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Applying Nuisance Law to Internet Obscenity

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Abstract:

The current use of criminal law to prosecute Internet obscenity is both ineffective and unfair. While prosecution of obscenity over the Internet is extremely rare, when a prosecution does occur, the punishment is extremely harsh. This paper advocates the use of nuisance law injunctions as a better alternative to responding to Internet obscenity. Nuisance law provides the advantage of allowing for wider enforcement of obscenity law on the Internet while simultaneously reducing the penalty for violating the subjective Miller *test for obscenity. This paper also explores recent applications of nuisance law to the Internet and the standards for the ancient tort of moral nuisance.*

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INTRODUCTION

Despite the exponential growth of obscenity on the Internet, there is virtually no way to prevent minors from accessing obscenity on the Internet.[1] While there are federal criminal laws against obscenity, these laws are rarely enforced and widely ignored.[2] Critics of the government's lax enforcement of obscenity laws have hounded the Clinton, George W. Bush, and most recently, the Obama administration.[3] At the same time, the few recent obscenity prosecutions that have been brought have generated intense criticism from pornographers and free speech advocates for tossing pornographers in jail for making "obscene" videos, even though no one knows for sure whether a video is obscene until after the conviction.[4]

This paper analyzes the use of existing state nuisance laws to control obscene materials on the Internet. In the 1970s, some argued that nuisance law presented a more sensible option for controlling obscenity in the era's bookshops and movie theaters, and much of the same rationale holds true today for Internet obscenity.[5] The application of nuisance law to Internet obscenity follows a long line of common law "moral nuisance law," which is used to control, for example, brothels, saloons, and gambling halls.[6] A number of states still use nuisance law against brick and mortar businesses that sell obscenity.[7]

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[1] *See* discussion *infra* Part I.A.

[2] *Id.*

[3] *See* Nicholas Confessore, *Porn and Politics in a Digital Age*, FRONTLINE, Feb. 7, 2002, http://www.pbs.org/wgbh/pages/frontline/shows/porn/special/politics.html; Morality in Media, Inc., *President Obama's Choice for Deputy Attorney General would Likely Weaken Justice Department Efforts to Curb Sexual Trafficking and Sexual Exploitation of Children and Calls into Question Whether the New President Will in Fact "Stand up for Policies that Value Families,"* Feb. 4, 2009, http://www.moralityinmedia.org/ (follow "Current News & Issues" hyperlink).

[4] *See* Robert D. Richards & Clay Calvert, *Obscenity Prosecutions and the Bush Administration: The Inside Perspective of the Adult Entertainment Industry & Defense Attorney Louis Sirkin*, 14 VILL. SPORTS & ENT. L.J. 233 (2007).

[5] *See* Doug Rendleman, *Civilizing Pornography: The Case for an Exclusive Obscenity Nuisance Statute*, 44 U. CHI. L. REV. 509, 527–60 (1977).

[6] John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 277–81 (2001).

[7] B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 729–30 n.281 (1992).

Nuisance law has a history of application when society confronts new crises such as excess smoke, fumes, noise, water pollution, and even the loss of light and air that came with the industrial revolution. The most recent and controversial application of nuisance law to a new problem is its application to climate change through nuisance suits against companies that emit green house gasses.[8] Nuisance law is even entering cyberspace with recent nuisance suits against Craigslist for facilitating prostitution[9] and online cigarette merchants.[10]

Part I of this paper discusses the problems with using criminal law to control Internet obscenity. Part II analyzes the possibility of using nuisance law to control Internet obscenity. Part III uses the five elements of moral nuisance proposed by Professor John Nagle in his paper *Moral Nuisances*[11] and the nuisance definition in the *Restatement of Torts*[12] to demonstrate how the dissemination of Internet obscenity can be constitutionally treated as a moral nuisance.

I. THE CURRENT CRIMINAL LAW APPROACH

Although the Internet contains ample pornography, by definition, only the worst of it is "obscene." The First Amendment does not protect obscene pornography and criminal laws at the local, state, and federal levels penalize its manufacture and sale.[13] However, obscenity prosecutions are rare and often do not lead to convictions.[14] Nuisance law provides a more efficient and constitutional means of removing obscene materials from the Internet. A nuisance framework for controlling pornography will have less harsh remedies than a criminal framework. Because a nuisance suit will lead to an injunction rather than jail time, the procedures for a nuisance injunction are more efficient than a criminal proceeding.

A. *Obscenity Law*

While the First Amendment protects pornography that some may

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[8] *See infra* Part II.B.

[9] Dart v. Craigslist, Inc., No. 09 C 1385, 2009 U.S. Dist. LEXIS 97596, at *12–28 (N.D. Ill. Oct. 20, 2009).

[10] City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425 (2d Cir. 2008), *rev'd on other grounds sub nom.* Hemi Group, LLC v. City of New York, 130 S. Ct. 983 (Jan. 25, 2010).

[11] Nagle, *supra* note 6.

[12] RESTATEMENT (SECOND) OF TORTS § 821B (1979).

[13] *See infra* Part I.A.

[14] *Id.*

find offensive, it does not protect obscene pornography.[15] The United States Supreme Court in *Miller v. California* defined pornography as "obscene" if "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest," and "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."[16] The *Miller* standard defines obscenity only as those works that "taken as a whole, do not have serious literary, artistic, political, or scientific value."[17]

Internet pornography creates particular problems in applying the *Miller* test. An Internet site operating in one state has the potential to reach any other location in the nation. The *Miller* standard relies on "contemporary community standards," meaning that what is obscene in one location might not be obscene in another. Because of the uncertainty this generates in interpreting community standards for the Internet, it is legally "nearly impossible" to restrict minors from accessing obscene material online.[18] However, the impasse over community standards may be ending. The Ninth Circuit recently modified the "community standards" test to implement a national community standard for Internet pornography.[19] The Ninth Circuit based this decision on the Supreme Court's fractured reasoning in *Ashcroft v. ACLU*,[20] which overturned the Child Online Protection Act ("COPA"). Of course, a jury in one locale might have a different idea of what the "national community standards" are than one in another,[21] but courts in the Ninth Circuit will at least instruct jurors in obscenity trials to consider the views of others outside of their locality.

Although the community standards problem has made online obscenity difficult, if not impossible, to prosecute, there are federal criminal laws against obscenity on the Internet. Four laws in particular criminalize obscenity on the Internet.[22] The first prohibits anyone from using any means of interstate commerce, including a computer, to knowingly transmit obscene materials to someone that the transmitter knows is under sixteen years old.[23] The second makes it a crime to use an interactive computer service to knowingly display obscenity in a way that makes it available to

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[15] *See* Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

[16] *Id.* at 23–24 (internal quotations omitted).

[17] *Id.*

[18] MARGARET C. JASPER, THE LAW OF OBSCENITY AND PORNOGRAPHY 20 (2d ed. 2009).

[19] United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).

[20] Ashcroft v. ACLU, 535 U.S. 564 (2002).

[21] *Id.* at 607 n.3 (Stevens, J., dissenting).

[22] *See* JASPER, *supra* note 18, at 16.

[23] 18 U.S.C. § 1470 (2006).

someone under eighteen years old.[24] The third makes it a crime to knowingly make a commercial communication on the Internet that includes obscenity available to someone under seventeen years old.[25] The final law makes it a crime to use misleading Internet domain names to deceive someone into viewing obscenity.[26]

The First Amendment protects some pornography that is not obscene. Merely "indecent" pornography is tamer pornography that falls short of the *Miller* definition and is protected by the First Amendment. The government may restrict indecent pornography that falls within a few exceptions. One exception is that the government may restrict indecent pornography from children because of "the government's interest in the 'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'"[27] However, the restrictions on indecent speech are largely limited to broadcast television or radio because of the government's power as regulator of the airwaves, and thus do not include Internet indecency.[28] In addition, the government may restrict the sale of indecent images to minors.[29] The Supreme Court does not allow the same level of restriction on indecent speech on the Internet that it does over the airwaves.[30]

Congress's previous attempts to control pornography on the Internet have stumbled because of the constitutional problems with restricting indecent, as opposed to obscene, pornography. The Communications Decency Act ("CDA") and COPA sought to restrict too much "indecent" pornography at the expense of developing a workable solution to restrict obscenity online. In *Reno v. ACLU,* the Supreme Court held that the portions of the CDA that controlled "indecent" and "patently offensive" communications were unconstitutional.[31] The Supreme Court in *Reno* expressed a particular concern about criminal regulations of pornography:

> The vagueness of the CDA is a matter of special concern . . . [because] . . . the CDA is a criminal statute. In addition to the opprobrium and stigma of a *criminal* conviction, the CDA threatens violators with penalties including up to two years in prison for each act of violation. The severity of *criminal*

[24] 47 U.S.C. § 223(d) (2006).
[25] 47 U.S.C. § 231 (2006).
[26] 18 U.S.C. § 2252B (2006).
[27] FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (quoting Ginsberg v. New York, 390 U.S. 629 (1968)).
[28] Reno v. ACLU, 521 U.S. 844 (1997).
[29] Ginsberg v. New York, 390 U.S. 629 (1968).
[30] *See Reno*, *supra* note 28, at 867.
[31] *Id.* at 885.

