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Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential*

MAX WALTMAN ♣

Abstract

In 1999, Sweden passed a law criminalizing the purchase of sex and decriminalizing the prostituted person. The law was part of an omnibus bill against violence against women, recognizing prostitution as related to such violence. This article analyzes the reasons for the Swedish law and documents the law's impact, concluding that the law has significantly reduced the occurrence of prostitution in Sweden compared to neighboring countries. In addition, it addresses some important remaining obstacles to the law's effective implementation and responds to various common critiques of (and misinformation about) the law and its effects. Finally, this article argues that, in order to realize the law's full potential to support escape from prostitution, the civil rights of prostituted persons under current law should be strengthened to enable them to claim damages directly from the tricks/johns for the harm to which they have contributed.

* Except as noted, translations are the author's. The approach to this topic, with some of its key arguments and ideas, particularly legal ones, were previously developed together with co-authors of two submissions to the Swedish government (Petitioners et al. 2010; 2011). Similar material by the author is forthcoming in a symposium issue of the *Michigan Journal of International Law*, volume 33, where the Swedish law against purchase of sex is analyzed as a cogent response for States Parties wishing to fulfill their obligations under international trafficking law. In its first incarnation, this article was a speech addressed to the Medical Research Council, the South African Law Reform Commission, the Embrace Dignity Project, and the Coalition Against Trafficking in Women in South Africa at a joint seminar entitled *Prostitution in South Africa: Developing a Research Agenda*, held 14-15th April, 2010, at Leriba Lodge, Pretoria. Nozizwe Madlala-Routledge, Jeremy Routledge, and Mediatrice Barengayabo were helpful to its delivery, as well as Melissa Farley who contributed to its further development along with editors of *Women's Studies International Forum* and anonymous reviews. Jonas Tallberg and the Department of Political Science, Stockholm University, provided the necessary foundation for the research. The article would not have been conceived without the generous support of Catharine A. MacKinnon.

* Max Waltman is a PhD Candidate at Stockholm University, Department of Political Science, writing on legal challenges to pornography as a violation of equality and other human rights. He analyzes how democratic systems have handled these challenges and addresses the harms documented in commercial sexual exploitation, focusing on Canada, Sweden, and the U.S. A recent article of his on the topic, "Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the United States," is published in *Political Research Quarterly* vol. 63, no. 1 (2010): 218-237.

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Introduction

The challenges to prostitution and its harms have entailed claims of abuse, exploitation, and dominance on behalf of some, discrimination, victimization, and subordination by others.¹ 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 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 persons² and not those being bought. The law stated that "[a] person who . . . obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months" (BrB 6:11). From July 1, 2011, maximum penalty has been raised to imprisonment for at most one year (Bet. 2010/11:JuU22).

¹ For a small chronological sample of scholarly work making this analysis with special regards to prostitution in front of a camera, see, e.g. Dworkin (1981); MacKinnon (1985); Dines, Jensen & Russo (1998); Whisnant & Stark, eds. (2004); Kendall (2004); MacKinnon (2005; 2007, chap. 10); Guinn & DiCaro eds. (2007). See also Lederer (1980b), for some early key works pertaining to such an analysis.

² The term "prostituted person" suggests that persons in prostitution are substantially placed there and kept there by acts of others, which evidence further to be discussed indicates. While this term is used roughly synonymously with "person in prostitution," it expresses more clearly the reality, further dealt with below, that most people who are found in prostitution are either pimped, trafficked, or coerced by social forces including in particular poverty, racism, and sex inequality. Catharine A. MacKinnon made these definitions (see Petitioners et al. 2010, 7 n.4).

In the international debate regarding the best legal approach to prostitution (see further below), the law has been attacked by those who argue that prostitution can be made into an acceptable means for making a living. From their vantage point, Sweden's law restricts the rights of the prostituted person, making her or his situation more difficult or dangerous by imposing obstacles to tricks³ (clients) as well as to third parties, whom they regard as facilitators rather than as, e.g., exploitative pimps. Other opponents to the law seem to regard prostitution as impossible to eradicate; thus, they imply, even if it is undignified and unequal per se, controlled tolerance is the best legal approach. On the other hand, the Swedish law has been applauded by many of the activists, academics, and policymakers aiming at the abolition of prostitution, recognizing it as exploitative, harmful, and an expression of gendered sexual dominance whether the gender of the trick is male or (so far, in much lower numbers) female. In their view, somewhat simplified, by criminalizing the trick and decriminalizing and supporting the prostituted person the state clearly recognizes the inequality of prostitution as being wrong. Furthermore, it supports the prostituted persons by correctly attributing accountability to the predatory behavior of those who exploit their vulnerability to sexually gratify themselves.

