose this practice. *Id.* The positions on issues of speech regulation are largely reversed on the regulation of cigarette advertising and anti-abortion demonstrations. *Id.*

164. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND,* 151 (1803); see also, ROSCOE POUND, *Interests of Personality* (pts. 1 & 2) 28 HARV. L. REV. 343, 344-45 (1915) (maintaining that even though a legal system is concerned with social interests or community interests, the social interest in security is the first interest given attention from the law). For an in depth review of Dean Pound’s theory in regard to sociological jurisprudence and freedom of speech, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM, 69-74 (1991); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 988-1001 (1996); Heyman, *supra* note 162, at 1299-1304.

165. The Sixth Circuit avoided addressing First Amendment issues inherent in Alkhabaz’s speech. *Alkhabaz*, 104 F.3d at 1501.

of recent case history, and the current obscenity standard of review brought forth in *Miller v. California*.¹⁶⁶ The three basic guidelines of the *Miller* test are clearly satisfied in the present case.

First, under a majority of state statutes defining obscenity, the average person applying any contemporary community standard would find that Alkhabaz's speech, taken as a whole, appeals to prurient interests.¹⁶⁷ For example, Alkhabaz's Jane Doe Story and multiple e-mail messages appealed to the average person's prurient interests because of their morbid, sadistic, and unconstrained demonstrations of subordinating women to men through rape, torture, and murder.¹⁶⁸ Secondly, Alkhabaz's speech depicted or described, in a patently offensive way, the type of sexual conduct that has been specifically defined by applicable state statutes as being obscene.¹⁶⁹ Juries in most states have found that the depiction of women and young girls being raped, kidnapped, and tortured is obscene.¹⁷⁰ Furthermore, the Jane Doe Story went beyond the realm of simulated rape and entered the territory of sodomy, sexual bestiality, sadism, masochism, excretion, and lewd exhibition of the victim's genitals. Alkhabaz's speech portrayed the savaged torture and brutal beatings of women gagged and bound with no possibility of rescue, and men without any possibility of punishment.

Third, the Jane Doe Story and e-mails, taken as a whole, lacked serious literary, artistic, political, and scientific value.¹⁷¹ The argument that Alkhabaz's stories constitute creative fictional pieces of literature cannot be denied because they forcefully illustrate the creative ability to murder women and become aroused at the same time.¹⁷² However, writers of fiction are not immune from liability when they infringe on the fundamental rights of others.¹⁷³ Further, obscenity, whether or not classified as fiction, has never been granted First

166. See *supra* notes 105-117 and accompanying text.

167. *Miller*, 413 U.S. at 24 (listing the first guideline as whether "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"). For examples of state statutes and their definitions of obscenity, see 720 ILL. COMP. STAT. 5/11-20 (West 1999); L. REV. STAT. ANN. § 14:106 (West 1999); N.Y. PENAL LAW § 235.00 (McKinney 1999); TEX. PENAL CODE ANN. § 43.21 (West 1999).

168. See *Alkhabaz*, 104 F.3d at 1497-1498 n.1.

169. *Id.*

170. *Miller*, 413 U.S. at 24 (listing the second guideline as "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"). For examples of state statutes defining sexual conduct, see *supra* note 167.

171. *Miller*, 413 U.S. at 24 (listing the third guideline as "whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value").

172. See *Alkhabaz*, 104 F.3d at 1497 n.1. The Jane Doe Story strongly illustrates this point.

173. Heyman, *supra* note 162, at 1391.

Amendment protection.¹⁷⁴ Thus, the cloak of the First Amendment should have been denied to Alkhabaz and the Jane Doe story.¹⁷⁵

*B. Applying 18 U.S.C. § 875(c) to Alkhabaz's Speech: Is the Jane Doe Story a True Threat to Women?*¹⁷⁶

Under the plain language of the statute, in order for Alkhabaz to be convicted under 18 U.S.C. § 875(c),¹⁷⁷ the government need only prove that the Internet stories and e-mails constituted transmissions in interstate commerce, and that the communications contained a threat to injure or kidnap a person.¹⁷⁸ The Sixth Circuit erred when it relied on inconsistent court precedent concerning section 875(c) and concluded that speech describing the plan to savagely torture and rape women and young girls does not contain the elements of a true threat.¹⁷⁹ However, the distinctions between the different definitions of true threats used by the circuit courts are confusing and often result in courts using an insufficiently loose or too strict definition for the purposes of First Amendment jurisprudence.¹⁸⁰ The situation is further complicated by the differing precedents that affect a court's ability to know which precedent to follow. Typically, a court will follow the prevailing jurisdictional precedent or case law that interprets the statute in a manner similar to this court. These complications are evident in Alkhabaz's trial and appellate court decisions.¹⁸¹

In *Baker*, the district court relied on the constitutional dimensions of a true threat as expanded upon by the United States Court of Appeals for the Second Circuit in *United States v. Kelner*.¹⁸² *Kelner's*

174. *Miller*, 413 U.S. at 24 (holding that obscenity is not protected under the First Amendment).

175. *Rice*, 128 F.3d at 262.

176. This Note will not examine in detail the inconsistencies with which the *Alkhabaz* and *Baker* courts interpreted 18 U.S.C. § 875(c). Nonetheless, this Note will lay the necessary foundation upon which to build the argument. For a detailed Note on the inconsistencies between the courts, see David C. Potter, Note, *The Jake Baker Case: True Threats and New Technology*, 79 B.U. L. REV. 779 (1999).

177. See *supra* note 129 and accompanying text.

178. *United States v. DeAndino*, 958 F.2d 146, 148 (6th Cir. 1992), *cert. denied*, 505 U.S. 1206 (1992) (listing the "three elements of the offense defined by 18 U.S.C. § 875(c)").

179. *Alkhabaz*, 104 F.3d at 1492 ("Electronic mail messages between defendant and another, expressing sexual interest in violence against women and girls, did not constitute 'communications containing a threat.'").

180. *Baker*, 890 F. Supp. at 1381 (Cohn, J.) (realizing that deciding whether a statement is a "true threat" for the purpose of First Amendment limitation is confusing).

181. Compare *Baker*, 890 F. Supp. at 1381, 1383-85 (noting the confusion among the Circuit Courts of Appeals regarding the different understandings of the phrase "true threat"), with *Alkhabaz*, 104 F.3d at 1495 (interpreting a true threat under *DeAndino* as distinguishable from *Kelner*).

182. *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), *cert. denied*, 429 U.S. 1022 (1976).

standard of review for the prosecution of a crime under 18 U.S.C. § 875(c) is constitutionally required, and consistent with the statute's legislative history.¹⁸³ Under *Kelner*, 18 U.S.C. § 875(c) is properly applied to speech when the alleged threat is "unequivocal, unconditional, immediate and specific as to the person threatened, as to convey a gravity of purpose and imminent prospect of execution."¹⁸⁴ It is not necessary that the statement or threat be communicated directly to the would-be-target, rather the statement must be evaluated in light of foreseeable recipients of the communication.¹⁸⁵

The defendant in *Kelner*, a member of the Jewish Defense League, was convicted for his threatening statements on a New York television news program proclaiming that the Jewish Defense League planned to assassinate Yasser Arafat, who was in New York City at the time.¹⁸⁶ Kelner claimed that his purpose in issuing the threat was to further political objectives of his organization through intimidation.¹⁸⁷ The United States Court of Appeals for the Second Circuit upheld Kelner's conviction for violating 18 U.S.C. § 875(c) and determined that his statements "unambiguously constituted an immediate threat upon the life or safety of Arafat and his aides."¹⁸⁸ The Second Circuit held that Kelner's language was unequivocal, unconditional, immediate, and specific as to a target and thus satisfied these criteria.¹⁸⁹ Therefore, the court held that the "threat was within the constitutionally permissible scope of the statute" and thus, deemed in violation of section 875(c).¹⁹⁰

The facts of *Baker* are similar to *Kelner*, in that both men threatened a specific person as well as a particular group of people in general, through the use of the media. Nonetheless, the *Baker* court erred when it held that the government can only exercise its authority

183. *Baker*, 890 F. Supp. at 1383.

184. *Kelner*, 534 F.2d at 1027. However, Judge Mulligan stated that "the proposed requirement that the threat be of immediate, imminent and unconditional injury seems to be required neither by [18 U.S.C. § 875(c)] nor the First Amendment." *Id.* at 1029 (Mulligan, J., concurring).

185. *Baker*, 890 F. Supp. at 1382, 1386 ("[W]hile the statement need not identify a specific individual as its target, it must . . . as to its potential target or targets to render the statement more than hypothetical.").

186. *Kelner*, 534 F.2d at 1021.

187. *Id.* at 1021-22. Kelner testified that his statements at the Jewish Defense League's press conference were not actual statements describing the plan to assassinate Yasser Arafat, but rather responses to threats from the Palestine Liberation Organization. *Id.* The sole objective behind making the statements "was to show the PLO that 'we [as Jews] would defend ourselves and . . . [that the PLO] would not be able to accomplish anything in accordance with their threats.'" *Id.* at 1022.

188. *Id.* at 1028.

189. *Id.*

190. *Id.*

when the communication at issue is so interlocked with the violent act that it actually constitutes a part of the proscribed action itself.¹⁹¹ Based on the *Kelner* method of inquiry, the issue of whether Alkhabaz intended to carry out the actions he described on the Internet should be irrelevant to the constitutional inquiry.¹⁹² Furthermore, Alkhabaz's threats need not identify a specific person but merely a potential target.¹⁹³ The court subsequently erred, after analyzing the counts against Alkhabaz and Gonda, by holding that Alkhabaz's speech "constituting shared fantasies" fell short of being true threats under *Kelner* because they were not "unequivocal, unconditional, immediate or specific threat[s that] convey[ed] an imminent prospect of execution," and the potential target was too indeterminate.¹⁹⁴

The confusion surrounding section 875(c) is demonstrated by the *Alkhabaz* court's interpretation of the statute. The *Alkhabaz* court did not follow the *Kelner* standard of review, but rather precedent set by the United States Court of Appeals for the Sixth Circuit in *United States v. DeAndino*.¹⁹⁵ The court in *DeAndino*, defined a true threat under section 875(c) as

communication such that a reasonable person: (1) would take the statement as a serious expression of an intention to inflict bodily harm (the mens rea), and (2) would perceive such expression as being communicated to effect some change or achieve some goal through intimidation (the actus reus).¹⁹⁶

The *Alkhabaz* court referred to the precedent set forth in *DeAndino*,¹⁹⁷ and the requirement that a mens rea accompany the actus

191. *Baker*, 890 F. Supp. at 1382 (citing *Kelner*, 534 F.2d at 1027 (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 329 (1970))) (recognizing that the "only extended discussion of the constitutional dimension of the 'true threat' requirement with regard to § 875(c) is found in *United States v. Kelner*").

192. *Baker*, 890 F. Supp. at 1385.

193. *Id.* at 1386.

194. *Id.* at 1385-86; Potter, *supra* note 176, at 795.

195. *United States v. DeAndino*, 958 F.2d 146 (6th Cir. 1992), *cert. denied*, 505 U.S. 1206 (1992).

196. *Alkhabaz*, 104 F. Supp. at 1495; Potter, *supra* note 176, at 795 ("restating the *DeAndino* standard, which articulates the *actus reus* elements").