> *sanctions* may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.[32]

Congress attempted again to limit children's access to Internet pornography through criminal sanctions. COPA imposed criminal penalties of a "$50,000 fine and six months in prison for the knowing posting, for 'commercial purposes,' of World Wide Web content that is 'harmful to minors.'"[33] The Court again invalidated the law, stating that "[c]ontent-based prohibitions, *enforced by severe criminal penalties*, have the constant potential to be a repressive force in the lives and thoughts of a free people."[34] In a concurring opinion, Justice Stevens was particularly outspoken about the inappropriateness of using criminal law to regulate pornography. According to Justice Stevens: "Criminal prosecutions are . . . an inappropriate means to regulate the universe of materials classified as 'obscene,' since 'the line between communications which "offend" and those which do not is too blurred to identify criminal conduct.'"[35]

A less severe remedy, such as a civil injunction, may be more appropriate for regulating obscenity. It is important to remember that the freedom of speech precedents set by the Court in responding to the CDA and COPA could be extreme because the Court was responding to extreme laws. Rather than just focusing on online obscenity, CDA and COPA sought to limit merely indecent speech. Both the CDA and COPA used the draconian approach of forcing age verification under penalty of criminal prosecution. Each law required the use of credit card verification, which could cause embarrassment to pornography users. Nuisance law would instead be a defensive mechanism rather than an offensive mechanism. The result would not be forced credit card age verification, but injunctions to stop a substantially harmful activity.

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[32] *Id.* at 871-72 (emphasis added) (citing Dombrowski v. Pfister, 380 U.S. 479, 494 (1965); Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996)).

[33] Ashcroft v. ACLU, 542 U.S. 656, 661 (2004).

[34] *Id.* at 660 (emphasis added); *see also id.* at 661 ("COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech."); *id.* at 662 ("While the statute labels all speech that falls within these definitions as criminal speech . . . ."); *id.* at 674 (Stevens, J., concurring) ("Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction.").

[35] *Id.* at 674-75 (Stevens, J., concurring) (citing Smith v. United States, 431 U.S. 291, 316 (1977) (Stevens, J., dissenting); Marks v. United States, 430 U.S. 188, 198 (1977) (Stevens, J., concurring in part and dissenting in part)).

B. *Objections to the Current Criminal Obscenity Approach*

The current criminal law approach to obscenity has created a regime that is unpopular with the three most interested parties: anti-pornography advocates, federal prosecutors, and pornographers. Even under the more conservative Bush Administration, obscenity convictions were sporadic,[36] representing less than ten of the 20,000 criminal cases carried out each year by the Department of Justice.[37] These few convictions were expensive and drawn out, often dragging on for years. However, in the rare event that a pornographer is convicted, the punishment is very severe. For example, the government recently convicted a notorious pornographer, who appropriately refers to himself as Max Hardcore, and sentenced him to forty-six months in prison, imposed upon him a $7,500 fine, fined his business $75,000, and confiscated his websites.[38]

Since the Clinton Administration, anti-pornography advocates have complained that the existing federal obscenity laws are not enforced.[39] In addition, by only reaching the extreme fringe of pornography, the government sends the didactic message that everything else not including bestiality, depictions of rape, or sexualized defecation are morally acceptable. The few pornography prosecutions only reach the "low[est]-hanging fruit" of fringe pornography that does not appeal to wide audiences.[40] The community standards requirement also allows the Justice Department to discretely eliminate obscenity prosecutions by changing the venue of trials to socially liberal states.[41] Penalizing only freakish depictions sends the message to the operators of thousands of pornographic websites that their actions are acceptable.

Obscenity cases are unpopular with some federal prosecutors because the cases are difficult and consume valuable prosecutorial time and

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[36] *See* Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L. 299, 324 (2008) ("In the United States today, federal obscenity prosecutions are sporadic, but arbitrary and highly politicized.").

[37] Mark Follman, *The U.S. Attorneys Scandal Gets Dirty*, SALON.COM, Apr. 19, 2007, http://www.salon.com/news/feature/2007/04/19/DOJ_obscenity/.

[38] Ben Montgomery, *Pornographer to Serve Nearly 4 Years, Pay Fines*, St. PETERSBURG TIMES, Oct. 4, 2008, at 1B.

[39] *See* Alan Sears, *Why Enable Pornographers?*, WASH. TIMES, Nov. 1, 2009, at B03, *available at* http://washingtontimes.com/news/2009/nov/01/why-enable-pornographers/

[40] Joe Mozingo, *Obscenity Task Force's Aim Disputed*, L.A. TIMES, Oct. 9, 2007, at 1, *available at* http://articles.latimes.com/2007/oct/09/local/me-obscene9.

[41] Josh Gerstein, *Porn Prosecution Fuels Debate*, POLITICO, July 31, 2009, http://www.politico.com/news/stories/0709/25622.html.

resources.[42] However, many federal prosecutors believe that the few fringe pornographers convicted of obscenity are worth the resources expended to convict them.[43] The Department of Justice encountered strong resistance from U.S. Attorneys when asked to prosecute obscenity cases where there were no allegations that children or minors were involved.[44] U.S. Attorney Daniel Bogden, who covered the porn-saturated jurisdiction of Las Vegas, was fired by the Bush administration partially for refusing to enforce obscenity laws.[45] All indications are that obscenity prosecutions will decline further under the Obama Administration, which reinstated Bogden to his previous position.[46] Pornographer Larry Flynt believes that a Democratic president is good for the pornography industry because prosecutions for obscenity will decline.[47]

Pornographers are uncomfortable with the current criminal obscenity regime because, in the words of one pornographer, "This is the only crime you don't know you did until the jury tells you you did it."[48] The unpredictability of criminal law enforcement combined with harsh criminal penalties leads to a real concern about chilling of speech.[49] Since there is no way for a defendant to know whether he is breaking the law prior to conviction for criminal obscenity laws, people may restrain their speech to be safe.[50] Longtime pornography industry lawyer Paul Cambria created a list of depictions that pornographers should avoid on the covers of videos to stay out of legal trouble.[51] Pornographer Larry Flynt credits the Cambria List with saving the pornography industry millions of dollars and keeping people out of jail.[52] The list contains many activities that, by themselves, would not be obscene, such as featuring a coffin, using a blindfold, and

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[42] Mozingo, *supra* note 40.

[43] *Id.*

[44] U.S. DEP'T OF JUST., AN INVESTIGATION INTO THE REMOVAL OF NINE U.S. ATTORNEYS IN 2006, 205 (2008), http://www.justice.gov/oig/special/s0809a/final.pdf.

[45] Posting of Kevin Bohn to CNN Political Ticker blog, http://politicalticker.blogs.cnn.com/2009/07/31/fired-u-s-attorney-gets-second-chance/ (July 31, 2009, 16:50 EDT) (last visited Apr, 5, 2010).

[46] *Id.*

[47] Richards & Calvert, *supra* note 4, at 275.

[48] Mozingo, *supra* note 40.

[49] *Id.*

[50] *Id.*

[51] Paul Cambria, *The Cambria List*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/porn/prosecuting/cambria.html (last visited Mar. 7, 2010); *See also* Clay Calvert & Robert D. Richards, *Adult Entertainment and the First Amendment: A Dialogue and Analysis with the Industry's Leading Litigator & Appellate Advocate*, 6 VAND. J. ENT. L. & PRAC. 147, 163–64 (2004) (featuring an interview with Paul Cambria commenting on his list).

[52] Richards & Calvert, *supra* note 4, at 275.

depicting black men with white women.[53]

The current criminal law regime for enforcing obscenity laws satisfies few. The limited resources of the Department of Justice should not be depleted by making the Department the sole enforcer of obscenity laws. Additionally, pornographers deserve to know if they are violating a law and should not be jailed under such a subjective standard.

II. APPLYING NUISANCE LAW TO OBSCENITY

Nuisance law could be a reasonable compromise to improve the enforcement of obscenity laws online. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[54] A public nuisance is "an unreasonable interference with a right common to the general public."[55] Neither category of nuisance is exclusive; an activity could be both a public and a private nuisance.

A private nuisance must be connected to land, which could limit its application to the Internet. However, on the outer boundaries of private nuisance law, courts have found enough connection with land to sustain private nuisance claims involving annoying telephone calls and electrical signals that interfere with television signals.[56] Some have suggested using private nuisance to deal with spam.[57]

A public nuisance can result from storing explosives, keeping diseased animals, and even from hosting carnivals.[58] Either the state or an individual can bring a public nuisance action if the individual can show a "special injury distinct from that suffered by the public at large."[59] Private or public nuisance claims brought against "moral" harms such as brothels, gambling houses, and adult bookstores are called moral nuisances.[60]

Some types of conduct are legal and have social value when carried out with good sense, but the same act carried out in an irresponsible manner may "contravene the commonly accepted standards of decency."[61] Some

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[53] *See* Cambria, *supra* note 51.

[54] RESTATEMENT (SECOND) OF TORTS § 821D (1979).