Ideological positioning should be measured against evidence, as opposed to rhetoric or principles, of what was known about prostitution in Sweden before and after the law's enactment. This includes assessing preconditions to enter it, the situation while there, and possibilities for exit, as well as the impact and implementation of the law itself compared to other countries. This article aims to sort out the conflicting claims on these matters. It will present an analysis of the core reasons for the Swedish law and the legislative findings on which it was based. Furthermore, the article documents the law's impact along with some of the more crucial obstacles to its full and effective implementation. It also responds to some critiques of the law that have been promulgated in the international debate. Finally, an extensive analysis will be offered of the Swedish case law which evolved after the enactment of the Sex Purchase Law. This case law, which has gone virtually unnoticed outside Sweden, needs to be challenged in order to support persons escaping from prostitution more effectively.⁴

³ The word "trick" is used to denote a purchaser of sex in this article. Other commonly used words are johns, punters, buyers, or clients. The term trick is frequently used by prostituted women when describing men who buy them, the word referring to how the men "trick" them into performing more acts than paid for, or cheat them by for instance refusing to pay (see Farley 2007b, 147). Moreover, evidence presented further on about preconditions to entering prostitution and the treatment in commercial sex shows a huge power-imbalance between trick and prostituted person, enabling the former thus to "trick" the latter into exploitation and degrading, dangerous, and inhumane treatment.

⁴ A rare exception outside Sweden of noting the problems with the current case law was made by the U.N. Rapporteur on Violence against Women in 2007, Yakin Ertürk. She noted that Swedish official government documents took the view that "regardless of the consent of the women involved . . . legislation regards women in prostitution as victims of male violence" (U.N. Human Rights Council 2007, ¶ 41). However, in the Rapporteur's communication she indicated that the government had "clarified that Swedish penal legislation does not regard women in prostitution to be victims of male violence" (¶ 41 n.23). This seeming inconsistency was not further analyzed by Ertürk. Nonetheless, the most recent government commission of inquiry's report (SOU 2010:49) in July 2010 came in favorably to some (but not all) of the suggestions voiced in a joint submission by myself and 12 other

Sweden's Legislative History, the Evidence, & Comparative Outlooks

The Swedish Act prohibiting purchase of sex was enacted after more than two decades of public debate and government commissions deliberating on the right legal response to prostitution (see, e.g., Svanström 2004). An outline of some relevant events both prior and subsequent to the law's passage discussed in this article is provided in this list:

- **1993 Prostitution Inquiry**, government expert commission.
- **1995 Final Report** by the 1993 *Prostitution Inquiry*, including dissent (SOU 1995:15).
- **1998 Women's Sanctuary Bill (Kvinnofrid)** (government bill) (Prop. 1997/98:55).
- **2001 Supreme Ct.**, short cursory opinion affirming lower courts' rulings.
- **2005 Sexual Offenses Bill**, government bill, minor amendments (Prop. 2004/05:45).
- **2007 Stockholm Administrative Ct. of Appeal**, decision on taxation.
- **2007 Ct. of Appeals for Western Sweden**, higher punishment, without damages.
- **2008 Inquiry**, evaluation, government expert commission.
- **2010 Final Report** by the 2008 Inquiry (SOU 2010:49).
- **2011 Government Bill**, proposing raised punishment and some damages (Prop. 2010/11:77).

Before the Act was passed neither the purchasing of sex from adults nor being prostituted was criminalized, but procuring it was. Laws governing tangentially related matters, such as prohibitions against public pornography performances, and regulations with respect to communicable diseases, aliens, compulsory care of young or addictive persons, could be used in a prostitution context (SOU 1995:15 pp. 55-70). For instance, the Care of Abusive Persons (Special Provisions) Act could be used to force compulsory care on an addicted adult prostituted person. This might be done in an institutionalized setting, even against their will, if there was, "an extraordinarily severe situation, where the addiction patently endangers, i.e., next to thwarting the substance abuser's possibilities to live a humanly dignified life during a long time ahead" (p. 67; citing legislative history). Similarly, the Legal Aliens Act at the time was said, *inter alia*, to enable the state to refuse a non-citizen to enter, or revoke their residence permit when having conducted, or could be presumed to conduct, a "dishonest living" that might include "procuring" and "prostitution" (the latter, assumingly, meant being prostituted) (pp. 67-68; citing legislative history). When the 1995 Final Report was written, laws pertaining to legal aliens appear not to have apprehended prostitution as exploitation of vulnerable persons or as acts of inequality. Rather, being prostituted seem to have been viewed as immoral, thus the expression "dishonest

