RETHINKING DEMOCRACY:
Legal Challenges to Pornography and Sex Inequality in Canada, Sweden, and the United States.


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Introduction

Pornography has been found to desensitize societies to violence against women, inspiring rapes and contributing to the sexual subordination of women to men, and in making their materials pornographers exploit existing inequality between the sexes to coerce women and children to perform unwanted or dangerous sexual acts as a form of prostitution. Existing legal regulations in democratic societies have not approached pornography with these realities in mind, but usually rather as a right protected by freedom of expression, or as an “obscene” expression offending the public rather than harming any particular group. In rare but important instances, pornography has legally been seen as a harmful practice violating women’s human or democratic rights to equality. This analysis exposes tensions and poses questions regarding democracy, equality and the meaning of citizenship. If a practice like pornography systematically reproduces and sustains a group’s domination of another, and one democratic ideal is to provide equality among citizens who may participate in self-rule, existing democracies may be regarded as insufficient to their own ideals when they do not regulate it effectively. In this light, the question becomes what, under present systems of democracy, are the obstacles to democracies addressing these problems, and what alternatives exist? To pursue this inquiry, this paper will compare events in Canada, Sweden, and the United States where laws regulating pornography and prostitution were challenged on the basis that they did not respond to their harms to women’s equality.

In Canada the Supreme Court held that legally prohibiting pornography that is violent, degrading or dehumanizing, seeking “to enhance respect for all members of society, and non-violence and equality in their relations with each other,” promotes equality, a fundamental democratic value “that the restriction on freedom of expression does not outweigh.”2 In the U.S., on the other hand, federal courts held that giving women a civil right to sue pornographers for the harm to women to which pornography contributes was “viewpoint discrimination” in violation of the First Amendment.3 Similarly, while in Sweden the purchase of sex was prohibited in 1998 and being prostituted was not on the legislative rationale that prostitution is a

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1 See infra, notes 15-100 and accompanying text for sources, documentation and analysis of these conditions.
form of sex inequality and violence against women, pornography’s prostitution of women was nevertheless protected as “speech” when legislators lamented that so extending “liability for procuring . . . is in conflict with . . . Freedom of Expression.”

National differences notwithstanding, after subsequent judicial interpretation similar heterosexual pornography once ruled criminal by the Canadian Supreme Court in Butler is now legal; e.g., materials presenting women presented as sexually insatiable and constantly looking for sex with strangers, men repeatedly ejaculating into their mouths, and a man verbally abusing a woman, bending her backwards over a toilet while urinating into her mouth, and “punishing” her when it overflows by scrubbing the toilet bowl with her head all the while she is “obviously not consenting” according to the acquitting judge. Not surprisingly, existing obscenity regulation of pornography in the U.S. is also considered arbitrary as well as ineffectual, most forms of pornography making their way to the market in any case. And in Sweden, despite that purchase of sex, if not pornography, was criminalized as a form of sex

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7 Factum of the Intervener Women’s Legal Education and Action Fund ¶¶ 4-5, in the case of R. v. Butler, [1992] 1 S.C.R. 452, reprinted in Women’s Legal Education and Action Fund (LEAF), Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada (Montgomery CA: Emond Montgomery, 1996) p. 204 (describing content of seized materials presenting women (some appearing to be children) being raped, performing sex on superiors, and penetrated in “every orifice” by penises and objects, all while themes of racism and sexism in comments such as “bitch” or “hole” were abundant, accompanied by denigrating treatment such as ejaculation in women’s faces.). [hereinafter: Factum of LEAF]
inequality and violence against women, which has reduced demand significantly, the judiciary interpreted the law as a victimless public crime implying it being a violation against morals, and ignored prostituted person’s damages.

Considering these trajectories of mostly unsuccessful democratic challenges against the harms of pornography and prostitution to sex equality, the question for the political theorist is what is in the way for democracies to address the harms of pornography to gender equality. To this end, the means of a comparative inquiry will be further utilized. However, in order to apprehend the substantial implications for democratic theory and practice, specifically for women’s full citizenship and gender inequality, it is first necessary to conduct a review of the conditions of production and the consumption of pornography to further substantiate its connection to gender inequality.

Production & Consumption of Pornography

The challenges to pornography and its harms have entailed claims of abuse, exploitation, and dominance on behalf of one group, discrimination, victimization, and subordination on another.

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14 Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2001-07-09 p. 529 (Swed.) (“the act is not to be viewed primarily as a crime against person but instead as a crime against public order[,] Already the fact that the one who has carried out the sexual service is called as a witness by the prosecutor speaks in favour of that this is the case.”).
As with any other political claim of magnitude, such as alleging that capitalism is inherently exploitative or that many people in western industrialized countries benefit from former colonialism, this one is highly contested among those whom it indicts, including their apologists. To those who are caught in between, for instance politicians and the judiciary, having to face the exigency of the issue may be compelling or exhaustively onerous. In responding to the rage expressed by those engaged to stop pornography’s harms, the amount of legal accountability demanded, and their sometimes far-reaching political implications, questions will eventually be raised on how to judge existing evidence against pornography. Such questions are at the center of this section.

While data on how many male or females have (ever) encountered pornography does not answer questions of its frequency of use, studies inquiring into or simply indicating the gender composition of regular users often show striking gender differences. Compared to men, women and girls rarely, if ever, actually use pornography, and if they do the initiative often emanates from a male partner. However, proponents of the view that prostituted women


17 Data from the General Social Survey (U.S.) in 1973, 1994, and 2000-2, showed that “regardless of technological context, pornography use is . . . predominantly male [and] young males are the predominant users[.]” Timothy Buzzell, “The Effects of Sophistication, Access and Monitoring on Use of Pornography in Three Technological Contexts,” Deviant Behavior 26 (2005): 127. The data on consumption from the U.S. General Social Surveys are comparatively crude, operationalizing consumption as having “seen an x-rated film in the past year,” distinguishing between movie theatres or VCRs, or whether respondents had “used a pornographic website in the last 30 days,” Ibid., 117. Hence, the survey cannot with certainty distinguish, e.g., accidental from systematic use. However, a representative sample of 4,343 third-year high school students from Sweden offers substantially more grounds for the same conclusion. Only 6.5% of the girls used pornography more than a couple of times a year (5% once in a month or so, 1.3% once in a week or so, 0.2% more or less every day), and usually initiated by male partners. By contrast, 9.9% of boys used it every day, 27% a couple of times per week, and 27.9% a couple of times per month. See Carl-Göran Svedin and Ingrid Åkerman, “Ungdom och pornografi,” [Youth and Pornography] in Medierådet: Koll på porr, ed. Ann Katrin Agebäck (Stockholm: Swed. Gov’t Council: Medierådet [Media Council], 2006), 89-92. Males more often used pornography alone whereas females encountered it in company, or a male used it together with her. Ibid., 92. These general trends seem to confer with the Swedish adult population included in a
pornography performers are engaging in “a form of work” and that the sex industry “cannot be reduced to gender oppression and is much more complex,”19 as well as that “[v]iewing prostitution as the epitome of gender violence . . . obscure the contingencies and diversity of the structures under which it materializes,”20 repeatedly evade the very simple fact that pornography users and tricks (clients)21 overwhelmingly are men, while prostituted persons overwhelmingly

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18 The term “prostituted person” indicates that persons who are in prostitution are substantively placed there and kept there by acts of others, which the evidence indicates. While the term is used roughly synonymously with “person in prostitution,” it conveys more clearly the reality, discussed below, that most people who are found in prostitution are either pimped, trafficked, or coerced by social forces that include prominently poverty, racism, and sex inequality. Thanks to Catharine A. MacKinnon for this definition.


21 The word trick is used to denote a purchaser of sex in this article. Other such commonly used words are johns, punters, buyers, clients, or sex predators. Trick is a word frequently used by prostituted women themselves for men who buy them. It also refers to the many ways these men “trick” them into performing more acts than what the men paid for, or cheating them by, e.g., refusing to pay after having sexually exploited them. See Melissa Farley, “‘Renting an Organ for ten Minutes’: What Tricks Tell Us about Prostitution, Pornography, and Trafficking,” in Pornography: Driving the Demand in International Sex Trafficking, ed. David E Guinn and Julie DiCaro (Los Angeles: Captive Daughters Media / DePaul Univ. Int’l Human Rights Law Institute, 2007), 147. Moreover,
are women. Considering women’s generally subordinate position vis-à-vis men, this fact precisely suggests gender oppression.\(^{22}\) Similarly, sweeping observations noting “variation across time, place, and sector . . . in terms of workers’ experiences as well as power relations between workers, customers, and managers”\(^{23}\) do not, without more, qualify the proposition that the sex industry is not an expression of gender oppression. Nor does such variation indicate, by itself, that variation is “complex” with regards to gender. The gender disparity in using and being used in the industry is not complex, and should be theoretically and empirically addressed—not evaded.

Contemporary consumption of pornography, unlike during the age of eighteen century libertines such as Marquis de Sade, is not a marginalized phenomenon. In a recent estimation it was found that merely those revenues that were reported in a sample of sixteen countries totaled $97.06 billion in 2006—a sum larger than the combined revenues of top technology companies Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink.\(^{24}\) Considering that much activity is illegal and unofficial, hence goes unreported, even these numbers are underestimations. Already in 1985 it was thoroughly documented that pornography production and distribution in the U.S. were under control of organized crime.\(^{25}\) Since then, legitimate

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\(^{23}\) Weitzer, “Prostitution as Work,” 144.

\(^{24}\) Ropelato, “Pornography Statistics 2007.” Nine countries were some data were available were South Korea, Japan, U.S., Australia, U.K., Italy, Canada, Philippines, Netherlands. Seven countries with incomplete data included in this study were China, Taiwan, Germany, Finland, Czech Republic, Russia, and Brazil.

corporations are increasingly involved with distribution. Moreover, while much pornography is made by “organized criminal enterprises” some amount is also made in the context of war, or during genocide by soldiers for the purpose of propaganda, or to be kept as trophies. Additionally, there are numerous individual men such as “amateurs,” freelancers, boyfriends or other intimates, rapists, sex murderers, pimps, and tricks (i.e., purchasers/clients/johns) who make materials that usually involve regularly prostituted women.


27 The Attorney General’s Commission defined organized crime with respect to the pornography industry not as being the equivalent of the “La Cosa Nostra,” even while there were strong connections between them, see, e.g., Final Report, 295-96, but rather as consisting of “a large and organized enterprise engaged in criminal activity, with a continuity, a structure, and a defined membership, and that is likely to use other crimes and methods of corruption, such as extortion, assault, murder, or bribery, in the service of its primary criminal enterprise.” Ibid., 293. Alternatively it was defined as “any large and organized enterprise engaged in criminal activity [with] continuity and a defined membership[,]” Ibid.


Legal Challenges to Pornography

Taking into account that sexual acts performed on real persons in visual materials end up as masturbation materials overwhelmingly for male consumers, numbers available evidences of a form of mass prostitution through media.\(^{30}\) Indeed, studies made with “tricks” (clients of prostituted persons) indicate that half, or more, explicitly see pornography as just another form of prostitution.\(^{31}\) Highlighting this association, 49 percent of a sample of 854 prostituted women in nine countries, found across five continents, reported being used in pornography \((n = 802)\), confirming numbers from previous studies.\(^{32}\)

Many former pornography performers testify to the systematic threats, rapes, and violence regularly committed against women and children. Women and young girls are documented to have been tortured to increase the market value of the materials, resulting in permanent physical injuries.\(^{33}\) Male participants also confirm that pornographers regularly force women, who manifestly resist it, e.g., to have anal intercourse.\(^{34}\) Some have been coerced into pornography films already at age eight.\(^{35}\) Others end up in pornography at a later age. An individual example of the latter as well as an expression of the coercion needed to make women perform in pornography is found in Linda Boreman, the performer in the pornography classic “Deep Throat,” who was cajoled at twenty-one into an initially personal relationship of two and a half years in which she suddenly found herself constantly threatened, battered, and raped, sometimes on a daily basis, and held in captivity.\(^{36}\) An in-depth study with fifty-five female survivors of prostitution in Portland, Oregon, reported that 53 percent were sexually tortured on average fifty-

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\(^{30}\) Andrea Dworkin and Catharine A. MacKinnon pioneered this claim.


\(^{34}\) Att’y General’s Comm., *Final Report*, 773-74 (quoting from Los Angeles Hearings).


four times a year, often while made to participate in pornography.\textsuperscript{37} Although some question that pornography is produced under such coercive or violent conditions as those documented in this sample, a significant body of evidence below unfortunately shows this study was not an exception. Rather, violence, force, and coercive circumstances seem endemic in its production which, considering among other things the gender inequality in its consumption, suggest that it is strongly related to male social dominance.

Judging from studies of general populations of prostituted women (more below), movies such as those Boreman was forced to make—including being hypnotized to suppress the gag-reflex so a man could rape her down to the bottom of her throat, and being forced to have sex with a dog\textsuperscript{38}—seem symptomatic of an industry in which violence and coercion are hidden behind cameras. Other than when materials are expressly violent, as they often are,\textsuperscript{39} they simply cannot alone reveal if force was used to produce them. Moreover, because people withhold information when threatened or dependent on the industry, the possibility exists of more rather than less coercion. Testimonial evidence on violence, coercion, and trauma during pornography production revealed in public hearings repeatedly mirror both quantitative and qualitative data on these subjects in the lives of prostituted women around the world, and cannot therefore simply be discarded as unrepresentative or “anecdotal.”

For example, Linda Boreman was forced to have intercourse or fellatio every time she was made to perform for pornography, so was raped countless times, which also was revealed to be the case with the fifty-five Portland survivors previously mentioned of whom 78 percent were raped an average of forty-nine times a year, and 84 percent were victimized through aggravated

\textsuperscript{38} “The Minneapolis Hearings,” 65 (testimony of Linda Marchiano).
assault an average of 103 times a year. Converging with such data, other survivors from the pornography industry testify to constantly being covered with “welts and bruises.” Independent testimonies in recent procuring and trafficking cases in Sweden suggest such violence (including welts and bruises) is not an exception. Studies conducted in other countries are indicative of similar levels of violence against prostituted persons where, e.g., the use of weapons such as baseball bats, crowbars, or where the offender jerks the prostitutes woman’s head against a car’s dashboard or a wall, occur regularly. Not surprisingly, a Swedish government report in 1995, preceding the passing of the current law against purchase of sex in 1998, concluded that

[i]t is common that women in the sex trade are subjected to various forms of violations such as physical abuse and rape. Some purchasers conceive the situation such as that they, since they’re paying, have a right to treat the woman as they wish. The purchaser thinks that he has not only paid for particular sexual services, but also paid for the woman’s right to a human and dignified treatment.

This treatment is possible because prostitution usually entails a massive power-imbalance against the prostituted person, often simply because of the desperate conditions causing her entry into prostitution. There is no reason to believe circumstances are safer in those forms of prostitution in which a camera is present. Rather, the contrary seems to be the case. For instance, among active prostituted persons surveyed in the nine-country study previously mentioned, those 49 percent (n = 802) of women who reported they had been used by pimps or tricks to make pornography were diagnosed with “significantly more severe symptoms” of

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40 Hunter, “Prostitution is Cruelty,” 93-94.
42 See, e.g., Helsingborg’s District Court [Hb. Dist. Ct] B 1230-05, 2005-09-25, ss. 58-59 (Swed.), rev’d, Scania and Blekinge Court of Appeals [S.B. Ct. App.] B 2429-05, 2006-01-11 (Swed.) (Katarina’s damage claim dismissed), for a testimony by Katarina, forced by violence and/or threats to have intercourse two or three times every day with a pimp in whose house she lived in for almost two months, entrapped in part because pimps took all her money and her passport. Katarina’s testimony is corroborated by Niculeta’s. See Hb. Dist Ct., pp. 48-56. See also Stockholm’s District Court [Sthlm Dist. Ct.] 2003-03-21, B 4205-02 (Swed.) (also called the “Ludvig Case”) (testimonies by Nadja, Julia, Renata & Olesia) (“welts and bruises” mentioned by independent witnesses, e.g., at pp. 14, 16, 21 (trans. “blåmärken”)), sentence modified, Svea Court of Appeals [Svea Ct. App.] 2003-06-23, B 2831-03 (Swed.) (also with additional testimonies).
44 Statens offentliga utredningar [SOU] 1995:15 Könshandel [government report series], 142 (Swed.).
posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography.\textsuperscript{46} Two thirds (68\%) of all prostituted persons in the study ($n = 827$), including those not reporting being used in pornography, met clinical criteria for PTSD regardless of whether prostitution was legalized or criminalized, and regardless in which form or site of prostitution they were prostituted such as indoors, brothel, or street prostitution.\textsuperscript{47} The symptoms were in all nine countries higher or equal to that of treatment-seeking Vietnam veterans, fugitives from other forms of violence against women, torture, as well as from state-organized terror.\textsuperscript{48}

Although similar data currently do not exist on pornography production and PTSD in Sweden among prostituted women as there now are in Canada ($n = 100$) and the U.S. ($n = 130$),\textsuperscript{49} professional practitioners treating psychological trauma testify to similar assessments of PTSD from working with prostituted women in Sweden: “Common with all those women are the severe post traumatic stress reactions that are manifested in the forms of serious mental disorders such as severe sleep- and concentration disorders, recurrent anxiety- and panic attacks, grave depressions, severe anorectic reactions, self-destructive behaviors combined with extensive problems of impulse control, and manifest or latent suicidality.”\textsuperscript{50} Similarly, a more recent study

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\item \textsuperscript{46}Farley, ““Renting an Organ,”” 146, 422n298 (Pearson $r = 126$, $p = .001$, $n = 749$).
\item \textsuperscript{47}The researchers interviewed and asked prostituted persons at the following locations: 1) on the streets in Canada, 2) in brothel, stripclub, street, or at massage parlors in Mexico, 3) at clinics for STD controls in Turkey (respondents not “seeking assistance/treatment”), 4) by local newspaper advertisement, drop-in shelter for drug addicted women, and peer-referred (snowball sampling) in Germany, 5) randomly sampled interviews in four different areas on San Francisco streets, 6) at a beauty parlor in Thailand and at a job training/nonjudgmental support agency in Northern Tailand, 7) at brothels, streets, and drop-in center for prostituted persons in Johannesburg and Capetown, South Africa, 8) at a nongovernmental organization (NGO) supporting approximately 600 women a week in Lusaka, Zambia, and 9) at support agencies in Bogota, Colombia. Male and/or transgendered persons were included in the Thai, South African, and U.S. samples. For more information on the samples and methods, see Farley et al., "Prostitution in Nine Countries," 37-39.
\item \textsuperscript{48}Farley et al., “Prostitution in Nine Countries,” 44-48. Although respondents were sampled from varying forms of prostitution in the different countries, the standardized and validated tests for posttraumatic stress nonetheless exhibit the same results for all, and were replicated in all countries. Regarding variation in different samples, noting for instance the high measurements of a reliable measure such as posttraumatic stress disorder operationalized according to seventeen DSM-IV symptoms, one may wonder why the nine-country study shows slightly lower numbers of rapes and assault in comparison with the smaller Portland sample. See Farley et al., “Prostitution in Nine Countries,” 41 (PTSD-measurement) 43 (violence frequency). However, the authors of the larger study note that asking about rape in prostitution is like asking a person in a combat zone if that person is being under fire. Ibid., 66. Considering that other large screening surveys usually have employed a range of ostensive definitions of typical acts of violence to avoid that respondents minimize their experiences in such ways, see, e.g., Eva Lundgren et. al., Captured Queen, 15-16, this study presumably underreports the frequency of violence. With regards to the time constraints of surveying or interviewing such a large population of prostituted persons on the streets, in brothels while being interrupted by pimps, or in other public locations such as medical facilities, similarly stringent measures would indeed have been difficult to employ.
\item \textsuperscript{49}Samples from the U.S. and Canada are included in the nine-country study. Ibid., 37-38.
\item \textsuperscript{50}Statement from the Crisis- and Trauma Center in Stockholm (Kris- och Traumacentrum), June, 28, 2005, quoted in Linda Karlsson, ”Målsägandebegreppet vid vissa sexualbrott: köp av sexuella tjänster, människohandel
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from Korea with 46 formerly indoor (as opposed to outdoor/street) prostituted women revealed significantly higher symptoms of PTSD and disorders of extreme stress not otherwise specified (DESNOS) compared to a control group even though the mean number of days since leaving prostitution was as high as 573.12 (range: 16 to 2,190), and despite controlling for mediating variables such as prior childhood abuse, childhood sexual abuse, and childhood sexual abuse by a significant other. To the horrific statistics of trauma and stress among prostituted women should then be considered that those women having pornography made of them are even more hurt (see above). This suggests that the condition of production in pornography, as a specific branch of prostitution, is particularly vicious and cruel to women.