[55] Nagle, *supra* note 6, at 273 (quoting RESTATEMENT (SECOND) OF TORTS § 821B(1)).

[56] Jeremiah Kelman, Note, *E-Nuisance: Unsolicited Bulk E-Mail at the Boundaries of Common Law Property Rights*, 78 S. CAL. L. REV. 363, 385 (2004) (citing Wiggins v. Moskins Credit Clothing Store, 137 F. Supp. 764 (E.D.S.C. 1956) (telephone calls); Macca v. Gen. Tel. Co. of the Northwest, 495 P.2d 1193 (Or. 1972) (telephone calls); Brillhardt v. Ben Tipp, Inc., 297 P.2d 232 (Wash. 1956) (telephone calls); Page County Appliance Ctr. Inc., v. Honeywell, Inc., 347 N.W. 2d 171 (Iowa 1984) (television interference)).

[57] *Id.* (detailing how private nuisance could apply to SPAM).

[58] Nagle, *supra* note 6, at 273.

[59] *Id.* at 274 (citing RESTATEMENT (SECOND) OF TORTS § 821C(1)).

[60] *Id.* at 266.

[61] RESTATEMENT (SECOND) OF TORTS § 829 cmt. d (1979).

conduct cannot, and should not, be prohibited. But under some circumstances, injured parties should have recourse.[62] The *Restatement of Torts* provides an example:

> A and B own small farms on the outskirts of a village. Their farms are on opposite sides of a highway and their residences are directly opposite one another and about 75 yards apart. A makes a practice of breeding livestock in his front yard and in full view of persons in the front rooms of B's house. This is a source of considerable annoyance and embarrassment to B and his family. A's conduct is indecent and he is subject to liability to B.[63]

No one wants to put a farmer in jail for breeding livestock, but there is a proper place for it. The breeding of animals is a societal benefit and so are some applications of non-obscene pornography, but harm can result when either activity is done irresponsibly.

Courts use the nuisance remedy to address pervasive harms that seem minor at any instant, but that cause injury to the public when they persist for a long time.[64] The gradual effects of a nuisance are difficult to address using other remedies because the actions of the individual seem harmless at first. However, taken together, these effects can destroy the economic value of property. For example, in the environmental context, a landowner can recover damages for a decrease in land value resulting from pollution from a nearby landowner's activities.[65] On any one day, the pollution could be a minor aggravation. But over time, the pollution causes serious harm. Similarly, the common law provides a recovery for nuisance in the case of injuries to a landowner's property caused by the accumulated harms of a brothel or a theater with indecent shows.[66]

When it comes to the sale of obscene materials, many states allow public nuisance lawsuits against adult theaters and book stores.[67] Even

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[62] *See id.*

[63] RESTATEMENT (SECOND) OF TORTS § 829 cmt. d, illus. 2 (1979). This scenario is close to an 1866 case in which a man was granted a permanent injunction against his neighbor's noisy breeding of horses. *See* Hayden v. Tucker, 37 Mo. 214 (Mo. 1866).

[64] Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-space Zoning, in* THE LEGAL GEOGRAPHIES READER 19, 22-23 (Nicholas Blomley et. al. eds., 2001).

[65] James D. Lawlor, Annotation, *Federal Common Law of Nuisances as Basis for Relief in Environmental Pollution Cases*, 29 A.L.R. FED. 137 (1976).

[66] RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979).

[67] *C.f.* Joseph T. Bockrath, Annotation, *Pornoshops or Similar Places Disseminating Obscene Materials as Nuisance*, 58 A.L.R.3d 1134 (1974).

under California law, the undisputed capital of the American pornography industry, "public nuisance laws may properly be employed to regulate the exhibition of obscene material to 'consenting adults.'"[68] California's general nuisance statute, which applies to obscene material, states, "[a]nything which is injurious to health, including . . . [that which] is indecent or offensive to the senses . . . so as to interfere with the comfortable enjoyment of life or property . . . is a nuisance."[69] The broad language of the California law is a codification of the common law nuisance.

A. *Advantages of the Nuisance Injunction Remedy*

Nuisance law is preferable to criminal law for controlling obscenity.[70] In today's society, it seems draconian to criminally punish pornographers and website operators for distributing obscenity.[71] However, uncontrolled distribution of obscene pornography runs the risk of hurting individuals and the society at large. In 1977, Professor Doug Rendleman advocated that states repeal criminal nuisance laws and replace them with nuisance laws that provided the sole remedy of an injunction.[72] Rendleman's insightful paper anticipated the problems with criminal enforcement, but could not have anticipated the growth and new distribution methods of the pornography industry. What was, at the time, a highly centralized enterprise consisting of limited adult theaters and producers has become a massive and widespread enterprise. If anything, this growth of Internet pornography makes Rendleman's nuisance ideas even more applicable to today's obscenity challenges.

Criminal sanctions for obscenity are inferior to a nuisance solution for a number of reasons. First, criminal obscenity laws lead to unpredictable enforcement.[73] Under *Miller*, a pornography distributor does not know what is actually obscene until the fact finder renders a verdict.[74] Criminal law punishes past acts, so by the time the material is conclusively determined to be "obscene," the crime is committed and the defendant is guilty.[75] On the other hand, a nuisance law injunction is directed at future rather than past conduct.[76] An injunction, in effect, requires two violations

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[68] People *ex rel.* Busch v. Projection Room Theater, 550 P.2d 600, 606 (Cal. 1976).
[69] CAL. CIV. CODE § 3479 (West 1997).
[70] *See* Rendleman, *supra* note 5, at 527–60.
[71] *See id.* at 510.
[72] Rendleman, *supra* note 5.
[73] *Id.* at 513.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 512.

before the defendant is punished: the first to provoke the injunction action and the second in violation of the injunction.[77]

The second advantage of nuisance law injunctions over criminal obscenity laws is that the unpredictability of criminal law enforcement leads to chilling of speech.[78] The online advice given to pornographic website operators confirms the chilling effect of criminal prosecutions,[79] as does the existence of the Cambria List.[80] While any legal action is undesirable for a defendant, the sanction of an injunction is less harsh than that of a criminal penalty.[81] An injunction that forbids a defendant from distributing material deemed to be obscene is less threatening than jail time.

Nuisance law also offers procedural advantages to criminal law. Primarily, civil nuisance actions do not require proof beyond a reasonable doubt to get an injunction.[82] The procedural safeguards for criminal defendants make obscenity prosecutions expensive and protracted.[83] Prosecutors may not want to risk scarce resources waging a controversial fight against obscenity because of the procedural disadvantage imposed on the prosecution and the perceived victimless nature of the crime.[84]

Some may argue that the extra protections in a criminal obscenity case protect important First Amendment rights. However, the extra procedural safeguards of criminal law have nothing to do with protecting First Amendment rights. Rather, they relate to the severity of the punishment. The procedural safeguards of the *Miller* decision will remain in effect regardless of whether the case is criminal or civil. In addition, the case law regarding prior restraints preserves First Amendment rights.

Nuisance injunctions could be particularly effective because of the Ninth Circuit's recent decision to apply national community standards to

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[77] *Id.*
[78] *Id.* at 513.
[79] One website advises:

> If you have any content on your adult website that might be considered obscene and without redeeming value by some communities, you are the potential victim of a "zealous" prosecutor. If you want to play it safe, censor all images of penetration and anything else "hardcore" on the free section of your site. Hide the good stuff in a members' section and charge for access - don't give a prosecutor anywhere a reason to target your site.

AdultWebLaw, Obscenity, http://www.adultweblaw.com/laws/obscene.htm.

[80] *See* Cambria, *supra* note 51.
[81] Rendleman, *supra* note 5, at 510.
[82] *Id.* at 511.
[83] *Id.* at 513.
[84] *Id.*

the Internet.[85] Previously, because of the *Miller* concept of community standards, an injunction could not "be broader than the geographic boundaries of the community whose standards are used in determining the obscenity of the materials."[86] If statewide standards were used, then the court could issue a statewide injunction. However, if the court applied local standards, then the court could only issue a local injunction.[87] With the worldwide reach of the Internet, the local injunctions would be meaningless. However, if a national community standard becomes the norm for obscenity cases, then federal courts could issue injunctions that apply nationwide.

B. *Emerging Applications of Nuisance Law*

The application of common law nuisance is expanding beyond the traditional context of local polluters and pornographic movie theaters into the realm of global climate change and even the Internet. Indeed, a few scholars have advocated for the use of nuisance law in cyberspace.[88] Professor Dan Burk suggests using the tort of nuisance rather that the tort of trespass to deal with Internet wrongs.[89] The "muddy" nature of nuisance allows recovery for particularly burdensome abuses of the Internet while simultaneously permitting uses that are beneficial for society.[90] The extension of nuisance to the Internet is not farfetched considering the application of trespass to chattels to the Internet.[91] While previous cases applying trespass to chattels had involved the denial of access to tangible property, many state courts have extended the remedy to interference by the invasive use of the Internet.[92]

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[85] *See* United States v. Kilbride, 584 F.3d 1240 (2009).

[86] FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 239 (Bureau of National Affairs 1976).