NGOs and individuals (see Petitioners et al. 2010), particularly to vindicating the civil rights of the prostituted persons to claim damages directly from the trick for the harm he contributes to. The government response in this respect will be further analyzed in this article.

living” and the de facto criminalization of legal aliens who were prostituted. Such views, as will be shown, are not officially expressed in the current Swedish law prohibiting purchase of sex.

Prostitution had increasingly been framed as a problem of sex inequality at the national government and parliament levels, at least since the end of the 1970s (Svanström 2004). Some relatively obscure efforts to criminalize purchasers, based partly on a gender-equality rationale understanding that buying women for sex was exploitive, did not bear fruit at the time. For instance, Sweden's Social Worker's Association submitted responses to a 1981 government-commissioned report, arguing that a law against purchasers would “improve equality between the sexes and prevent undue exploitation of socially deprived women” (Prop. 1981/82:187 p. 44; summarizing responses). The idea did not go further until American lawyer Catharine A. MacKinnon in 1990, during a speech together with writer Andrea Dworkin, organized by the umbrella association Swedish Organization for Women's and Girls' Shelters (ROKS) under its first chair Ebon Kram, independently argued publicly that gender inequality and sexual subordination in this area could not effectively be fought legally by assuming a gender symmetry that empirically does not exist (MacKinnon 2006, 101; cf. 1991, 69; translated transcription). Thus, in an unequal world, a law against men purchasing women is called for together with no law against the people, mainly women, being bought for sexual use: “ending prostitution by ending the demand for it is what sex equality under law would look like” (Ibid). ROKS held regular yearly meetings with members of parliament, and in 1992, 1994, and 1995 the criminalization of purchasers was an agenda item (Svanström 2004, 236).

After years of determined effort by Swedish women, in 1998 the parliament finally passed the omnibus bill on men's violence against women; the so-called *Kvinnofrid* bill (approx: Women's Sanctuary or Women's Peace). The bill situated prostitution in the context of sex inequality—rather than, as has been common, among crimes against morality, decency, or public order. The connection between gender-based violence and prostitution was elaborated in the government bill, inter alia, by noting the relationships between the two commissions that had inquired into these issues:

Both the Commission on Violence Against Women and the Prostitution Inquiry thus raise issues that in major parts pertain to relationships between men and women—relationships that have significance for sex equality, in the particular case as well as in the community at large. In this way the issues can be said to be related with each other. Men's violence against women is not consonant 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. (Prop. 1997/98:55 p. 22)

In addition to these statements, recognitions of exploitation and abusive conditions in prostitution related to sex inequality—i.e., how girls and women are socially subordinated thus made particularly vulnerable to exploitation and abuse—were expressed in the law's legislative history (see further below). Taken together, these views suggest prostitution to be a form of sex

inequality related to gender-based violence, exploiting and harming the prostituted person. The findings recognized by Parliament when passing the bill also emphasized that prostituted women were persons who often had deprived childhoods, were neglected, and early on were deprived of a sense of self-worth (pp. 102-03). Additionally, a strong association between prostitution and sexual abuse during childhood was noted (p. 103). Thus, social inequality and other coercive preconditions, such as being sexually abused and traumatized when vulnerable as a child, were understood to propel women and girls into prostitution (more below).

Harm, Trauma, and Power-Imbalance in Prostitution

The forms where prostitution occurs have changed to some extent since the introduction of the Swedish law. New mediums for prostitution such as the Internet, along with a changed transnational traffic in sex, so-called sex tourism, and new prostituted populations from previously less poor regions such as Eastern Europe, are some of the changes. However, as far as the research questions, for instance, concern preconditions for entering prostitution, the power-imbalance while there, and tricks' treatment of prostituted persons, more recent social evidence does not suggest any significant difference from the situation observed in the 1980s. Rather, they provide it with depth and validation. Thus, many of the studies on prostitution's harm cited below that were made during the 1980s, or sometimes the 1970s, are still highly relevant. Particularly, this is so when considering the quality and meticulous methods used then, which are still high compared to some more recent studies. Older studies are difficult to surpass without adequate resources and ample commitment.