Apart from the economic misery and desperation that propels many into prostitution, the majority of prostituted people have somewhere between, as conservatively estimated, 55 percent and less conservatively 90 percent, been subjected to sexual abuse and physical assault as children, according to many international studies. Many, as a consequence, run away from the


52 For original data, see, e.g., Farley et al. “Prostitution in Nine Countries,” 43, finding that 59% of all responding prostituted persons (n = 448) affirmed that they ”[a]s a child, was hit or beaten by caregiver until injured or bruised.” An additional 63% (n = 508) affirmed they were ”sexually abused as a child.” Ibid. However, it should be mentioned that these data most likely are underestimations for reasons discussed above in note 48. In-depth studies of persons who left the sex industry show higher frequencies of childhood abuse. See, e.g., Hunter, “Prostitution is Cruelty,” 98-99 (85% of 123 survivors of prostitution reported being victims of incest as a child, 90% were physically abused, and 98% were emotionally abused); Mimi H. Silbert and Ayala M. Pines, ”Entrance Into Prostitution,” Youth & Soc’y 13 (1982): 479 (60-70% of the prostituted in the study had a prior history of sexual abuse during childhood); Evelina Giobbe, ”Confronting the Liberal Lies About Prostitution,” in Living With Contradictions, ed. Alison M. Jaggar (Boulder Colorado: Westview Press, 1994), 123, 126n10 (organization WISPER conducted interviews with formerly prostituted persons in Minneapolis where 90% stated they had been assaulted and 74% stated they had been subjected to sexual abuse between 3 to 14 years of age; A ”Mary Magdalene Project” found that 80% of prostituted women in their project reported sexual abuse during childhood; ”Genesis House” reported the same for 94%); See also Ronald L. Simons & Les B. Whitbeck, “Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women,” J. Fam. Issues 12 (1991): 361 (finding, in a sample of 40 adolescent runaways and 90 adult homeless women in Des Moines, Ohio, that ”early sexual abuse increases the probability of involving in prostitution irrespective of . . . [other] factors”); Chacón Echeverría et al., “Soy Una Mujer de Ambiente...”: Un Análisis Sobre Prostitución Feminina, Prevenir y SIDA (San Jose: Instituto de Investigaciones Sociáles, Universidad de Costa Rica, 1993), 40-50 (reporting that 71% of the prostituted women who were studied had experienced sexual abuse by age 18, either by their fathers, uncles or priests (43%) or by close acquaintances); Ines Vanwesenbeck, Prostitutes’ Well-being and Risk (Amsterdam Neth.: VU Uitgeverij, 1994), 21-4 (summarizing studies); Chris Bagley & Loretta Young, “Juvenile Prostitution and Child Sexual Abuse: A Controlled Study,” Canadian J. Community Mental Health 6 (1987): 5 (73% of the prostituted in the study were subjected to sexual abuse as children); Mimi H. Silbert and Ayala M. Pines, “Sexual Child Abuse as an Antecedent to Prostitution,” Child Abuse & Neglect 5 (1981): 407; Jennifer James & Jane Meyerding, “Early
abuse, become homeless, then to be exploited by pimps and tricks, including pornographers. In a San Francisco study with 200 prostituted females where 60 percent had reported sexual abuse by on average two adult men, 70 percent of them explicitly reported sexual abuse as affecting entry while more indicated this strongly, and 96 percent of all participating juveniles were runaways. A 1995 government report in Sweden corroborated the San Francisco-study’s high frequency of sexual abuse in childhood and its subsequent influence in the girls’/women’s entry into prostitution with findings from interviews made by clinical- and outreach workers in Gothenburg, the second largest city in Sweden. Correspondingly, a low age of entry in prostitution is generally corroborated internationally.

For instance, 47% in a sample of 854 prostituted persons in nine countries found across five continents reported they entered under age 18 (n = 751). In the sample of 200 prostituted women in San Francisco 78% entered under 18, and although “average” entry age for the whole sample was 16 a majority of 62% had started before 16, and “a number were under 9, 10, 11 and 12 when they started prostitution.” Subsequently, in Sweden the number of children being sexually exploited remains “significant” according to a 2004 government report, and the Crisis-and Trauma Center in Stockholm concludes that prostituted persons whom they made contact with have had a difficult childhood, been assaulted, and in most cases been sexually exploited or subjected to abuse. Recent research findings in Sweden among youth who have been prostituted in and around Gothenburg also confirm high correlations to childhood abuse, neglect, and homelessness, indicating the Swedish law against purchase of sex should be more
efficiently implemented or amended to reach its full potential, including making escape from prostitution possible. Even most tricks seem to know quite well that the women whom they purchase sex from have a prior childhood history of sexual or other forms of abuse, that they are often pimped, trafficked, and seriously abused by pimps and tricks alike as well as subjected to dire economic hardships. This, Melissa Farley and associates’ interviews with tricks from London, Chicago, and Scotland vividly confirm,\(^{60}\) as have other researchers like Martin Monto.\(^{61}\)

Critics who argue that brothel prostitution is less abusive,\(^{62}\) and more specifically claim it is different regarding women’s prior histories of abuse compared to street prostitution, have not

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\(^{60}\) An interview study of 103 men who buy sex in London, solicited through newspaper advertisements for anonymous interviews against remuneration, found that “34% of the interviewees estimated that between 30-40% of all women in prostitution were [abused as children], and 35% thought that 50-90% were.” Farley, Bindel and Golding, *Men Who Buy Sex*, 4 (summary). Moreover was found that “[a]lmost all (96%) bought sex indoors, and many reported that they were aware of pimping, trafficking and other coercive control over those in massage parlour, brothel, and escort prostitution. These men were frequently aware of the vulnerability and risk factors for entry into prostitution including not only childhood abuse, but also lack of alternative job choices, coercive control and homelessness.” Ibid. “Forty-four per cent of the men believed that prostitution had a very or extremely negative effect on the prostitute. Only 19% felt that prostitution had a very or extremely positive effect on the prostitute. The positive effect they referred to was primarily a financial benefit. . . . Of the men interviewed, 55% believed that a majority of women in prostitution were lured, tricked or trafficked.” Ibid., 14-16. In another similar interview study from 2008 with 113 tricks in Chicago, 66% of interviewees responded that “economic necessity” is the cause of female prostitution, 27% that the majority are “homeless,” 57% believed the majority had “experienced some type of childhood sexual abuse,” 32% believed the majority’s age of entry to be below eighteen, 41% “said” they tried to “help or rescue a woman in prostitution when she was being harmed,” 49% said “prostitution exploits a woman’s sexuality,” 42% that “prostitution causes both psychological and physical damage,” and 27% described “the prostitute-pimp relationship as exploitative and harmful.” Durchslag and Goswami, *Deconstructing The Demand*, 20-23. In another interview study with 110 tricks in Scotland as many as 85% stated that the prostituted women do not like the sex of prostitution, and 73% noted that women are prostituted only because of “economic necessity.” Jan Macleod et al., *Challenging Men’s Demand for Prostitution in Scotland: A Research report Based on Interviews with 110 Men Who Bought Women in Prostitution* (Glasgow, UK: Women’s Support Project, 2008), 20-21. www.prostitutionresearch.com/ChallengingDemandScotland.pdf. Prostitution researchers have long since confirmed that tricks are aware of the prostituted persons’ victimized situation, while denying their own abusive contributions.

\(^{61}\) Martin A. Monto, “Female Prostitution, Customers, and Violence,” *Violence Against Women* 10, no. 2 (2004): 177 (stating about tricks that “though they may not acknowledge their part in the system, many are aware that prostitutes are victimized in the course of their activities.”).

\(^{62}\) For example, this claim has been promulgated by sociologist Ronald Weitzer, who argues for a de facto legalization of brothel prostitution. In contrast to Weitzer, other researchers have noted how prostituted persons often are more vulnerable in indoor prostitution than on the streets due to their restricted physical scope for action, lack of effective escape routes, and highly reduced transparency from outside, while the trick and the pimp acquires a significantly larger amount of discretion. See, e.g., Melissa Farley, “Bad for the Body, Bad for the Heart”: Prostitution Harm Women Even if Legalized or Decriminalized,” *Violence Against Women* 10, no. 10 (2004): 1099-1103 (citing studies and original data); “Prostitution Harms Women Even If Indoors: Reply to Weitzer,” *Violence Against Women* 11, no. 7 (2005); Jody Raphael and Deborah L. Shapiro, “Reply to Weitzer,” *Violence Against Women* 11, no. 7 (2005). Tellingly, many research-teams have been denied entry to brothels. One such interviewing Asian women prostituted in “massage parlors” in San Francisco were denied recruiting respondents in thirteen out of twenty-five. Tooru Nemoto et al., “HIV Risk Among Asian Women Working at Massage Parlors in San Francisco,” *AIDS Education and Prevention* 15, no. 3 (2003): 247. Nonetheless, among those interviewed 62% “had been
only failed in offering sufficient and reliable data to this end, but did often not account for how they approach the methodological problems involved with interviewing prostituted persons. For instance they did not employ formerly prostituted interviewers who are known able to establish a sense of trust and empathy other interviewers cannot, as did Silbert and Pines, or they did not account for any alternative measures to secure the trust of respondents, or they inconsistently physically beaten by a customer,” Ibid., 250, suggesting higher rates in parlors denying researchers entry. Similarly, Melissa Farley and associates were denied to speak with prostituted women in 6 out of 14 legal brothels in Nevada. Melissa Farley, Prostitution and Trafficking in Nevada: Making the Connections (San Francisco: Prostitution Research and Education, 2007), 23.

63 For instance, Weitzer claimed that histories of “[c]hildhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers,” citing two studies. See Ronald Weitzer, “Sociology of Sex Work,” Annual Review of Sociology 35 (2009): 219 (citing N. Jeal and C. Salisbury, “Health Needs and Service Use of Parlour-Based Prostitutes Compared with Street-Based Prostitutes: A Cross-Sectional Survey,” BJOG: An International Journal of Obstetrics & Gynaecology 114, no. 7 (2007); Roberta Perkins and Frances Lovejoy, Call Girls: Private Sex Workers in Australia (Crawley: Univ. W. Aust. Press, 2007)). His first citation was to a study of a Bristol sample of seventy-one prostituted women in massage parlors compared to an equal number of Bristol women in street prostitution. It is notable that respondents in the this study were not allowed to participate if being below age sixteen (a common age in prostitution, see supra notes 55-61 and accompanying text), and not surprising that two of fifteen visited massage parlors did not allow interviews, but particularly remarkable that the cited authors themselves raise concerns that “[t]he small sample size for each group may mean that important differences have not reached significance.” Jeal and Salisbury, “Health Needs,” 879.

Regarding Weitzer’s second citation, that study did not survey any women in street prostitution, only “call girls,” with women in brothels as a “control group”. Perkins and Lovejoy, Call Girls, 10. Drop-out rates were unusually high. For call girls, 304 telephone numbers (listed advertisements) were called, although at one number sometimes even four women would answer. However, only half of the total calls were answered. Ibid., 7. In sum, researchers spoke with 244 women, but finally only 95 responded to the survey; i.e., a drop-out rate well over half the sample, even without considering the many unanswered calls. Ibid., 161. Even more remarkably, no attrition-analysis is presented by the authors. Moreover, authors provide no information on how the “control group” of women in brothels were sampled, only noting that they responded to the same questionnaire without, however, specifying drop-out rates or other important information. Ibid., 161. Hence, most likely there is a serious sampling bias of which we don’t know the parameters. Therefore the results cannot be compared with other studies which have included street workers, which is something Weitzer apparently assumes. Their reported percentage of child-sexual abuse or early sexual experiences, ibid., 137-40, are comparably low, indeed, but since the methodology and sampling procedure leave so much else to ask for, it is unscholarly the way he cites them. Moreover, several studies indicate that a majority of women in street prostitution have additionally been prostituted in one or more types of indoor prostitution, and vice versa, including pornography and brothels. See, e.g., Melissa Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harms Women Even if Legalized or Decriminalized,” Violence Against Women 10, no. 10 (2004): 1099 (citing studies); Farley, Prostitution in Nevada, 29. Hence, distinctions between indoor- vs. outdoor prostitution can be assumed to have a particularly weak explanatory value regarding claims about the women’s social background and preconditions.

64 Mimi H. Silbert and Ayala M. Pines, “Pornography and Sexual Abuse of Women,” Sex Roles 10, no. 11/12 (1984): 863 (“interviewers reflected the makeup of the sample population [which] maximized their credibility with the subjects (who, in general tend to be distrustful of the ‘straight world’) and their understanding of the jargon terms and lifestyle issues.”); Silbert and Pines, “Abuse as Antecedent,” 408 (“interviewers . . . have been juvenile and/or adult prostitutes who have been victims of sexual assault.”); See also Raphael and Deborah L. Shapiro, Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago; A Research Study (Chicago: Center for Impact Research, 2002), 10, www.impactresearch.org/documents/sisterspeakout.pdf (“Twelve survivors of prostitution were recruited and trained to orally administer an extensive questionnaire”).

65 For instance, the Bristol research team cited by Weitzer, see supra notes 62-63, never confronted these issues. See Jeal and Salisbury, “Health Needs,” 876 (accounting for no particular procedure to secure the trust of respondents). See also Ibid., 880 (recognizing the help of outreach workers to “administer” questionnaires).
choose to criticize some studies for employing prostituted women while approvingly citing others who do without further explanation.\textsuperscript{66}

Particularly important for the purpose of validity, since prostituted persons in and outside pornography are distrusted and stigmatized by the community, and therefore rarely have confidence in those around them, including researchers, public authorities, and support agencies, it is absolutely crucial that the respondent can obtain a sense of trust toward their interviewer to reveal essential details on abuse, and that they won’t get judged adversely because they do not leave prostitution and thereby continues to be subjected to harm.\textsuperscript{67} Even the Swedish government commission, preceding the passage of the law, acknowledged that what is needed is “long time and close contact with prostituted women in order to acquire knowledge of their real situation.”\textsuperscript{68} According to the Commission, a survival strategy was even said to “entail that the more gross violence . . . the less becomes her propensity to report it.”\textsuperscript{69}

None of the variations in the documented social settings where pornography is produced change the basic “coercive circumstances” and unequal conditions imposed on the ones being used in such visual materials; i.e., it is still mostly prostituted persons, not seldom homeless children and teenagers, or coerced, poor, unequal, or desperate women who figures in the materials (see above). If there was a convincing preponderance of empirical evidence showing where mass-consumed pornography was made under non-coercive conditions or circumstances of social equality between the sexes, such data would indeed deserve to be considered. In contrast, what exist are unverified and unfounded claims of a large prevalence of “home-made” or “amateur” pornography that would be different in these regard. Such claims were recently heard, among other places, in Sweden, made by journalists, social commentators, even law

\textsuperscript{66} Weitzer assumes an there exist unbiased observer of prostitution, arguing prostitution “survivors” are biased as interviewers if they “may have been likeminded” with researchers, or when they “did not see their own [prostitution] experiences as “work” or a choice[.]” Weitzer, “Flawed Theory,” 939 (alterations in original; quoting Raphael and Shapiro, Sisters Speak Out, 9). However, he sees no problem in citing Perkins and Lovejoy who employed “women either currently working or formerly working in the sex industry” to conduct surveys. See Call Girls, 161, cited in Weitzer, “Sociology of Sex Work,” 219. Whether these interviewees were likeminded with the authors or not cannot be discerned, in contrast with those scholars criticized by Weitzer. Lack of transparency can produce serious flaws. Furthermore, in its impact neutrality to viewpoints may often, rather than being “unbiased”, constitute an advocacy for status quo (if not simply being an expression of ignorance).

\textsuperscript{67} See Jody Raphael and Deborah L. Shapiro, “Reply to Weitzer,” Violence Against Women 11, no. 7 (2005): 967 (arguing that those who have left prostitution have made clear that they often failed to seek help because of the fear to be adversely judged by social services agencies).

\textsuperscript{68} Statens offentliga utredningar [SOU] 1995:15 Könshandeln [government report series], 144 (Swed.).

\textsuperscript{69} Id. at 144.
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professors, despite that to date no evidence or data exist on the prevalence of such pornography compared to materials produced by the organized industry. Even less evidence exist showing home-made, amateur, or female-directed materials would be made under different conditions, i.e., under less coercive circumstances, or under conditions of social equality, than what has already been documented.

Responding to the question, 89% (n = 785) of prostituted persons from nine countries explicitly stated they wanted to leave prostitution, but could not make that happen. Such results document sexual slavery, not a job. In order to make materials, the industry exploits existing

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71 A recent comparison, published in 2008, of an equal number of randomly selected female-directed versus male-directed scenes (n = 122) from 44 randomly selected top selling pornography movies (n = 250) suggests not only that the content of materials are not much different with women as directors, but that neither is the level of violence, aggression, and degrading treatment women performing in pornography must endure. Sun et al., “Male and Female Directors,” 317-20. In their conclusions, the authors state that “the female targets almost always exhibited pleasure or indifference toward the aggression inflicted on them . . . [and that] female-directed films did not offer an alternative construction of sexuality and gender roles from their male counterparts.” Ibid. Such findings do not indicate a difference regarding the conditions of production such as, among other things, the amount of hidden coercion behind the camera. Rather, the study found that “best-renting pornography films” were three times as aggressive than previous content analysis-studies suggest, in part due to the latter’s less systematic methods of sample selection. Ibid., 321. Regarding the director’s gender, the authors report no significant differences in terms of the frequency of violent, aggressive, or degrading acts directed against women in pornography such as choking, gagging, slapping, pulling hair, pinching, verbal aggression, men ejaculating in women’s mouths, or spanking. Ibid. The few significant differences recorded were related to the fact that women-directed scenes contained more women-to-women scenes than did their male counterparts. However, this fact entailed more violence being performed against women under female directors since “[e]ven when controlling for gender composition of main characters, female-directed scenes continued to show significantly more woman-to-woman aggression (27.9% of female-directed scenes) than male-directed scenes (12.6% of male-directed scenes); χ²(1) = 17.43, p < .001.” Ibid., 321. If what molds the industry is the “socio-economic” demand as the authors suggest, ibid., 323, and that demand overwhelmingly and for all the more obvious reasons comes from men, not women (see above), it is not surprising if women directors apparently treat female pornography performers more badly than male directors if it acquires them success on the market.