[87] *Id.*

[88] *See* Kelman, *supra* note 56, at 399 ("Nuisance . . . may be better equipped to address the conflicts and abuses of cyberspace generally"); s*ee also* Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27, 53 (2000) ("[T]he correct property theory [for Internet harms] might be *nuisance* to web sites, rather than trespass.")

[89] Burk, *supra* note 88, at 33.

[90] *Id.* at 53.

[91] *See e.g.*, Compuserve Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015 (S.D. Ohio 1997); *see also* Register.com v. Verio, Inc., 356 F.3d 393 (2nd Cir. 2004) (involving the use of a search robot that harmed the defendant's servers).

[92] *See e.g.*, America Online, Inc. v. LCGM, *Inc.*, 46 F. Supp.2d 444, 451–52 (E.D. Va. 1998); s*ee also* Hotmail Corp. v. Van Money Pie, Inc., No. C98-20064 JW, 1998 U.S. Dist. LEXIS 10729 (N.D. Cal. April 16, 1998); *CompuServe Inc.*, 962 F. Supp. at 1018; Sotelo v. DirectRevenue, LLC, 384 F.Supp.2d 1219 (N.D. Ill. 2005) (recognizing a trespass to chattel claim under Illinois law for spyware); *but see* Intel Corp. v. Hamidi, 30 Cal. 4th

The use of nuisance law on the Internet is increasing. The Cook County Sheriff recently filed a public nuisance suit against Craigslist for facilitating prostitution, but the case failed because of the popular website's "Good Samaritan" protection under the Communications Decency Act.[93] Another recent decision of the New York Court of Appeals supports the notion that a plaintiff could sustain a nuisance suit based on the targeting of minors by Internet cigarette merchants.[94] The City of New York argued that since the sale of cigarettes over the Internet was a "serious threat to public health, safety, and welfare, to the funding of health care, and to the economy of the state," common law public nuisance should apply.[95] The district court had dismissed the public nuisance claim, finding that "the number of cigarette sales over the Internet was 'small ... compared to brick and mortar sales' and that the City had not alleged a harm that 'endangers . . . the public at large.'"[96] Based on the state's interest in protecting public health, the Second Circuit reversed the District Court's dismissal and remanded the public nuisance question back to the state court for hearing.[97] The Second Circuit's willingness to let a public nuisance claim proceed based on the Internet sale of cigarettes suggests a future for nuisance in the legal landscape of the Internet. The New York Court of Appeals ultimately rejected the City's nuisance claim because it based the suit on tax evasion rather than harm to the health and morals of residents.[98] However, the court indicated that the City could sustain a similar nuisance suit if predicated on the sale of cigarettes to minors.[99]

Perhaps the greatest development in the law of nuisance comes from nuisance suits filed to fight climate change.[100] In *Connecticut v. American*

1342 (Cal. 2003).

[93] *Dart*, 2009 U.S. Dist. LEXIS 97596, at *12–28 (E.D. Ill. Oct. 20, 2009).

[94] City of New York v. Smokes-Spirits.com, Inc., 911 N.E.2d 834 (N.Y. Ct. App. 2009)

[95] City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425 (2nd Cir. 2008).

[96] *Smokes-Spirits.com*, 541 F.3d at 437, citing City of New York v. A.E. Sales LLC, No. 03 CV 7715, 2005 WL 3782442 (S.D.N.Y. Feb. 9, 2005).

[97] *Id.* at 457.

[98] *Smokes-Spirits.com*, *supra* note 94, at *8 ("the Legislature did not intend its findings to authorize a public nuisance claim based primarily upon alleged tax evasion …").

[99] *Id.* at *8 n.5 ("We acknowledge that a different result might be reached if the City's complaint alleged that defendants had made unauthorized shipments to minors . . . ."); *see also* Joel Stashenko, *New York City's Use of Consumer Fraud, Public Nuisance Statutes to Recoup Cigarette Taxes Is Rejected*, 241 N.Y. L.J. 1 (quoting Elizabeth S. Natrella, Senior Counsel in the Corporation Counsel's appeals division: "[T]he Court of Appeals' decision permits us to proceed under the public nuisance law to combat illegal sales of cigarettes to youth. . . .").

[100] *See* David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 3 (2003).

Electric Power Company, Inc., the Second Circuit allowed a federal common law nuisance suit to proceed against electric power companies for greenhouse gas emissions.[101] The court relied on the *Restatement of Torts* § 821B to define a public nuisance under the federal common law of nuisance.[102] Using the *Restatement's* nuisance definition, the court allowed a nuisance claim of "unreasonable interference" with "public rights" in that the electric companies' conduct interfered with "the right to public comfort and safety, the right to protection of vital natural resources and public property, and the right to use, enjoy, and preserve the aesthetic and ecological values of the natural world."[103] The court went on to hold that federal common law nuisance claims were not just limited to disputes between the states; even municipalities and private organizations could maintain such suits in federal court.[104] Specifically, environmental organizations could file federal common law nuisance claims based on "interference with a public right in protecting natural resources."[105]

The Second Circuit's explicit use of the *Restatement's* nuisance definition may open the door to a federal common law doctrine of nuisance that could be used against purveyors of online obscenity. Comment (b) of *Restatement (Second) of Torts* § 821B makes clear that, at common law, public nuisance included interference with public morals "as in the case of houses of prostitution or indecent exhibitions . . . ."[106] If the federal common law of nuisance relies upon the broad guidelines[107] of *Restatement* § 821B, then an obscenity nuisance may justifiably be a federal common law cause of action. Nuisance claims for obscenity likely never arose at the federal level because, prior to the Internet, obscenity was a strictly local offense. With advent of the Internet, obscenity is now a global problem that raises many federalism questions. A website in California can just as easily stream obscenity to a man in Ohio as a website in Ohio can stream obscenity to the same man. With the explosion of Internet pornography, obscenity is a federal problem.

One challenge in using the federal common law of nuisance is that a suit is displaced if "federal statutory law governs a question previously the subject of federal common law."[108] Federal common law is preempted "as

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[101] Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2nd Cir. 2009).
[102] *Id.* at 326 n.6.
[103] *Id.* at 352.
[104] *Id.* at 366.
[105] *Id.* at 367.
[106] RESTATEMENT (SECOND) OF TORTS § 821B, cmt. b (1979).
[107] *Am. Elec. Power Co.*, 582 F.3d at 328 (Using the Restatement's definition of public nuisance even though "[i]t is true that the Restatement's definition of public nuisance—'an unreasonable interference with a right common to the general public'—is broad.").
[108] Milwaukee v. Illinois, 451 U.S. 304, 316 (1981).

to every question to which the legislative scheme '[speaks] directly,' and every problem that Congress has 'addressed.'"[109] "The linchpin in the displacement analysis concerns whether the legislation actually regulates the nuisance at issue."[110] Comprehensive environmental legislation such as the Clean Air Act (CAA) displaces all federal common law, while less comprehensive laws such as the Clean Water Act (CWA) displace federal common law to the extent that the two bodies of law conflict.[111] With online obscenity, it is not clear whether or not existing federal criminal obscenity laws displace common law nuisance claims. The four federal criminal laws that address online obscenity are by no means a comprehensive framework for regulation in the form of the CAA or even the CWA.

In addition to a federal common law nuisance suit, a plaintiff might be able to file a suit based on state nuisance law. Federal law only preempts state common law in three situations: (1) when Congress clearly intends to preempt the state statute; (2) when federal law is so comprehensive as to leave no room for state laws; and (3) when the state law actually conflicts with a federal statute.[112] A nuisance suit framed around online obscenity would not fall into any of these three narrow exceptions. Congress has passed surprisingly little obscenity legislation that applies to the Internet. The federal laws in effect are very difficult to apply to the Internet and "make it nearly impossible to restrict access to obscene materials on the Internet to any minor who has access to a computer and the Internet."[113]

A state law nuisance claim could be based on the state's common law of nuisance or a specific state nuisance statute. As previously discussed, many states have nuisance statutes that specifically deal with obscenity. Of course, none of these statutes specifically mention *online* obscenity. States interested in pursuing online obscenity should consider amending their obscenity nuisance statutes to include online obscenity. Such a statute should contain procedural requirements to ensure First Amendment compliance and enforceability. For example, courts should use a national community standard when evaluating online obscenity. While this may not be required in a state's appellate court, it would give an injunction wider application than a finding of obscenity based on state or local standards. In addition, Professor Rendleman's model obscenity

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[109] In re Oswego Barge Corp., 664 F.2d 327, 335 (2nd Cir. 1981) (quoting *Milwaukee*, 451 U.S. at 315.).

[110] *Connecticut*, 582 F.3d at 386.

[111] Bradford C. Mank, *Civil Remedies*, *in* GLOBAL CLIMATE CHANGE AND U.S. LAW, 209 (Michael Gerrard ed., 2007).

[112] *Id.* at 210.