Accordingly, as indicated in the Women's Sanctuary bill in 1998, the majority of prostituted persons—somewhere between 55% and 90% according to various international studies available—were subjected to sexual abuse as children. Many consequently run away from home and begin a life living on “the street,” exploited by tricks unscrupulously purchasing them for sex. A large study published in 2003 surveying a population of 854 prostituted persons in nine countries across five continents, in virtually all forms of prostitution (see *infra* note 6, for sample procedure), found that 59% of all respondents affirmed that they, as children, were “hit or beaten by caregiver until injured or bruised” (Farley et al. 2003, 43; *n* = 759). An additional 63% reported they were sexually abused as a child (*n* = 806). In the same sample, 75% reported they had been homeless, either currently or in the past (*n* = 761). Not unexpectedly, a low age of entry is generally corroborated internationally. Forty-seven percent in this sample reported they entered under age 18 (Farley et al. 2003, 40; *n* = 751). Silbert and Pines (1982) interviewed 200 juvenile and adult women in the San Francisco Bay Area by informal recruitment and advertising (to avoid “arrestable” or “service oriented” respondents) (p. 474), and 78% reported entering under age 18 (Silbert & Pines 1981a, 410). 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” (p. 410). Ninety-six percent among the juveniles interviewed were runaways (p. 410). Consistently, 70% of respondents were under age 21 at the interview, almost 60% were

16 or below, and “many were” age 10, 11, 12, and 13 years old (p. 408; oldest respondent 46, youngest 10, mean 22; cf. Silbert & Pines 1981b, 396).

Regarding history of sexual abuse during childhood, 60% out of 200 in Silbert and Pines' (1982) sample reported this from age 3 to 16 (p. 479). The mean age for the victimization was 10, and on average they were abused by two people (Silbert, Pines, & Lynch 1980, 26). The Swedish 1993 Prostitution Inquiry had found that findings from Swedish clinical- and outreach workers in Gothenburg were corroborated by studies such as Silbert & Pines's. In this context the Inquiry cited, *inter alia*, that 60% of the 200 San Francisco respondents had been sexually abused as children by on average two adult men, and 70% of them explicitly reported that sexual abuse affected entry while even more indicated this strongly in their open-ended responses (SOU 1995:15 p. 104; citing Silbert & Pines 1983, 286; see also Silbert & Pines 1981a, 410).⁵ However, Farley et al. (2003) note that traumatized persons “tend to minimize or deny their experiences” (p. 57). In part for such reasons, Farley and her coauthors believe childhood sexual abuse was underreported among their respondents (p. 57). Some screening studies of gender-based violence, in order to avoid respondents minimizing their experiences, utilize a range of ostensive definitions of typical acts of violence used (see, e.g., Lundgren et al. 2002, 20). Not surprisingly, in-depth studies of persons who left the sex industry show higher frequencies of childhood abuse than did Farley et al. (2003) or Silbert & Pines (1981a, 1982, 1983).

Hunter (1993) found that 85% out of 123 survivors of prostitution reported being victims of incest as a child, 90% were physically abused, and 98% were emotionally abused (p. 99). Giobbe (1994) reported that the organization WHISPER conducted interviews with formerly prostituted women in Minneapolis where 90% stated they had been battered and 74% stated they had been subjected to sexual abuse between 3 and 14 years of age (p. 123). Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of prostituted women they worked with were sexually abused during childhood, and Genesis House in Chicago reported the same for 94% (p. 126 n.10; citing The First National Workshop for Those Working with Female Prostitutes. Wayzata, Minnesota, Oct. 16-18). Consequently, it is clear that, as Simons and Whitbeck (1991) found in a sample of 40 adolescent runaways and 90 adult homeless women in Des Moines, Iowa, “early sexual abuse increases the probability of involvement in prostitution irrespective of any influence exerted through factors such as running away from home, substance abuse, and other deviant activities” (p. 361). *See also* Vanwesenbeeck (1994, 21-24; summarizing studies); Bagley & Young (1987); Silbert & Pines (1981a; 1982; 1983); James & Meyerding (1977).