197. *Alkhabaz*, 104 F.3d at 1496; *DeAndino*, 958 F.2d 146. The *DeAndino* court identified three elements of an *actus reus* for a defense defined under 18 U.S.C. § 875(c): "There must be: (1) a transmission in interstate commerce; (2) a communication containing a threat; and (3) the threat must be a threat to injure the person of another." *Id.* at 149. Additionally, the court held that the *mens rea* requirement of section 875(c) calls only for general intent since, "according to the plain language of the statute," the section does not expressly discuss an element of specific intent. *Id.* at 149-50. Thus, the standard of review is objective, regarding, only that a reasonable person consider the communication a threat, regardless of the defendants' subjective belief and intent. *Id.* at 148. See also Potter, *supra* note 176, at 783-93.

reus, as specifically set forth by statute.¹⁹⁸ Thus, if the threatening speech from an objective standpoint is transmitted for the purpose of intimidation and it is likely that the recipient will be intimidated or the recipient's peace of mind will be disrupted, then the speech will constitute a true threat under section 875(c).¹⁹⁹

In *DeAndino*, the defendant was charged under section 875(c) for "knowingly and willfully transmitting in interstate commerce a communication containing a threat to injure" another person.²⁰⁰ The court examined whether speech deemed communication containing a threat required general or specific intent,²⁰¹ and determined that general intent was the presumptive required element under section 875(c).²⁰²

Thus, applying *DeAndino*, the court held that Alkhabaz's speech did not constitute "communications containing a threat" under section 875(c).²⁰³ The court held that "no reasonable person would perceive . . . [Alkhabaz's] communications as being conveyed to effect some change or achieve some goal through intimidation."²⁰⁴ Under *DeAndino's* interpretation of section 875(c), the *Alkhabaz* court erred in granting First Amendment protection to Alkhabaz's e-mails and Internet stories. The court further erred in its failure to perceive Alkhabaz's e-mails and stories as threats written to effect some societal change or achieve some societal goal through intimidation.²⁰⁵

The *Alkhabaz* court's interpretation of section 875(c) is inconsistent with both the statutory language and precedent. The *Alkhabaz* court erred in several ways with regard to the holding in *DeAndino*. First, the court misinterpreted the *DeAndino* standard of review. The *DeAndino* court interpreted section 875(c) as requiring only general intent, and accordingly held that the statute only required proof that a reasonable person would have taken the defendant's statement as a

198. *Alkhabaz*, 104 F.3d at 1496.

199. *Id.*

200. *DeAndino*, 958 F.2d at 147. Defendant, Jean Pierre DeAndino, threatened Nelson Baker by stating that he was "going to blow his brains out." *Id.*

201. *Id.* at 148 (holding that if the statute required general intent, the standard would objectively inquire whether a "reasonable person consider[ed] the statement to be a threat"). If the statute required specific intent, the standard would subjectively question whether the defendant had "subjective knowledge that his statement constituted a threat to injure" and whether he "subjectively intend[ed] the statement to be a threat." *Id.*

202. *Id.*

203. *Alkhabaz*, 104 F.3d at 1496.

204. *Id.*

205. *Id.*

“serious expression of an intention to inflict bodily harm.”²⁰⁶ Had the *Alkhabaz* court correctly applied *DeAndino*, it is likely that the court would have held that a member of the general public or a reasonable woman would have perceived Alkhabaz’s statements as expressions of the intention to inflict bodily harm to another person.

In addition, the court erred in failing to decide the issue of whether Alkhabaz’s speech contained an intent to inflict bodily harm or effect some change, rather than leaving the question to the trier of fact. It is likely that a trier of fact would have found that the speech portrayed intentions to inflict bodily harm. “There can be no doubt that a rational jury [would have found] that some or all of the communications [between Alkhabaz and Gonda] . . . constituted threats . . . to harm a female human being, which a reasonable objective recipient of the transmissions would find credible.”²⁰⁷ The Jane Doe Story was a premeditated plan to rape, torture, and murder a female classmate, as well as women and young girls in general.²⁰⁸

The correct interpretation of section 875(c) is found within Judge Krupansky’s dissenting opinion: “[E]very communication conveying an intention to kidnap or injure any person sent in interstate or foreign commerce which would appear to an objective, rational recipient to be a statement of a serious intent to commit the harms menaced is constitutionally prosecutable.”²⁰⁹ Therefore, a simple and yet credible threat to cause injury to another, made for any reason or no reason at all, constitutes a threat.²¹⁰ Thus, the scope of section 875(c) is not confined to criminalized communications directed to identified individuals with the intent to effect some particular change or goal.²¹¹ Under Krupansky’s definition and interpretation of section 875(c), it is clear that the *Alkhabaz* majority erred in not characterizing the communications as true threats in violation of the First Amendment. It is likely that such an error was based upon the court’s desire to settle the issue when the decision should have been placed in the hands of jurors.

206. *DeAndino*, 958 F.2d at 148 (citing *United States v. Vincent*, 681 F.2d 462, 464 (6th Cir. 1982)).

207. *Alkhabaz*, 104 F.3d at 1504 (Krupansky, J., dissenting).

208. The Jane Doe Story specifically contained one woman’s name and her address. *Id.*

209. *Alkhabaz*, 104 F.3d. at 1505 n.14.

210. *Id.* at 1502.

211. *Id.* at 1502 (Krupansky, J., dissenting); *DeAndino*, 958 F.2d at 148.

C. *Societal Factors Influencing the Baker and Alkhabaz Courts Decisions*

The striking aspect of the court's failure to find a true threat in Alkhabaz's e-mail and Internet stories demonstrates the utter failure of the court to consider the negative impact that obscene e-mails and Internet stories have upon women. The unpunished existence of such threatening messages allows the continuing subordination of women in society. "Women cannot live in a true society with men until [they] have equal standing" within the community.²¹² Such standing requires the denial of First Amendment protection to obscene Internet transmissions that portray women as sexual objects.

Chief Judge Boyce F. Martin, Jr.'s majority opinion in *Alkhabaz* proved that in reality the court did not acknowledge the role that true threats, such as Alkhabaz's messages, play in the continuation of women's social and sexual subordination. Ironically, in *Baker*, Judge Avern Cohn stated the following:

It is not the policy of the law to punish those unsuccessful threats which it is not presumed would terrify ordinary persons excessively; and there is so much opportunity for magnifying or misunderstanding undefined menaces that probably as much mischief would be caused by letting them be prosecuted as by refraining from it.²¹³

Both courts misunderstood the menaces contained within Alkhabaz's speech because it is reasonable to believe that such speech would terrify an average woman. The court should have acknowledged and taken into consideration a woman's thoughts as to whether the stories and e-mails were threatening.²¹⁴ The court may have had a difficult

212. Stella Rozanski, *Obscenity: Common Law and the Abuse of Women*, 13 ADEL. L. REV. 163, 173 (1991).

213. *Baker*, 890 F. Supp. at 1378 (citing *People v. B. F. Jones*, 28 N.W. 839 (Mich. 1886)).

214. The *Alkhabaz* court did not take into consideration what women thought about the Jane Doe Story or whether the actual woman portrayed in the story felt the story threatened her safety. Unfortunately, the disregard of women's issues apparently is a common practice in today's courtrooms.

As Congress learned from numerous witnesses and studies commissioned by the state judiciaries themselves, state regulation of forms of assault traditionally directed at women has been deeply shaped by stereotypical thinking about women. From the police report through prosecution, trial and sentencing, state actors take crimes against women less seriously than other crimes.

Brief of Law Professors as *Amici Curiae* in Support of Petitioners in Violence Against Women's Act. *Draft* (on file with author). Furthermore,

[s]tudy after study commissioned by the highest courts of the states . . . has concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men. Collectively these reports provide overwhelming evidence that gender bias permeates the court system and that women are most of its victims.

Id. (citing S. REP. NO. 102-197, at 43-44 (1991)).

time deciding whether the stories were threatening due to the inherent biases evident in a court which is composed primarily of male judges.²¹⁵ These biases “do not mean that judges hate women or even believe unconsciously that men are innately superior human beings to women,” but rather, “judges look at the world from a perspective held by men more than women” and this results in producing laws “better adapted to the needs of men than those of women.”²¹⁶

Many women in our society will read the Jane Doe Story, recognize the true threats it contains, and begin to feel fear. For example, in a recent case study of *Alkhabaz* in an Internet Law class at the Seattle University School of Law, women who read the *Alkhabaz* case had different reactions as to whether the stories constituted threats when they were confronted with the stories in the setting of a secure classroom, as opposed to their feelings outside the classroom.²¹⁷ In this class, the professor questioned “whether the utopian view of the Internet as a decentralized communication medium with revolutionary democratic potential,” otherwise known as cyberspace, is challenged by the electronic transmission of stories involving the rape, torture, and mutilation of women.²¹⁸ In class, one female student reported that she did not believe that the government should have brought the case against *Alkhabaz*.²¹⁹ However, that student soon changed her mind when she was confronted by an unknown male outside of the classroom, who utilized the Internet in obtaining contact with her.²²⁰ Although the woman may have initially believed that the *Alkhabaz* decision was legitimate, her position changed when she herself was

215. “Despite the steady increase in the numbers of women lawyers and judges, the federal and state judiciaries are still overwhelmingly male and white.” U.S. Report to the U.N. on Status of Women, § 2, *Gender Bias in the Courts*, August 1994, available at http://dosfan.lib.uic.edu/ERC/intlorg/Status_of_Women/s2.html. According to the United States Report to the United Nations on the status of women and the judicial system from 1985 to 1994:

There are 837 seats on the federal judiciary – nine on the Supreme Court, 179 on the Circuit Courts and 649 on District Courts. As of January 1, 1994, there was a total of 101 female federal judges – two Supreme Court, 24 circuit, and 75 district judges. These figures include eight African-American women and six Hispanic-American women. During 1993, his first year in office, President Clinton sent to Congress his confirmation 48 judicial nominees – a group unprecedented for its diversity: 18 women, 11 African-Americans, 3 Hispanic-Americans.

Id. Furthermore, regardless of the increased number of women in American courtrooms, there is still a continual bias against “women litigants, witnesses, lawyers, jurors, court employees and judges” as demonstrated in a 1994 study conducted by twenty-one states and two federal circuits which found that bias was a significant problem in the courts. *Id.*

216. Becker, *supra* note 72, at 988.

217. Chon, *supra* note 46, at 144.

218. *Id.* The professor focused on the Jane Doe Story. *Id.*

219. *Id.*

220. *Id.*

confronted with the Internet's capability to aid in the commission of crimes by sexual predators.²²¹

Women experience and fear many things because of their gender.²²² For example, "women fear rape not because of anything in [their] individual personalities, but because [they] are women in a rapist society. And every time a woman is sexually harassed or confronted with some other manifestation of sexism, [such as sexual obscenity or violence on the Internet] it is *only* because she is a woman."²²³ Very often, a woman's individuality is seen as totally irrelevant or is simply disregarded; thus, threats to women's status in society through the Internet are accepted by some members of society because of the traditional belief that women are inferior to men.²²⁴ Consequently, when a woman views sexual violence, threats, or obscenity on the Internet and in society, she must realize that everything which is done to women could be done to her, due to the simple fact that she is a woman.²²⁵

221. In particular, the female student was confronted with a tow-truck driver who had responded to her call to the Automobile Association of America (AAA). Chon, *supra* note 46, at 144-45. The tow-truck driver asked her to get into the car in order to go to the home office. *Id.* The girl recognized that the request was out of the ordinary and denied the man's request. *Id.* Soon after, the tow-truck driver sent by AAA arrived. *Id.* Apparently, the first tow-truck driver had been monitoring the webpage of the AAA and preyed on women whose cars broke down. *Id.* At least two rapes were allegedly attributed to this tow-truck driver. *Id.*

222. Rozanski, *supra* note 212, at 165. "Women experience so many things in a certain way because we are women. Very often our individuality is totally irrelevant or disregarded because we are women." *Id.*

223. *Id.*

224. *Id.*

225. *Id.* See also Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuses of Women*, in *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 314, 314-15 (Mary Becker et al eds., 1994) (demonstrating how a woman portrayed in obscene or pornographic material is used to depict all women in the eyes of some men). Accordingly, when a man reads or writes about or looks at obscene or pornographic material and then sees a woman not associated with that material, the non-associated woman "becomes" the woman in the obscene material. *Id.* at 314. This theory is identified in a study of 200 prostitutes and the relationship between sexual abuse and their assailants' referral to obscene or pornographic materials during the sexual or physical abuse. *Id.* Out of 193 cases of rape, 24% mentioned the assailants referral to obscene or pornographic material. *Id.* For example, one assailant began punching and raping the woman and told her he had seen whores like her in three pornographic movies mentioned by name. *Id.* at 316. The assailant stated, "You were in that movie. You were in that movie. You know you wanted to die after you were raped. That's what you want; you want me to kill you just like (specific pornographic film) did." *Id.*

This particular woman suffered, in addition to forced vaginal penetration, forced anal penetration with a gun, excessive bodily injuries, including several broken bones; and a period of the time in which the rapist held a loaded pistol at her vagina, threatening to shoot, insisting this was the way she had died in the film that he had seen.