[113] Jasper, *supra* note 18, at 20.

nuisance legislation contains many valuable procedural safeguards that are absent from most state obscenity laws.[114]

III. THE ELEMENTS OF MORAL NUISANCE

For a nuisance suit to succeed under federal or state law, it is critical that the application of nuisance comport with the common law, particularly as defined by the *Restatement of Torts*.[115] In recent years, only a few commentators have addressed the issue of what should constitute a nuisance in modern society.[116] Evaluating past nuisance claims and the *Restatement*, Professor Nagle identified five conditions for a successful action for moral nuisance:

> (1) a substantial and legally cognizable interference with a landowner's use or enjoyment of his or her land is caused by (2) an action that is regarded as immoral by a reasonable person within the community (3) whose harm outweighs the benefit of the offending conduct, and (4) which is not protected by the law. A moral nuisance claim is even stronger when (5) the activity is not only immoral, but illegal as well. [117]

Under these five criteria, the tort of nuisance could apply to the distribution of obscenity on websites. This section will discuss how well the criteria for a moral nuisance fit in the context of Internet obscenity.

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[114] For example:

9) Any defendant may demand that the obscenity issue be tried to a jury.
10) The (prosecuting attorney) must prove obscenity by clear and convincing evidence.
11) Pursuant to a jury verdict that the matter is not obscene, the court shall enter a judgment declaring the matter not obscene and dismissing the action. Pursuant to a jury verdict that the matter is obscene, the court shall independently determine whether the matter is obscene.

Rendleman, *supra* note 5.

[115] *Am. Elec. Power Co.*, 582 F.3d at 351 ("The Restatement definition of public nuisance has since been used in other federal cases involving the federal common law of nuisance").

[116] Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505, 516 (2006) (describing Professor Nagle as "the only recent scholar to grapple with the question of what sorts of harm are or should be cognizable as nuisances . . . .").

[117] Nagle, *supra* note 6, at 268-69.

A. *Substantial Interference*

The first criterion for moral nuisance is "a substantial and legally cognizable interference with a landowner's use or enjoyment of his or her land . . . ."[118]

Obviously, nuisances normally involve interference with *land*. However, courts in recent years have moved around property requirements in applying the tort of trespass to chattels to the Internet.[119] Additionally, a number of cases have found private nuisances in telephone calls and electrical interference with televisions, neither of which connect to land in the traditional sense.[120] Public nuisance has always been disconnected from the land requirement by allowing the public at large to recover for harms that affect no particular person, such as interference with public health, safety, peace, morals, comfort, or convenience."[121] The legally cognizable harm of Internet obscenity is harm to the public morals.[122]

Echoing the *Miller* test for obscenity, a nuisance can be defined as an activity that can be "perceived as unneighborly under contemporary community standards."[123] It is "unneighborly" to reduce your neighbor's enjoyment of his land by polluting it, so nuisance is often applied to environmental harms. Likewise, a "moral nuisance exists only if an activity that most members of the community find immoral actually interferes with their use and enjoyment of their land."[124] To apply nuisance law to Internet pornography, we must ask what types of pornography are so bad that they interfere with the use and enjoyment of a computer. In a sense, this

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[118] *Id.*

[119] Burk, *supra* note 88, at 53-54.

[120] Kelman, *supra* note 56, at 385.

[121] Nagle, *supra* note 6, at 273 (citing RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979)).

[122]

> At common law public nuisance came to cover a large, miscellaneous and diversified group of minor criminal offenses, all of which involved some interference with the interests of the community at large -- interests that were recognized as rights of the general public entitled to protection. Thus, public nuisances included interference . . . with the public morals, as in the case of houses of prostitution or indecent exhibitions . . . .

RESTATEMENT (SECOND) OF TORTS § 821B, cmt. b (1979).

[123] Robert Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 748 (1973); *see also* Nagle, *supra* note 6, at 299–300.

[124] Nagle, *supra* note 6, at 301.

question is the same as the question posed by the *Miller* test. Obscenity is the worst of the worst pornography as judicially determined. Now that at least the Ninth Circuit uses a national community standard for the Internet,[125] it is reasonable for courts to ask whether some Internet pornography is so bad that most Americans do not want themselves or their children to stumble across it, even in the darkest recesses of the Internet.

B. *Regarded as Immoral*

The second requirement of moral nuisance is that the challenged act is one that "is regarded as immoral by a reasonable person within the community . . . ."[126]

A 2005 survey conducted by Harris Interactive suggests that Americans' views of children's access to pornography are mostly negative.[127] Only 2% of respondents agreed that pornography "helps kids better understand sexuality." On the other hand, the top three responses were "[i]t distorts boys' expectations and understanding of women and sex" at 30%, "[i]t makes kids more likely to have sex earlier than they might otherwise" at 25%, and "[i]t distorts girls' body images and ideas about sex" at 7%. While none of the options touched directly on the morality of allowing children to have unlimited access to pornography, it is reasonable to assume that most would find unfettered Internet access to obscenity immoral.

C. *Harm Outweighs the Benefit*

The third requirement for a moral nuisance is that the "harm outweighs the benefit of the offending conduct . . . ."[128] As mentioned in the previous section, only 2% of Americans primarily identified children's access to pornography as a benefit to their sexuality.[129]

Despite the name *moral* nuisance, a nuisance based solely on a moral objection to an activity normally would not prevail.[130] In the case of brothels, it has not been enough that illicit sexual activity occurs at a

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[125] United States v. Kilbride, 584 F.3d 1240, 1254 (9th Cir. 2009).

[126] Nagle, *supra* note 6, at 268–69.

[127] Press Release, Harris Interactive, No Consensus Among American public on the Effects of Pornography on Adults or Children or What Government Should do About It, According to Harris Poll (Oct. 7, 2005) (on file with author) ("There is no consensus on the impact of pornography on children but most people, including both men and women, think the effects are mainly negative.").

[128] Nagle, *supra* note 6, at 268–69.

[129] Harris Poll, *supra* note 126.

[130] Nagle, *supra* note 6, at 278–80.

location. Rather, the courts have focused on harms caused by offensive sights, sounds, and sleep disruption causing property value loss.[131] While many people might morally object to a brothel, courts base recovery under nuisance law on the side effects rather than moral objections. Like brothels, Internet obscenity could have numerous negative effects, but only some are grounds for a nuisance recovery. These harms are categorized as economic, physical, or social.

Nuisance law's insistence on actual harm screens lawsuits to eliminate those based on discriminatory motives. In a thought-provoking study of the claims of "racial nuisance" during the Jim Crow era, Professor Rachel Godsil explored how southern judges surprisingly often refused to apply nuisance claims based on racist stereotypes.[132] Nuisance law, when properly applied, should transcend motives and focus impartially on the harms suffered by the plaintiff.

1. *Economic Harms*

Obscenity on the Internet creates two externalities. First, it shifts the economic burden of restricting pornography completely to parents who must purchase increasingly sophisticated filtering products. Second, it reduces the value of the personal computer used in the family through reduced computer performance and the over-inclusive restriction on access to safe websites by filters.

Under current law, filters are the main method that parents have to keep children away from pornography. Filters can impose a great financial burden particularly on low-income families. While filtering is included in Microsoft and Apple operating systems, the systems can be complex to install and use.[133] In addition, these filters are not really free. Rather, the cost is distributed across all purchasers, whether they use the filter or not.[134] New operating systems and filtering require money and some technical skills, so children who come from low-income families and single parent families are often at the highest risk of abusing pornography.[135] Internet

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[131] *Id.*

[132] Godsil, *supra* note 116, at 510.

[133] Stephanie Olsen, *Parents the Winner in Leopard, Vista Showdown*, CNET, Nov. 20, 2007, http://news.cnet.com/2009-1025_3-6219420.html (last visited April 3, 2010).

[134] Conceptually, all purchasers of new Microsoft and Apple operating systems are paying to support computer programmers' efforts to outwit Internet pornographers, even if the user does not use the operating system's filtering ability. In this regard, the theory of public nuisance seems especially appropriate.

[135] John Mark Haney, *Teenagers and Pornography Addiction: Treating the Silent Epidemic*, VISTAS, 2006, at 50 ("[W]hile teenagers who grow up in homes with multiple computers and a high degree of computer literacy have more opportunities to engage in

filtering programs, independent of operating systems, range in price from thirty to sixty dollars per year.[136] While this price may not seem substantial, some low-income families might pay fifty dollars for a second-hand computer without a modern operating system. Such a family likely could not afford to buy a filter more than double the cost of their computer and a subscription that generally must be renewed every year. The cost of maintaining filters while a child lives in the home is great. If a family renews a $40 per year filter for ten years (ages eight to eighteen), that family will pay $400 over the course of those ten years (not accounting for inflation). Four hundred dollars is an exorbitant amount for a family to pay to *not* have pornography in the home.

The second economic cost of obscenity on the Internet is the lost value of the personal computer. Filters at the Internet service provider (ISP) level degrade Internet performance, sometimes up to 75%.[137] ISP filters also can lead to excessive blocking of non-problematic Internet sites. One study found that ISP filters inadvertently blocked 10,000 out of every 1,000,000 innocent websites.[138] Unfortunately, the pervasive use of filters has eroded children's access to unprotected material while at the same time failing to keep them away from pornography.[139] Growing use of filters continues to raise troubling questions. Beyond just filtering content that is obscene for minors, filters allow for the filtering of controversial ideas and harmless content.[140] Filters at one school limited access to information about the Dalai Lama and Buddhism because the school's Internet filter controlled access to "cults and non-mainstream religions."[141] Arguably, the over- and under-inclusivity and connection speed reduction associated with filters represents a reduction in the value of the computer.