In Sweden the number of children being sexually exploited is still “considerable” according to a government report from 2004 (SOU 2004:71 pp. 15-16, 27-28). Recent findings among

⁵ For a reply to recent attempts by history of ideas scholar Susanne Dodillet to criticize the Swedish legislative findings from 1995 and 1998 as not sufficiently relevant to indoor-prostitution, see discussion *infra* at 25 et seq; Cf. 16 et seq, for a critical discussion regarding indoor/outdoor distinctions.

young adults over age 18 who have been prostituted in and around Gothenburg, Sweden's second largest city, confirm high correlations to prior childhood (sexual) abuse, neglect, and homelessness (Abelsson & Hulusjö 2008, 97-99). These findings are corroborated in other recent nationally representative youth-surveys (including particular surveys on LGBT-populations), adding socioeconomic factors and nationality as predictors to prostitution (Svedin & Priebe 2009, 74-75, 110, 112, 135; Ungdomsstyrelsen 2009, 156, 158, 161-69). Such findings strongly suggest the Swedish law should be more efficiently implemented or amended to reach its full potential, including making escape from prostitution possible. Hence, in most situations of prostitution, coercive circumstances exist that push women into the sex industry. These circumstances may include subjection to sexual abuse as children, homelessness, sex and economic discrimination, and often racism.

For instance, as the Swedish National Council for Crime Prevention (BRÅ 2008) recently found, poverty and discrimination are two key structural factors for recruitment into trafficking to Sweden, Finland, and Estonia (pp. 36-43). Many trafficked women and girls belong to minority groups, such as the Baltic Russian-speaking minority and the Roma people in Eastern Europe, and the majority come "from the lowest social strata" (BRÅ 2008, 8). Similarly, in North America Black women and First Nations women and girls appear grossly overrepresented in prostitution relative to their population proportion (see, e.g., Farley, Lynne & Cotton 2005, 242; Nelson 1993, 83 et seq; James 1980, 17, 19). Concurring, Goldsmith (1993) found among 3000 "streetwalking prostitutes" interviewed in New York City that half were African American and a quarter Hispanic (p. 65). The Special Committee on Pornography and Prostitution in Canada (1985) also noted that most prostituted persons on the prairies were young native women (p. 347). Similarly, the Aboriginal Women's Action Network (2011), has stated that Aboriginal women's overrepresentation in prostitution in Vancouver "is not simply a coincidence." Evidence suggests that, once having entered prostitution, the injuries these people are exposed to are compelling.

The abovementioned nine-country study found that 68% of the prostituted persons ($n = 827$) met criteria for posttraumatic stress disorder (PTSD), and symptoms were higher or equal to that of treatment-seeking Vietnam veterans (Farley et al. 2003, 44-49, 56). The symptoms were in the same range as for battered women seeking shelter, survivors of rape, and refugees from state-organized torture (p. 56). Such symptoms were also found regardless of whether prostitution was legalized or criminalized, and regardless of whether it took place indoors, in brothels, on the streets, or in developing as opposed to fully industrialized countries (p. 48).⁶ Similar research on

⁶ Researchers interviewed/surveyed prostituted persons at the following locations: 1) on the streets in Canada, 2) in brothel, stripclub, street, or massage prostitution in Mexico, 3) at clinics for STD controls in Turkey (not service-oriented respondents), 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 Thailand, 7) at brothels, streets, and drop-in center for prostituted persons in Johannesburg and Capetown, South Africa, 8) at

PTSD currently does not exist in Sweden, although psychologists and psychiatrists working with trauma and recovery of women prostituted in Sweden testify that it is common with all women they encounter. These professional practitioners report that the women have “severe posttraumatic stress-reactions manifested in the forms of serious mental disorders such as grave sleep- and concentration disorders, recurrent anxiety- and panic attacks, grave depressions, severe anorectic reactions, self-destructive behaviors combined with extensive dissociation, problems with impulse control, and manifest or latent suicidality” (Ramos-Ruggiero & Hännestrand 2010, 1).