Id. at 316.

The court also failed by characterizing the communication in the Jane Doe Story as mere fantasies shared between friends.²²⁶ The judge completely ignored the real dialog that is held between men who share their fantasies and the impact such stories have on women and society. The court ignored any social considerations as a basis for prohibiting speech containing threats to women. Male sexual fantasies about the mutilation and subordination of women should not be considered harmless when they are coupled with the power men possess in today's society. This power is visible through the present patriarchal society where men have the ability to determine women's roles in society. This power is evident in the continued attempts to subordinate women, and the subsequent fueling of anti-feminist politics.²²⁷ Male fantasies are implicit abstracts manifested from their perceptions of reality; thus, the abstracts themselves facilitate the subordination of women.

The way in which men control the status of women in society is inferable in the context of abuse. Theoretically, men physically abuse women because "the violence temporarily stops a woman from doing what threatens and challenges [men's] authority."²²⁸ Men can generally overpower women in physical strength; additionally, "men have

226. *Alkhabaz*, 104 F.3d at 1496.

227. VICTOR J SEIDLER, *UNREASONABLE MEN: MASCULINITY AND SOCIAL THEORY* 98 (1994). Men have learned that masculinity is power and that if a man wanted to aid in the fight against the subordination of women he would have to give up his masculinity. *Id.* "In some cases this has possibly fueled a kind of anti-feminist politics, a threat or fear that women are somehow out to take away men's potency . . ." *Id.* Thus, men cannot reject their masculinity even if it is the fuel lighting the fire that is burning women into subordination. *Id.* at 101. Catharine MacKinnon also noted that men embrace their masculinity and the advantages it gives them. The primary advantage or inherent value of male masculinity is "the mechanism by which their interest itself is enforced and perpetuated and sustained: power. Power in its socially male form. It is not only that men treat women badly, although often they do, but that it is their choice whether or not to do so." CATHARINE MACKINNON, *Consciousness Raising, in FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 52, 54 (Mary Becker et al. eds., 1994). For a more philosophical analysis of men's power in society, see ANNA G. JONASDOTTIR, *Her for Him, Him for the State: The Significance of Sex and Marriage in Hobbes's and Locke's Political Theories, in WHY WOMEN ARE OPPRESSED* 109-43 (1994) (exploring the writings of Thomas Hobbes and John Locke, "the influential forefathers of liberalism" and their views on the relations between the sexes, the usefulness of the female sex, and the historical process of an emerging patriarchal institution). During the life of Thomas Hobbes, in 1662, Margaret Lucas, Duchess of Newcastle characterized the relationship between the sexes:

Men are so unconscionable and cruel against us, as they endeavor to Barr us all Sorts or kinds of Liberty, as not to suffer us Freely to associate amongst our own sex, but, would fain Bury us in their houses or Beds, as in a Grave; the truth is, we live like Bats or owls, Labour like Beasts, and Dye like worms.

MARGARET LUCAS, DUCHESS OF NEWCASTLE, *Female Orations, in WHY WOMEN ARE OPPRESSED* 109 (Anna G. Jonasdottir 1994).

228. Dick Bathrick & Gus Kaufman, Jr., *Male Privilege and Male Violence: Patriarchy's Root and Branch, in MEN & INTIMACY* 111, 112 (Franklin Abbot ed., 1990).

been socialized to believe [they] have the right and privilege to dominate and control women” via their physical strength or mental power.²²⁹ It has been noted that no sense of a woman’s own self-purpose can supersede male domination until the male’s sense of her purpose enables him to experience “raw phallic power.”²³⁰ Reading or communicating obscene speech on the Internet allows men to fully realize their sense of power, that women are mere objects, and that women have the sole purpose of making men erect. Allowing obscenity on the Internet leads to men subordinating women, forces women to believe that their true purpose and nature is to be used by men and that she is merely an object to be controlled.²³¹

When discussing the system of male domination and female subordination, the workings of a patriarchy, a system of male control over women, is being described.²³² Studies show that male subordinators

229. *Id.* For example, many women make most of their decisions based on how to avoid subjecting themselves to dominating men; decisions such as where and when to walk at night, whom to talk with and what to wear, demonstrate how much control men have over women and the way they think. *Id.* at 114. “So men end up determining if women get to go out and where they go.” *Id.* Women desire to go through a day without being systematically subordinated to men thus women “spend an incredible amount of time, life, and energy cowed, fearful, and colonized, trying to figure out how not to be the next [woman] on the list.” CATHARINE MACKINNON, *Introduction: The Art of the Impossible*, in *FEMINISM UNMODIFIED* 1, 7 (1987). It is only through “osmosis [that women will learn] what men want in a woman and try[] to give it to them” and the hope that if the woman becomes the desired image men will release the subordinating power over them. *Id.* Women act in accordance for their safety, nonetheless, the way that some women act reinforces the belief that men are the only route to safety, when in fact men are the danger. For example, some women will agree that they sometimes depend on men to protect them, to walk them home late at night, so that in the end, men end up determining if women will go out and where they go, thus once again exercising control. Bathrick & Kaufman, *supra* note 228, at 114.

230. PORNOGRAPHY, *supra* note 68, at 128. See also Dworkin, *Pornography Happens to Women*, in *THE PRICE WE PAY* 181, 182 n.1 (Laura J. Lederer & Richard Delgado eds., 1995) (describing a man’s ability to experience “raw phallic power” is in a sense describing a man’s ability to cause and sustain a penile erection).

231. *Id.* at 182 n.51. See also Becker, *supra* note 72, at 992. Becker comments on “the extent that injuries to women are someone else’s constitutional right” and that women are less likely to see the ways in which men injure them. *Id.* Becker furthers this analysis by quoting Robin West: “The tendency of all subordinated persons toward self-betittlement by trivializing the nature of their injuries is geometrically enhanced by the self-perception that their injuries do not exist because their infliction is constitutionally protected.” *Id.* at 992 (citing Robin West, *Constitutional Skepticism*, 72 B.U. L. Rev. 765 (1992)).

232. Bathrick & Kaufman, *supra* note 228, at 114. Bathrick and Kaufman note that:

In our Western version of patriarchy, traditionally this meant a white, male god at the top, the Pope, secular leaders like the President . . . followed by middle management, professionals, and religious leaders, then workers . . . then white families (women, children, and maiden aunts) and, at the bottom, people of color.

Id. See also JONASDOTTIR, *Sex/Gender, Power, and Politics: Patriarchy in the Formally Equal Society*, in *WHY WOMEN ARE OPPRESSED*, *supra* note 227, at 11 (studying theoretical contemporary power relations between the sexes). Jonasdottir used the term patriarchy and male domina-

can decrease the amount of power they exercise over women by: (1) listening to women without interrupting—giving women your full attention and seriously considering their point of view; (2) believing women and taking them seriously—accepting their feelings, versions, and visions; (3) changing what is wrong—giving up pornography and obscenity since they only reinforce the assumption that women are to be controlled and subordinated.²³³

To separate acts from fantasies, thoughts, or ideas, is artificial, but this is exactly what the court did in *Alkhabaz*. The judicial system was careful not to infringe upon social liberty; nonetheless, members of the court and society must realize that once a person communicates his or her fantasies, it becomes speech. Speech has real characteristics, it is tangible, and it is no longer a figment of someone's dirty imagination.²³⁴ The idea that obscene speech on the Internet is not currently federally regulated is dangerous because in balancing women's physical integrity with the ability of men to speak about their obscene sexual fantasies over the Internet, the ability for men to discuss the subordination of women as mere sexual objects will ultimately prevail in the courtroom.²³⁵ Under *Alkhabaz*, mere fantasies involving the rape and torture of women are granted First Amendment protection.

As demonstrated in *Alkhabaz*, the law is profoundly patriarchal.²³⁶ Lawyers themselves "are taught to think of issues, but not of the con-

tion synonymously in designating a social and political power system. *Id.* Jonasdottir made the assumption "that sex/gender – women and men as sociosexual beings – comprises a particular material base for generating and shaping history and society." *Id.* at 11-12.

233. Bathrick & Kaufman, *supra* note 228, at 115. Sociolinguists have also researched the differences between men's and women's speech patterns. The data demonstrates that men's speech "chills" women's speech and reveals that obscenity is a mechanism by which the chilling occurs. Michelle J. Anderson, *Silencing Women's Speech*, in *THE PRICE WE PAY* 122, 124 ("[R]esearch shows that after viewing pornography [and obscenity] women have less to say and men hear less of what women do say.").

234. Fantasies are defined as "the art of forming images or representations whether in direct perception or memory; also an image or impression derived through sensation." WEBSTER'S THIRD NEW INT'L DICTIONARY 823 (1981).

235. It could be argued that the sexually degrading fantasies of men would not prevail in the courtroom if the percentage of female judges were to increase or if the American Bar Association Model Code of Judicial Conduct mandated and enforced a requirement that judges not manifest bias or prejudice in the performance of their judicial duties. See Becker *supra* note 72, at 987 (commenting that "judges are members of a small elite professional class and are overwhelmingly white men"). For more information regarding judicial biases against women, see Judith Resnik, *Naturally Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682 (1991); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

236. See Rozanski *supra* note 212, at 176.

texts in which the issue arises.”²³⁷ The way in which lawyers think of issues is determined by the law.²³⁸ Therefore, when considering an offense, lawyers think of the elements which comprise the offense and whether these elements are established.²³⁹ The validity of the elements are not questioned and the social context of any case is not taken into consideration.²⁴⁰ For example, the fact that violence is endemic in our society has never become an issue in any rape case.²⁴¹ In precisely this way, male patriarchy is evident in *Alkhabaz* because there were no indications that the lawyers and judges took into consideration the continued subordination of women in American society.²⁴²

In not addressing the First Amendment concerns in Alkhabaz’s speech, thereby leaving women no choice but to allow this type of speech to exist on the Internet, the court denied women their very humanity. The fact that some of the e-mails were meant to be private transmissions between Alkhabaz and Gonda does not make them so. The e-mails can be considered public because they have the social power to create a society in which women are systematically subordinated to men. An opponent may argue that since the e-mails and Internet stories were private and only accessible by choice, women were not captive audiences to the sexually graphic and threatening speech being communicated on the Internet, and further, the speech was not forced into their homes, an area commonly mandating privacy protection. Similarly, an opponent may claim that since the obscenity was not publicly displayed by any means of expression, other persons had a meaningful opportunity to avoid reading the speech, thus, there was no captive audience. Internet contact is “[u]nlike an unexpected outburst on a radio broadcast” and the obscenity received or contributed by the user “[i]s not so invasive or surprising that it prevents an unwilling [reader] from avoiding exposure to it.”²⁴³ Opponents of this Note’s reasoning will likely argue that users who log onto the sexually

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. See Becker, *supra* note 72, at 975 *passim* (commenting on judicial review and the constraints of *stare decisis*, and also discussing the negative impact of having a “small elite group of lawyers, who are not politically accountable, be able to block legislation desired by a majority of the citizens in a democracy”).