2. *Physical Harms*

Growing evidence suggests that exposure to pornography harms

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online behavior, some of the young people who are most vulnerable to pornography are those who come from low socioeconomic and more challenged backgrounds.").

[136] TopTenREVIEWS, Internet Filter Software Review, http://www.Internet-filter-review.toptenreviews.com/ (last visited April 3, 2010).

[137] Michael Meloni, *The High Cost of Internet Filtering*, ABC NEWS, Oct. 24, 2008, http://www.abc.net.au/news/stories/2008/10/24/2399876.htm.

[138] *Id.*

[139] MARJORIE HEINS, CHRISTINA CHO, & ARIEL FELDMAN, INTERNET FILTERS: A PUBLIC POLICY REPORT, BRENNAN CTR. FOR JUSTICE (2006), *available at* http://www.fep project.org/policyreports/filters2.pdf.

[140] *Id.*

[141] Markeshia Ricks, *Students say Religion Research Hampered by School's Web Filter*, SARASOTA HERALD-TRIBUNE, Nov. 8, 2005, at BS1.

children by dramatically affecting the brain. According to Dr. Mary Anne Layden, testifying before the Senate, "[r]esearch indicates that even non-sex addicts will show brain reactions on PET scans while viewing pornography similar to cocaine addicts looking at images of people taking cocaine."[142] More than merely forming politically incorrect views on gender relations, scientific evidence suggests that children's exposure to pornography can lead to real physical consequences such as nightmares, anxiety, interference with sexual development, and sexual addiction.[143] Using new positron emission tomography (PET) technologies to study the brain, scientists can tell if a brain has suffered damage. In the words of a Michigan judge approving of the use of PET in a tort case, "[w]hat matters for a legal analysis is the existence of a manifest, objectively measured injury to the brain."[144] If scientists can demonstrate that pornography physically harms a child's brain, then tort liability should follow.

A number of social science studies have demonstrated the negative effects of pornography on young people.[145] These harms include "modeling and imitation of inappropriate behaviors; unhealthy interference with normal sexual development; emotional side effects (including nightmares, and residual feelings of shame, guilt, anxiety and confusion); stimulation of premature sexual activity; and the development of misleading and potentially harmful attitudes toward sex."[146] Other risks to teens range from

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[142] *Hearing on the Brain Science Behind Pornography Addiction and the Effects of Addiction on Families and Communities*, 108th Cong. (statement of Dr. Mary Anne Layden, Co-Director, Sexual Trauma and Psychopathology Program, Center for Cognitive Therapy, Univ. of Penn.), *available at* http://www.obscenitycrimes.org/Senate-Reisman-Layden-Etc.pdf (last visited April 3, 2010); *see also Hearing on the Brain Science Behind Pornography Addiction and the Effects of Addiction on Families and Communities*, 108th Cong. (statement of Dr. Jeffrey Satinover ("[T]hat particular form of expression we call pornography, unlike all other forms of expression, *is a delivery system that has a distinct and powerful effect upon the human brain and nervous system.* Exactly like cigarettes, and unlike any other form of expression, this effect is to cause a powerful addiction. Like any other addiction, the addiction is both to the delivery system itself—the pornography—and to the chemicals that the delivery system delivers.").

[143] Haney, *supra* note 135, at 49.

[144] Allen v. Bloomfield Hills School Dist., 281 Mich.App. 49, 57-58, 760 N.W.2d 811, 815 (Mich. App. 2008).

[145] *See* Tori DeAngelis, *Web Pornography's Effect on Children*, MONITOR ON PSYCHOLOGY 50, November 2007 (providing a brief overview of current research on pornography's effects on children); Michael Flood, *The Harms of Pornography Exposure Among Children and Young People*, 18 CHILD ABUSE REV. 384–400 (2009); Jochen Peter & Patti M. Valkenburg, *Adolescents' Exposure to a Sexualized Media Environment and Their Notions of Women as Sex Objects*, 56 SEX ROLES 381-395 (2007).

[146] Haney, *supra* note 134, at 49 (citing Elissa P. Benedek & Catherine F. Brown, C. *No Excuses: Televised Pornography Harms Children*, 7 HARV. REV. OF PSYCHIATRY 236, 236–40 (1999)).

"aggressive patterns of acting out sexually, the depersonalization of women (and now men and children), and an increased risk of poor social bonds as adults to the very real possibility of developing a pornography addiction, a relatively new but pervasive phenomenon which has been confirmed by research."[147]

The anecdotal evidence suggests that the act of quickly clicking from image to image in Internet pornography can lead to behavior similar to addiction.[148] Commentators frequently describe Internet pornography as the crack cocaine of pornography.[149] Pornography websites, similar to drug dealers, use men's addict-like reaction to Internet pornography to hook repeat users for maximum profit.[150] The race to counter viewer boredom has led to a race to the bottom as pornographers lower the bar of what they will depict.[151] Modern pornography producers search for increasingly deviant acts to capture the short attention of the Internet pornography user.[152] As the extreme practices introduced in pornography become commonplace, pornography viewers can experience tension in their relationships and suffer from the inability to perform sexually.[153]

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[147] *Id.* (citing Steven Stack, Ira Wasserman & Roger Kern, *Adult Social Bonds and the use of Internet Pornography*, 85 SOCIAL SCIENCE QUARTERLY 75, 75–88 (2004); Mark Griffiths, *Sex on the Internet: Observations and Implications for Internet Sex Addiction*, 38 THE JOURNAL OF SEX RESEARCH 333, 333–342 (2001)).

[148] ROBERT JENSEN, GETTING OFF: PORNOGRAPHY AND THE END OF MASCULINITY 81 (South End Press 2007).

[149] *Id.* at 215.

[150] *Id.* at 81 (citing Jack Morrison, *The Distracted Porn Consumer: You Never Knew Your Online Customers so Well*, AVN ONLINE, June 1, 2004).

[151] *Id.* at 16–17. Interestingly, while the pornography has become more extreme, society has become more accepting of pornography.

[152] In the pornography industry, new practices begin with low budget "gonzo" production companies, then enter higher budget "feature" films. To demonstrate the recent state of the industry, according to Jenson, the new practices entering features were: double penetration – where a woman is penetrated vaginally and anally at the same time; double anal – where a woman is penetrated anally by two men at the same time; double vag – where woman is penetrated vaginally by two men at the same time; and ass-to-mouth, or "ATM" – where a man removes his penis from the anus of a woman and puts it in the mouth of another woman. "Gonzo" directors will strive to depict practices even more extreme than this. *Id.* at 59.

[153] PAMELA PAUL, PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES 73-106 (Times Books 2005). Paul describes her interview with men who view pornography. The descriptions seem to follow a standard pattern of growing pornography use leading to warped relationship expectations and pornography negatively affecting the quality of sex with real women.

Social Harms

A court must be careful in applying nuisance law based on social harms. This justification of social harm has the greatest risk of being influenced by discriminatory motives. As previously noted, nuisance law exists not to enforce community morals, but to compensate property owners who were harmed in the use and enjoyment of their land. That said, there are real social harms caused by Internet pornography that transcend any discriminatory motives.

Professor Elizabeth Dionne recently published a survey of the harms connected with pornography.[154] Professor Dionne notes that there is a growing concern among psychologists that children are becoming heavily sexualized before the age of fourteen without their parents' knowledge or consent, leading to increased sexual behavior at a younger age.[155] Quoting Professor Fredrick Shauer, Professor Dionne perhaps best identifies the reason pornography could cause social harm:

> I find it a constant source of astonishment that a society that so easily and correctly accepts the possibility that a cute drawing of a camel can have such an effect on the number of people who take up smoking, has such difficulty accepting the proposition that endorsing images of rape or other forms of sexual violence can have an effect on the number of people who take up rape.[156]

While such a statement is an oversimplification, it is reasonable to concede that children's access to pornography could have negative consequences on society.

Twenty-five years ago, researchers Jennings Bryant and Dolf Zillman measured the social influence of pornography in an experimental study.[157] In the Bryant & Zillman study, eighty college students were

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[154] Elizabeth Harmer Dionne, *Pornography, Morality, and Harm: Why Miller Should Survive Lawrence*, 15 GEO. MASON L. REV. 611 (2008). Professor Dionne's interesting paper concerns the question of whether the current constitutional rule that allows for the regulation of pornography will survive the *Lawrence v. Texas* decision. She concludes that it should.

[155] *Id.* at 643 (citing Paul, *supra* note 153, at 180; Janis Wolak et al., *Unwanted and Wanted Exposure to Online Pornography in a National Sample of Youth Internet Users*, 119 PEDIATRICS 247, 254–55 (2007)).

[156] *Id.* at 678 (citing The Massachusetts Hearing, in IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 361, 396 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997)).