Suggesting doubts about the position recently taken in an Ontario court that PTSD “could be caused by events unrelated to prostitution” (*Bedford v. Canada* 2010, ¶ 353), a Korean study from 2009 with 46 former indoor-prostituted women and a control group found that prostitution was strongly related to PTSD even when controlling for childhood abuse (Choi et al. 2009, 942). For comparative purposes it is also notable that this latter study contained women prostituted indoors, e.g., in escort and brothels, as opposed to people who had been prostituted primarily in outdoor/street venues. Furthermore, apart from PTSD the study revealed significantly higher symptoms of disorders of extreme stress not otherwise specified (DESNOS) among the prostituted women compared to the control group. This finding was significant in spite of the fact that 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 (pp. 935-36, 942, 945).

Reviewing other evidence of the harmful circumstances in prostitution in terms of health consequences, an article in the *American Journal of Epidemiology* from 2004 showed that in a population of 1969 prostituted persons in Colorado Springs during the years 1967-1999, those active in prostitution ran a risk of murder 18 times higher than in a comparable non-prostituted population (Potterat et al. 2004, 782-83). The homicide rate for prostituted women (204 per 100,000) was “many times higher than that for women and men in the standard occupations that had the highest workplace homicide rates in the United States during the 1980s (4 per 100,000 for female liquor store workers and 29 per 100,000 for male taxicab drivers)” (p. 783). Similarly, the Special Committee on Pornography and Prostitution in Canada (1985) quoted estimates that mortality for prostituted persons may be 40 times higher than the national average (p. 350). Not surprisingly, women (and men) in prostitution have been documented as particularly vulnerable to victimization by serial murderers (see, e.g., Hickey 2002, 252-53).

Against the backdrop of mortality in the prostituted population, it is not extraordinary but rather well-known and well-documented that pimps as well as tricks use threats and violence. Evidence reviewed by one Canadian federal inquiry in the 1980s suggested that tricks were “the

a nongovernmental organization (NGO) supporting approximately 600 women a week in Lusaka, Zambia, and 9) at support agencies in Bogota, Colombia (Farley et al. 2003, 37-39). Male and/or transgendered persons were included in the Thai, South African, and U.S. samples (p. 39).

primary source of sexual violence” (Special Committee on Pornography and Prostitution in Canada 1985, 388), and a previous Canadian federal inquiry similarly found tricks to be the most frequent category among perpetrators (Committee on Sexual Offences Against Children & Youths 1984, 1026). Among the 200 juvenile and adult prostituted women surveyed in San Francisco by Silbert and Pines (1981b), 70% reported having been raped or similarly abused by tricks an average of 31.3 times (p. 397). Among 222 prostituted women surveyed in Chicago, Illinois, approximately 21% *explicitly* acknowledged having been raped over 10 times in escort services ($n = 28$) and in street prostitution ($n = 101$), and when prostituted in their private homes ($n = 24$) (Raphael & Shapiro 2004, 134-35). Tricks were generally the “most” frequent “perpetrators of violence across all types of prostitution” (p. 135). These are notable figures, particularly considering that rape is commonly and grossly underreported by prostituted persons themselves (cf. Farley 2003, 57, 66; SOU 1995:15 p. 144).

Thus, considering that underreporting is common it is understandable that among 55 female prostitution survivors participating in a project in Portland, Oregon, the reported numbers were even higher: Eighty-four percent had been subjected to aggravated assault on average 103 times a year, 78% to rape 49 times a year, and 53% were sexually tortured on average 54 times a year (Hunter 1993, 93-94). During the torture, pornography was reportedly often made (p. 94). The nine-country study mirrors such conditions. Forty-nine percent ($n = 802$) of the respondents in that study reported being used in pornography, and these persons were diagnosed with “significantly more severe symptoms” of PTSD than were those who did not report being used in pornography (Farley 2007b, 146, 422n298; Pearson $r = 126$, $p = .001$, $n = 749$). This suggests sexual exploitation in pornography is particularly vicious and cruel. Converging with such data, other survivors from the pornography industry testify to constantly being covered with “welts and bruises” (Att’n General’s Comm. on Pornography 1986, 784; quoting from Washington DC, Hearing, Vol. I. p. 179-82).