72 It is, of course, not possible to disprove by 100 percent something that appears having never existed. However, in a world where women are sexually unequal to men, the existence of a production of sexually explicit materials employing real women under uncoercive circumstances, and conditions of mutual equality, even if directed or produced by women, must necessarily be subject to skepticism.

73 Farley et al., “Prostitution in Nine Countries,” 51, 56.
subordination and vulnerability of women and children.\textsuperscript{74} In a mutual and equal sexual relationship a man would stop if a partner told him what he did hurt her, what he did was uncomfortable, or what he did was insulting. He would not continue rubbing against a sore tissue, pushing the limits of internal organs where it hurts, or demand his partner to be an oral receptor of semen against her wishes. Prostitution, however, often is premised upon the idea that such considerations can be put aside, which the documented harm and trauma in commercial sexual exploitation evidences to. With “the money he can buy a human life and erase its importance from every aspect of civil and social consciousness and conscience and society,”\textsuperscript{75} as Andrea Dworkin once expressed it. This, even the Swedish government commission acknowledged when stating that “some purchasers” (some is actually an understatement) believe the money gives them “a right to treat the woman as they wish” and ignore her rights to humanity and dignity.\textsuperscript{76} Because of the extremely unequal position of power between him and the prostituted person, there are no incentives for him to care for her rights. This becomes even more evident where legalization or decriminalization of prostitution has been implemented, despite the perceptions that making the sexual exploitation of women legal and subject it to regulations would transform an age-old oppression into a harm-free work environment.

As Mary Sullivan and others have asserted,\textsuperscript{77} everywhere where prostitution becomes decriminalized or legalized sex exploitation expands simply because it becomes implicitly condoned. Legalization/decriminalization pushes the limits of what can be done to women. In the state of Victoria, Australia, a prostituted women participating in a survey said legalization leads to a competition increasing demands that women perform harmful practices and accept unwanted “customers”.\textsuperscript{78} Numerous testimonies from brothels in Nevada tell about unsafe sex demanded from tricks as well as pimps. Moreover, if a woman gets HIV she apparently is most likely to

\textsuperscript{75} Andrea Dworkin, “Prostitution and Male Supremacy,” 4.
\textsuperscript{76} Statens offentliga utredningar [SOU] 1995:15 Könshandeln [government report series], 142 (Swed.).
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simply get fired because it is the tricks, and their money, that drive the business—not the women. Legalization has also not reduced HIV among prostituted women in jurisdictions where prostitution occurs under regulatory regimes because they can never address the power imbalance between the Trick and the prostituted woman, and, among other things, his demand for unsafe sex. That is how inequality looks like. With all this force needed to make women in pornography perform, will consumers use force on other women to experience what has been used through mediation?

**Pornography & the Construction of Sex Inequality**

Compared to prostitution in the flesh, pornography has a specific circular power that reinforces sexual inequality. Making women perform as sexual puppets (as “acting” objects), it eroticizes sexual subordination of women for consumers, who then find existing and further subordination justified. This effect has been persistently documented on “normal” men as well as some women. Meta-analyses from 1995 of scholarly experimental literature showed that explicitly violent as well as non-violent sexual materials (except mere pictorial nudity) increase various rape-myths significantly, such as victim-blaming, and increase aggression, sexual callousness, disinterest in the suffering of others, and desensitization to violence against women, regardless of mediating/moderating variables. However, a more recent meta-analysis from 2010 has confirmed beyond cavil that experimental and nonexperimental studies converge in showing a “significant overall relationship between pornography consumption and attitudes supporting violence against women.” Contrary to what was reported in 1995, where experimental studies were said to exhibit a significant effect while nonexperimental studies where not, this study

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82 See Gert Martin Hald, Neil Malamuth, and Carlin Yuen, “Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies,” *Aggressive Behavior* 36 (1) (2010): 18. Significantly higher correlations were found between such attitudes and the use of sexually violent pornography compared with nonviolent pornography, but the latter relationship was also found significant.
shows otherwise. Another recent analysis from 2009 similarly found that studies consistently show, across experimental and nonexperimental conditions and differing populations, that pornography use risks sexually aggressive outcomes, particularly for men who score high on other risk factors for this behavior.

Prolonged experimental exposure to common non-violent pornography was previously found to produce unfounded beliefs in sexual promiscuity as well as acceptance of male dominance and female servitude, a significant leniency toward rapists when judging rape cases, and a reduced concern for those victimized as well as self-assessed proclivity in men to force sex on women. These results converge with more recent actual self-reports, in one case from a large (n = 2972) representative sample of U.S. college men, where correlations between consumption and sexually coercive behavior were significant for all, and dramatically for highly predisposed men. The latter studies of correlations between pornography consumption and actual sexual

83 First, the main problems with the findings of Allen et al., “Exposure”, were that half of the studies included (4 out of 8) “should not have been included due to lack of fit in concept definitions, sampling procedures, subject samples, and/or the assessment instruments used.” Hald, Malamuth, and Yuen, “Pornography and Nonexperimental Studies,” 15. Second, there was an important statistical error in their analysis. Ibid. For instance, one study included estimations of “exposure to media treatments of sexual assault,” defined as ‘television, motion picture, dramatic, and newspaper treatments of rape or sexual assault’ Ibid., 15 (quoting Martha R. Burt, “Cultural Myths and Supports for Rape,” Journal of Personality and Social Psychology 38, no. 2 (Feb. 1980): 221 (emphasis added)), but was nonetheless classified as estimating exposure to “pornography” in the meta-study by Allen et al. One cannot draw conclusions about effects of pornography consumption from studies using materials that may simply be a critical documentary, a motion picture, or news report of rape and sexual assault, since these materials are often rather the opposite of materials “designed to sexually arouse the consumer.” Ibid., 15. Hence, the authors noted that theoretical models would predict a negative association between such materials and violence against women. Ibid., such as the propensity to/or frequency of rape, a higher belief in rape-mys, or coercive behavior towards one’s partner.


86 Dolf Zillman, “Effects of Prolonged Consumption of Pornography,” in Pornography: Research Advances and Policy Considerations, ed. Dolf Zillman and Jennings Bryant (Hillsdale, N.J.: Erlbaum, 1989) 127, 131-38, 145-47 (summarizing studies). Non-violent pornography received higher effects than violent pornography, albeit effects were more pronounced for normal men with some degree of psychoticism. Ibid., 148-150 (citing study by James Check); See also Daniel G. Linz, Steven Penrod and Edward Donnerstein, “Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women,” J. of Personality & Social Psych. 55, no. 5 (1988): 766 (finding less sympathy and decreasing empathy towards those victimized by rape after exposure); Dolf Zillman and Jennings Bryant, “Effects of Massive Exposure to Pornography,” in Pornography and Sexual Aggression, ed. Neil M. Malamuth and Edward Donnerstein (Orlando: Academic Press, 1984), 133-35 (moderately and massively exposed subjects to non-violent materials recommended lower punishment for rapists, trivialized sexual abuse, were less supportive of women’s liberation movement, and men’s callousness toward women increased exponentially).

aggression controlled for other known predictors of sexual aggression.\(^8\) Hence, they could establish that pornography consumption causes men, in varying frequencies, to report, “e.g., using a position of power over a woman to get her to engage in unwanted oral sex, holding a woman down and causing her pain in an attempt to get her to engage in unwanted intercourse, etc.,” or “arguing heatedly, yelling and/or insulting, pushing, hitting the other person, and hitting with something hard.”\(^8\)

The findings above are consistent with reports from prostituted persons of how clients often force them to imitate pornography. In the San Francisco study (\(n = 200\)) 193 women had reported rape, of whom twenty-four percent made unsolicited comments that rapists referred directly to pornography and insisted that victims enjoyed the rape and extreme violence.\(^9\) Forty-seven percent in the nine-country study (\(n = 802\)) reported being upset by attempts at making them imitate pornography.\(^9\) A woman attested for a group of survivors during a public hearing in Minneapolis: “Men witness the abuse of women in pornography constantly, and if they can’t engage in that behavior with their wives, girlfriends, or children, they force a whore to do it.”\(^9\) A Swedish 1993 government appointed commissioner and former Supreme Court Justice, Inga-Britt Törnell, similarly noted that according to

the Prostitution Unit in Gothenburg [social outreach workers], it is not unusual that men approach prostitutes with a pornography magazine and points out at the pictures what sexual services they want to have performed. Prostituted women also report, according to the Prostitution Units, that the sex purchasers nowadays, inspired by the pornography, asks for more unusual and more gross sexual services than before.\(^9\)

Furthermore, from the commissioners’ interviews with 60 tricks, where 50 responded they had used pornography, 8 men reported they “sometimes bought or rented a pornography film instead of going to a prostitute” and 6 men reported they “used to get inspiration from

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\(^9\) Malamuth, Addison, and Koss, “Pornography and Sexual Aggression,” 63-64.
pornography magazines for various intercourse positions, which they later wanted to perform with some prostitute.”\textsuperscript{94} Moreover, the commission had found that johns often were consumers, and that “[m]any purchasers in the sex trade [prostitution] are high-consumers of pornography.” Additionally, it noted that it “is often also the same women who participate at the production of pornography as in the sex trade [prostitution].”\textsuperscript{95}

Women and girls who are not prostituted have also repeatedly testified about similar coercion as the former.\textsuperscript{96} An agency for battered women asked clients whether abusers used pornography and conservatively estimated, one half did.\textsuperscript{97} In a rape case, six adolescent boys gang-raped a juvenile while reenacting a specific pornography magazine’s outlay.\textsuperscript{98} Specialized agencies meet an increasing number of survivors of throat-rape, sometimes reporting assailants were referring to the movie \textit{Deep Throat} prior to their assault.\textsuperscript{99} Sexual objectification in media and culture is forced on women from birth, accelerated by the influence of pornography steadily trickling down into mainstream culture.\textsuperscript{100} This would predictably result in increased coercion simultaneously with social desensitization, and an accelerating demand for prostitution as well as for pornography and other forms of objectified sex.

\textbf{Feminist Challenges to Pornography: A Historic Résumé}

Existing laws or policies in modern democracies are ineffective in addressing any of the substantial harms from pornography.\textsuperscript{101} Analyzing this problem, feminist criticism was articulated in the 1970s while organizations were formed, taking visible actions such as picketing

\begin{thebibliography}{99}

\bibitem{94} Ibid., 136.
\bibitem{95} Ibid., 136.
\bibitem{100} \textit{See generally} Am. Psych’l Ass’n, \textit{Task Force Report} (reviewing research); Catharine A. MacKinnon, “X Underrated,” \textit{The Times Higher Education Supplement}, May 20, 2005, 18 et seq. (analyzing the role of pornography and how it increasingly influences mainstream culture)
\bibitem{101} \textit{See citations supra} note 11.
\end{thebibliography}
outside pornography stores, organizing marches and rallies. The pornography movie *Snuff* was released in the US in 1976. *Snuff* presented murder and dismemberment of a woman as erotic entertainment (female homicide was equated with sex) and ignited feminist opposition to pornography in Canada and the U.S. where feminists picketed, demonstrated, and committed civil disobedience against the film. The analysis and courage of radical feminist writer Andrea Dworkin, among others, was particularly influential in this movement. The demonstrations were occasionally violent.

In Canada the critique against pornography was similar as in the U.S. Nevertheless, the legal challenges were different in Canada. The appointment of the federal governmental Committee on Pornography and Prostitution (the so called “Fraser Committee”) in 1983 marked the “culmination” of extensive and diverse public pressure to change, improve, or abolish existing obscenity laws from the mid 1970s. Despite its thorough preparatory works, the Fraser Committee’s report in 1985 was regarded an inconsistent political compromise of little practical use, in spite of its pretensions of representing “a rational, fair and realistic balancing of the interests involved.” It never gave rise to consistent legislative action. Around this time the site for feminist action in Canada turned to the courthouses where judges recently had begun applying some of the critique of harm in interpretations of obscenity laws. Although the mobilization of feminist Canadian lawyers such as Kathleen Mahoney and Linda A. Taylor, with help from their American counterpart Catharine MacKinnon, did not fundamentally alter pornography’s availability on the ground, continuing its harms of inequality unabated.

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106 Mahoney, “Defining Pornography, Bill C-54,” 575-99, for a critical review of the last major Parliamentary effort at this time to change the laws regulating pornography.


108 Mahoney and Taylor were, e.g., counsels for the Women’s Legal Education and Action Fund (LEAF) in the *Butler* case. R. v. Butler, [1992] 1 S.C.R. 452, 460. MacKinnon is recognized as having “helped prepare the legal brief” of LEAF in this case. Jeff Sallot, “Legal Victory Bittersweet GOOD; BAD NEWS: The Supreme Court’s
The aim of the early women’s movement against pornography was to raise consciousness of how pornography destroyed the possibility of equal and mutual sexual relationships and contributed to the exploitation and abuse of women, which partly they succeeded in. Legislatures and judiciaries in America were not unaware at the time of this new discourse, stressing how pornography reinforced women’s unequal status as citizens. Further efforts by the women’s movement in the U.S., pioneered by Andrea Dworkin and Catharine A. MacKinnon in 1983, established a new legal paradigm recognizing pornography as a violation of women’s equal attainment of rights. These events directly challenged the unresponsiveness by democratic states to the harms of pornography, and will therefore be the subject of further analysis below. While the evidence has grown since then, the whole range of studies supporting their analysis – from experiments to survivor testimony – were present at that time.109

**Challenging the Obscenity Approach**

Existing pornography laws in the U.S. are not based on a contextual recognition of inequality but rather on a concept of obscenity.110 The Canadian obscenity law is more harm-based. In Sweden obscenity laws were formally abolished in 1969,111 although certain elements of the concept still exist in other provisions such as the prohibition of “unlawful exhibition of pornographic pictures [if] apt to result in public annoyance.”112 Obscenity law has historically been focusing on morals of appropriate public behavior, countering dissolution of social structures by containing sexuality inside stable (heterosexual) relationships, purporting a concern for keeping sexual restraint on

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111 Proposition [Prop.] 1970:125 Kungl. Maj:ts proposition nr. 125 med förslag till ändring i tryckfrihetsförordningen m.m. [government bill] (Swed.).

112 Brottsbalk [BrB] [Criminal Code] 16:11 (Swed.).
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and commitment by individuals.\textsuperscript{113} Criminal obscenity litigation has alternatively been deployed to repress women’s reproductive and sexual autonomy by regulating birth control information, abortion, and “dissident” sexual practices.\textsuperscript{114} Granted this use, its implicit purpose has been analyzed as male sexual control, restricting only materials the men thought expendable by those in power would desire, such as gay men, or materials promoting viewing men as sexual objects of coercion.\textsuperscript{115}

While obscenity in the U.S. has been excluded from First Amendment protection,\textsuperscript{116} seeming to make possible the restriction of pornography, the pornography industry did not stop growing, even as obscenity laws were used at times to restrict literary or artistic works, and even those criticizing pornography.\textsuperscript{117} Attempting to refine and tighten the law, the decision in \textit{Roth v. the United States} (1957)\textsuperscript{118} did not stop these trends, but rather more exceptions protecting pornography followed.\textsuperscript{119} The later legally largely intact definition of obscenity in \textit{Miller v. California} (1973) also failed to address the harms of pornography to women as a group.\textsuperscript{120} \textit{Miller} defined obscenity as:

\begin{itemize}
  \item \textsuperscript{114} See, e.g., Cole, \textit{Sex Crisis}, 70.
  \item \textsuperscript{116} See, e.g., Roth v. United States, 354 U.S. 476, 481 (1957) (citing “numerous opinions” in support for excluding obscenity from First Amendment protection)
  \item \textsuperscript{118} 354 U.S. 476 (1957)
  \item \textsuperscript{120} See, e.g., Downs, \textit{New Politics of Pornography}, 22.
\end{itemize}
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(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 121

For both the U.S. and Canada 122 the concept of “contemporary community standards” ignores social structures of sexual domination; i.e., law is insensitive to whether a community tolerates subordination of women through, e.g., pornography. 123 Neither does Miller’s notion of “prurient interest” identify what is harmful to the ones victimized by pornography but rather focuses on observers, implying that the harm of pornography can be avoided by victims “averting their eyes”. 124 Closing your eyes will not prevent women from being raped, battered, or tortured by intimate partners being inspired and impelled by pornography though. Nor will it help adolescent girls forced out on streets, coerced into imitating pornography upon thousands of client’s requests, 125 to escape the sexual abuse. Defining harm as an offence to observers silences and denies these women their rights.

Consistent with other scholars, writer Susan Cole suggests that a successful law particularly must target the harm women experience, and not be gender neutral. 126 Legal scholar Catharine A. MacKinnon noted how the gender-neutrality of obscenity covers how pornography’s subordination of women as a group is a concrete politics of sex inequality—not an abstract depraved morality of society as a whole. 127 Not surprisingly, defining what appeals to “prurience” has been shown to be extremely difficult and subjective. 128 And if material “taken as a whole” has other value, MacKinnon asked why this by definition should outweigh sexual abuse and women’s subordination. 129 The general focus on morality misses what is harmful with

122 In Canada, the concept of community standards was introduced in Brodie v. The Queen, [1962] S.C.R. 681, 706 at paras. 76-78. See also Cole, Sex Crisis, 70.
123 For an elaborate account of the criticism in this paragraph, see, e.g., MacKinnon, “Not a Moral Issue,” 152-54.
125 The average woman is estimated to serve five men per day, entailing an eighteen year old has been used by over 9,000 men if entering at thirteen. Vednita Carter and Evelina Giobbe, “Duet: Prostitution, Racism and Feminist Discourse,” Hastings Women’s L.J. 10, (1999): 46.
126 Cole, Sex Crisis, 63-64.
pornography, and will not be a sound foundation for review of relevant facts in a democratic context, that is, on the assumption that women are not to be treated as unequals.

In comparison with American and Canadian obscenity-doctrines, the Swedish provisions do not explicitly refer to obscenity, but its legal definition of pornography shares substantial obscenity elements. Instead of referring to prostitution, as in the original greek/latin meaning of the term,\(^\text{130}\) or “explicit sexual subordination”—as was originally done in the legal definitions proposed by feminist activists in the U.S.\(^\text{131}\)—the criminal code prohibits publicly exhibiting (but not disseminating for private consumption) materials “apt to result in public annoyance [as] unlawful exhibition of pornographic pictures.”\(^\text{132}\) As with obscenity law generally, regulating what is annoying to the observer misses what is harmful to those documented to be victimized by pornography. And as with the Miller definition’s focus on what is offensive to observers, or appealing to their prurient interests, or the materials’ artistic merit, the Swedish legal definition is indeed occupied with everything but whom pornography subordinates (even the producer’s intent is given more weight):

A pornographic picture is defined as a picture that, without containing any scientific or artistic values, in an uncovered and provocative way depicts a sexual theme. Crucial . . . is what purpose a specific presentation has. If the intent with the presentation in a substantial way is to sexually affect the viewer, it might be considered a pornographic product. But if the picture has been produced with other intent, e.g. artistic, it is not considered as pornographic.\(^\text{133}\)

**Questioning the “Violence and Coercion” Approach**

Additionally, Sweden criminalizes as “unlawful depiction of violence” when “[a]ny person . . . depicts sexual violence or coercion with intent to disseminate the picture or pictures or disseminates such depiction.”\(^\text{134}\) Social evidence firmly suggests that pornography does indeed present sexual acts “committed on a person under circumstances which are coercive,” meaning that the production of pornography could qualify as sexual violence according to the

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\(^{130}\) See supra, note 110.