[157] Paul, *supra* note 153, at 77. The age of the study is no indication that its results

divided into four groups.[158] The first group, called the "massive exposure" group, was shown 48 minutes of hardcore pornography each week for six weeks (which by today's average Internet pornography user does not seem so "massive").[159] The second group, "intermediate exposure," was shown a combination of erotic and non-erotic movies for six weeks.[160] The third group, "no exposure," was shown strictly non-pornographic movies.[161] The fourth group was used as a control group and shown no movies at all.[162] At the halfway point, the groups were asked to rate the prevalence of sexual practices in America. Compared to other groups, the "massive exposure" group estimated that twice as many people engaged in sexual practices such as bestiality and sadomasochism.[163] The "massive exposure" group dramatically misperceived the actual prevalence of sexual practices when compared to the actual statistics.[164] At the end of the experiment, the participants were asked to read a newspaper article describing the rape of a hitchhiker and to recommend a sentence for the rapist.[165] Men in the "massive exposure" group recommended an average sentence of 50 months while men who had not viewed pornography recommended an average of 95 months.[166]

While these statistics are disturbing, courts have rejected previous efforts to create a civil remedy based on the discriminatory influence of pornography.[167] A city law passed in the 1980s related the sexual inequality created by pornography to the inequality of racial discrimination.[168] The law reflected a radical feminist viewpoint in that it lumped pornography in with other forms of discrimination. However, discriminatory speech is often protected political speech.[169] A similar ordinance forbidding the trafficking of racist materials or forcing racist speech on a person would also run into constitutional problems. In effect, focusing on the social effects of pornography equates pornography to other protected speech that

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cannot be duplicated. Rather, current rules on the use of human subjects prohibits the use of humans in studies that could cause irreversible harm. In a way, this study is reminiscent of the famous 1971 Stanford Prison Experiment, which could not be conducted today.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 78.

[164] *Id.*

[165] *Id.* at 89.

[166] *Id.*

[167] American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 324 (7th Cir. 1985).

[168] *Id.*

[169] *See* Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (protecting the speech of the Ku Klux Klan).

advocates discrimination.

While the social harms of Internet pornography are real, it may not be the best justification for a nuisance action. The possibility that an activity could serve as a moral temptation and lead others astray is not a sufficient ground for a moral nuisance claim.[170] In the context of Internet pornography, the most successful justifications for a nuisance claim are likely to be economic and physical harms.

3. *Benefits*

In the words of one scholar: "few scholars are willing to argue that pornography consumption benefits either society or the individual consumer. There is simply no social science supporting this position."[171] However, it is conceivable that pornography could function as social commentary not devoid of all value. To separate the social commentary from the pornography, a court applying nuisance law should look at the primary purpose of the activity.

The *Restatement (Second) of Torts* § 828 provides that courts should consider the "social value that the law attaches to the primary purpose of the conduct . . . ."[172] when evaluating a harm. When considering the social value that the law places on the primary purpose of Internet pornography, we must first determine what the primary purpose is. For most consumers of pornography its primary purpose is as a masturbatory aid.[173] As such, the social value is slight compared to other forms of expression. In the words of Professor Cass Sunstein, "Many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection . . . ."[174] At least in terms of indecent speech, the Supreme Court agrees with Professor Sunstein. Quoting Justice Murphy, the Supreme Court noted, "Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest

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[170] Nagle, *supra* note 6, at 295 ("The simple awareness that a neighbor is engaged in activities that one regards as immoral does not support a nuisance claim.").

[171] Dionne, *supra* note 154, at 637.

[172] RESTATEMENT (SECOND) OF TORTS § 828 (1979).

[173] Dionne, *supra* note 154, at 623 (citing David Steinberg, *The Root of Pornography*, *in* MEN CONFRONT PORNOGRAPHY 54 (Michael S. Kimmel ed., 1990); Frederick Schauer, *Speech and "Speech"-Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L. J. 899, 923 (1979).

[174] Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 807–08 (1993); *but see* MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 75 (1984).

in order and morality."[175]

If the court determines that a website in question is more masturbatory aid than art or social commentary, a balancing test would then be applied to weigh the harms and the benefits of the activity. In the case of the average masturbatory aid pornography website, the harms could be great.

D. *Not Protected by Law*

The law must not protect the activity challenged in a moral nuisance claim.[176] Although obscenity is not protected by the First Amendment, the fact that a nuisance suit against online obscenity is aimed at speech could present constitutional problems. As Professor Nagle notes, "a nuisance action against any activity based on notions of morality is sure to prompt a constitutional objection."[177] According to the Supreme Court, "the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary for the abatement of an ordinary nuisance."[178]

1. *Prior Restraints*

The ultimate goal of any nuisance suit against a website featuring obscene content would be an injunction. Injunctions against obscenity come in two forms: the abatement injunction and the standards injunction. The abatement injunction prohibits the distribution of materials that a court deems obscene in an abatement hearing.[179] Such an injunction that comports with *Miller* raises few constitutional issues.[180] The second type of injunction is a blanket standards injunction.[181] Blanket standards injunctions are often in the form of "padlock orders." A padlock order is an injunction to close down a business location, usually for a period of a year.[182] Standards injunctions raise many First Amendment issues and can

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[175] FCC v. Pacifica Foundation, 438 U.S. 726, 746 (1978) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[176] Nagle, *supra* note 6, at 269.

[177] Nagle, *supra* note 6, at 303.

[178] Vance v. Universal Amusement Co., 445 U.S. 308, 315 (1980).

[179] Steven T. Catlett, *Enjoining Obscenity as a Public Nuisance and the Prior Restraint Doctrine*, 84 COLUM. L. REV. 1616, 1618 (1984).

[180] *Id.*; Freedman v. Maryland, 380 U.S. 51 (1965).

[181] Catlett, *supra* note 179.

[182] Jeffrey S. Trachtman, Note, *Pornography, Padlocks, and Prior Restraints: The Constitutional Limits of the Nuisance Power*, 58 N.Y.U. L. REV. 1478, 1488 (1983).

be unconstitutional prior restraints on speech.[183]

A "prior restraint" on speech "is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur."[184] Freedom from prior restraints has long been recognized as being essential to the maintenance of a free press.[185] Generally, prior restraints are unconstitutional except when applied to unprotected speech such as obscenity.[186]

A plaintiff in a nuisance abatement suit against online obscenity could stay out of constitutional trouble by merely seeking an abatement injunction as opposed to the cyber equivalent of a padlock order. Very little is lost by just pursuing an abatement order because a padlock order for a website is an ineffective technique. For example, in 2008, a federal judge ordered the website Wikileaks.org to shut down and for the registrar of the domain name to disable the site.[187] The site was accused of publishing stolen documents in violation of a confidentiality agreement and banking laws.[188] The injunction failed to shut down the site because the site maintained foreign mirror sites and the users were still able to access the site by manually entering the IP address.[189] While shutting down a website is extreme and ineffective, going after particular obscene works is similar to preventing online copyright infringement. While the suppression of infringing copyrighted works is aided by the Digital Millennium Copyright Act (DMCA),[190] the increasingly successful suppression of infringing works on the Internet suggests that the suppression of judicially determined obscenity could be equally successful.

The most constitutionally complex aspect of abating a nuisance with an injunction is "the scope of temporary or preliminary relief pending the full adversary hearing."[191] The Court in *Vance v. Universal Amusement Co.* held that a judge cannot suppress pornography by an injunction prior to a judicial determination that a work is obscene.[192] Under *Blout v. Rizzi*, the Supreme Court held that suppression of pornography requires a judicial

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[183] *Id.*

[184] 16A AM. JUR. 2D *Constitutional Law* § 454 (2008) (citing Alexander v. U.S., 509 U.S. 544 (1993), *reh'g denied*, 510 U.S. 909 (1993)).

[185] Near v. Minnesota, 283 U.S. 697, 713–714 (1931).

[186] Kingsley Books, Inc. v. Brown, 354 U.S. 436, 445 (1957).

[187] Adam Liptak & Brad Stone, "U.S. Judge Orders Wikileaks Web Site Shut Down," N.Y. TIMES, Feb. 20, 2008, *available at* http://www.nytimes.com/2008/02/20/world/americas/20iht-20cndwiki.10214457.html. (last visited Apr. 8, 2010).

[188] *Id.*

[189] *Id.*

[190] Pub. L. No. 105-304, 112 Stat. 2860 (1998).

[191] FREDERICK F. SCHAUER, THE LAW OF OBSCENITY 237 (Bureau of National Affairs) (1976).