243. *Sable Comm. of Calif. v. FCC.*, 492 U.S. 115, 128 (1989) (arguing that the “context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from the situation in which a listener does not want to receive the message”). See also *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

explicit newsgroups or BBSs will not generally be unwilling readers or contributors. These users will likely be intentionally logging onto the newsgroup for the purpose of reading such obscene stories detailing the sexual subordination of women for personal enjoyment. Thus, opponents to regulation of the Internet will likely argue that women and men who oppose obscenity on the Internet are able to "avert their glances" and avoid the obscenity if they desire.²⁴⁴

While it is arguably true that a captive audience does not exist on the Internet given the Internet's voluntary nature, the subordination of women is perpetuated and is fostered by men who participate in and contribute to sexual fantasies. The men who share such horrid, misogynic fantasies or ideas subordinate women by believing and supporting such ideas, spreading beliefs indulgent in savage thoughts to other men, and acting upon such beliefs. The communication and enjoyment of these sexual fantasies creates a communal and brotherly acceptance of the desires and fantasies from one man to another. This acceptance creates the grounds from which the status of women is uprooted and thrown away. The acceptance of sexual fantasies from other men and judges functions to concentrate the oppression from which the sexual threats are mounted as they reinforce the beliefs that women are unequal to men and merit oppression, rape, torture, and death.²⁴⁵

The inconsistencies in the *Alkhabaz* and *Baker* opinions, in defining what constitutes a true threat, impaired the court's ability to find that

244. See *Cohen v. California*, 403 U.S. 15, 21 (1971) (holding that the government entity could "avoid further bombardment of their sensibilities simply by averting their eyes"). Nonetheless, it is important to note that *Cohen* discusses the fact that persons "are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Id.* at 21. Therefore, opponents will likely fail on this argument since Internet transmissions take place within the home more often than outside the home. Women are subject to the Internet and its vast capabilities and subordinating contents because of the fact that they have family members using the Internet, they have friends that use the Internet, and they have co-workers that use the Internet. It is this usage that implicitly subordinates women inside and outside their personal homes. Thus, the ability to "avert their eyes" is not a viable option.

245. Laura J. Lederer, *Pornography and Racist Speech as Hate Propaganda*, in *THE PRICE WE PAY* 131, 139 (1995). The acceptance of men's fantasies are obvious in magazines such as *Playboy* and *Hustler*. *Playboy* allows men to believe that what they are contributing to is acceptable and reinforces the thoughts of men by telling them it is tolerable to think that women are inferior because other men believe the same thing. *Id.* at 139. "Hate mongers and pornographers refer to higher authorities, famous people, experts, scholars, and other leaders to gain respectability." *Id.* One of the most clever programs supporting the campaign of subordinating women is fashioned in "*Playboy Magazine's Playboy* interview, which has featured presidents, legislators, athletes, authors, artists, major sports figures . . . and Hollywood stars . . ." *Id.* The presence of such leaders "legitimizes the rest of the magazine's content." *Id.* at 139. See also Bathrick & Kaufman, *supra* note 228, at 115 (noting how men try to describe, in reality, ways to justify their position on women and male power).

Alkhabaz's speech was in fact a true threat to continue the subordination of women. The court's error could have been easily prevented, had Congress enacted a federal statute regulating Internet obscenity. The *Alkhabaz* court erred when it held the e-mails and Internet stories were protected under the First Amendment. As demonstrated by the application of *Miller*, the court should have characterized the speech as obscene. Furthermore, the court erred in not holding that the communications were true threats under 18 U.S.C. § 875(c). The inconsistencies in Alkhabaz's trial and appellate court decisions impaired the court's ability to find that Alkhabaz's speech constituted true threats of the continued subordination of women. Unfortunately, the inconsistency between the courts was likely caused by inherent biases of a court composed of men. Biases are inherent within a male patriarchy, which is the premise of the current judicial system. Nonetheless, the court's error could have been easily prevented had Congress enacted a federal statute regulating obscenity on the Internet.

V. THE NEED FOR A FEDERAL STATUTE REGULATING OBSCENITY ON THE INTERNET

Regardless of the definition the Sixth Circuit used to determine whether Alkhabaz's e-mails and Internet stories were true threats, the Internet communications should have been considered obscene under the *Miller* test, and thus, not granted First Amendment protection. For many years, the Supreme Court has been praised for its courage in upholding First Amendment protections and recognizing the importance of the right to free speech. However, the Court has also recognized that certain forms of speech are impermissible and that individuals do not have an absolute ability to communicate their desires.

Accordingly, the court's holding in *Alkhabaz* demonstrates the need for Congress to enact a federal statute containing a national standard of review to regulate obscenity on the Internet. The lack of federal regulation on Internet obscenity has furthered the subordination of women, a problem visible not only in cyberspace, but also in reality. The problems begin with the mild tactics of subordination which are demonstrated when women are pushed, shoved, felt up, and called dirty or foul names.²⁴⁶ Women generally try to ignore these oppressive acts of violence and attempt to move past them. However,

246. Andrea Dworkin, *Pornography Happens to Women*, in *THE PRICE WE PAY* 181, 184 (1995). The mild tactics of subordinating women are important to point out because, amazingly enough, it is acknowledged that had the pushing, touching, and name-calling been done to a man it is likely that the invasions would have been considered physical attacks. *Id.*

every time a man acts out sexual violence against a woman the subordination intensifies.²⁴⁷ Nonetheless, since the acts are done to women, some members of society believe it is acceptable to treat women in such a manner because that is the way things are in society.²⁴⁸

A federal statute is needed to illustrate to every citizen that obscene speech, regardless of its medium, is not considered speech under the First Amendment, and thus, does not receive protection. Enacting a federal statute that mandates a national standard for regulating obscenity could thwart the continued subordination of women. However, in order to be effective, the proposed federal statute must define a national standard for obscenity, rather than one based on a contemporary community standard, as seen in *Miller*. Additionally, the federal statute must design strict regulations for the Internet and implement a system of enforcement that will fine Internet providers, operators, and users who communicate or aid in the communication of obscene speech.

A. *Typical and Contemporary Community Standards*

Most states throughout the nation have statutes that, under *Miller*, define obscenity as material that the average person, when applying contemporary community standards, finds appealing to the prurient interests taken as a whole. Many state statutes, such as those from Illinois, Louisiana, New York, and Texas, are relatively consistent in defining the standard for obscenity and failing to mention the Internet as a possible medium for its transmission. For example, Illinois defines obscenity as material that “describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions or lewd exhibitions of the genitals.”²⁴⁹ Louisiana defines obscenity as material demonstrating hard core conduct such as “[s]adomasochistic abuse, meaning actual, simulated or animated, flagellation, or torture by or upon a person who is nude or clad in undergarments or in costume that reveals the pubic hair . . . or in the condition of being fettered bound, or otherwise physically restrained.”²⁵⁰ In fact, most state statutes, similar to that of Louisiana, usually find violent material de-

247. *Id.* In addition, when women “have their passage physically blocked on the street or in the office; women simply move on, move through, unless the man escalates the violence to what the larger patriarchal world takes to be real violence” *Id.*

248. *Id.* Due to the fact that these acts are done to women, some members of society think that the acts are terrible, but “that’s the way things are; don’t make a federal case out of it.” *Id.*

249. 720 ILL. COMP. STAT. 5/11-20 (West 1999).

250. LA. REV. STAT. ANN. § 14:106 (West 1999).

picting offensive acts of violence, including but not limited to, acts of sadistic conduct, whippings, beatings, torture, and mutilation of the human body, to be obscene.²⁵¹

New York and Texas rely heavily on whether the material is “patently offensive.”²⁵² For example, New York maintains that obscene material “depicts or describes in a patently offensive manner, actual or simulated: sexual intercourse, sodomy, sexual bestiality, masturbation, sadism, masochism, excretion or lewd exhibition of the genitals, and considered as a whole, it lacks serious literary, artistic, political, and scientific value.”²⁵³ Similarly, Texas defines obscenity as material represented by “patently offensive representations or descriptions of . . . sodomy . . . masturbation, sexual bestiality . . . masochism . . . the male or female genitals in a state of sexual stimulation or arousal, covered male genitals in a discernibly turgid state or a device designed and marketed as useful primarily for stimulation.”²⁵⁴

The minor inconsistencies between state statutes defining obscenity demonstrate that, while the standard of review is similar, there are still differences regarding a state’s tolerance level with respect to various sexual acts. Hence, a sexual act that is tolerated in one state is not always going to be tolerated in the neighboring jurisdictions.²⁵⁵ The ability for such minor, but disconcerting, inconsistencies demonstrates the need for a federal statute to define and regulate obscenity on the Internet. Furthermore, the federal statute would introduce a standard which all states would follow and set the standard to be applied in determining whether something is obscene. The states could raise the standard of federal review to include more material as obscene, but a state could never lower the standard.

B. The Elements of a Federal Statute Defining and Regulating Obscenity on the Internet

In determining the elements of a federal statute defining obscenity, a similar statute in neighboring Canada aids in the construction of a statute for the United States. Canada’s statute is an excellent model,

251. *Id.*

252. N.Y. PENAL LAW § 235.00 (McKinney 1999); TEX. PENAL CODE ANN. § 43.21 (Vernon 1999).

253. N.Y. PENAL LAW § 235.00 (McKinney 1999)

254. TEX. PENAL CODE ANN. § 43.21 (Vernon 1999).

255. Thomas Earl Pryor, *Does Arkansas Code Section 15-14-122 Violate Arkansas's Constitutional Guarantee of Equal Protection?*, 51 ARK. L. REV. 521, n.21 (1998). See also GA. CODE ANN. § 16-6-2 (West 2000) (criminalizing sodomy). Thirty-one states plus the District of Columbia do not have sodomy statutes, such as Alaska, California, Colorado, Illinois, Kentucky, and North Dakota. See Pryor, *supra* at n.21).

deserving the respect, support, and consideration of the United States.²⁵⁶ On February 27, 1992, the Supreme Court of Canada unanimously adopted the thesis that Canada's criminal obscenity law should be broadened to apply to "materials that subordinate, degrade or dehumanize women."²⁵⁷ The Canadian Criminal Obscenity Law defines obscenity as follows: "Any publication, a dominant characteristic of which is undue exploitation of sex, or of sex and any one of the following subjects: crime, horror, cruelty, and violence."²⁵⁸ Therefore, in order to have a statute that can be easily interpreted by the states and the users of the Internet, the proposed statute must define obscenity, use a national standard of review, in contrast to a community standard, and implement penalties for violating the statute. Additionally, in order to be considered constitutional under the Constitution of the United States, the statute must not be overbroad and comply with Congress' commerce clause power as acknowledged in *United States v. Lopez*.²⁵⁹

1. *Elements of a Federal Statute Regulating Obscenity*

A federal statute that regulates obscenity on the Internet would define a national standard of review with definite guidelines which would be easily understood by the fifty states. The federal statute would define explicit harm, cruelty and subordination, and give examples of representations that would constitute the submissiveness of the women. In addition, the federal statute would provide the penalties of violating the statute. As a whole, the federal statute would clearly define obscenity. In part, the statute would state as follows:

All material that explicitly harms women, depicts sexual violence, cruelty against women, or subordinates women in a sexual context will be considered obscene If the user transmits any obscene

256. Joan Kennedy Taylor, *Gender Symposium: Does Sexual Speech Harm Women? The Split Between Feminism*, 5 STAN. L. & POL'Y REV. 49, 51 (1994).