\(^{131}\) See infra, note 174.

\(^{132}\) Brottsbalk [BrB] [Criminal Code] 16:11 (Swed.) (emphasis added).


\(^{134}\) Brottsbalk [BrB] [Criminal Code] 16:10b (Swed.) (emphasis added).
International Criminal Tribunal of Rwanda. But despite these hypothetically far reaching statutes—i.e., virtually all pornography is produced under coercive conditions, hence “depicts” sexual coercion—enforcement is not effective in targeting the supply of coercive or even violent pornography. There are occasional cases brought against distributors, sometimes entailing three months imprisonment or probation with 120 hours of communal service, but the availability of such materials nevertheless exist despite deterrence of criminal penalties.

The judicial procedures applied to most criminal code provision that is part of the so called “Freedom of the Press Act’s Crimes Catalogue” effectively minimizes the scope for successful legal action against such materials. Moreover, unlawful depiction of violence does not entail civil penalties.

135 Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (“The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive.” Id. ¶ 688), aff’d, Case No. ICTR-96-4-T, Judgement, ¶¶ 423-424 (June 1, 2001). In the tribunal’s opinion “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances...” Id. ¶ 688. In this context the court suggests that the presence of a hostile armed militia or group of men by itself can create circumstances during which women may find themselves coerced to submit to sexual demands, such as doing gymnastic exercises nude in public. Id. Similarly, women in pornography are often forced by circumstances around them at the moment, such as being threatened with violence if refusing to perform specific acts, or they are forced to act by circumstances in their lives generally such as poverty and the need for survival. Many women in similar situations outside the pornography studios may also be coerced to perform unwanted or dangerous acts that actually originate from pornography, being subordinately situated in asymmetric relations of power. The Rwanda Tribunal also held that sexual violence “is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” Id. ¶ 688. Some pornography presents women being dehumanized as sexual objects for men’s gratification and does as such not necessarily contain physical contact per se. Applying the tribunal’s definition then, pornography could be a form of sexual violence.

136 See e.g. Rättsfall Från Hovrätterna [RH] [Selective Ct. App. Rep.] 2000:97 (Dec. 5, 2000) (Swed.) (probation conviction with 120 hours communal service, equivalent to 3 or 4 months imprisonment); Svea hovrätt (HovR) [Svea Court of Appeals], June 12, 1995, No. B 1326/94 (Swed.). (three months imprisonment)

137 A government report in 1995 officially concluded that a widespread marked existed in Sweden for this type of pornography. See Statens Offentliga Utredningar [SOU] 1995:15 Sammanfattning: Könshandel. Betänkande av 1993 års prostitutionsutredningen. [summary of government report series] pp. 3-4 (Swed.). With the increased use of internet since then, availability has generally grown in many countries. See e.g. Rimm, “Marketing Pornography,” (containing sample of internet downloading frequency according to pornography categories); Bjørnebekk and Evjen, “Violent Pornography,” (describing internet availability according to pornography categories). For instance only in the young population, a large survey-study among third year high-school students in Sweden in 2003 showed that 97.6% of the boys and 76.3% of the girls of 4343 respondents reported having looked at pornography (although with vast sex-disparities regarding the frequency of use), and of these 11.9 percent of the boys and 3.6 percent of the girls reported seeing/using pornography containing explicit violence or coercion. Svedin and Åkerman, “Ungdom och pornografi,” 92 (citing data retrieved in Statens offentliga utredningar [SOU] 2004:71 Sexuell exploatering av barn i Sverige. [government report series] (Swed.).)

138 For instance, the law against “unlawful depiction of violence” has a parallel regulation in the Constitution signalling its special protection under the Freedom of the Press Act, prohibiting “unlawful portrayal of violence, whereby a person portrays sexual violence or coercion in pictorial form with intent to disseminate the image, unless the act is justifiable having regard to the circumstances.” Tryckfrihetsförordningen [TF] [Constitution] ch. 7, art. 4:13 (Swed.) See also Yttrandefrihetsgrundlagen [YGL] [Constitution] 5:1 (Swed.), which cross-refers, holding the former valid to other forms of media as well. For the procedural regulations, see particularly Tryckfrihetsförordningen, ch. 9, 12. (Swed.)
damages for women as a group, as has not yet the hate-speech provisions in the Freedom of the Press Act nor the provisions criminalizing possession or dissemination of child pornography.\(^{139}\) The legal rationale in effect concerns the public morality and “offensive speech” rather than harm or reputation to those victimized. In the words of a critical scholar, “[r]eputational harm to those who are allowed to be individuals—mostly white men—is legal harm. Those who are defined by, and most often falsely maligned through, their memberships in groups—namely almost everyone else—have no legal claim.”\(^{140}\)

Considering the desensitization to coercion and violence against women that pornography evidently produce in its consumers,\(^{141}\) only allowing the public to report violations while the sole consent of the Chancellor of Justice is needed to charge under this law is not promising. Additionally restraining these proceedings, a majority of six among nine members of a special “Freedom of the Press-Jury” is needed for a successful conviction when a charge has finally been brought by the Chancellor. Finally the Chancellor is not allowed to appeal an acquittal whereas defendants, on the other hand, may appeal. In such cases, an Appeals’ Court may only acquit or lower the penalty. Prior restraint is prohibited except at public broadcasting or cinemas where, as has also been the case in Canada, a quasi judicial film-review board can censor or allow exceptions for certain materials (exceptions will also hold for non-public copies).\(^{142}\) A sample of Chancellor dismissals of reported violations is telling for the high threshold.

The Chancellor decided to dismiss a case against a magazine presenting “fisting” where two men had sex with one woman while one is inserting a fist into the woman’s vagina.\(^{143}\) In another case he offered a waiver of prosecution for a cable-broadcasted four minute rape-scene seven minutes into the movie previously censored for cinemas in “Les Grandes Jouisseuses” (Wild Sex-Plays of the Paris Girls), holding his decision valid in so far as “no compelling public or private interest would seem to be set aside, and assuming the crime would not entail more penalty than a fine.”\(^{144}\) He has also offered waivers of prosecution for nine films that previously, in an opinion delivered in a brief written by the National Board of Film Censors, had been found criminally

\(^{139}\) See Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1978-01-02 p. 3 (Swed.) (dismissing civil claims for groups under provision criminalizing agitation against a population group).

\(^{140}\) Catharine A. MacKinnon, Only Words (Cambridge MA: Harvard University Press), 81-82.

\(^{141}\) See empirical evidence presented supra, notes 81-100.

\(^{142}\) Brottsbalk [BrB] [Criminal Code] 16:10b:3-4 (Swed.).

\(^{143}\) JK-beslut B 1 [1990] Ifrågasatt tryckfrihetsbrott; olaga våldsskildring [Chancellor decisions] (March 7).

liable. The film titles were “Lolita Geile Züchtigung, Non Stop Bondage SM, School Dayz 86, Anal-Extreme/Anal Ecstasy, Bizarre Bond Special, Women’s Penitentiary, Bondage Interludes vol 1., Bizarre 2., College Classics part 2.”\textsuperscript{145} Finally, in a case where materials were described in detail, the decision entailed that he dismissed charges against an issue of the Swedish Hustler Magazine containing a series of pornography sequences with pictures presenting one woman’s head being cut off, another implying a man using an ax to cut off another woman’s head, while additional pictures showed the man performing surgery to replace their heads/bodies. Despite admitting this sequence was “particularly pornographic in its nature” the Chancellor nonetheless held that “the violence the women are subjected to is not part of a sexual act, and the pictures where the violence is presented or implied do not contain sexual allusions.”\textsuperscript{146} Since Hustler’s presentation of violence is an integral part of the sexual context, the Chancellor’s suggestion that the violence do not contain sexual allusions is highly questionable. If anything, such presentations inspire sexual coercion, objectification, and treating women like sexual commodities or things.

The analysis above suggests that the judiciary is more or less unable to perceive sexual coercion and violence, in part because pornography sexualizes violence. ”The term violence means negative, exceptional, extreme, not everyday, not positive. The pleasure of sexual arousal is a powerful positive reinforce. . . . Once violence is sexualized, it is less likely to be seen as violence.”\textsuperscript{147} The gender power-imbalance seems reinforced in the powers of the state to regulate pornography, and in Sweden particularly in the office of the Chancellor.

**Adjudicating Freedom of Expression, Equality & Harm**

One of the main obstacles to challenges to pornography as a violation of human rights and equality has been conflicting interpretations of democratic rights. Generally, liberal notions of equality under democracies values rights to individual self-development and communication, which are to be protected by the state. Expressive rights are seen as enabling autonomous and informed value judgments, e.g., by making different views available, and has appeared as a way

\textsuperscript{145} JK-beslut B 4 [1994] Justitiekanslern har i visst fall beslutat att inte inleda förundersökning beträffande yttrandefrihetsbrottet olaga våldsskildring [Chancellor decisions] (May 9).
\textsuperscript{146} JK-beslut B 12 [1991] Ifrågasatt tryckfrihetsbrott, olaga våldsskildring i form av serie av stillbilder [Chancellor decisions] (Nov. 21).
to prevent tyranny by making dissident political opposition heard.\textsuperscript{148} This view implicitly presumes citizens to be \textit{equal} participants and consumers in what Justice Holmes called the “market-place” of ideas,\textsuperscript{149} and it is less responsive to relationships between \textit{de facto} unequal participants (e.g. prostituted women \textit{vs}. well-to-do pornography-consumers). Similarly, the analogy between pornographers and political dissidents—the latter generally conceived as raising legitimate political critique—is less consistent with how pornography is documented to condition sexual responses, including violence, coercion and discrimination, and how it is produced; i.e., by exploiting existing inequalities in order to prostitute women en masse. Rather than being the guarantor of individual self-development (for whom?) and a vibrant market-place of ideas among equal citizens, pornography is a practice silencing women’s genuine public voices by effectively contributing to, and benefitting from their social, sexual, and political subordination.\textsuperscript{150}

The central argument of liberal theories of expression is eloquently spelled out by John Stuart Mill in \textit{On Liberty}, where free expression was argued to be important for the development of societies, hence, restrictions only legitimate insofar as one’s rights would harm another’s: “The object of this essay is to assert one very simple principle . . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”\textsuperscript{151} However, Mill’s writings can also be seen from the perspective of considering his assumptions of friends’ and family’s disapproval of his intellectual affair with a wife of an older man and their subsequent marriage after her husband’s death, which may have inspired Mill to express the impassionate “animus against society” in his critique of social pressure and conformity in \textit{On Liberty}.\textsuperscript{152} It is also suggested suggested the reductive “attempt to subsume a large and complicated set of problems under ‘one very simple principle’” is what made \textit{On Liberty} appealing.\textsuperscript{153} When confronting the empirical complications arising from his harm principle, Mill chose a hypothetical fear of excessive regulations—the “slippery slope
hazard”—over real harm. As an example he conceded that unregulated access to alcohol entails tangible costs, damages, and harm to society, but opposed restricting it on a harm-rationale, arguing it could legitimize a “monstrous a principle” possible to extend to freedom of expression and other rights.

Attempting to remedy Mill’s own disqualification of the principle of harm in social settings where regulations seem justified, a distinction between so called direct and indirect harm is sometimes entertained. The law of speech in the U.S., accordingly, holds there is a distinction between “mere advocacy and incitement to imminent lawless action,” protecting televised Klan-speech advocating lynching and other acts against specific groups while discussing the organization of a “four hundred thousand strong” member-march accompanied by statements such as “this is what we are going to do to the niggers,” “bury the niggers,” “send the Jews back to Israel,” and “we intend to do our part.” However, Brandenburg’s distinction excludes the form of harm to groups that practices such as pornography creates, changing attitudes and behaviors in large populations with the consequence that members of already disadvantaged groups become exceedingly discriminated against, and indeed subjected to direct violence. The evidence of pornography’s consumption and production suggests that the line between direct and indirect harm is a fiction, at least in this instance, perhaps others. Genocides, e.g., are usually not possible without a prolonged change of attitudes, beliefs, and behaviors among key populations – often a result of, inter alia, simple as well as sophisticated propaganda, politics, and, at times, pornography.

In U.S. law, infringements of the First Amendment often need a “clear and present danger” to be found constitutional, although courts’ perceptions of such dangers may vary significantly.

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154 For a critical review of this concept see, e.g., Frederick Schauer, “Slippery Slopes,” Harv. L. Rev. 99 (1985): 361-383; For a critique of it in the context of pornography and freedom of expression-law, see MacKinnon, Only Words, 71-110, esp. 75-78.

155 Mill, On Liberty, 158


157 A similar but not identical argument could be made regarding racist hate propaganda, but with important modifications. For example, a necessary precondition for making pornography is coercion in one form or another, which is not necessarily the case with racist hate-propaganda. See, e.g., Factum of LEAF, ¶ 30. Since racism isn’t explicitly sexual, an accurate analysis of its dynamic must also be made on its own terms.


159 See, e.g., MacKinnon, “Turning Rape into Pornography,”; “Rape, Genocide, and Women’s Human Rights,” 5-16.

160 Compare Schenck v. United States, 249 U.S. 47, 52 (1919) (holding World War I anti-draft leaflets clear and present danger), and Whitney v. California, 274 U.S. 357, 374-80 (1927) (Brandeis joined by Holmes JJ., concurring) (upholding syndicalism conviction of a Communist Labor Party of California-member on clear and
However, exceptions exist for speech that do not pose such a clear danger; e.g., so-called low value speech such as obscenity, libel, and “fighting” words, if after strict scrutiny review, there exist a compelling state interest to protect society against it. For instance, cross-burning at Ku Klux Klan rallies or on the lawn of black families by white neighbors have been successfully prohibited as long as laws are framed in a “content-neutral” fashion, using race-neutral terms such as “intimidating,” while statutes prohibiting cross burning because it “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” are seen as “actual viewpoint discrimination” against “disfavored topics.” Hence, dominant interpretations of content-neutrality doctrine protect the latter as analogous to political critique of the government, the economy, or foreign policy.

However, cross-burning and pornography are connected to a specific context of social dominance, and not just intimidating or offending per se. Laws presumed facially “neutral” have less surface plausibility in reaching such harms, and are easily questioned (outside its racial context, is there anything intimidating about lighting a piece of wood?). Feminists have persuasively argued that the analogy between dissident political speech and these acts is misplaced, and that pornography is a social act based on and inspiring sexual coercion.

**The Civil Rights Approach**

During the 1980s, the legal foundation for regulating and protecting pornography was challenged by feminist critiques in both the U.S. and Canada, in democratic challenges to a practice of inequality. In the U.S., a major effort was the antipornography ordinances originally passed by the Minneapolis city council in 1983 and 1984, vetoed by its Mayor two times but eventually
adopted in Indianapolis in 1984 in slightly different form but invalidated in the 7th Circuit Court of Appeals. In Cambridge, Massachusetts, where political scientist Amy Elman (then a graduate student), Barbara Findlen, and others in 1985 almost succeeded by placing the ordinance on referendum, they first had to sue the city to get access to the ballots. A similar referendum tactic succeeded in 1988 with 62 percent support in Bellingham, Washington, although after being challenged by the ACLU the ordinance, which was never used, got invalidated in a federal district court, citing the Seventh Circuit opinion. In other jurisdictions, such as Los Angeles (1985) and the state of Massachusetts (1991), the ordinance did not pass.

The Minneapolis ordinance was directly grounded on the experiences of those victimized and hurt by pornography, in contrast with the legal obsession with dominant heterosexual morality and appropriate public behavior. Residents in Central and Powderhorn Park—poor, working class, neighborhoods largely of people of color in the city of Minneapolis—were the initiators, disproportionately exposed to “adult establishments” such as pornography-theatres and stores. Patrons were drawn from the greater city-area, and were sexually harassing women and children on a daily basis, including raping or soliciting pedestrians for prostitution, making neighborhood unsafe, dangerous, and declining. Neighborhood activists noted how elites vigorously supported civil liberties, but fought so pornography businesses were not present in their own areas.

The ordinances were also supported by city politicians engaged in their issue, legal scholar Catharine MacKinnon and writer Andrea Dworkin (who together drafted it) and a group of antipornography activists, some of who had attended a University of Minnesota course on pornography held by the two during the fall of 1983. Additionally, during the legislative process calls went out to the Minneapolis network of community organizations, including women’s shelters, rape crisis centers, other neighborhood groups, social workers and other authorities, and individual survivors of pornography and sexual abuse who came to testify in support of the ordinances during public hearings. Opposition was also heard.

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166 Brownmiller, *In Our Time*, 323-25. The ordinance lost 42% to 58%.
168 Ibid; See also Village Books et al. v. City of Bellingham, C88-1470D (W.D. Wash, 1989) (unreported).
171 Brest & Vandenberg, “Politics, Feminism, and the Constitution,” 620. The complete Minneapolis hearings are reprinted along with ordinance-hearings from other jurisdictions. See *Harm’s Way*.
This democratic process of creating the ordinances converges with the feminist practice and theory of *consciousness raising*.\(^{172}\) It took the lived realities of women seriously and the imperative of ending sex inequality as a prime mover for constructing knowledge. Documenting empirical conditions previously silenced in academia, showing that what had been passing as “objective” reality for centuries was rather a “point of view” from those with power, built upon the continuing trivialization of/or invisibility of those with less social power. In contrast with liberal theories of freedom of speech, built on the political practices among different groups of historically privileged and relatively equal men, the ordinance was concretely connected to women’s experiences, the Minneapolis city council finding pornography to be “central in creating and maintaining the civil inequality of the sexes [and] a systematic practice of exploitation and subordination based on sex” differentially harming women and “restricting women from full exercise of citizenship.”\(^{173}\)

Pornography was defined as

the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission; or (vi) women’s body parts - including but not limited to vaginas, breasts, and buttocks - are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.\(^{174}\)


\(^{173}\) Proposed Ordinance Sec 1., to add Minneapolis City Code, Minn., Sec. 139.10(a)(1). 1st Reading, Nov. 23, 1983. *reprinted in Harm’s Way*, 427 [hereinafter: Minneapolis Ordinance].

\(^{174}\) Minneapolis Ordinance, Sec. 139.10(a)(1). *reprinted in Harm’s Way*, 428-29. Men, children, or transsexuals would be included in place of women in the definition.
This definition, also in contrast to the morality of obscenity laws, was built on the experiences of those victimized by pornography had of it, revealed during hearings\textsuperscript{175} or in consultation with the drafters. The definition of actionable materials centers on sexual subordination, having been identified and documented as problematic rather than what is arousing to the observer.\textsuperscript{176}

\textit{Toward a Democratic Theory of Civil Rights}

Political scientist Iris Marion Young writes that for a theory of justice to be useful, it must consider some substantial social issues and not be too general, abstract, or detached.\textsuperscript{177} The antipornography ordinance converges with this theory since, in a democratic sense, in the legislative process legislators explicitly took the standpoint of subordinated groups, identifying their troubles rather than deploying abstract neutrality. For analytical purposes, Young distinguishes between the concepts of deliberative democracy and political activism. According to this account, a typical political activist “eschews” existent forms of deliberation as biased in favor of existing power relationships, rather relying on actions outside established decision-making procedures.\textsuperscript{178} However, during the trajectory of the ordinances deliberations were transformed when legislators affirmed a democratic ideal of substantial equality; i.e., previously silenced citizen groups were listened to, believed, and defended. Legislatures rejected formal equality under gender-neutral laws of obscenity and speech, instead identifying social practices that had to be changed to make citizenship more equal, so democracy would deliver its purported values. Hence, existing forms of deliberation were fused with a conscious activist ideal, creating new proactive forms and ideals of democracy.