[192] Vance , *supra* note 178, at 317

determination of obscenity, with the exception of a short restraint to maintain the status quo in anticipation of judicial resolution.[193] Broad padlock orders against an entire establishment are considered unconstitutional prior restraints.[194]

With a judicial determination of obscenity, federal, state, and local authorities, and even private parties, could have broad powers to suppress obscene materials with a nuisance injunction. Many of the legal protections for websites and even ISPs disappear when dealing with judicially determined obscenity. One complication with suppressing obscenity is that obscenity is increasingly distributed through sites in the YouTube model, appropriately called porntubes.[195] Five of the top 100 most popular websites are porntube sites. The material on a porntube site is not actually created by the site, but posted by users. Section 230(c)(2) of the CDA[196] contains a "Good Samaritan" provision that protects ISPs that attempt to block obscene or otherwise criminal material posted by members. With a judicial determination of obscenity, any porntube that displays obscene material loses its Good Samaritan protection. The Good Samaritan exception contains loopholes to the exception that permit enforcement of federal criminal obscenity laws[197] and state laws that are "not inconsistent" with the section.[198] Given that one of the stated purposes of the Good Samaritan exception is "to deter and punish trafficking in obscenity[,]" it seems that a common law nuisance suit to suppress judicially determined obscenity would not be inconsistent with the Good Samaritan clause. Some have noted that websites may not be able to claim CDA § 230 immunity for user-posted obscenity despite the fact that no cases specifically address this issue.[199]

In summary, a nuisance suit against online obscenity could become an unconstitutional prior restraint if it seeks to suppress pornography without a judicially determined finding of obscenity. To avoid this problem, any nuisance action should only seek an abatement injunction against specific online postings that could be obscene. With the judicial finding of obscenity, public and private parties would be able to seek

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[193] Blount v. Rizzi, 400 U.S. 410, 421 (1971) (citing Feedman v. Maryland, 380 U.S. 51, 59 (1965)).

[194] *See* Trachtman, *supra* note 182, at 1489.

[195] Ellen Gray, *CNBC Probes Ailing Porn Biz*, PHILLY.COM, July 15, 2009, *available at* http://www.allbusiness.com/entertainment-arts/entertainment-arts-overview/12559624-1.html. (last visited Apr. 8, 2010).

[196] 47 U.S.C. § 230(c)(2).

[197] 47 U.S.C. § 230(e)(1).

[198] 47 U.S.C. § 230(e)(3).

[199] *Website Provider Liability for User Content and Actions*, ERICGOLDMAN.COM, http://www.ericgoldman.org/Articles/websiteliabilityalert.htm (last visited April 8, 2010).

injunctions against any other sites that post the material, possibly including ISPs and porntube sites. Any nuisance suit against online obscenity should be very carefully limited to avoid imposing a prior restraint.

2. *The Chilling Effect, Vagueness, and Overbreadth*

The Supreme Court has an overarching concern that a civil law restricting speech will chill speech.[200] If a newspaper faces a succession of libel lawsuits, the newspaper will assume "the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which First Amendment freedoms cannot survive."[201] The Court is concerned with the possibility of "self-censorship" by parties faced with the threat of lawsuits.[202] A nuisance lawsuit against an Internet pornographer would raise concerns that plaintiffs would use the lawsuits to stop website operators from publishing their message.

Even minor punishments can chill protected speech, so the Court permits parties to challenge laws that burden expression.[203] The concern is that "few legitimate movie producers or book publishers, or few other speakers in any capacity, would risk distributing images in or near the uncertain reach of this law."[204] This risk is not limited only to criminal restrictions. Tort actions also pose risks of chilling protected speech. In the words of one district court declining to apply libel to an ISP: "tort-based lawsuits pose [a threat] to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech."[205] However, some of the Court's concern about using the tort remedy of libel against service providers could be explained by the difficulty of confirming the accuracy of user postings on the Internet.

Although tort actions can chill speech, the Supreme Court, evaluating the CDA and COPA, tied the chilling effect on speech to the fact that both of those statutes provided criminal remedies and dealt with merely indecent, as opposed to obscene, pornography. In the words of the *Ashcroft* Court: "Above all, promoting the use of filters does not condemn as criminal any category of speech, and *so the potential chilling effect is*

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[200] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 292 (1964).
[201] *Id.* at 278.
[202] *Id.* at 279.
[203] Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244 (2002) (citing Wooley v. Maynard, 430 U.S. 705 (1977)).
[204] *Id.*
[205] Blumenthal v. Drudge, 992 F. Supp. 44, 50 (1998).

eliminated, or at least much diminished."[206] The *Reno* Court noted that "[t]he severity of *criminal sanctions* may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images."[207] The chilling effect in a criminal action is much greater because of the social stigma of being a "criminal," or in the case of pornography, a "sex criminal." The label of "nuisance" only connotes that an activity's harms outweighs its benefits and thus, compensation is due.

At the same time, a nuisance lawsuit cannot avoid the "inherent vagueness of an obscenity prohibition."[208] As demonstrated by the Cambria List, which pornographers follow to avoid criminal prosecution, pornographers shy away from constitutionally protected depictions because of the uncertainty of obscenity law. While the consequences of a nuisance suit are less severe than a criminal penalty, nuisance suits have the capability of being filed more frequently than the rarely enforced federal obscenity law. In addition, parties with less discretion than the Department of Justice could file nuisance suits. At the same time, online pornography is a particularly hardy variety of speech. Even today with harsh criminal penalties, pornographers continue to push the envelope of obscenity.[209] Pornographers can get away with much of what would be considered obscenity under *Miller* because as long as they are not the worst of the worst, such as Extreme Associates or John Stagliano, there is little risk of prosecution. With the dearth of shocking pornography on the net, it is likely that a series of nuisance suits applying national community standards would provide some clarity to the law. A number of federal adjudications of obscenity law could quickly set parameters for what is obscene and what is merely indecent more reliably than only a couple of obscenity prosecutions each decade combined with the Cambria List.

E. *Strengthening Case: Illegal and Immoral*

A final element to consider in a moral nuisance claim is that the case "is even stronger when the activity is not only immoral, but illegal as well."[210] Despite impressions that there are no remedies for the propagation of obscenity on the Internet, there are a few, if rarely enforced, rules in

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[206] Ashcroft,*supra* note 203, at 667 (emphasis added).

[207] Reno v. ACLU, 521 U.S. 844, 872 (1997) (emphasis added).

[208] *See* Catlett, *supra* note 179, at 1626.

[209] Susannah Breslin, *Extreme Porn Crackdown*, SALON.COM, July 12, 2001, http://www.salon.com/ent/movies/feature/2001/07/12/seymore/index.html (last visited Apr. 8, 2010) (Describing efforts by the Los Angeles Police Department to fight obscenity and the emergence of extreme pornography).

[210] Nagle, *supra* note 6, at 266.

effect.[211] Congress has clearly indicated its intent to keep obscenity illegal with the enactment of the CDA then COPA.

Congress also continues to chip away at the margins of obscenity, primarily focusing on deceptive practices. For example, under the Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act (the "PROTECT Act") it is a federal crime to create a misleading domain name to lure children to pornography sites.[212] A man was convicted in 2004 of using close misspellings of children's websites to lure children to Internet pornography (e.g.. www.bobthebiulder.com was a pornographic site).[213] Wisely, the PROTECT Act provides an exemption for sites that label their content by putting "sex" or "porn" in the domain name.[214] Also, the Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act forbids sending pornographic spam using deceptive practices.[215] A spam company cannot send a message with a purposely-misleading subject header.[216] The Federal Trade Commission, under authority granted in CAN-SPAM, formulated a rule that requires all pornographic spam to be labeled as "SEXUALLY-EXPLICIT" in the subject header.[217]

CONCLUSION

While many see little hope of success in any attempt to limit obscenity on the Internet, nuisance law could offer a workable alternative to the present criminal framework. Nuisance law offers less harsh penalties than criminal law while simultaneously allowing more efficient and economical civil injunctions. While nuisance law may open the door for more judicial determinations of what is obscene online, it would also provide notice to pornographers of what is obscene before they risk criminal sanctions for violating an injunction. Nuisance law also allows parties outside of the Department of Justice, which is often reluctant to enforce obscenity law, to help protect the moral environment of society. The critical freedom of speech principles protected by the First Amendment can

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[211] *See supra* notes 23–26 and accompanying text.

[212] 18 U.S.C.A. § 2252B (West 2009).

[213] Robert Longley, *Use Cyber Tipline to Report Deceptive Domain Porn Sites*, ABOUT.COM, http://usgovinfo.about.com/cs/consumer/a/porntipline.htm (last visited April 9, 2010).

[214] 18 U.S.C.A. § 2252B(c) (West 2009).

[215] 15 U.S.C.A. § 7704 (West 2009).

[216] 15 U.S.C.A. § 7704(a)(2) (West 2009).

[217] Press Release, Federal Trade Commission, FTC Adopts Rule That Requires Notice That Spam Contains Sexually-Explicit Material (Apr. 13, 2004), *available at* http://www.ftc.gov/opa/2004/04/adultlabel.shtm (last visited April 8, 2010).

be respected without giving pornographers effective license to distribute freely the "ideas" of extreme pornography[218] and simulated rape.

Many consider this a radical idea, but many have also considered the use of nuisance law to address global warming radical. Nonetheless, these suits have become a reality. Nuisance law presents a centuries-old mechanism for dealing with the cultural conflicts that arise with new technologies. While the application of nuisance law to Internet obscenity is novel, it is a realistic option to control obscenity without putting pornographers in jail.

[218] *See* Jensen, *supra* note 148.