257. *See id.*

258. *Butler v. The Queen*, [1992] S.C.R. 452. "The court redefined undue exploitation . . . ruling that the Canadian Charter of Rights and Freedoms protected the equality of women as well as freedom of expression, and therefore in the name of equality sexually explicit materials that harm women may be suppressed." Kennedy Taylor, *supra* note 256, at 51-52 (citing Camilla Gibb, *Project P Targets Lesbian Porn*, QUOTA MAG., May 1992). *But see* NATIONAL COALITION AGAINST CENSORSHIP, A CONFERENCE REPORT, THE SEX PANIC: WOMEN, CENSORSHIP, AND "PORNOGRAPHY" 5 (1993). Thelma McCormack, professor of sociology at York University in Ontario and director of the Center for Feminist Research commented on Canada's Supreme Court decision in the 1992 *Butler* decision. *Id.* McCormack claimed that "[a]lthough the decision was hailed a great victory for feminist anti-porn forces, the *Butler* decision belongs to the Right. The Supreme Court of Canada doesn't give a damn about gender equality. It is concerned about control and was pleased to have a feminist gloss put on it." *Id.*

259. 514 U.S. 549, 558-59 (1995).

materials as defined above over the Internet with the knowledge of the nature of the content thereof, with the intent to advertise, create, possess with intent to disseminate, sponsor, sell, deliver, provide, offer to deliver, publish, or post, the user will be in violation of the statute. If it is found that any of the depictions or descriptions on the Internet are of sexual conduct described and declared as obscene by a court of law by applying the national standard to have been unlawfully transmitted on the Internet, the Internet provider, author, and any other person sponsoring the obscene material will be subject to a \$5000 fine or five months in jail or both.²⁶⁰

Canada's definition of obscenity may be broad, nonetheless, the American federal statute outlined above would narrow the definition of obscenity by further describing the meaning of the terms horror, cruelty, violence, and crime. For example, explicit harm and cruelty portrayed in a sexual context would be demonstrated with the use of bigotry, hostility, pain, coercion, subordination, and misogynous aggression against women. Material could also be defined as obscene when: (1) the use of violence or other acts of crime are depicted through one person inflicting serious bodily harm on another; (2) the participant did not consent before the production of the material; or (3) a participant in the production of the material was a minor.²⁶¹

260. The statute in full would resemble something like this:

Obscenity is all material that explicitly demonstrates harm being done to another person, depicts sexual violence or cruelty against that person, or subordinates that person in a sexual context.

Explicit harm and cruelty include the sexual context of one or more of the following: (i) bigotry; or (ii) hostility; or (iii) pain; or (iv) coercion; or (v) subordination; or (vi) misogynous aggression against women; or (vii) degradation; or (viii) dehumanization.

The sexual or social subordination of women includes the representation of one or more of the following: (i) women as sexual objects who enjoy pain or humiliation; or (ii) women as sexual objects who experience sexual pleasure in being raped; or (iii) women as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (iv) women submissive to men.

The depiction of women submissive to men includes the representation of one or more of the following: (i) women in postures of sexual submission; or (ii) women as whores by nature; or (iii) women being penetrated by objects or animals; or (iv) women in scenarios of degradation, or injury, or torture, or shown as filthy or inferior, or bleeding, or bruised, or hurt, in a context that makes these conditions sexual.

Upon the transmission of any obscene material, as defined above, with the knowledge of the nature of the content thereof, with the intent to advertise, create, possess with the intent to disseminate, sponsor, sell, deliver, provide, offer to deliver, publish or post in interstate or intrastate commerce, including the Internet, a court shall by applying the national standard declare the material as obscene and find the person in violation of the statute.

Upon declaring the material as obscene the Internet provider, author, and any other party sponsoring the obscene material will be subject to a \$5000 fine or five months in jail or both.

261. This statute extracts some ideas from the MacKinnon-Dworkin model definition of pornography. See *supra* note 68 and accompanying text.

Material that subordinates or dehumanizes women to men would be considered obscene if the women are presented as sexual objects who experience sexual pleasure in being raped, or as sexual objects tied-up, cut-up, mutilated, bruised, innately physically hurt, or as sexual objects who enjoy pain and humiliation.²⁶² The ability to portray women as submissive to men or inferior in our society is demonstrated by depicting women in postures of sexual submission, women as whores by nature, women being penetrated by objects or animals, women in scenarios of degradation, injury, torture, shown as filthy or inferior, bleeding, bruised, or hurt, in a context that makes these conditions sexual.²⁶³

The federal statute would make the transmission of obscenity over the Internet a federal offense. Furthermore, since the Internet is comprised of, but not limited to, e-mail, Usenet, and any newsgroup or BBS, any other Internet facility introduced in the future or not expressly mentioned in the statute would fall within the statute's boundaries and federal jurisdiction. Thus, the federal statute would recognize the infinite realm of cyberspace.

2. *National Standard Defined*

The theory of the contemporary community standard found in *Miller* is difficult to uphold in a jurisdiction that has no boundaries.²⁶⁴ Due to the availability of obscene materials on the Internet, the lack of jurisdiction over cyberspace, and the inability to prosecute obscenity offenders on the Internet, a national standard of review is necessary. In general, obscenity prosecutions are quite rare due to the difficulty in establishing material as obscene under the *Miller* test, therefore, the standard of review for the locale in which the suit is being brought cannot be applied in cases involving the Internet.²⁶⁵

Jurisdictional problems arise when looking at the structure of cyberspace and the imposition of liability on Internet users and sponsors for illegal postings, such as obscenity, which is not protected by the First Amendment. Thus, due to the lack of jurisdiction over cyberspace, the contemporary community standards test must be viewed as inapplicable. The Sixth Circuit has held that the "venue for federal obscenity prosecutions lies 'in any district from, through, or into which'

262. This statute extracts some ideas from the MacKinnon-Dworkin model definition of pornography. See *supra* note 68 and accompanying text.

263. This statute extracts some ideas from the MacKinnon-Dworkin model definition of pornography. See *supra* note 68 and accompanying text.

264. See *supra* notes 32-39 and accompanying text.

265. Bilstad, *supra* note 43, at 363.

the allegedly obscene material moves”²⁶⁶ Therefore, the court can decide which community standard it will apply if there is more than one. Unfortunately, “[t]his may result in prosecutions of persons in a community to which they have sent materials which [are] obscene under that community’s standards though the community from which it is sent would tolerate the same material.”²⁶⁷ Hence, in order to maintain fairness and consistency, the regulation of obscenity on the Internet must be confined within the application of a uniform national standard.

A uniform national standard of review for obscenity would allow the fifty states to clearly and undoubtedly recognize material that portrays women as being socially and sexually subordinated, beaten, raped, tortured, mutilated, or murdered as obscene. In conforming to a national standard, courts would not need to question in which jurisdiction the obscene material was processed, accessed, sold, bought, posted, or moved through. A national obscenity standard would allow Internet providers, moderators, and operators to know whether they are in compliance with the law on a national level, and need only further investigate to determine whether they are in compliance with their local standard which may be more strict, or more encompassing than the national standard.²⁶⁸ For example, a federal statute that explicitly defined the law on obscenity and its relative standard of review, in relation to the Internet, would allow moderators of BBSs to apply definite guidelines to e-mails or stories requesting to be posted on the Internet.

Definite guidelines are imperative to a nation composed of multiple vague and indefinite community standards. These guidelines would enable the prosecution of offenders because the standard would be consistent and easily understood, thus, the possibility of mistake or lack of knowledge on behalf of the user would be slim, if nonexistent. Currently, community standards are inconsistent and easily misunderstood because they differ from community to community, and inflict punishments on some people but not others who engage in the same

266. *United States v. Thomas*, 74 F.3d 701, 711 (6th Cir. 1996). This case involved one of the first federal criminal convictions for transmitting obscene materials over the Internet as applied to 18 U.S.C. § 3237. *Id.* The defendants in *Thomas* were convicted of federal obscenity charges concerning their operation of a computer bulletin board business known as the Amateur Action Computer Bulletin Board System. *Id.* at 705.

267. *Thomas*, 74 F.3d at 711.

268. Remember that under the federal statute, states could heighten the level of scrutiny, but never lower it. Thus, if a state had a higher standard, the user would need to qualify under the federal statute and then look to the state statute as well. However, it is likely that a federal statute would remain the primary statute looked to for guidance.

criminality. The application of a community standard in defining obscenity on the Internet is analogous to one state criminalizing murder and one state endorsing murder merely because the state is more tolerant. For example, what may be tolerated in Chicago, Illinois, may not be tolerated in Fargo, North Dakota.²⁶⁹ The differing viewpoints of what constitutes obscenity in these communities is likely due to various societal factors including tolerance of minority viewpoints, racial diversity, religious diversity, and population.²⁷⁰ Therefore, a national standard would rectify the problem of inconsistent application of federal law and inconsistent tolerance levels. As illustrated in *Alkhabaz* and *Baker*, courts would have to only focus on one standard of review. Thus, obscene Internet speech that portrays women being tortured in one community would be considered obscene across the nation.

3. *The Inherent Need to Control Obscene Speech Would be Accomplished by a National Standard*

The United States Supreme Court has held that defining and maintaining a national standard for obscenity in the face of constantly changing ideas of morality provides a great obstacle to implementing a national standard, such as the one this Note proposes.²⁷¹ However,

269. For example, the moral fabric of some rural communities located in the Midwest does not allow members of society to participate in sexually orientated businesses, but the moral fabric of society in large cities, such as Chicago, Illinois, may be more tolerant of such businesses. See Marilyn Wheeler, *Fargo Nixes Mix of Nude Dancing Bars*, BISMARCK TRIB., Dec. 19, 1995, at 10A. "The Fargo City Commission on Monday voted 4-1 to ban exotic dancing in bars . . ." *Id.* However, the Commission's ban did "not prohibit exotic dancing in any other venue that [was] not serving alcoholic beverages."

270. The population of Chicago, Illinois, is 2,802,079 and the population of Fargo, North Dakota, is 170,122. THE WORLD ALMANAC AND BOOK OF FACTS 2001 (Beth R. Ellis, eds., 2001). The total population for North Dakota is 642,200. U.S. Census Bureau: American Factfinder, North Dakota (2000), available at <http://factfinder.census.gov> (last visited Apr. 6, 2001). Of the total population of North Dakota, 593,181 are white, 3,916 are African American, 31,329 are American Indian and Alaska Native, and 3,606 are Asian. *Id.* Thus, 93 percent of the total population is white. *Id.* The total population for the State of Illinois is 12.5 million. *Id.* Of the racial composition of Illinois, 1.9 million are African Americans, 10.1 million are white, 31,000 are American Indian and Alaska Native, and 423,000 are Asian. *Id.*

271. *Miller*, 413 U.S. at 30. The *Miller* Court rejected the notion of a national standard of review:

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interests' or is 'patently offensive.'

Id. Nonetheless, it could be argued that due to the fact that women make up over 51 percent of the nation's population, a majority of the nation could agree that speech that portrays women being sexually and physically subordinated should be regulated, considered obscene, and thus not constitutionally protected by the First Amendment. See Population Estimates Program, Population Division, U.S. Census Bureau, Washington, D.C., Oct. 25, 2000 (detailing the residential

regardless of the change in societal morality, the fact that obscenity is not protected by the First Amendment has not and likely will not change in the future. In regard to whether the definition of obscenity will change because of increased tolerance levels in society, it is doubtful that reasonable members of society, women included, will tolerate the portrayal of women being beaten, raped, and sexually subordinated.