Consistent with Young, democratic theorist Ian Shapiro—discussing Foucault, Weber and Plato—writes that while hierarchies are sometimes a legitimate part of democracies, and power may indeed be ubiquitous, one may still reject that “domination” must be (as, e.g., when a teacher sexually harasses a student rather than “requiring” her to do homework).\textsuperscript{179} Studying inequalities in democracies caused by social domination—e.g., economic distribution, racial and

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\textsuperscript{175} For accounts of hearings, see generally Harm’s Way; See also Att’y General’s Final Report, 767-900.


\textsuperscript{178} Iris Marion Young, “Activist Challenges to Deliberative Democracy,” \textit{Political Theory} 29, no. 5 (Oct. 2001): 673-84.

ethnic hatred, and sex equality issues in rape- and abortion laws—Shapiro analyzes how domination can be countered by institutional mechanisms. He finds consensus by deliberative politics as insufficient on its own, although if previously excluded groups are represented it may reduce some.\textsuperscript{180} Although he does not discuss pornography per se, it is an excellent example where domination of women and desensitization of consumers work against a rational deliberative politics, similarly as community standards tend to support status quo. These two principles for making judgments or decisions do not counter systematic social domination. In the case of deliberation, invoking a perceived but biased “common good” privileging established interests will often be done by groups with an upper hand.\textsuperscript{181} Hence, Young suggests a veto-power for women in issues immediately affecting them as a group.\textsuperscript{182} This would counter unequal standards set by communities or by demands for consensus. Similarly, Shapiro suggests means for groups to “appeal, delay, and in extreme cases even veto—but only those who are vulnerable to the powers of others because they have basic interests at stake in a given setting.”\textsuperscript{183}

Recognizing the partiality behind the façade of gender-neutrality and that those “vulnerable to powers of others” have less access in implementing “victimless” obscenity laws in a male dominated society, the ordinance was constructed as a \textit{civil rights law}, giving legal initiative particularly to those victimized.\textsuperscript{184} The drafters’ intentions were that this be an empowering right, making pornographers and perpetrators directly accountable to the survivors rather than to the state, redistributing power more democratically. With compensation in reach tangible incentives exist for light to be shed on pornography’s harm in courts as well as real opportunities for women in the industry to escape it. Bypassing criminal sanctions also entails a lower burden of proof, reducing obstacles to legal action. Until these rights exist, there are no reasons why the survivors’ silence will not continue.

Where the ordinances were proposed, (1) \textit{coercion} into pornographic performance, (2) \textit{forcing} pornography on someone, (3) \textit{assault caused} by specific pornography, and (4) \textit{trafficking} in pornography, were all defined as sex discrimination (except for minor differences), grounding

\textsuperscript{180} Shapiro, \textit{Democratic Theory}, 35-49.
\textsuperscript{181} Cf. Iris Marion Young, \textit{Inclusion and Democracy} (Oxford: Oxford University Press, 2000), 40-44.
\textsuperscript{182} Young, \textit{Politics of Difference}, 184.
\textsuperscript{183} Shapiro, \textit{Democratic Theory}, 5.
\textsuperscript{184} For the ideas referred to in this paragraph, see, e.g., Andrea Dworkin and Catharine A. MacKinnon, \textit{Pornography and Civil Rights: A New day for Women’s Equality} (Minneapolis: Organizing Against Pornography, 1988) available at http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/TOC.htm
civil claims for damages and injunctive relief.\(^{185}\) Proofs corresponding with legislative findings and the pornography definition would support plaintiffs. Since the *trafficking* provision empowered any woman or similarly subordinated person to sue as being sexually discriminated by circulation of specific materials, the pornographers would have to pay for the harm their materials engender.

The ones victimized have never adequately been represented in the process of making obscenity laws, which the ordinance would have changed. If not a veto power as suggested by Shapiro and Young, the ordinance would create an opportunity for those subordinated by pornography to stop circulation of materials documented to be harmful. Such a second-guessing judicial power may be what Shapiro implies is needed in democracies. Although not a better remedy against domination *per se* than legislative deliberation, it could counter threats against groups not adequately represented in the democratic processes as exemplified, inter alia, by the decisions on race by the Earl Warren Court during the civil rights era.\(^{186}\) Similarly, in Canada civil rights are seen as making democracy more inclusionary, realizing ideals of equal citizenship. Political scientist Robert Vipond argues the 1982 *Charter of Rights and Freedoms* was influenced by the American 1968-71 civil rights movement’s underlying ideals “of equality and participation.”\(^{187}\) Addressing contemporary critics of “judicial activism” he argues this ideal of civil rights is one of the legislative intentions underlying the *Charter*.

The advantage of civil rights against pornography’s harms, as a complement to legislative problems with consensus and subordination of the interests of those victimized, becomes more evident in light of democratic theories on descriptive (group) representation. Political scientist Jane Mansbridge has suggested that political representation of women would promote equality particularly in contexts of conflicting interests and “mistrust” between the genders, and where women’s interest historically have been unarticulated.\(^{188}\) Pornography poses such a conflict of interests and mistrust between the sexes, and the politics of obscenity that regulates it has indeed ignored women’s voices and interest throughout history. However, as Mansbridge recognizes,

\(^{185}\) See, e.g., Indianapolis, Ind. Code Ch. 16 § 16-3(g) (4-7) (1984), reprinted in *Harm’s Way*, 444.

\(^{186}\) Cf., with some ambivalence, Shapiro, *Democratic Theory*, 20, 64-65.


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the *relevant* descriptive representation may be contingent with issue and context.\(^{189}\) Considering the issue of pornography, descriptive representation of an equal amount of women to men may create an illusion that deliberation is equal and fair when, in fact, it is difficult to know how these particular women represent those *victimized* by pornography.

As is evident from the research on pornography, prostituted women are most likely subjected to the worst negative effects of consumption, along with battered women. In addition, certain intersectional factors such as race and class may increase the exposure for some women more than others to the harm of pornography considering, inter alia, how race is often associated with particular forms of subjugating sexual exploitation and abuse.\(^{190}\) Research also indicates that many of those victimized by sexual harassment tend to share a common history of sexual abuse during childhood. The harassers seem to identify some common trait that signals vulnerability. Since pornography inspires sexist behaviour generally, a relationship to sexual harassment can be assumed, hence a common interest exist among those victimized by sexual harassment as well as pornography.

On the other hand women in legislatures—i.e., politically active women—may share different commonalities than the former groups with respect to their exposure of the harms of pornography. Moreover, research on political mobilization in male dominated contexts, particularly in party-politics and political organizations, suggests the existence of certain parameters, or “group dynamics,” that tend to exclude women critical of male dominance over “tokens,” or those less critical.\(^{191}\) Hence, any effective democratic strategy to empower those victimized by pornography must account for the fact that their interest might not be articulated adequately by a general descriptive representation of politically active women in legislatures. In certain contexts it could even be counterproductive, offering pro-pornographers false legitimacy by symbolic gender representation. In contrast, by using law, and especially human- and civil

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\(^{189}\) Mansbridge, “Should Blacks/Women Represent,” 638.


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rights-law, a process where actual findings of social subordination may ground the parameters for legislative deliberation is affirmed. Arguments developed and enshrined in legal doctrine through conscious litigation in relevant cases by gender-sensitive antipornography organizations, as well as legislative lobbying, may provide a factually accurate basis for promoting equality less elusive than deliberation among a descriptively gender-representative group of legislators. Hence, civil rights attentive to the concerns of those victimized by pornography would further their voices and empower their interests in democratic societies.

Several theorists generally recognize civil rights as a democratic practice to counter social domination, although this inquiry also suggests that such rights need to identify what is particularly harmful in pornography. There already exist constitutional equality guarantees and civil codes that could hypothetically be used. So why have they not been? Shapiro may have sensed this problem while discussing the distinction between procedural and substantive theories of democracy, envisioning a role for a judicial remedy against social domination to complement the blindness of elective and legislative elements of democracy.\(^{192}\) However, he avoids the fundamental issue at stake when circumscribing such remedy to a “middle ground” preventing “courts or other second-guessing agencies”\(^{193}\) to impose solutions on, e.g., deliberative legislative majorities. Young’s approach, however, suggests there is no way around identifying the actual substance of how subordination works in social reality if democracies shall deliver their equality commitments.\(^{194}\) This means, contrary to Shapiro’s teaching, that a decision identifying pornography as a violation of constitutional equality must be done. Whether made in legislatures or judiciaries is less relevant.

Several instances of international law suggest that democratic ideals of equality of citizenship will not be realized without concrete involvement with the reality of all citizens, identifying means and expressions of political subordination even if, contrary to Shapiro’s “middle-ground” theory, this would entail imposing commitments on national legislatures. Such a substantive approach to equality has already been recognized in international human rights law in the case of

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\(^{192}\) See Shapiro, *Democratic Theory*, 64-77.

\(^{193}\) Ibid., 75.

men’s violence against women, gender-based violence now being regarded a concrete violation of women’s human rights to equality in many democracies.195

The paradigmatic shift in international law, moving beyond false neutrality and abstraction of Milltonian thinking, can be seen when comparing it to the 1985 Fraser Report which did consider but not recommend the antipornography ordinances for Canada, instead encouraging the use of gender equality clauses under existing human and civil rights codes.196 Although the committee referred to the “great interest” surrounding the ordinances in Canada at the time, particularly so its trafficking provision, it reflexively commented in a slightly paternalistic tone that initiation of civil class-actions had traditionally been conferred to the Attorney General.197 While conceding that public interest in the ordinances derived from legitimate dissatisfaction with the administration of criminal laws under various censor boards and courts, the committee nevertheless preferred “to address directly the deficiencies in the criminal law rather than create a new form of civil action . . . .”198

However, the Fraser Committee did not address that in a context of male dominance, there exists an inherent male bias—in criminal as well as civil justice systems—making it imperative

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197 Ibid., 309.
198 Ibid.
that pornography is *explicitly defined* as a violation of women’s human rights if law is to work and retain surface plausibility. This, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) did through its monitoring body in 1992 when identifying “pornography” as a practice that “contributes to gender-based violence” (gender-based violence already a violation of women’s human rights), and states parties were obliged to “take all legal and other measures . . . including . . . civil remedies and compensatory provisions”199 to stop it. Where the Fraser Report halted, the CEDAW-Committee expressed an explicit support for a civil rights-based antipornography remedy.

Moreover, under the International Covenant of Civil and Political Rights (ICCPR), the U.N. Human Rights Commission in 2000 similarly held that since “pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.”200 Similarly, already in the 1995 Beijing Convention States parties agreed that “[i]mages in the media of violence against women… including pornography, are factors contributing to the continued prevalence of such violence[.].”201 The more recent 2005 African Union’s Protocol on women’s human rights in Africa also urged states to “take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.”202 These instances of international law suggest that democratic ideals of equality of citizenship will not be realized without concretely engaging with the reality of all citizens, identifying means and expressions of political subordination even if, contrary to Shapiro’s middle-ground theories, this would entail “imposing” commitments on national legislatures.

**Engaged and Detached Governments**

In contrast to the persuasive imperative of international human rights law, legislative challenges to pornography and sex inequality in the 1980s suggest, consistent with Shapiro, Young, and

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201 *Beijing Declaration*, supra note 195, ¶ 118.
202 African Protocol, supra note 195, art. 13(m). While exploitation and abuse have been documented preconditions for pornographers to be supplied by human capital (see above) these terms, while illuminating, are rather superfluous in a legal setting.
other similar democratic theorists, that existing forms of democratic deliberations are insufficient and need firmer institutional mechanisms representing the interest of those victimized by pornography. For instance, the Canadian Fraser Committee on Pornography and Prostitution deliberately consulted a wide variety of views from the Canadian society. The diverse public opinions repeatedly resurfaced during the committees public hearings and closed interview sessions held across 22 centers and towns where hundreds of organizations and individuals (e.g., some prostituted women) presented their views in writing, or orally.\(^{203}\) However, it is one thing to stay detached and allow a variety of views during deliberations, and another to engage with them seriously.

**The Articulation of the Interests of Prostituted Persons**

The Fraser Committee collected many testimonies and documentations suggesting women and children were harmed in production of pornography and subjected to harm caused by its consumption. Recent sociological research were presented to the committee suggesting a majority of prostituted persons had been subjected to incest and sexual abuse already as children, entered prostitution during early or middle adolescence, and had generally been runaways.\(^{204}\) Many groups and individuals stressed the correlation between women’s subordination and low status in society with the phenomenon of prostitution, the fact that women were poorer than men, and some cited pornography as a “cause and contributor” to prostitution since it “reinforces the view that women are sexual objects for men’s pleasure [or] the prostitute is the most available person to engage in the sexual acts portrayed in pornography. One promises, the other delivers.”\(^{205}\) These very same views were expressed in the Minneapolis and Indianapolis hearings at the time, and have also been extensively documented in research.\(^{206}\)

Regarding preconditions for entry into prostitution the committee observed that while women’s groups offered many theories for the causes of prostitution, other interest groups such as community associations, the police, and civic leaders, who did not want prostituted women on

\(^{203}\) Canada, *Pornography and Prostitution*, 10, 63. Those in favor of regulations were women’s organizations, churches and church groups, community organizations, educational associations, representatives from the police, different sorts of elected government representatives etc., while those opposing them were civil liberties groups, some professional associations (e.g., librarians), publishing and media industry and related associations, as well as gay rights organizations in major cities. Ibid., 63-64.

\(^{204}\) Ibid., 351-54.

\(^{205}\) Ibid., 351-54, quote at 354.

\(^{206}\) See, e.g., quote from testimony by T.S., *supra* note 92; For research, see above.
the streets in their cities, “said very little when it came to a discussion of the root causes of . . . prostitution.”207 Interestingly, while the committee took notice of these disinterested groups and contrasted them with the more engaged ones, it ignored the latter’s apparent conclusions when remarking that an adult prostituted person cannot be seen as victimized, but . . .

. . . must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as victims, whether the economy or patriarchal social structure, or of abuse directed at them during early years. We have sympathy with this point of view . . . . However, we do not accept it as a principle upon which to structure criminal law. In contrast, it is our view that children should be regarded as vulnerable . . . . thus be seen as victims[.]208

It is inconclusive to suggest that after having been subjected to sexual abuse and incest, then forced to run away from home during childhood or adolescence—with all the attendant problems of staying alive in prostitution, on the street, and still managing school and obtain professional skills—these women should be regarded as responsible for their situation and not victimized. Distinguishing between child- and adulthood makes little sense, but as an illusion it offered Canadian legislators an opportunity to reject prostituted women’s damages and civil rights as injured persons. This, the Minneapolis-style ordinances proposed to the committee by several individuals and organizations in Canada, would have granted them.

In contrast, the U.S. federal Commission on Pornography appointed in 1985 by then Attorney General William French Smith implicitly understood that a democratic imperative of equality among citizens must entail that any lawmakers investigate the conditions of those used to produce pornography. A hostile press later dubbed it the “Meese Commission”, trying to de-legitimize it by associating it with an “almost universally despised man”209 who announced its formation but was unresponsive to its further needs, ignored its recommendations, and ridiculed it by publicly receiving it under a semi-nude statue of the “Spirit of Justice.”210 Furthermore, the “Media Coalition”—an interest group consisting primarily of publishers and distributors, some involved with pornography—a month prior to the release of the report paid Gray & Company,

207 Ibid., 351.
208 Ibid., 25.
then Washington’s largest PR-firm, up to $900,000 for (in the words of Gray) “a ‘strategy designed to further discredit the Commission.’” Grays’s budget was more than twice that of the Commission’s $400,000, and their instructions were to persuade the Attorney General himself, the White House, and leaders of both political parties that the final report was (again, in Gray’s words) “so flawed, so controversial, so contested and so biased, that they should shy away from publicly endorsing the document.” Nonetheless, in the report the former Nixon-initiated 1970 U.S. federal report on the subject was openly denounced, and the 1979 Williams Report in the U.K. and the 1985 Fraser Report were similarly criticized for completely having failed to consider the interests of those abused in the industry.

The Commission noted that while the Fraser Committee had “declared” that producers of violent pornography have “‘little or no respect for the rights and physical welfare of [the performers],’” they had not discussed any evidence of these practices or how to distinguish between simulation and actual harm, and “did not devote even a paragraph to consideration of harms to performers other than those resulting from outright violence on the set.” The U.S. Attorney General’s Commission, on the other hand, devoted a whole chapter on “performers” where numerous interviews and readings on the subject from such varying quarters as the industry’s own publications, producers’, performers’, law enforcement personnel’ testimonies, along with published interviews in pornography- or popular magazines were presented and analyzed. Regarding the personal backgrounds in the population of pornography performers, the commission noted their similarity with the backgrounds of those studied by other researchers in other forms of prostitution. It was also noted, e.g., how one performer who two years earlier had “declared” before a Senate subcommittee the “myth” of “unhappy childhoods,” then

\[212\] Ibid., xlvi (quoting Johnsson). Some of the invented claims promulgated and successfully becoming “conventional wisdom” in most media coverage of the report were that “[t]his campaign to infringe on all our rights is the work of ‘religious extremists,’” and that “[i]f the effort to stop pornography succeeds, its leaders will be encouraged to force their ‘narrow and social agenda on the majority,’’ however inaccurate they were. Ibid., xlviii (quoting Johnsson).
\[213\] Att’y General Comm., Final Report, 842-46.
\[214\] Ibid., 845 (citing Canada, Pornography and Prostitution, 265).
\[216\] Ibid., 859/n.983.
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tested to the commission of early sexual abuse along with “many other models.”\textsuperscript{218} The report concluded that even while evidence was limited, it was “generally true of commercial pornography’s use of performers:

(1) that they are normally young, previously abused, and financially strapped; (2) that on the job they find exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement; and (3) that in their personal lives they will often suffer substantial injuries to relationships, reputation, and self-image.\textsuperscript{219}

Particularly mentioned was that although hypothetically there could be exceptions to all their findings which “an extremely thorough investigation” might reveal, tellingly “the industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us.”\textsuperscript{220}

Comparing the U.S. and Canadian commissions it is notable that even though their subjects of inquiry were the same, and they seem to have been presented similar evidence and information, they drew quite different conclusions. The U.S. commission early on took an affirmative stance in favor of what they identified as a subordinated group based on the existing evidence, which apparently pushed their efforts into interrogating more closely the relevant conditions under which pornography performers lived. Their Canadian counterpart in contrast, receiving similar testimonies and taking part of the same research findings, exhibited a stance formally neutral to the various public opinions. However, if evidence shows there is a power-imbalance in society, acting neutrally toward the different interest involved will rather support status quo, hence support the subordination as such. Further analysis will make this point clearer.

\textbf{Articulation of the Interests of Those Victimized by Consumption}

Contrary to the Canadian Fraser Report which heard testimonies of victimization in the production of pornography but did not pursue an inquiry of it nor propose a civil remedy for those victimized, the U.S. Attorney General’s Commission called into question the 7\textsuperscript{th} Circuit Court of Appeal’s decision to invalidate the Indianapolis Antipornography Civil Rights-

\begin{footnotesize}
\begin{enumerate}
\item Ibid., 857.
\item Ibid., 888.
\item Ibid., 889.
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Ordinance, rather following the lead from those having been harmed by pornography. The commission pointed to that the U.S. Supreme Court in decisions such as Brown v. Board of Education\textsuperscript{221} regarding racial segregation of schools, and Muller v. Oregon\textsuperscript{222} regarding excessive working hours, had relied on precisely the kind of social evidence and findings that the Indianapolis legislature had accepted to construe their ordinance (the so-called “Brandeis Brief” method of legal argument).\textsuperscript{223} But where the Supreme Court had relied on such findings to change the established judicial doctrines of the time, Judge Easterbrook in the 7\textsuperscript{th} Circuit Court of Appeals, who even accepted the legislative findings in his opinion, erroneously described the ordinance as imposing restrictions based on a “preferred viewpoint”\textsuperscript{224} when, on its face, it explicitly regulates pornography as “sexually explicit subordination.” Pornography as sexual explicit subordination is simply not a viewpoint, but a social practice of producing and sexually consuming inequality, which Judge Easterbrook first recognized when approvingly citing the legislative premises (see below). Nonetheless, by later construing pornography as just one “viewpoint” among others such as socialism, conservatism, or pacifism, the court invalidated the ordinance since so described, it would indeed move beyond established obscenity doctrines of the First Amendment:

\begin{quote}
[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.\[note\] In the language of the legislature, ‘pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. . . .’ Indianapolis Code § 16-1(a)(2). Yet this simply demonstrates the power of pornography as speech. . . . If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. . . . Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.\textsuperscript{225}
\end{quote}

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\item[221] 347 U.S. 483 (1954).
\item[222] 208 U.S. 412 (1908).
\item[223] See generally, Att’y General Comm., Final Report, 747-54.
\item[224] American Booksellers Ass’n, Inc., v. Hudnut, 771 F.2d 323, 325 (7\textsuperscript{th} Cir. 1985) ("The ordinance discriminates on the ground of the content of the speech. . . . The state may not ordain preferred viewpoints in this way.")
\end{footnotes}
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But even if accepting the content neutrality principle as referred to by Judge Easterbrook—despite that obscenity, which is unprotected by the First Amendment, if anything expresses a conservative heterosexual “viewpoint” of morality—that principle has nonetheless never been a constitutional absolute, especially when the content of the speech is found to cause criminal behavior or violate other compelling state interests, as Easterbrook conceded pornography did. Regarding child-pornography the Miller exception for artistic, political or social value was unambiguously rejected by the Supreme Court in New York v. Ferber (1982) on a reversed principle compared to the reasoning of the Seventh Circuit, entailing the more harmful the effects of the “content,” the less protected the materials. Hence, there was a compelling state interest in prohibiting the “content” of speech. Not surprisingly then, the Attorney General’s Commission who did engage themselves with the interest of those victimized by pornography, recommended “[t]he civil rights approach [since it] is the only legal tool suggested to the Commission which is specifically designed to provide direct relief to the victims of the injuries[.]

. . . At a minimum, claims could be provided against trafficking, coercion, forced viewing, defamation, and assault.”

In a comparative discussion mentioning the Minneapolis Ordinance’s Assault Provision that would enable plaintiffs to sue producers when having suffered harm caused by specific pornography, the Canadian Fraser Report also cited women’s shelters reporting how clients told about male partners requiring or being subjected to acts which these men had seen in pornography, as well as cases of violent sex crimes where the perpetrator had been found with “a supply of violent pornography.” In addition, in each city the Fraser Committee was presented with extensive content samples of contemporary pornography abundant with misogyny, coercion and violence against women. Moreover, detailed descriptions of the social effects of pornography were provided in “many briefs” of which, according to the Fraser Committee, “most” were concerned with “that pornography degrades women, robs them of their

226 New York v. Ferber, 458 U.S. 747, 761, 763-64 (1982) (holding that “it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests . . . .” Id. at 763-64)
228 Ibid., 308. Such testimonies are in fact corroborated by large-N surveys as well as qualitative interviews among populations of abused and prostituted women, and other public inquiries on the subject, which many were known already at the time. See previously cited sources and accompanying text supra, notes 90-99.
229 Canada, Pornography and Prostitution, 64-67.
dignity as . . . equal partners within a relationship and treats them as objects or possessions to be used by men [and] that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others . . . .”

Considering the received opinions on associations between pornography and sexual abuse, it is notable that the Committee themselves declared that “we are of the view that [representations and depictions of sexual violence] lower the status of women and thus contravene their right to equality.” In this context the equality guarantees in section 15 of the Canadian Charter were specifically mentioned, as well as the possibilities of limiting freedom of expression under section 2(b) on basis of section 1 of the Charter, which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” But their proposed legal definition of pornography did not define it in terms of lowering of the status of women, as had Minneapolis and Indianapolis. Rather, pornography was gender-neutrally defined in terms of depictions of sexual explicitness, the degree of violence depicted, or depictions of certain body-parts or sexual practices (the “body-parts approach”), or whether “lewd” acts or “lewd exhibition of the genitals” were presented. Such definitions, while not expressly referring to obscenity, are nonetheless less sensitive to how pornography reinforces hierarchy in sexual relationships. Similarly with obscenity laws, they are concerned with regulating violence, nudity, or sexual explicitness per se, rather than sexual subordination.

Since the mid 1950s, federal Canadian law had already prohibited the production and distribution of obscenity defined as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.” Hence it is unclear how come, at least in their definition of pornography, the Fraser Committee thought its “approach represent[ed] a rational, fair and realistic balancing of the interests involved, and a significant advance of the present state of the

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230 Ibid., 67. These effects of exposure mentioned have also been extensively documented in research, literature, and public inquiries. See citations and accompanying text supra, notes 81-100.
231 Ibid., 268.
232 Ibid., 266-68
234 Canada, Pornography and Prostitution, 276-79.
particularly considering the purpose of contravening pornography’s subordination of women. Consequently, it is also unclear for whom their approach was fair except for those in favor of status quo. Rather, it seems as if the committee ignored the interest of those victimized and subordinated by pornography, which suggests the hypothesizes drawn from Shapiro, Young, and Mansbridge’s work are accurate; i.e., that there exists a democratic deficit in terms of representation and articulation of the interest of those victimized as women. It is, as have already been mention, one thing to allow for a variety of views to be expressed during deliberations, and another to democratically engage with them seriously as opposed to the detached but illusory neutrality above. Here, the Fraser Committee’s implicit democratic ideal seems inadequate.

Challenging or Reinforcing Domination in Democracies

Political Scientist Donald Alexander Downs, who criticized Minneapolis’ and Indianapolis’ approach to democracy in adopting the antipornography ordinances said, inter alia, the legislatures engagement with antipornography activists—many of whom had been raped and tortured—threatened the “perspective and civility required by healthy public life.” He preferred a model of “democratic elitism” where elites “protect civil liberties” from infringement by mass politics. His ideas are reminiscent of various liberal ideals of Montesquieu, Madison as well as Mill, emphasizing checks and balances, the supremacy of certain rights over others, and a restriction of politics by limiting the sphere for democratic intervention. As with the ideal of a deliberative consensus though, restraining public discourse and privileging abstract liberal rights of freedom of speech risks silencing those with least access to established decision-making, while amplifying the speech of the pornographers and the privileged in democracies. These models do not contain mechanisms countering existing systematic domination as those suggested by Shapiro, Young, and to certain extent Mansbridge, or more concretely by the ordinance itself. Moreover, following Shapiro’s critique, the Fraser Committee’s ambition to present a “rational compromise” (see above) rather than siding with those victimized by pornography in line with the U.S. Commission would necessarily be biased in favor of the status quo.

236 Canada, Pornography and Prostitution, 260.
237 See testimonies from witnesses in Harm’s Way.
238 Downs, New Politics of Pornography, 68.
239 Downs, New Politics of Pornography, 89, 142.
quo; i.e., as if the white minority in South Africa, merely because they had an “interest” at stake in the democratic transition, legitimately could have expected a compromise that preserved the principle of apartheid along that of racial equality.  

A similar critique as Down’s was expressed by Canadian scholar Dany Lacombe, alleging that the “rigidity” of anti-pornography feminists “cannot allow for the plurality of subject positions that women occupy,” nor recognize “differences” and the “fluidity of political identities.” However, pornography could be seen as precisely what circumscribes the possibilities of social and cultural fluidity, and “difference” among women, ascribing their role as sexual objects for men’s use. Here, both Lacombe and Downs have avoided the substantive issue of which social group is situated in a power-relationship over whom—that is, the inequality that democracy purports to oppose. While not denying gender as a systematic structure subordinating women to men, the forms of democratic decision-making implicitly favored in their critique contains no institutional mechanisms to counter this dominance. What Downs rejects would be precisely those democratic values that Young, Shapiro, Vipond, international human rights law, the approach taken by the U.S. Attorney General’s Commission on Pornography, and especially the civil rights ordinance itself, took: i.e., that politicians may listen to activists and the ones actually being hurt by pornography, taking a standpoint in support of those constituents not yet adequately represented to challenge male dominance, making democracy more equal by crafting rights responsive to these imperatives.

Sweden’s 1998 Sexual Crimes Committee (Sexualbrottsutredningen) is another example of the often ignorant, detached, and elitist approach to democracy that governments have taken since the 1970s regarding pornography and its harms. In 1998, the Swedish government instigated a total review of the sexual crimes in the penal code, finalized in a bill and passed in parliament 2005. In this context questions were raised whether the criminal prohibitions on procuring should be extended to pornography. This idea had initially been proposed by a 1993 commission on prostitution, recognizing “[p]ornography production to be, in reality, prostitution in front of the camera. By the films, her degradation can then be preserved and

241 Cf. Shapiro, Democratic Theory, 44.
242 Lacombe, Blue Politics, 152-53.
243 Proposition [Prop.] 2004/5:45 En ny sexualbrottslagen [government bill] (Swed.).
repeated during a long time." The latter’s suggestions to view pornographers as pimps were dismissed though in 1997 by the government as having not considered enough the consequences to the fundamental laws on freedom of expression and the press. The older Prostitution Committee’s idea of extending procuring prohibitions makes sense though, if pornography is seen as an arm of prostitution where the law already penalized procurers, among other things to prevent prostitution itself. In addition, Sweden had in 1998 passed a law prohibiting the purchase of sex in prostitution, while decriminalizing the prostituted persons, on the legislative rationale that prostitution is a form of sex inequality and violence against women exploiting and harming the prostituted person. In the 1998 *Women’s Sanctuary Bill* that was passed it is said that

... both the Commission on Violence Against Women and the Prostitution Investigation bring up issues that in essential parts concern relationships between men and women, relationships that have significance for sex equality, in the particular case as well as in society at large. By this way, the issues may be said to be related with each other. Men's violence against women is not consistent with the aspirations toward a gender equal society, and has to be fought against with all means. In such a society, it is also undignified and unacceptable that men obtain casual sex with women against remuneration.

The evidence explicitly recognized by the legislators in 1998 indicated that “the prostituted persons mostly are women that in various ways were provided a bad beginning in life, were early on deprived of their self-respect, and were given a negative self-image. In recent times, the link between prostitution and sexual abuse in childhood has become all the more apparent.” The condition that the trick exploits the prostituted person’s situation was also observed: “Even the government makes the assessment that . . . it is not reasonable also to criminalize the one who, at least in most cases, is the weaker part whom is used by others who want to satisfy their own

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245 SOU 1995:15 Könsförsörjning, 136. Moreover, this commission found, inter alia, that social agencies and prostituted women alike reported that tricks often brings a pornography magazine to instruct what “sexual services” they wanted, and that 50 of 60 tricks who responded on issues of pornography during the investigators’ interviews said they used pornography. *Id.* at 135. Moreover, the commission recognized that “[m]any purchasers in the sex trade are heavy consumers of pornography” and “often those women who participate in the production of pornography are also found in the sex-trade [i.e., prostitution].” *Id.* at 136.


247 *Id.* p. 22.

248 *Id.* p. 102-03.
sexual drive."\(^{249}\) The legislature recognized the destructiveness of prostitution in the Women’s Sanctuary bill, in which a statement from the government official report published prior to the bill was cited wherein the investigators rhetorically asked themselves “how it is that ‘ordinary men’ who are often married or cohabiting, are involved in an activity that they should be aware of is destructive . . . especially for the women they are buying sexual services from?”\(^{250}\) The investigators themselves suggested that “[p]ossibly men have not received sufficient enlightenment and information to the effect that they are actually using their sexual urge to harm other people[.]”\(^{251}\)

In light of these comparatively remarkable recognitions of prostitution as a form of violence against women and sexual exploitation, from an international perspective, it is striking how different the government’s new directive to the 1998 Sexual Crimes Committee regarding pornography was perceived. In contrast to its 1993 counterpart the 1998 Committee, while discussing their directives, declared that any considerations to extend the procuring provision “should [take as] a starting point that the proposals should not lead to infringements of the fundamental laws of freedom of press and expression, and [that] it is not the committees assignment to propose a general prohibition against pornography.”\(^{252}\) However, the legal rationale behind the prior 1993 Committee on Prostitution’s suggestions was said to be similar with what others had argued when passing laws criminalizing child-pornography.\(^{253}\) Nonetheless, the committee did not find these rationales transposable to adult pornography:

An extension of the [criminal] liability for procuring is intended to protect those who participate in pornographic pictures and movies and does admittedly have another purpose than to infringe the rights of production and dissemination as such. The actual restrictions would be so significant though that in the eyes of the committee, it is in conflict with [freedom of expression].\(^{254}\)

\(^{249}\) Id. p. 104. (noting as well that decriminalizing the prostituted person while penalizing the trick “is also important in order to encourage the prostituted persons to seek assistance to get away from prostitution, that they do not feel they risk any form of sanction because they have been active as prostituted persons.”)


\(^{251}\) SOU 1995:15 Könshandeln, 28 (english summary).


\(^{253}\) Id. at 413.

\(^{254}\) Id. at 415.
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The committee did not explain why restrictions would be more “significant” with respect to adult pornography than with child materials. One is therefore left with a feeling that in contrast to children, harm to women was simply viewed insignificant for legislative concern. In contrast to the Canadian Fraser Committee as well as the U.S. Attorney General’s Commission on Pornography, neither the evidence of pornography’s harm nor the conditions of production was reviewed. During the Swedish Committee’s term of inquiry several attempts to address pornography’s harm in terms of sexual subordination, abuse, gender inequality and sex discrimination, as had been attempted in Canada and the United States, were nevertheless made in Parliament by various minorities, but all were dismissed.\textsuperscript{255} None of them made an impact on the committee in terms of going further with pornography. One such attempt, signed also by a MP in the committee herself, wished to extend the government’s directive to include a

\textsuperscript{255} See, e.g., some of the Parliamentary motions put forward by various minorities: Motion till Riksdagen [Mot.] 2001/02:K348 Pornografins utveckling [The Evolution of Pornography] [parliamentary motion] (Ewa Larsson and Kia Andreasson; Greens) (\textsuperscript{S}wed.) (\textsuperscript{K}=constitutional committee) (demanding the appointment of an investigation reviewing the evolution of pornography, noting that “now it is a cruel exploitation of female children and young women in the name of profit,” further asking “how do various researchers view the associations between pornographic film, rapes, and other sexual violence?”); Mot. 2001/02:Ub348 Jämställdhetsarbete mot pornografi [Gender Equality Work Against Pornography] (Christina Nenes and Göte Wahlström; Social Democrats) (\textsuperscript{Ub}=committee on education) (referring to pornography in terms of “the forces which . . . actively counteract the work for gender equality.”); Mot. 2000/01:K351 Pornografi i kabelTV-kanaler [Pornography in Cabel TV-Channels] (Birgitta Sellén and Rigmor Stenmark; Center party) (noting, inter alia, associations between pornography consumption and “brutally executed” rapes, urging politicians to take action in order to “reduce the possibility to ‘spur’ people to . . . rape women (and men).”); Mot. 2000/01:K375 TV-kanaler med pornografska sändningar [TV-Channels with Pornographic Broadcasts] (Carina Hägg, Birgitta Ahlqvist, and Agneta Brendt; Social Democrats) (noting “probable” connections between “the use of pornographic movies and making use of sexual epithets, sexual harassment, and sexual assault” and urging government to propose more restrictions on TV-broadcasts in this area); Mot.1999/2000:K304 Pornografska sändningar [Pornographic Broadcasts] (Hägg, Ahlqvist, Brendt; Social Democrats) (content same as in supra Mot. 2000/01:K375); Mot. 2000/01:N310 Export av pornografi gratis [Export of Pornographic Materials] [Export of pornographic materials] (Carina Hägg: Social Democrat) (noting “probable” connections between pornography use and sexual coercion and violence, remarking that the European Union, which should prioritize gender equality, should investigate export of pornography, recognizing the harmful contribution by pornography particularly to development countries that are fighting AIDS); Mot. 1998/99:K224 Videovåld och pornografi [Video Violence and Pornography] (Margareta Viklund; Christian Democrat) (noting that pornography is a multi-billion industry, presents women and girls as slaves to men, contributes to “the oppression of women”, is a “threat against the security” for females, is made up, inter alia, by filmed and photographed sexual abuse, “encourage rape, incest, abuse, torture, and murder on women and girls. . . . and claims women enjoy rape and abuse,’’ demanding a government review and a strategy against pornography); Motion 1998/99:K285 Pornografi [Pornography] (Gudrun Schyman et al.; Left Party) (similar content as in infra Mot. 1997/98:K342 ); Mot. 1997/98:K342 Pornografi m.m. [Pornography etc.] (Johan Lönnroth et al.; Left Party) (noting uselessness of current laws against violent pornography, stating that “[c]ontempt for women is the essence of pornography . . . presentations of women as an object . . . enjoying violence and torture mirror this contempt. . . . The pornography industry is . . . the largest cause to that the sexualized violence in society has increased,” urging government, inter alia, to review legislation on “female-degrading pornography” and, in the meantime, to restrict it); Mot. 1997/98:K319 Pornografi reklam [Pornographic Advertising] (Elisa Abascal Reyes et al.; Greens) (urging, inter alia, government to propose laws against cars with pornographic commercials, finding their content to be “clearly degrading to women” and “a clear expression of hateful incitements against women”)
comprehensive review “from a gender-political perspective [to] analyze pornography, and from this analysis propose further measures with special emphasis on preventing harmful effects on young people.”256 In the motion (approx: proposal), texts on the back of convolutes from “some regular Swedish pornography movies” where quoted, assumingly in an attempt to raise the consciousness of other MPs about the problems.

“How much should a petite 18-year-old have to go through? Five sixty year old men, four Africa Negros [sic], six iron-hard villains. Anal! Sadomasochisms! Mouth Cascades! Mini-Girl Sandy is Back!” “Teenage Bambi Taken Aback by Eight Nasty, Mad Anabolic Monsters.” “Deborah and 14 Men. A Bachelor Party Degenerating and the Poor Stripper has to Tackle the Entire Gang of Drunkards. ALL Empty in Her Mouth.” “Assembly Band Sex. Four Strangers Line Up to Empty Themselves in the Teen Mouth!” “The Lolita Gets Two Dicks in the Ass at the Same Time! Little Tammi is Merely 18 Years and Make the Hardest Scene in History!” “Peter North’s 25 Best Shots. Mouth After Mouth is Sprayed Full! The Girls Get Drowned! Fabulously Grotesque! Do NOT Miss This Unique Cavalcade!”257

Having been made more informed this way of what practices were protected under the Swedish constitution, nonetheless the legislature dismissed this initiative of a modest inquiry restricted to the harmful effects on young people by 251 votes against 49.