If society does begin to tolerate this type of obscene speech, members of society may have to confront some serious issues. Society may need a federal statute to restrict the moral structure of the nation. Perhaps it will be necessary for society to be reminded every once in a while that obscene speech implicates a woman's status in society. It may be necessary for citizens to have their thoughts and ideas controlled and regulated if they are obscene, discuss the mutilation of women, and lack value to society. If society's morals are not restricted or controlled, the amount of obscenity on the Internet will continue to increase, women will lose their status in society, and the nation will once again become a slave nation.²⁷²

C. *Obscenity is Violence Against Women*

It may be difficult to find scientific evidence which confirms that obscenity implicates violence against women. Nonetheless, there must undoubtedly be an empirical link indicative of the causal relationship between obscenity and violence against women. The subordination of women is an inherent factor in the nation's continual rise in the physical and emotional harm done to women every day.

population of the United States, in thousands, as being 140 million females and 135 million males).

272. ANDREA DWORKIN, *The Slavery of Women in Amerika, in OUR BLOOD* 76-95 (1975) (commenting on the slavery of women and the few victories women have won in the fight towards equality). Dworkin focuses on male domination over women and how women are the one thing that men will always have control over, in a slave nation such as America. *Id.* at 82. "This nation's history is one of spilled blood This is a nation built on slave labor, slaughter, and grief. This is a racist nation, a sexist nation, a murderous nation. This is a nation pathologically seized by the will to domination." *Id.* at 77. Furthermore,

"[e]very married man, no matter how poor, owned one slave—his wife. Every married man, no matter how powerless compared to other men, had absolute power over one slave—his wife. Every married man, no matter what his rank in the world of men, was tyrant and master over one woman—his wife.

Id. at 82. Dworkin carries the control married men have over their wives to non-married men and their "brutal and absolute authority over the bodies of women [and] ruthless and malicious tyranny over the hearts, minds, and destinies of women." *Id.* Within a so-called slave nation men reveled in their power and identified women as "chattel [or] animals to be fucked and to breed." *Id.*

1. *Obscenity is Violence*

“Nudity, excess of candor, arousal or excitement, prurient appeal, illegality of the acts depicted, and unnaturalness or perversion” are all celebrated in obscene material.²⁷³ These depictions illustrate sex forced on women, and when these depictions are communicated or read on the Internet, they are physically forced on other women. In most obscene material posted on the Internet, women’s bodies are “trussed and maimed and raped and made into things to be hurt and obtained and accessed.”²⁷⁴ Presenting women in this nature induces many men to physically act on the depictions.²⁷⁵ The way in which obscenity subordinates women is visible to women, however, this phenomenon is remarkably invisible to men. As a result, the threat of societal harm to women is constant.²⁷⁶

Women who are withdrawn, robbed of their humanity, of their ability to have emotions, or of their ability to live, may sexually thrill and arouse some men. The active and explicit domination of women through the communicated images of bondage, torture, and murder give some men mental pleasure.²⁷⁷ For some, the dismemberment of women, either physically or socially, is the only thing that can give men pleasure and increase their self-esteem.²⁷⁸ Obscene speech is itself sexual violence against women, and Alkhabaz sexually violated and threatened all women and their personal security when he posted his obscene stories on the Internet.

There is a need for the regulation of individual rights, such as the right to free speech, when the exercise of that right causes severe invasions into the rights of others, whether immediately identifiable victims or the community itself.²⁷⁹ Alkhabaz’s speech may not have caused women physical harm by itself, although we do not know if someone has tried to copycat the Jane Doe Story, however the speech

273. Catharine A. MacKinnon, *Francis Biddles's Sister: Pornography, Civil Rights, and Speech*, in *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY*, *supra* note 70, at 327.

274. *Id.*

275. *Id.*

276. *Id.*

277. *BEYOND PATRIARCHY*, *supra* note 47, at 99.

278. *Id.* Horowitz and Kaufman agree that obscenity and pornography are “brash statements” of male power because the depictions of women portray the false availability of women, women’s vulnerability, reduction of women to sexual parts, and women being defiled or dismembered. *Id.*

279. Heyman, *supra* note 162, at 1319 (explaining women’s rights to personal security in great detail).

did sexually dehumanize women.²⁸⁰ The speech treated women as mere objects that have no intrinsic value and deserve to feel pain.

It could be argued that Alkhabaz's speech constituted a physical assault to women since it inflicted injury, not only to the body, but also to the consciousness of the victim.²⁸¹ Thus, a threat of harmful or offensive contact to the body may be perceived as a threat to the safety of one's dignity and undermine one's sense of authority in relation to one's own body.²⁸² In this way, Alkhabaz's e-mail and Internet stories make women feel as though they have lost control of their status in society. A cyclical event begins because if one man possesses such ideas about women, the number of men with similar ideas can only escalate, and the subordination of women will inevitably turn into a continual process.

Obscenity threatens and violates personal security through its direct impact on the minds of women. Even if a woman does not have direct contact with obscenity, she will feel the impact of the speech through societal subordination against her status as a woman. If the woman has direct contact with the threats, then her personal security and oppression is immediately experienced and acknowledged.

The reactions to the Jane Doe Story are often strong. The fact that a person actually thought up such a horrid act sheds light on the concept that such acts of misogyny could happen to anyone. The silencing of women often occurs after having contact with such obscenity; thus, silence or shock are common reactions after reading the story.²⁸³

The impact of obscenity on the Internet is similar to the modern day allowance of pornography in the mass media. The harm of Alkhabaz's e-mail and Internet stories directs harm to a specific, dis-

280. *Id.* at 1322 (“The communicative aspect of expression is capable of violating personal security . . .”). Heyman described the way in which some communication has the same impact as battery, as illustrated in *Alcorn v. Mitchell* and *Fisher v. Carrousel Motor Hotel*. *Id.* In *Alcorn*, “a litigant spat in his adversary’s face in the presence of a large number of people in the courtroom,” and in *Fisher*, “a NASA scientist was standing in a [lunchroom] . . . when the restaurant’s manager snatched a plate out of his hand and shouted that he could not be served there because of his race.” *Id.* at 1322. See *Alcorn v. Mitchell*, 63 Ill. 553 (1872); *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967). Both acts consisted of offensive contact and thus constituted battery. Heyman, *supra* 162, at 1322. The “greatest element of offense derived from the contempt that the acts expressed and the humiliation that they were intended to inflict” thus, the acts themselves were communicated for the purpose of insult and indignity. Heyman, *supra* note 162, at 1322.

281. *Id.* at 1322. “[A]ssault is an injury to consciousness in its own right, and is therefore the most subjective injury.” *Id.*

282. *Id.* at 1323.

283. Michelle J. Anderson, *Silencing Women’s Speech*, in *THE PRICE WE PAY*, *supra* note 233, at 122-24 (describing the speech patterns between men and women, specifically “aspects of men’s speech patterns that ‘chill’ women’s speech . . .”).

advantaged group of women,²⁸⁴ and encourages rape, sexualizes dominance, and enforces the continued societal subordination of women.

2. *Obscenity is Education*

The effects from the encouragement of rape, sexual dominance, and subordination can be observed in recent case law. Certain cases reflect the fact that some men, who commit sexually violent acts against women, or murder women in a sexual manner, have admitted to indulging in obscene materials accessible to them before committing the crime.²⁸⁵ Obscene materials do not only fall into the hands of grown men, but also in the developing hands of the nation's young men and

284. *Id.* at 123. See also Laura J. Lederer, *Pornography and Racist Speech as Hate Propaganda*; in *THE PRICE WE PAY*, *supra* note 245, at 136 (commenting on how name calling plays a special role in dehumanizing people). Everyday we hear dozens of inhuman terms for females: "cunt," "twat," "bitch," "whore," and "piece of ass." *Id.* Similarly, women are often referred to in animal or food contexts: "bunnies," "pet," "chicks," "cows," "sows," "kittens," and "lambs;" or named "Taffy," "Candy," or "Cookie." *Id.*

285. *Minnesota v. Herberg*, 324 N.W.2d 346, 347 (Minn. 1982) (describing the various sexual acts that the defendant asked his kidnapped fourteen year old female victim to perform, including ordering her to remove her clothes and his also). In *Herberg*, the defendant forced his victim to perform horrid acts, of which he had seen performed or read about in movies, books, and magazines.

He then made her stick a safety pin into the nipple of her left breast. He then forced her to ask him to hit her. After hitting her, he forced her to commit fellatio and to submit to anal penetration. He made her use a cigarette to burn herself on a breast and near the pubic area. He then defecated and urinated on her face, forcing her to ingest some of the excrement and urine. He then made her urinate in a cup and drink it. He then took a string from her blouse and choked her to the point of unconsciousness, leaving burn marks on her neck. Then, after cutting her with his knife in a couple of places, he drove her back to the area from which he had abducted her and released her.

Id.

The books that were seized from the defendants home were *Violent Stories of Kinky Humiliation*, *Violent Stories of Dominance and Submission*, *Bizarre Sex Crimes: Shamed Victims*, and *Watersport Fetish: Enemas and Golden Showers*. *Id.* See also *Illinois v. M.D.*, 595 N.E.2d 702, 707 (Ill. 1992) (discussing how a husband rammed his fist, holding a raw egg in its shell, several inches into his wife's vagina and the husband's claim that the injuries occurred accidentally during a form of sex play which he had copied from a pornographic movie). For a discussion on the theory that pornography and obscenity produce imminent lawless activity in those who contribute to the pornography and obscenity industry, see Edward Donnerstein, *Pornography: Its Effect on Violence Against Women*, in *PORNOGRAPHY AND SEXUAL AGGRESSION* 53 (Neil M. Malamuth & Edward Donnerstein eds., 1984); DIANA E. H. RUSSELL, *SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT* 34-41 (1984); Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women: 10 Sex Roles*, in *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 314, 314-15; Neil M. Malamuth & James V.P. Check, *Penile Tumescence and Perceptual Responses to Rape as a Function of Victims Perceived Reactions*, 10 *J. APPLIED SOC. PSYCH.* 528 (1980), Diana E.H. Russell, *Pornography and Rape: A Causal Model*, 9 *POL. PSYCH.* 41, 68 (1988).

boys.²⁸⁶ The obscenity available on the Internet can be reached by young people every day. In the end, the material only serves to teach these youths an unhealthy form of sexuality.

For the first time in history, there are children whose earliest sexual imprinting is derived not from a living human being, or their adolescent fantasies, but rather from mass produced, deliberately dehumanizing images of women on the Internet.²⁸⁷ Multiple studies have been conducted to show how obscenity impacts adolescent males. One study demonstrated that males learned many of their sexual lessons from pornographic or obscene reading materials.²⁸⁸ Not surprisingly, this study illustrated that young men learned that the use of force during sex can be related to feelings of excitement and stimulation.²⁸⁹ Young men also learned that force can be justified if the female was active in the sexual act.²⁹⁰ Male adolescents are learning more than what their sex education books are offering when confronted with obscenity on the Internet. They are confronted with the false myth that domination is connected with pleasure, and that the only way to feel pleasure is to exploit and physically harm women.²⁹¹

This phenomenon can be observed as a recurring cycle between young boys and the men they grow up to become. Some men desperately want women to desire possession, cruelty, and dehumanization.²⁹² A recent study found that men who viewed material showing women being raped, tortured, and enjoying pain were less sympathetic toward women who had been raped.²⁹³ In addition, these men trivialized the trauma of rape by believing that women lie about sexual assault.²⁹⁴ Some men have been shown to view women as less than equal and display decreased sympathy toward sexual inequality than before.²⁹⁵ Furthermore, some studies have found that individuals exposed to pornographic or obscene materials responded with blunted

286. Michelle J. Anderson, *Silencing Women's Speech*, in *THE PRICE WE PAY*, *supra* note 233, at 122. "Nine out of ten boys . . . have seen at least one pornographic video in their lives and one-third of boys . . . consume pornography more than once a month." *Id.*

287. *Id.*

288. James Check, *Teenage Training: The Effects of Pornography on Adolescent Males*, in *THE PRICE WE PAY* 89, 90 (1995).