**Toward a New Democratic Model**

The U.S. Attorney General’s Commission, compared to the equivalent challenges in Canada and Sweden, is the most far-reaching and substantially challenging effort against pornography on a federal government level. Despite its “radicalism” the appointees represented a broad spectrum of political views; there were four conservatives, three liberals, and four “middle of the roaders.”258 Nonetheless their composition did not result in a watered down and ineffective compromise, as did the Fraser Report. Nor did it result in detachment, ignorance, and dismissal, as in the case of the Swedish 1998 Sexual Crimes Committee. Rather, the realities were engaged

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257 Mot. 1999/2000:Ju710, Pornografi (quoting Linna Johansson, "Vi fick veta saker om sex" [We were Told Things about Sex], in Fittstim [Cunt Swarm], ed. Linda Norman Skugge, Belinda Olsson, and Brita Zilg (Stockholm: Bokförlaget DN, 1999), PAGE?
258 McManus, introduction to Final Report, xxxvi.
with utmost concern for those victimized, who’s situation and interests were identified as crucial in contrast to the more detached deliberative approaches of the other two commissions.

The Attorney General’s Commission’s members had the courage to change their views significantly during the course of investigation. Dr. Park Elliot Dietz, for instance, initially held a liberal position, but later wrote a personal statement in the final report that pornography “is used as an instrument of sexual abuse and sexual harassment,”259 adding that he cried during Andrea Dworkin’s testimony, and compelled the nation to act:

I ask you, America, to strike the chains from America's women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.260

In light of the comparison between the differing outcomes of the Canadian, Swedish, and U.S. government commissions on pornography (and prostitution), the problem for democracy, as suggested by Shapiro, Young, and Mansbridge, has been that there exist no institutional mechanisms or democratic representation that guarantees an adequately articulated interest of those victimized in or by pornography, pretensions of a “fair and realistic”261 balance of interest notwithstanding. One might say there is a civil rights and equality-deficit regarding policies regulating pornography. For instance, female representation alone seemed elusive in the Swedish case, as was previously suggested when analyzing Mansbridge’s discussion on descriptive representation. Considering that the systematic dismissals of addressing, or even inquiring into pornography’s harm in terms of sexual subordination, abuse, and sex discrimination, were made at a historically unprecedented representation of 42.7% women in parliament,262 compared to descriptive representation a civil human rights-based remedy such as the antipornography ordinance initially introduced in Minneapolis (see above) would more clearly have represented the interest of those actually harmed by pornography—harms these MPs might have very little

259 Attorney General’s Comm., Final Report, 47 (Personal statement by commissioner Elliot Dietz. Commissioner Cusack Concurring)
260 Ibid., 51 (Personal statement by commissioner Elliot Dietz. Chairman Hudson, Commissioners Dobson, Lazar, Garcia and Cusack Concurring)
261 Canada, Pornography and Prostitution, 260.
262 Statistiska Centralbyrån, Riksdagsledamöter efter kön och tid. Valår 1922-2006 (Stockholm: Statistics Sweden), www.scb.se/Pages/TableAndChart_____160728.aspx
experience of. It would give victimized women (and similarly situated men) a legal right to represent as well as articulate their interests themselves or/and through a qualified counsel in a more truly democratic deliberation. However, the current Swedish democratic system makes any such options almost impossible without support from the legislature, and particularly in the U.S. and Canada, the judiciary is needed as well. Although as previously mentioned (above, pp. 41-42), existing international human rights law puts an obligation on states to address these harms consistent with such a model, which would entail a more engaged democracy. Hence, national democracies might change if pressured on this point internationally further. Until then, there seem to be no effective remedies through existing democratic systems.

**Appendix: Legislative & Judicial Responses; the Aftermath**

What happened after the political processes initiated in the governments in the three countries analyzed above, and what do the legislative and judicial responses entail for the prospect of democratic progress in addressing the harms of commercial sex? This question is the subject for the additional section below, which is attached to this paper in the form of an appendix for anyone further interested.

**Canada: A Legislative Vacuum for those Victimized by Pornography**

Around the time of the Fraser Commission’s appointment, there was a consensus that the Canadian obscenity provisions in the *Criminal Code* were “too broad and too vague.” Feminists criticized that section 159 (now 163) in the Criminal Code not only often let through “violent” and “degrading” pornography, but “non-degrading sexual material” was (and is) also found obscene from time to time. The code’s requisite that obscenity be a matter of “undue exploitation of sex” also implies an acceptable “due exploitation” of sex. The Fraser Report did not lead to immediate legislation after its submission in February 1985, although the conservative government introduced bill C-114 in 1986 in an attempt to reform pornography law. C-114 did not stick to the recommendations in the Fraser committee only to criminalize violent materials, but included an extensive body-parts definition of pornography—denounced

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263 Mahoney, “Defining Pornography,” 578.
266 Ibid.
by Canadian feminists such as Susan Cole as the “laundry list.” Such definitions do not consider
pornography as sexual subordination, or inequality, instead defining pornography gender-
neutrally in opposition to the contemporary critique from the women’s movement.

Moreover, while “treating . . . another as . . . object” or “attempts to degrade . . . another” could hypothetically cover Playboy, terms such as “object” or “degradation” are not equivalent to “subordination” per se. The Indianapolis definition had “servile display” and other more apt definitions for materials that graphically subordinate others. Furthermore, C-114 offered no civil rights (i.e., it was a “victim-less crime”) and lacked a connection to equality guarantees in the Charter to motivate its surface plausibility why “degrading,” or treating “another” as an object, would be contrary to democratic imperatives and be a compelling state interest for criminal sanctions. Not surprisingly, the bill died and was never debated in Parliament after the government sponsor, John Crosbie, was sent to the department of transportation, replaced by Ramon Hnatyshyn.

Based on interviews and other sources (press and public statements), Dany Lacombe claims the conservative government (Tory) “lost track of feminists’ concerns about the harm pornography causes to women’s rights to equality,” and neglected the interests of women’s groups. The crafting of the bill was dominated by conservative caucus negotiations. A focus on child sexual abuse began to dominate throughout. The bill was a target for massive criticism from all quarters, except conservatives and churches according to Lacombe. Some feminists even argued that had a lack of clarity which made a greater scope for judicial interpretation, hence would allow for materials portraying “physical harm and violence toward woman.” According to Lacombe Hnatyshyn seriously considered the public discontent over Bill C-114 and intended to make another attempt.

However the next bill, C-54, had similar flaws as did C-114. For example, the National Action Committee on the Status of Women (NAC) submitted a brief to the House of Commons

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268 Bill C-114 ¶ 1, s. 138, (p.2) [all section citations are to numbers as they would appear in an amended Criminal Code following passage of the Bill in 1986].
269 This paragraph is, where not noted, based on the analysis in Lacombe, Blue Politics, 99-116.
270 Ibid, 112.
271 Ibid, 111.
272 Ibid, 115.
273 Lacombe, Blue Politics, 116.
Justice Committee where, inter alia, they suggested that the government should not limit itself to criminal, but also explore civil remedies and other positive measures. These requests were not met. Rather, under the proposed law, after the judicial order for forfeiture any further proceedings would need the consent of the Attorney General similarly with how, under Swedish law, any proceedings against unlawful depiction of sexual coercion or violence needs the consent of the Chancellor to be instigated (see above). Bill C-54’s definition of pornography was similar in many respects to bill C-114. Rather than sexual subordination or inequality, it was occupied with “depictions”; e.g., “the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years . . . .”

Minister of Justice, Ramon Hnatyshyn, was quoted at a press conference saying bill C-54 was a result of consultations with various groups that represented a “‘broad consensus in Canadian public that there is no place for portrayals of child pornography, sexual violence and degradation in a sexual context.’” However, this consensus was questioned by highly pitched voices, not only from the women’s movement. For instance, some writers and artists protested in 1987 by exhibiting art by Matisse covered in brown paper. Chair of Toronto Public Library Board, Sheryl Taylor-Munro, decided to close 28 of 32 public libraries in Toronto on Dec. 10, 1987, and was quoted saying “’This bill is a clear threat to a first-class library system . . . . The Government is saying we are no different than child pornographers. This bill goes against everything we believe in—things like open access to information and freedom of speech.’” Apparently Edward L. Greenspan, a “prominent” criminal lawyer had been consulted by the Canadian Civil Liberties Association (CCLA) and had “warned” librarians about the consequences of the proposed legislation.

According to Lacombe, the implications of Bill C-54 was that “many important artistic and educational works could be censored” such as “Petronius’s *Satyricon*, Boccaccio’s *Decameron*, Nabokov’s *Lolita*, and Plato’s *Symposium*” since they all “‘encourage’” sexual intercourse

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275 Kirsten Johnson, *Undressing the Canadian State: The Politics of Pornography from Hicklin to Butler* (Halifax: Fernwood, 1995), 52-53 (citing NAC brief to the House of Commons Justice Committee on Bill C-54, prepared by Kate Andrew and Debra J. Lewis, Toronto (Feb.))
276 Bill C-54, ¶ 1, Sec. 138, 1(a)(i). (p. 2.)
278 Ibid, 118-120.
280 Lacombe, *Blue Politics*, 124 et seq.
between children or between an adult and a child.\textsuperscript{281} Lots of other educational or artistic materials were also cited by the criminal lawyer, as potentially threatened by the bill.\textsuperscript{282} Lacombe quotes Greenspan writing that “anyone distributing such material [as defined by the bill] would be liable to 10 years in jail.”\textsuperscript{283} Regardless of Lacombe and Greenspan’s exaggerations, one may still ask why artistry and educational matters should be more important than discrimination, harm, and sexual violence against women per se? And why is it reasonable to believe that the Supreme Court of Canada, on basis of the \textit{Charter}, could possibly support charging librarians 10 years in prison on behalf of distributing books by Plato?

Hnatyshyn tried but failed to assure librarian that they were not the target of legislation, but rather hard-core pornography. Other conservative MP’s had, e.g., defended the bill in ways that did imply that some “reorganization” of libraries might be necessary in order to keep certain materials away from young Canadians.\textsuperscript{284} But it is simplified to assume only this opposition made the bill fall. The government had a majority in the House and could easily have pushed the bill through, but it did not.\textsuperscript{285} Additionally, religious and conservatives who supported the bill were said to withdraw their support when, among other things, another lawyer hired by the Inter Church Committee on Pornography (ICCP) had found “numerous loopholes that could drastically liberalize an apparently conservative law,”\textsuperscript{286} much to the contrary of the teachings of Mr. Greenspan and Prof. Lacombe.

In Canada most hopes were dashed after the Fraser Committee handed down their report, with the attendant legislative vacuum. When those subordinated and harmed are not adequately represented, no democracy has yet been able to address their harms. This legislative example is telling; i.e., despite the assumed “broad consensus” that existing obscenity laws were unsound, could be misused, did not touch harmful materials, among other things, the interest of those victimized were not addressed. The obsession in the 1980s with pornography seemed to have additional roots, and while the harms were addressed by some of those engaged in the struggle, their voices were nevertheless drowned.

\textsuperscript{281} Lacombe, \textit{Bue Politics}, 126.
\textsuperscript{282} Ibid, 124-25.
\textsuperscript{283} Ibid, 126.
\textsuperscript{284} Lacombe at 128 (quoting from MP Richard Grisé, parliamentary secretary to the deputy prime minister and president of the Privy Council).
\textsuperscript{285} Ibid, 128-29.
\textsuperscript{286} Ibid, 130.
A Legislature Loosing Track and a Judiciary Detached

Likewise, after an initially highly promising Supreme Court decision on pornography in *R. v. Butler*\(^{287}\) the continuing interpretation of that decision has been highly disappointing.\(^{288}\) In Canada, Federal law still prohibits the production and distribution of *obscenity*, defining it as “any publication a dominant characteristic of which is the *undue* exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.”\(^{289}\) In a series of decisions during the 1980s, ending with *R. v. Butler* in 1992, Canadian courts reinterpreted the obscenity laws by incorporating some of the challenges of feminist notions of pornography’s harm and inequality, and rejected challenges appealing to the supremacy of freedom of expression over prohibiting certain pornography.\(^{290}\) In Butler it was held that legally prohibiting pornography that is violent, degrading or dehumanizing, seeking “to enhance respect for all members of society, and non-violence and equality in their relations with each other,” promotes equality, which is a fundamental democratic value “that the restriction on freedom of expression does not outweigh.”\(^{291}\) At this point, a series of three tests had developed in Canadian courts to interpret “undue” according to the obscenity statute (mere “exploitation” of sex not being enough): (1) The community standards test, (2) the degradation and dehumanization test, and (3) the “internal necessities” test, providing an “artistic defense” if a serious literary or political treatment was advanced.\(^{292}\) Hence, obscenity law had departed from its usual occupations with morals by recognizing harm and sexual abuse, rather than “prurient interest” or “patent offensiveness” as is the focus of the U.S. standard in *Miller*. While this development initially looked more promising than, e.g., the *Miller*-standard, general problems of criminal obscenity laws returned once again post-Butler.

\(^{288}\) The further analysis of these Canadian judicial decisions is more fully elaborated in Max Waltman, “Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the United States,” *Political Research Quarterly* 63, no. 1 (2010): 231-34. I’m indebted to feminist scholars who have analyzed the development during the 1980s, such as Janine Benedet, Susan Cole, Kirsten Johnson, Christopher Kendall, Catharine MacKinnon, Kathleen Mahoney, and others.
\(^{289}\) Canada Criminal Code, R.S.C. 1985, c. C-46, s. 163(8) (*emphasis* added).
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Similar heterosexual pornography once ruled criminal by the Canadian Supreme Court in *Butler* is now legal; e.g., materials presenting women presented as sexually insatiable and constantly looking for sex with strangers, men repeatedly ejaculating into their mouths, and a man verbally abusing a woman, bending her backwards over a toilet while urinating into her mouth, and “punishing” her when it overflows by scrubbing the toilet bowl with her head all the while she is “obviously not consenting” according to the acquitting judge. The obscenity statute has also been interpreted as requiring a mens rea which acquits pornography stores—but not so called “distributors”—assuming the former do not have adequate knowledge of the content they’re trafficking even when materials combine sex with violence.

The failure of the implementation of the Butler law eventually comes down to that the foundation for Butler never substantially departed from the obscenity approach, hence it kept the loopholes made possible under criminal law’s standard of proof, the biases of contemporary community standards, the supremacy of the artistic defense, and a lack of explicit constitutional reference to equality provisions 15 or 28 in the *Charter*, including the silence of those victimized in court and non-existence of civil remedies to complement the criminal sanctions. Cases since *Butler* confirm that judicial review in existing democracies are inadequate in representing interests of those victimized by pornography. Rather than moving towards more engagement with these constituents, Canadian courts have reverted to disengagement.

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293 Factum of LEAF, p. 204 (describing content of seized materials presenting women (some appearing to be children) being raped, performing sex on superiors, and penetrated in “every orifice” by penises and objects, all while themes of racism and sexism in comments such as “bitch” or “hole” were abundant, accompanied by denigrating treatment such as ejaculation in women’s faces.).


298 This analysis is more fully presented in Waltman, “Rethinking Democracy,” *Political Research Quarterly* (forthcoming).
**Legislative Obstacles in the U.S.**

The U.S. Attorney General’s report, perhaps expectedly, resulted in an outcry of media attention, substantially orchestrated by pro-pornographers. Nonetheless the ideas from the report lingered on in the U.S. Congress for several years, and specifically the civil rights ordinance approach itself which was introduced in part in the form of two law proposals between 1984 and 1991. First, the *Pornography Victims Protection Act* was introduced the first time in 1984 by Senator Arleen Specter, R-Pa., later in the House as well, containing a civil ground for adult and child victims who had been coerced into making pornography to recover damages from producers.\(^{299}\) The bill defined actionable materials as “visual depiction” of “sexually explicit conduct,”\(^ {300}\) and offered shields against typical judicial gender bias that could not negate a finding of coercion; such as whether the plaintiff previously had been prostituted, had had sex with defendant, had posed for pornography, had consented, had signed a contract, was paid, etcetera.\(^ {301}\) While not offering a subordination-based pornography definition as the antipornography ordinances did, nevertheless it was not limited to obscenity per se. However, despite being reintroduced through 1987 in similar forms, it never passed.\(^ {302}\)

In 1989, another similar attempt was made by Senator Mitch McConnell, R-Ky, who introduced the *Pornography Victims’ Compensation Act*. This bill centered on consumption harms and offered civil remedies to its victims from producers, distributors, or sellers of specific materials, assuming plaintiffs could prove, with a preponderance of evidence—as under the Minneapolis/Indianapolis ordinances’ assault provision—that specific materials caused an assault or a murder.\(^ {303}\) The first versions explicitly referred to the findings of the Attorney General’s Commission as well as to other federal investigations and research on the subject.\(^ {304}\) However, as deliberations moved on in the Senate Judiciary Committee and in conjunction with media being filled by the common outrage from pro-pornography quarters,\(^ {305}\) the challenging approach of the bill became increasingly watered down. In conjunction with striking out the

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\(^{300}\) S. 3063, Sec. 2(3), p.2; H.R. 5509, Sec. 2(3), p.2.


\(^{304}\) S. 226, Sec. 2(2-7), S.983, Sec. 2(3-8).

\(^{305}\) *See e.g.* Christopher M. Finan, *From the Palmer Raids to the Patriot Act*, (Boston: Beacon Press, 2007), 260-64;
references to research on pornography and replacing it with a preamble instead referring to the imperatives of “Anglo-American jurisprudence” and “American tort law,” as well as striking out any testimonies from the offender as admissible evidence (the “Ted Bundy Provision”), so many additional requisites were added that the bill became a dead letter law.

Senator Howell Heflin, D-Ala., successfully added an amendment requiring a criminal conviction of the offender before a civil suit could be filed against producers, distributors or sellers. Senator Specter also added an amendment requiring that defendants must first be convicted under criminal obscenity laws, whereas pornography in the initial versions had been defined as that which is “sexually explicit,” and in various sub-defininitions further specified through a “body-parts” approach as well as an antipornography subordination approach centered on explicitly violent and coercive materials. However, Specter’s and Heflin’s restrictive modifications did apparently not please First Amendment considerations among Committee members enough. An additional amendment provided by the chair of the Judiciary Committee Joseph R. Biden, D-Del (now Vice-President of the United States), went even further, but was narrowly rejected (7-7). The Biden-amendment would have required proof that defendants knowingly had provided the public with obscene materials by the time of the assault or murder. This meant that defendants first be convicted in a criminal obscenity proceeding before the assault or murder had even taken place, entailing only those being (in the words of senator Strom Thurmond, R-Sc) “foolish enough to commit the identical criminal act twice” to be civilly liable under the law.