289. *Id.* at 89-90.

290. *Id.* at 90.

291. *Id.* at 91.

292. Catharine A. MacKinnon, *A Feminist/Political Approach: Pleasure under Patriarchy*, in *THEORIES OF HUMAN SEXUALITY* 65, 76 (James H. Geer & William T. O'Donohue eds. 1987).

293. Michelle J. Anderson, *Silencing Women's Speech*, in *THE PRICE WE PAY*, *supra* note 233, at 126.

294. *Id.*

295. *Id.* at 126.

sensitivity to violence against women, attained callused attitudes about rape, felt sexually aroused when confronted with rape depictions and laboratory simulations, showed aggression toward women, or demonstrated other antisocial responses.²⁹⁶

D. *Enforcing the Federal Statute*

A uniform federal statute regulating obscenity on the Internet would be upheld by the United States Supreme Court and followed by the individual Internet providers. The United States Supreme Court would have the task of determining whether the Congressional legislation violated the Constitution's First Amendment.²⁹⁷ Once the Constitutional issue has been addressed, the local and national Internet providers, as well as law enforcement agencies, would need to enforce the statute using every means possible. Nonetheless, the ability to regulate obscenity on the Internet should not be that difficult.

"In the modern world of Internet anarchy, such fears of liability" would induce Internet and network operators to react to a federal statute by either shutting down their bulletin board altogether, severely limiting its access to known users, moderating the stories before posting them, or searching every file and deleting those that the administrator believes contain obscene material.²⁹⁸ As noted, some Usenet BBSs are presently regulated by moderators who are able to weed through the content of the stories and post only those that are not in violation of the bulletin board requirements.²⁹⁹ Further, there would be no difficulty in determining what community standard the administrator was required to apply because a federal statute would mandate the use of a national standard.

Objections to the regulation of obscenity on the Internet will likely take the form of rejecting governmental power to regulate some "unpopular" speech on the Internet, thus, stimulating a chilling effect on societal speech in the marketplace of ideas and a potential abuse of the regulating power. However, what objectors to this federal statute must remember is that obscenity is not protected by the First Amendment. Thus, a federal statute applying a national standard of review is

296. EDWARD I. DONNERSTEIN, DANIAL LINZ, & STEVEN PENROD, *THE QUESTION OF PORNOGRAPHY: RESEARCH FINDING AND POLICY IMPLICATIONS* 5 (1987).

297. "[D]eference to a legislative finding cannot limit judicial inquiry where First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 485 U.S. 829, 843 (1975).

298. Robert F. Goldman, *Put Another Log on the Fire, There's a Chill on the Internet: The Effect of Applying Current Anti-Obscenity Laws to Online Communications*, 29 GA. L. REV. 1075, 1078 (1995) (noting that current fears of Internet liability has led to various forms of censorship, raising serious constitutional questions about when censorship goes too far).

299. See *supra* note 38-41 and accompanying text.

only going to aid the technological nation in policing and regulating the infinite amount of obscene speech in cyberspace.

E. Current Internet Regulation

Regulating the Internet is not a new idea, and the current forms of regulation are not limited. With the continually increasing amount of Internet commerce, shopping and the performance of other business transactions over the Internet, the need for government or private regulation of the Internet has become a necessity. For example, buying prescription drugs online has become an easy and convenient method of shopping for young and old people alike. "Like many professions, pharmacists are regulated by the states.³⁰⁰ Anyone who fills prescriptions for residents of a particular state is supposed to be licensed in that state."³⁰¹ However, since the Internet lacks jurisdictional boundaries, and "the absence of federal regulation, the National Association of Boards of Pharmacy has instituted a voluntary certification program called Verified Internet Pharmacy Practice Sites, or VIPPS."³⁰² VIPPS places its seal of approval on licensed pharmacies in order for consumers to know which e-pharmacies are approved.³⁰³ "VIPPS certification requires that online pharmacies be licensed in every state to which they ship drugs. In addition, sites must meet standards for patient privacy, quality assurance, authentication, and security of prescriptions and communication between patients and pharmacists."³⁰⁴ Similarly, in accordance with regulation of the Internet, Illinois recently enacted a bill that allows the state to regulate drug sales over the Internet.³⁰⁵ The Illinois Department of Professional Responsibility enforces mail-order pharmacy regulations

300. "Pharmaceutical drugs are regulated by the federal government, but pharmacies and doctors are controlled by the states." Gil Klein, *Who's Minding The Net Shops? Legislatures Discuss Regulating Pharmacies*, RICHMOND TIMES, July 31, 1999, at A2.

301. Rita Rubin, *Easier-to-Swallow way to get your pills refilled E-pharmacies offer convenience but raise safety concerns*, USA TODAY, Oct. 6, 1999, at 1D. See also Klein, *supra* note 300 ("Federal regulators said they still are working out who has jurisdiction. And they don't want to damage fledgling e-commerce in a wave of new regulation.").

302. Rita Rubin, *supra* note 301, at 1D. See also Lauren R. Rubin, *The Hazards of Buying Drugs Online: How some fly-by-night sites raise the risk to patients*, BARRON'S, May 17, 1999, at H5, H6 (commending the National Association of Boards of Pharmacy step toward "protecting the public from dubious web-based operators by developing a voluntary verification program . . .").

303. Rita Rubin, *supra* note 301, at 1D. Drugstore.com, planetrx.com, and Merck-Medco RX Services are three sites displaying the VIPPS seal. Lauren R. Rubin, *supra* note 302, at H5.

304. *Id.*

305. *Ryan signs body-piercing bill, approves 66 other measures*, CHI. SUN-TIMES, Aug. 8, 1999 at 9.

over the Internet and establishes additional rules for such pharmaceutical transactions.³⁰⁶

Additionally, states have initiated regulation of online gaming services. "Traditional gaming has been strictly controlled and regulated" by the states, "[h]owever, the internet is a global medium of communication that spans the borders and jurisdictions" of many states,³⁰⁷ thus, suggesting a need for the federal regulation of wagering transactions. Supporters have noted that the regulation of gaming on the Internet would not necessarily entail regulating the Internet as a whole, but rather regulating gambling products that are provided over the Internet.³⁰⁸ For example, Nevada enacted legislation that made "Internet gaming a crime, unless the wager is placed with a state-licensed sports book or casino."³⁰⁹ The regulation of Internet gaming would ensure the fairness of the games and address issues concerning the integrity of the games, access by minors, and compulsive gambling "without throwing sand in the gears of frictionless commerce on the Internet."³¹⁰

Interestingly, most proposals for regulating the Internet have stressed the fact that the regulation would not chill the active commerce on the Internet, but merely protect the consumers and Internet participants whether they are gambling, or purchasing prescription drugs. Thus, with the nation's interest in view, and the current regulations placed on Internet activity, it is easy to see that regulating obscenity on the Internet would also be possible.

VI. CONSTITUTIONALITY OF A FEDERAL STATUTE REGULATING OBSCENITY ON THE INTERNET

The United States Congress has the power to prohibit the transmission of obscene communications on the Internet. A similar situation arose in *Sable Communications of California, Inc. v. Federal Communications Commission*.³¹¹ In *Sable Communications*, the Supreme Court held that the total prohibition of obscene interstate commercial telephone communications under 47 U.S.C.S. § 223(b) did not violate

306. *Id.*

307. Sue Schneider, *Internet Gambling Before the House Subcomm. on Crime*, 105th Cong. 104 (1998) (statement by Sue Schneider, Chairwoman, Interactive Gaming Council, 1998 WL 8991992).

308. *Id.*

309. *Id.*

310. *Id.*

311. 492 U.S. 115 (1989).

the free speech provisions of the First Amendment.³¹² Justice Byron White, writing for a unanimous court, held that the protection of the First Amendment does not extend to obscene speech, therefore the prohibition of obscene telephone communications did not contravene the requirement that obscenity be determined by contemporary community standards.³¹³

In all likelihood, the constitutionality of a federal statute regulating obscenity on the Internet would eventually reach the Supreme Court. In addition, it is likely that the statute would fall within the Congress's power under the Commerce Clause and the Fourteenth Amendment as articulated by the Supreme Court in *United States v. Lopez*.³¹⁴ *Lopez* stands unceasingly for the principle that the Commerce Clause of the Constitution entrusts in Congress the power to "regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."³¹⁵ The Constitution "created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."³¹⁶ Additionally, *Lopez* underscores the point that the federal government is limited and restricted to those enumerated powers proclaimed through the Constitution, which includes limitations upon Commerce Clause litigation when the subject matter is traditionally regulated by the state, such as obscenity.³¹⁷ Yet, under the plain logic of *Lopez*, the argument for congressional power to regulate obscenity on the Internet under the Commerce Clause appears certain.

A. United States v. Lopez

In *Lopez*, the Supreme Court analyzed the constitutionality of the Gun-Free School Zones Act (GFSZA) of 1990, which Congress

312. *Id.* at 124-25 (explaining that "section 223(b) does not unconstitutionally prohibit the interstate transmission of obscene telephone messages") *Id.*

313. *Id.* at 124. The Court did not read section 223(b) "as contravening the 'contemporary community standards' requirement of *Miller v. California* . . ." *Id.* at 124 (citation omitted).

314. 514 U.S. 549, 552 (1995).

315. U.S. CONST. art I, § 8, cl. 3. *See also Lopez*, 514 U.S. at 552-53.

316. Michael C. Dorf, *Instrumental and Non-Instrumental Federalism*, 28 RUTGERS L. J. 825, 826 (1997) (quoting *United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 709 (1995)).

317. David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously: Lopez and the Partial-Birth Abortion Ban Act*, 30 CONN. L. REV. 59, 59 (1997) (asserting that under the plain logic of *Lopez*, the argument for a congressional power to regulate abortion under the Interstate Commerce Clause seems dubious at best). For a brief overview of the history of the Commerce Clause jurisprudence, see Charis Mincavage, *Title III of the Violence Against Women Act: Can it Survive a Commerce Clause Challenge in the Wake of United States v. Lopez?*, 102 DICK. L. REV. 441, 448-50 (1998) (presenting a historical review of Commerce Clause jurisprudence).

passed under its Commerce Clause authority.³¹⁸ The GFSZA made it a federal offense “for any individual knowingly to possess a firearm at a place that the individual [knew], or [had] reasonable cause to believe, [was] a school zone.”³¹⁹ In the majority opinion, Chief Justice William Rehnquist held that the GFSZA was unconstitutional because the possession of a gun in a school zone did not constitute economic activity that substantially effected interstate commerce.³²⁰ Thus, the Court determined that “the Act exceeds the authority of Congress [t]o regulate commerce”³²¹

Congress’ authority to regulate interstate commerce is limited to three categories of interstate activity.³²² First, Congress “may regulate the use of the channels of interstate commerce,” which includes keeping the channels of interstate commerce free from *immoral* and *injurious* uses.³²³ Second, Congress can “regulate and protect the instrumentalities of interstate commerce,” including persons or things.³²⁴ Third, Congress can regulate activities that substantially affect interstate commerce.³²⁵

Nonetheless, Justice William Rehnquist identified several deficiencies within the GFSZA in determining its unconstitutionality.³²⁶ The Court held that not only did the GFSZA have nothing to do with interstate commerce, or any other sort of economic enterprise, but also that it “contain[ed] no jurisdictional element[s] which would ensure, through case-by-case inquiry, that the firearm possession in question affect[ed] interstate commerce.”³²⁷ The other problems the Court discovered in *Lopez* concerned the lack of legislative history or findings connecting the relationship between the possession of a gun within 1,000 feet of a school and interstate commerce.³²⁸ Furthermore, if the GFSZA was affirmed, it would upset the federal-state balance of

318. *Lopez*, 514 U.S. at 549.