307 S. 1521, Sec. 3(c).
310 S. 983, Sec. 4. (subparts defining “(1) sexually explicit” as “graphically” depicting or describing “(A) sexual intercourse, including but not limited to genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) stimulation or penetration of the genitals by inanimate objects; (D) masturbation; (E) lascivious exhibition of the genitals of any person; or (F) sadistic or masochistic abuse, including but not limited to torture, dismemberment, confinement, bondage, beatings, or bruises or other evidence of physical abuse, which are presented in a sexual context or which appear to stimulate sexual pleasure in the abuser or the recipient of such abuse; however . . . not . . . an isolated passage; (2) "violent" describes any acts or behavior, or any material that depicts or describes such acts or behavior, in which women, children, or men are. (A) victims of sexual crimes such as rape, sexual homicide, or child sexual abuse; (B) penetrated by animals or inanimate objects; or (C) tortured, dismembered, confined, bound, beaten, or injured, in a context that makes these experiences sexual or indicates that the victims derive sexual pleasure from such experiences.)
As a result of these legislative deliberations, aggressively lobbied from inside as well as outside, as is common, American democracy failed to adequately represent and articulate the interest of those victimized by pornography. The Congress had missed an exceptional opportunity to rectify the First Amendment fundamentalism that had become the unofficial doctrine—though technically binding only for the 7th Circuit—after the Supreme Court in 1986 summarily affirmed (6-3), without offering their own opinion, Judge Easterbrook’s decision to invalidate the Indianapolis ordinance. In Congress, the victims were once again silenced. Since then, adult pornography in the U.S. is generally unchallenged outside the small confines of sexual harassment doctrine at work, where display is seen as contributing to a hostile working environment, hence entailing grounds for civil remedy. As a comparison, in Sweden such a doctrine has not yield ground, despite their more radical prostitution law. And while this prostitution law look promising it has not yet delivered the full potential of its democratic imperatives.

**Swedish Legislation on Prostitution: Impact of Sex Purchase Law**

Reducing the amount of persons in prostitution necessarily leads to less ruined lives since, as Dworkin once expressed, it “is impossible to use a human body in the way women’s bodies are used in prostitution and to have a whole human being.” In responding to the rage expressed by those engaged to stop the harms of prostitution, the amount of legal accountability demanded, and their sometimes far-reaching political implications, the Swedish legislature’s response has received international attention since its law against purchase of sex took effect in January 1999, criminalizing only those buying prostituted persons—not those being bought.

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315 See Arbetsdomstolen (AD) [Labor Court] 2005-06-08, Dom nr 63/05, Mål nr A 64/04 (Swed.), for an almost similar Swedish case of sexual harassment and pornography at work. The court noted that “inside the camp, several elements featuring half-pornographic or at least sexual content [where on display],” id. at 14., which were found in shared spaces were both genders had to stay. The National Armed Forces was here, as an employer, not being held civilly liable for a self-initiated resignation of a female employee due to sexual harassment despite the court’s recognition: “There are, according to the court’s opinion, circumstances suggesting that harassment in fact occurred.” Id. at 17. This judicial decision was largely made on technicalities regarding the employer’s liability for knowing the real reasons for the resignation. Id. at 18-21. Although the “half-pornographic” materials on display could have been accepted as evidence of such discriminatory negligence, it was not.
316 Dworkin, “Prostitution and Male Supremacy,” 3.
317 See Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.), which states that “[a] person who, otherwise than as previously provided in this Chapter [on Sexual Crimes], obtains a casual sexual relation in return for payment, shall
In 1995 the Swedish government commission estimated that there were 2500-3000 prostituted women in Sweden, among whom 650 were on the streets.\(^{318}\) In contrast, now there are approximately 300 women in street prostitution, and 300 women and 50 men who advertise on the internet, according to a 2008 review of published literature and evidence.\(^{319}\) Similarly, in Denmark there are at least 5567 persons visibly in prostitution among whom 1415 were on the streets.\(^{320}\) Hence, Sweden’s prostitution population is approximately a tenth of its neighbor Denmark’s where purchase is legal, even though Denmark only has a population of 5,5 million while Sweden has 9,3.\(^{321}\) Comparatively, in Norway, a neighbor in the West with 4,9 million people,\(^{322}\) it was estimated that there were 2654 prostituted women of whom 1157 where on the street in 2007,\(^{323}\) which is more than 4 times compared to Sweden’s 600 women, and almost 8 times more per capita if considering the population difference.

According to both NGOs and the police in Stockholm, Gothenburg and Malmö, the sex trade vanished more or less entirely from the street right after sex-purchase law came in force. In Stockholm, the numbers of tricks were reported by police to have decreased almost by 80% in 2001.\(^{324}\) Street prostitution then came back, but at a reduced scale. In Stockholm, social workers encounter only 15 to 20 prostituted persons per night, whereas prior to the law they encountered up to 60.\(^{325}\) In Malmö social workers encountered 200 women a year prior to the law, but one

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\(^{318}\) SOU 1995:15 Könshandeln, 10, 99 (Swed.).


\(^{322}\) Wikipedia, s.v. “List of countries by population.”

\(^{323}\) Holmström and Skilbrei, “Nordiska prostitutionsmarknader,” 13 (among those not on the street in Norway, the numbers were based on those who sought support from social agencies, or who’s advertisement where found on internet or in a paper).

\(^{324}\) Caspar Opitz, “Gatans sexhandel minskar” [Sex Trade of the Street Decreases], Dagens Nyheter [Daily News], June 29, 2001, p. 7.

year after the law there were only 130, and in 2006 there were only 66. In Gothenburg data indicate street prostitution declined from 100 to 30 persons a year only between 2003 and 2006.

Succinctly, the National Criminal Investigation Department’s wiretapping now show traffickers and pimps are disappointed with low demand in Sweden. Their clandestine brothels are fairly small enterprises, police raids rarely finding more than 3-4 prostituted women at one time. These criminal entrepreneurs are forced to operate through complex indoor arrangements to satisfy customer’s fears of getting caught, using several apartments and avoid staying too long at one place. This “necessity [for] several premises” has been corroborated in telephone interception (wiretapping), testimonies from prostituted women, police in the Baltic States, and in almost all preliminary investigations. Consequently, in 2008 no large groups of visible foreign women were prostituted in Sweden as there were in Norway, Denmark and Finland.

Moreover, the passing of the law seems, by itself, to have changed public attitude. In 1996, three years before the law took effect, a survey-study made by Sven-Axel Månsson showed only 44% of women in Sweden and 20% of men wanted to criminalize a male sex purchaser. In 1999, 81% of women and 70% of men wanted to criminalize purchase of sex, and in 2008, 79% of women and 60% of men favored the law. The young adult population (18-38), particularly women, is most in favor of the law.
Furthermore, the number of men reporting the experience of purchasing sex (before as well as after the law took effect) in the national population samples seems to have dropped from 12.7% to 7.6% from 1996 to 2008. Being directly asked in 2008 about the effects of the law on their purchase of sex, 5 men responded they completely quit, 2 men decreased, and 1 changed his venues for purchasing. No one said they had increased, or started purchasing sex outside Sweden, or changed into purchasing sex in “non-physical” forms. Other countries are now also starting to adopt aspects of the Swedish model, among them Norway, Iceland, and South Korea, and to some extent the United Kingdom. A similar law was proposed in India.

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Report that the more “gender neutral character” of his question than in previous surveys asking about similar issues might have made respondents believe they were rather surveyed about their view of procuring or trafficking (“sale of sex”) than about prostituted persons. Brottssökebyggande rådet (BRÅ) [Swedish National Council for Crime Prevention], Prostitution och människohandel för sexuella ändamål: En första uppföljning av regeringens handlingsplan; Rapport 2010:5 [Prostitution and Human Trafficking for Sexual Purposes: A First Evaluation of the Government’s Action Plan; Report 2010:5], authored by Anna Eklund and Stina Holmberg (Brottssökebyggande rådet: Stockholm, 2010), 70-71. Indeed, Månsson’s survey from 1996 used gendered wordings (“A woman accepts money for a sexual contact. Should the woman’s action be regarded as being criminal?”) and only found 42% women wanted to criminalize the prostituted woman. Månsson, “Commercial Sexuality,” 249 (original emphasis). In contrast, another survey conducted the same year the law took effect (1999) found 78% women wanted to criminalize—again, using gender neutral words—“to sell sex.” Kuosmanen, “Tio år med lagen,” 367 (citing 1999 study by survey institute SIFO). In fact, the documented coercive circumstances propelling women into prostitution and keeping them there (see above) entail that prostituted women are rather “sold” than “selling sex”. To the extent that respondents in 2008 have begun to understand the reasons for the Swedish law they would more likely associate “the sale of sex” with pimps and traffickers, as opposed to prostituted women.


Kuosmanen, “Tio år med lagen,” 370. The internal drop-out rate for this question was 11% (n = 1009) both genders, ibid 368n51, which most likely is larger than necessary had the survey restricted itself to asking respondents whether they had actually paid for sex with someone, not also whether they ever had “fantasized” or “could consider” doing so. Ibid., 368. Hence, respondents who did not pay for sex are nonetheless put in a “sensitive” position where they need to reflect on their mental state as opposed to actual behavior. Indeed, the author recognizes that these questions were “very sensitive,” according to individual written open responses. Ibid., 368n49. The author also cautions for some minor differences in the survey questions in 1996 compared to 2008. The former asked about purchase for being “sexually together with someone” while the latter added “sex with physical contact” in parenthesis in order to confirm more strictly with what is criminalized under case law. Ibid., 368n50.

Additionally, some respondents would not admit a sex purchase on a direct question, but would nonetheless describe details further on in the survey. Counting these responses, the number of male sex purchasers would approximate 9% in the 2008 survey. Ibid., 368n52. However, underreporting was most likely present in the 1996 survey as well, according to its author. Månsson, “Commercial Sexuality,” 239-40. Finally, Kuosmanen expresses some concern of underreporting in the 2008 questionnaire compared to 1996 when criminalization was not in place. Kuosmanen, “Tio år med lagen,” 377-78. However, this seems overly cautious considering the “total anonymity” procedure the researchers clearly communicated to all respondents. Ibid. 359.

Ibid., 372-73. Questions regarding experience of selling of sex has a very large fall-out rate, and the remaining sample is very small, although five women and four men one of each gender says they have been bought for sex. One from each gender responded they stopped because of the law, and one woman said she began selling in less visible forms. Ibid., 375-76.

See “Anti-Prostitution Laws in for Drastic Revamp,” Times of India, Oct. 1, 2005 (reporting about an “amendment, proposed by the department of women and child and awaiting cabinet clearance, [which] provides for three-month imprisonment and a fine of Rs 20,000 for the patrons. The department has also proposed to do away with Sections 8 and 20 of the Immoral Trafficking Prevention Act (ITPA), which makes soliciting a punishable

\textbf{Obstacles to Effective Implementation}

However, the Swedish law could even be even more strengthened. Consistent with the democratic imperative of identifying which groups are subordinated and victimized, as has been emphasized by Young among others, until the victims are compensated and helped further, enabled to leave the sex industry, the situation will not be fully addressed. Hence, there have to be three parts to any adequate scheme: 1) decriminalize \textit{and support} the prostituted people, 2) criminalize the buyers strongly, and 3) criminalize third party-profiteers. In this sense, the Swedish law is unfinished, much due to its treatment by the judiciary. After the law was passed, the courts had to interpret the level of penalty. In this context, the Supreme Court 2001 summarily affirmed rulings by lower courts holding that when a man makes use of a prostituted person her so-called “consent” entails the offense is committed against the “public order,” and not against her as a “person”.\footnote{Nytt Juridiskt Arkiv [NJA] [National Reporter] 2001-07-09 p. 529 (Swed.) (holding that “[i]n the Act Prohibiting Purchase of Sexual Services the consent is a requirement if there is to be a crime. It is not stated, as is the case with the act mentioned above prohibiting genital mutilation, that consent does not exempt from liability. The way the prohibition is articulated therefore leads one’s thoughts into that the act is not to be seen as primarily a crime against person but instead as a crime against public order, for which crime a consent as above will have no significance [since the prostituted person then may not dispose the protected interest]. Already the condition that the one who has carried out the sexual service is called by the prosecutor as a witness speaks in favor of that this is the case. With respect to this it will in deciding the level of penalty for the act initially be of significance that the act is to be viewed as a crime against public order and that prostitution is not a socially acceptable phenomenon in the community.” (Dist. Ct.), aff’d mem (HD) (Sup. Ct.) case no. B 3947-00, with slightly higher penalty. \textit{Id.} at 533.} Hence, her right to assessment of civil damages was not recognized, and the penalty was lower than it could have been otherwise.

By the Swedish National Board of Health and Welfare’s own account of “interventions against prostitution,”\footnote{Socialstyrelsen (SoS) [The National Board of Health and Welfare], \textit{Interventioner mot prostitution och människohandel för sexuella ändamål: En systematisk kartläggning med kompletterande intervjuer av svenska insatser [Interventions Against Prostitution and Human Trafficking for Sexual Purposes: A Systematic Review with} e.g., by social work, there is no systematic or effective approach in

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Sweden to provide a remedy, or an “exit strategy”, to women who want to leave prostitution. Therefore the decision by the courts to deny monetary damages from tricks is highly disappointing. It is notable that none of the conditions or observations of prostitution recognized in the legislative findings, or in contemporary research, document a condition of freedom required for the “consent” on which the Supreme Court relied to be meaningful. The courts ignore that the prostituted persons’ so-called consent is overwhelmingly fictional—exploiting someone’s position of desperation is not a situation to which a person can legitimately consent. The court also gives no attention to the legislative history showing that Parliament regarded prostitution to be a form of gender-based violence and its intent to help those who are victimized.

The Supreme Court decision also meant that the crime is in effect now technically regarded as a “low priority” crime, and only fined. For instance, a Supreme Court justice was convicted for purchase of sex but managed to keep his job, while being fined approximately US$ 5,800.\(^\text{341}\) Similarly, many law enforcement officers regard the crime as low priority when assigning resources to enforce it, explicitly citing the penalty level as determining their priorities.\(^\text{342}\) These are not arguments against criminalizing purchase of sex, but arguments for interpreting the Swedish law more strongly; i.e., as a crime against the person (not the public order). Some initiatives are underway in this regard, but Sweden is still dealing with some of the myths about consensual prostitution encountered everywhere.\(^\text{343}\)

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\(^{342}\) See, e.g., Magnus Hellberg and Daniel Siksjö, "Bilderna inifrån lägenhetsbordellen: Forskare grep efter sexbesöket i hyreshuset” [The Pictures from inside the Apartment Brothel: Researcher Apprehended after Sex Purchase in the Apartment Building], \textit{Kvällsposten} [Evening Post], May 23, 2010, at 8-11 (quoting Nat’l Criminal Detective Inspector Kajsa Wahlberg saying “A higher penalty would perhaps also lead to that the police prioritize these crimes more.”); Ann Johansson and Per Nygren, “Polisen tar tuffare tag mot sexköparna runt Rosenlund” [Police Being Tougher Against Sex Purchasers around Rosenlund], \textit{Göteborgs-Posten} [Gothenburg Post], Apr. 11, 2010, sec. “Söndagsreportage” at 9 (noting police traditionally consider success in terms of total jail time and number of convictions).

\(^{343}\) Contrary to evidence, many law enforcement officers express the view that domestically prostituted women are often meaningfully consenting, as opposed to trafficked women who are often believed to be coerced. See Annelie Siring, “Sexhandel, sexköpslagstiftning och myndighetsförståelse: Ett svenskt exempel” [Sex Trade, Sex Purchase Legislation, and Public Authority Knowledge: A Swedish Example], in \textit{Prostitution i Norden}, ed. Holmström and Skilbrei, 341-43 (quoting and citing from interviews with police officers). See also Sanna Jansson, "Få sexköpare åker fast i regionen” [Few Purchasers of Sex are Caught in the Region," \textit{Göteborgs Fria tidning} [Gothenburg Independent], Jan. 21, 2010, www.goteborgsfria.nu/artikl/82208, who quotes prosecutor Kristina Ehrenborg-Staffas who’s involved in a government commission reviewing the law, while she distinguishes between
For instance, further evidence of conflicting opinions in the judiciary appeared in another ruling from 2007, where an administrative court of appeal taxed a prostituted person based on a discretionary assessment. As the complainant pointed to, that decision leads to “that prostituted persons, in order to be able to pay taxes, are coerced to continue[.]” Even jurisdictions such as the state of Nevada that have legalized prostitution in certain counties, with all the attendant harm, refuse to make it worse by taxing the abuse. Considering the legislature’s recognition that the tricks know, or should know, that their purchase of sex is “destructive” to the prostituted persons, and to help the prostituted persons to get away from prostitution, decisions on damages would offer a stronger incentive for the victim of crime to testify against their exploiters. Today, case law has efficiently eliminated such incentive. Although some courts lately have switched direction and begun to recognize some circumstances in prostitution as coercive, hence justifying a higher level of penalty for tricks in those cases, no damages merited by such victimization have been awarded.

In this context, it is noted that the statutory wordings of the Swedish law defining prostitution as “purchase of sexual service” is highly inconsistent with reality. Prostitution is an abuse and exploitation of women, and not an acceptable job or “service”. Instead, prostitution could have been defined as “purchase of a sexual act of a person” which would make it much more difficult to interpret it as a regular business service for taxation purposes, or as a crime against public order, and not against a “person”. The wordings “sexual activity” were even proposed, unsuccessfully, to substitute “sexual service” by at least three considerate parties in response to the government’s referral of the 1998 Sexual Crimes Committee’s final report for public consideration; Hence, the Scania and Blekinge Court of Appeal and the Judicial Authority objected, inter alia, whether it would not be more consistent to let the prohibition relate to the trafficking victims and prostituted persons claiming “there are persons who prostitute themselves who do not do this under coercion, hence it may therefore be viewed as less serious.” Police officer Jonas Bergqvist is said to agree. Id. at 1.


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See, e.g., Svea Hovrätt (HovR) [Ct. App.] mål B 3065-07, 2007-12-18, s. 9-10 (convicting a trick to a higher penalty, but not to pay damages, since after the completed sexual act he introduces an acquaintance when the prostituted person has “been in such a subordinate position against the two men that it must have been considered a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited.”). The prostituted person was from the Court of Appeal’s view in effect understood to be in a situation in which genuine consent was not possible. In prostitution, this is usual.
concept “sexual activity,” and the Stockholm University Law School suggested replacing “sexual service” with something that did not imply prostitution to be part of regular commercial business services.\(^{350}\)

Moreover, the purchaser of sex (the trick) has money. Civil damages put the accountability where it belongs. The one who, by using her abused situation, violates the prostituted person by making her to perform sex harms her and should therefore compensate her. Thereby, an economic opportunity to change prostituted persons’ situations is created that the state does not have to pay for, while offering a incentive to testify which is currently lacking since the prostituted person is only regarded as a witness with no injured party rights, except against some pimps and traffickers.

**A Concluding Note on Democratic Progress & the Harms of Commercial Sex**

What can be perceived as a relentless disinterest among legislators and judiciaries for the situation of those victimized by pornography is however moderated when considering the passing of the act decriminalizing the prostituted person while criminalizing the purchaser in Sweden, which codified recognition of whom is subordinated and who is an exploiter.\(^{351}\) In other words, there may be some political and legal progress toward recognizing the civil rights violations pornography and prostitution accounts for, but progress is slow in major parts due to the inherent unequal democratic system and its lack of institutional mechanisms or representation that guarantees an adequately articulated interest of those victimized in commercial sex, and particularly by those victimized by pornography.

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\(^{350}\) Proposition [Prop.] 2004/5:45 *En ny sexualbrottslagstiftning* [government bill] pp. 103, 107 (Swed.).

\(^{351}\) “[I]t is not reasonable also to criminalize the one who, at least in most cases, is the weaker part whom is used by others who want to satisfy their own sexual drive.” Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill] p. 104 (Swed.).