319. *Id.* at 551.

320. *Id.*

321. *Id.*

322. *Id.* at 558-59. See also Kopel & Reynolds, *supra* note 317, at 60.

323. *Lopez*, 514 U.S. at 558-59 (emphasis added) (citing *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 256 (1964)).

324. *Id.* at 558 (citing *Southern Ry. Co. v. United States*, 222 U.S. 20 (1911) (upholding amendments to the Safety Appliance Act as applied to vehicles used in interstate commerce)).

325. *Id.* at 558-59.

326. *Id.* at 559-62.

327. *Id.* at 561. “[T]here [wa]s no indication that [Lopez] had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.” *Id.* at 567.

328. *Lopez*, 514 U.S. at 563.

power.³²⁹ The finality of the *Lopez* opinion “relaxed the commerce power test to a level of all-inclusiveness,” and yet, reflected the Court’s desire to “limit further expansion of the Commerce Clause.”³³⁰

*B. Applying the Lopez Test to a Federal Statute Regulating
Obscenity on the Internet*

The *Lopez* test begins by evaluating the federal statute’s nexus with interstate commerce and determining whether the statute regulates a commercial or economic activity. If a commercial or economic activity is involved, then substantial deference will be given to Congress.³³¹ The federal statute would uniformly regulate the posting or transmission of obscene speech or depictions over the Internet. Although the proposed statute does not specifically define the regulation of obscenity as economic or commercial in nature, an argument can be made that regulating obscenity on the Internet is as economically important as prohibiting discrimination against women in the workplace. As noted, depictions of subordinated women tend to perpetuate the subordination of women, and “[t]he subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, [and] battery and rape on the streets.”³³² Thus, a court could reasonably characterize a statute regulating obscenity on the Internet as being economic in nature.

The *Lopez* test raises the issue of whether the federal statute includes a judicial hook which incorporates a case-by-case Commerce Clause analysis. In addressing this issue, the federal statute itself is the hook because it forces Internet networks, providers, subscribers, moderators, and users to read sexual stories posted via the multiple modes of Internet technology and engage in a case-by-case analysis of

329. *Id.* at 564-68. To uphold the GFSZA, the Court would have had to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states. *Id.* at 567.

330. Peter Arey Gilbert, *The Migratory Bird Rule After Lopez: Questioning the Value of State Sovereignty in the Context of Welland Regulation*, 39 WM. & MARY L. REV. 1695, 1724-75 (1998). “*Lopez* suggests that the Commerce Clause test need not be strictly confined to the traditional nexus. When a regulation proves difficult to evaluate with the traditional commerce power test . . . the court may broaden the scope of its inquiry to evaluate the regulation.” *Id.* at 1725. For further analysis of the application of *Lopez* to federal statutes, see Kopel & Reynolds, *supra* note 317, at 59-65; Mincavage, *supra* note 317, at 459-70; Megan Weinstein, *The Violence Against Women Act After United States v. Lopez: Defending the Act from Constitutional Challenge*, 12 BERKELEY WOMEN’S L.J. 119, 127-30 (1997).

331. See *Lopez*, 514 U.S. at 559-61 (explaining that even in cases where the nexus is weak, the Court will sustain the exercise of commerce power).

332. *Hudnut*, 771 F.2d at 329.

each transmission in order to determine whether the transmission is obscene under the national standard, thus, justifying federal regulation.

Under the *Lopez* test, a final factor in evaluating the nexus with interstate commerce is an examination of the legislative findings. Unfortunately, only anecdotal data demonstrates that depictions of subordinated women actually perpetuates the continued subordination of women. "The social science studies are very difficult to interpret, however, and they conflict. Because much of the effect of speech comes through a process of socialization, it is difficult to measure incremental benefits and injuries caused by particular speech."³³³ For example, several psychologists have found that those who see violent sexually explicit films tend to have more violent thoughts.³³⁴ Nonetheless, whether viewing or reading obscenity actually leads to violence is a question that may never be answered scientifically. Thus, there are no direct scientific findings of fact that support the clear logic and empirical facts upon which the federal statute regulating obscenity is based.

Initially, due to the lack of legislative findings of scientific facts, and the difficulty a court may have in characterizing obscenity on the Internet as economic in nature, an opponent would likely find this statute unconstitutional. Nevertheless, the fact that a federal statute regulating obscenity on the Internet may not have a clear nexus with interstate commerce is not debilitating because the *Lopez* test allows for further scrutiny to determine if the statute regulates an area that is traditionally of state concern.³³⁵

Since the regulation of obscenity has traditionally been left to state and local authorities, it is clear that the statute does, initially, infringe "on territory traditionally reserved to the states."³³⁶ However, the question remains "whether sustaining the statute would effectively obliterate the constitutionally contemplated boundaries between federal and state sovereignty" or more succinctly, whether sustaining the statute would open the floodgates to litigation and expand Congress' commerce power.³³⁷

333. *Id.* at 329 n.2.

334. *Id.*

335. Gilbert, *supra* note 330, at 1727. "This is the first consideration in examining the impact that sustaining the law would have on the structure of government." *Id.*

336. *Id.*

337. *Id.* at 1728. "[P]roponents of the [statute] would need to demonstrate that the logic behind the [statute] would not open the door to a regulatory parade of horrors in which Congress could expand the federal commerce power without limits." *Id.* (citing *Lopez*, 514 U.S. at 564-68).

One may argue that such a federal statute would open the floodgates toward regulating all speech that described or portrayed women in a sexual manner, including the regulation of Internet web pages that transmit pictures of women posing naked or participating in sexual acts that normally qualify as soft porn or erotica.³³⁸ However, the statute does not regulate all speech depicting women in a sexual manner or a sexual position. Rather, the statute merely regulates obscene and constitutionally unprotected speech as defined under the statute.

The clear logic behind a federal statute regulating obscenity is based on the fact that obscene speech on the Internet continues the subordination of women. Furthermore, this clear logic is supported by the additional fact that the federal government is better situated to regulate obscenity on the Internet than a state government. Thus, since the federal government is better situated, both financially and legally to regulate and “accomplish effectively the goals of” the statute, the constitutional presumption of deference to state sovereignty should, therefore, not apply to the federal regulation of obscenity.³³⁹ “The logic upon which Congress reserved regulatory power to the states breaks down when that regulatory power is directed towards an activity, the cost and benefits of which are not confined substantially within the borders of individual states.”³⁴⁰ Obscenity on the Internet and its continuing effect of the subordination of women impacts the interests of women in the United States and all over the world, not merely a particular group of women in an individual state. “If an activity significantly affects the interests of a constituency broader than a state’s population, then the state government cannot protect effectively that constituency’s interests.”³⁴¹ A state cannot effectively protect women’s interests against subordination when Internet obscenity is posted in one state and read in another state. The impact of obscenity on the Internet is felt by women all across the nation, thus making the problem a national issue.

Congress’ power to enact such a federal statute is found within the Commerce Clause. Congress is acting to protect the nation’s economy from injuries that arise from gender-based threats of violence inherent within the continued subordination of women.³⁴² Furthermore, as

338. See <http://www.hotbox.com> (last visited Dec. 16, 2000); <http://www.whitehouse.com> (last visited Dec. 16, 2000) (portraying two “adult” Internet sites that are often considered by some people as “soft porn”).

339. Gilbert, *supra* note 330, at 1731.

340. *Id.*

341. *Id.* at 1731.

342. Brief of Law Professors as *Amici Curiae* in support of Petitioners in Violence Against Womens Act. Draft (on file with author).

recognized in *Lopez*, Congress has the ability to “protect the national economy from the injurious effects of systematic, pervasive discrimination designed to prevent a historically . . . subordinated group from equal and effective participation in economic life.”³⁴³ Thus, since the statute is consistent with the requirements enumerated in *Lopez*, it must be upheld as constitutional.

Without a federal statute regulating obscenity on the Internet women will continue to be subordinated. In allowing obscene writings and pictures on the Internet, which embody “woman hating,” the subordination of women, or sexual torture, the judiciary and the legislature are supporting these embodiments of woman hating and misogynist ideas as acceptable societal attitudes.³⁴⁴ “This new Internet community, [which the judicial system is part of,] is without any true geographic boundaries, [and] does not fit within the current framework for analysis of community standards [and] the regulation of interstate ‘distribution’ of obscenity.”³⁴⁵ Therefore, the inability to regulate obscenity on the Internet will only lead to a dramatic increase in the amount of obscenity available through the Internet and a significant increase in the subordination of women. The continued failure of our legal system’s ability to keep pace with the rapidly advancing cyberspace will impede the technological scope of the Internet, and in all events make effective legal control difficult.³⁴⁶ In 1998, adult sites constituted a one billion dollar industry. In addition, more than one-half of the requests on search engines are “adult orientated.”³⁴⁷ This amount will only increase over time. However, if there is a federal statute employing a national standard of review applicable to all states, any person who puts obscene material on the Internet would be prosecuted, and society would begin to realize that speech which continues the subordination of women rips the moral fabric of society into shreds.

343. *Id.*

344. ANDREA DWORIN, *WOMAN HATING*, *supra* note 1, at 192; KENNEDY TAYLOR, *supra* note 256, at 51-52.

345. Rebecca Dawn Kaplan, *Cyber-smut: Regulating Obscenity on the Internet*, 9 STAN. L. & POL’Y. REV. 189, 189 (1998) (tracing “the history and purpose of community standards law and suggest[ing] two possibilities for determination of community standards with regard to electronic erotica . . .”).

346. In fact, even today the courts have difficulty overseeing use of the Internet due to the fact that it has over 60 million users of material from worldwide sources with vast, diverse, and privately interconnected networks of communication.

347. Leland, *supra* note 51, at 61.

VII. CONCLUSION

From a public policy perspective, it is imperative that the United States Congress enact a federal statute regulating obscenity on the Internet. The Jane Doe Story is only one of many obscene Internet postings or e-mail transmissions that can be found on the Internet. However, it only takes one story for a woman's attention and social status to be caught and mutilated by the impact obscenity has on her physical, emotional, and social status. As demonstrated by the words of Abraham Jacob Alkhabaz, obscenity on the Internet is overwhelmingly misogynistic and its impact on women is subordinating. Hence, the need to put men and women on the path to equality will only begin to be furthered by the enactment of a federal statute regulating obscenity on the Internet.

This Note has explored the history of the Internet, First Amendment jurisprudence, and the current law of obscenity. Furthermore, this Note argued, through an analysis of *Baker* and *Alkhabaz*, that the court in *Alkhabaz* erred in not finding the Jane Doe Story and the e-mails as true threats to women in our society. The court also erred in not recognizing that the Jane Doe Story was obscene under the First Amendment.

In recognizing the immense harm that obscene Internet transmissions, such as Alkhabaz's Jane Doe Story, have on women, this Note proposed a constitutional federal statute that introduced a national standard of review to regulate Internet obscenity, in addition to the present contemporary standard of review presented in *Miller*.³⁴⁸ Accordingly, this federal statute defined obscenity, mandated a national standard of review, and listed acts constituting violations of the federal statute. This federal statute would allow all states to apply the same standard of review to material, and to decide whether the material is obscene.

More importantly, this federal statute reinforced the idea that obscenity is not protected by the First Amendment regardless of how it is communicated. Upon the implementation of this federal statute regulating obscenity on the Internet, women will be able to raise their heads from under the moral fabric of society and proclaim: "We are someone, we are equal, and we are continuing to fight against the subordination of women!"

Melanie Pearl Persellin

348. 413 U.S. at 24.