Studies conducted in Canada indicate levels of violence against prostituted women similar to those described above. Weapons such as baseball bats and crowbars are used regularly against them, as well as offenders jerking the prostituted women’s heads against car dashboards or walls (Farley, Lynne & Cotton 2007, 250-51). Independent witnesses in Swedish procuring cases unfortunately confirm this multi-country image of violence and coercion in prostitution, with testimonies of daily beatings, gang-rapes and torture, including the “welts and bruises” previously mentioned. For typical cases where documentations of such violence were recognized in the courts’ opinions, although sometimes severely downgraded legally, *see, e.g.*, Helsingborgs tingsrätt (2005, 58-59), *sentence modified by* Hovrätten över Skåne och Blekinge (2006; Katarina’s damages dismissed), *see also* Stockholms tingsrätt (2003, 14, 16, 21 et seq), *sentence modified by* Svea hovrätt (2003; containing additional testimonies). In many Swedish cases involving pimps, the pimps are unfortunately never charged or convicted under the trafficking law, even less under provisions against rape, assault, or unlawful deprivation where such crimes

were de facto committed. What is often used are the less severe procuring provisions, suggesting that prostituted persons are unequal under the law (see, e.g., Petitioners et al. 2010, 22-29).

The Swedish Crime Victim Compensation and Support Authority noted similar problems in a review of all human trafficking cases since July 2002, and in “some seventy judgments” since March 1999 on other charges (Brottsoffermyndigheten 2010, 14). They found “accounts of the criminal acts of procuring or gross procuring, despite the fact that in the description of the acts is accounted for a sequence of events that exhibit very large similarities to, or are completely identical with, those that could give rise to liability for human trafficking for sexual purposes (after the legislative amendment 2004)” (p. 14). The author notes that such downgrading of charges “may have the consequence that the victim, rather than as injured party, is considered as a witness and therefore is not given the opportunity to assist the prosecution, claim reimbursement under the scope of the criminal proceeding, or to receive an injured party’s legal counsel” (p. 15). One first step in challenging this unconstitutional treatment of prostituted people in courts would be to submit a diagnosis of the PTSD-symptoms of the prostituted persons, then to conduct additional inquiries about their suffering and situation to assess their damages. This was recently done in a number of British trafficking cases by plaintiffs’ attorneys (see *AT v. Dulghieru*, 2009; *AT, NT, ML, AK v. Gavril Dulghieru, Tamara Dulghieru* 2009). Using such documentation provides persuasive evidence that purchasers and pimps have contributed to harm, thus should pay damages (see further on damages below).

The fact that tricks are violent towards prostituted persons has long been known, albeit legally it may have been ignored. In the words of the Swedish 1993 Prostitution Inquiry:

It 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. (SOU 1995:15 p. 142)

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. Exemplifying such an instance, the Inquiry described a typical case where a “club” selling pornographic movies also produced their own materials in their basement where any paying male guest could have sex with women the club supplied (p. 96). One woman aged 20 and in great need of money at the same session found herself having to serve over 10 men from a large crowd with vaginal and oral intercourse, and a completely unprepared anal intercourse (pp. 96-97). According to her testimony, corroborated by similar reports from other “girls” (p. 97), this event had followed upon two “seasoning” sessions where at the first one she had sex with 1 man, and at the second one 3 or 4 men from a crowd of 30-40. Because she was still in great financial stress she accepted yet a third session despite the pornographers having apparently already pushed her limits, which is symptomatic for the imbalance in power that pro-

pels people into these dangerous and unwanted situations. The Inquiry stated that she had fared very badly from the events, and that other girls had testified about similar experiences at other sex clubs while the Police investigated several reports of this kind at the time (p. 97).

Comparative Observations

Given the obviously dangerous situations prostituted persons have entered into above, not unexpectedly there are often severe economic hardships forcing them to stay there. This seems to be a global condition across nations (see, e.g., Special Committee on Pornography & Prostitution in Canada 1985, 376-77; Gould 2008, 115; on South Africa; Silbert & Pines 1982, 486-89; San Francisco; Attorney General's Commission on Pornography 1986, 888; on "performers in commercial pornography" [U.S.], see also pp. 859-61; cf. Lederer 1980a, 58-59). The economic factors underlying persons' decisions to enter prostitution were part of the calculation underlying Sweden's 1998 decision to try a different path. For example, a 45 year old woman interviewed by the 1993 Prostitution Inquiry stated she had a prior history of childhood neglect, institutional foster care at age 16, as well as other kinds of problems during adolescence, and had been prostituted, mostly on the streets, for over 25 years (pp. 73-75). She was not among those worst off in terms of exposure to violence and abuse, even claiming to be able to choose her customers carefully (p. 75), but nonetheless said that "[m]ost of all, I want to end with prostitution" (p. 75), but she could not. The obstacles to her escape she described in the following ways:

The problem is that I cannot enter schools, courses, or work-places. I have no papers and I cannot account for what I have done during all these years. I get anxious for the future. It is too late for me now to change my life. Nonetheless, I am afraid to get stuck in prostitution. I cannot imagine going around here until age 50-60. For me, it is now burdensome and difficult to walk the streets. It is onerous to stand here. (SOU 1995:15 p. 75)

Moreover, the Inquiry revealed many other voids in the social safety net. Prostituted women with mental disorders were frequently encountered by outreach workers. The Inquiry had, however, found that it was "very difficult to get these women taken care of. This holds especially if the women are drug abusers. Neither the psychiatric care, nor drug addiction programs, seems then to want to take responsibility for them" (p. 109).

The exploitation that follows in prostitution often appears to entail a ruined psychic and social development for the prostituted persons, as well as a lack of realistic alternative means for income (cf. Herman 2003, 11). Thus, prostituted persons are rarely reintegrated into the community on equal terms. Instead they frequently get stuck in coercive circumstances of prostitution. Tricks apparently can buy, and pimps can sell persons for sex in nine countries where 89% of prostituted persons *explicitly* say they want to leave, but cannot (Farley et al., 2003, 51; $n = 785$). Hence, it appears that those prostituted persons are in a "status or condition . . . over whom any or all of the powers attaching to the right of ownership are exercised" (Slavery Convention 1926, art. 1:1 p. 163; cf. Barry 1981, 40; defining a situation of prostitution you cannot leave as "sexual

slavery"). Contributing to these conditions that they do not want and this situation which they cannot leave are numerous bureaucratic obstacles and barriers similar to those mentioned by the Swedish woman above. For instance, in Nevada women shelters do not admit women with children, pets, HIV, communicable diseases, or criminal records, women who have not been drug-free for a specified time, or women recently released from prison (Williams 2007, 159). In effect, these and similar policies create insurmountable barriers to escape for many prostituted women (see, e.g., pp. 159-72).

Tricks, who are exploiting the situation of prostituted persons, tend to know many relevant facts about prostitution. Interview studies show that tricks, to a significant extent, recognize how prostituted persons are economically strapped, subjected to violence and other grave hardships, and often pimped/trafficked, as well as knowing that most were abused or neglected as children (see, e.g., Durchslag & Goswami 2008, 20-23; Farley, Bindel, & Golding 2009, 14-16; Farley et al. 2011, 4-5, 8). Prostitution researchers have long since confirmed tricks' awareness of such facts and their tendency to deny or neutralize their own abusive contributions (see, e.g., Monto 2004, 177; Di Nicola & Ruspini 2009, 231-32). In light of such findings, it is not surprising that the 1998 Women's Sanctuary bill concluded "that 'ordinary men' who are often married or cohabiting, participate in an activity which they should be aware is destructive . . . particularly for the women they are buying sexual services from" (Prop. 1997/98:55 p. 22).

The Swedish government in 1998 clearly understood that in order to buy sex, tricks exploit prostituted persons' coercive circumstances; i.e., that the prostitution transaction is asymmetrical and unequal. This was also the explicit reason why Parliament in 1998 rejected a proposal that had been raised by the 1993 Prostitution Inquiry's majority, suggesting prostituted persons should be criminalized along with the tricks. The 1993 Inquiry's majority thought such double-criminalization would, *inter alia*, deter persons from entering or continuing prostitution (SOU 1995:15 p. 221). Nonetheless, Parliament accepted the executive government's conclusion to the contrary:

[I]t is not reasonable also to criminalize the one who, at least in most cases, is the weaker part who is *exploited* by others who want to satisfy their own sexual drive. It 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. (Prop. 1997/98:55 p. 104; emphasis added; *cf.* Bet. 1997/98:JuU13; Parliament dismissing minority motions [minority bills] proposing criminalizing both parties)

Interestingly, despite that the 1993 Prostitution Inquiry itself had amassed overwhelming evidence of harms in prostitution and also recognized the prostituted person as the most harmed "party," nonetheless its majority proposed criminalizing both parties in part on the alleged rationale that men (tricks) were also "victims, in some senses" (SOU 1995:15 p. 227). Moreover, the majority claimed the prostituted woman's difficult situation was not sufficient to "exempt her from liability for her actions" (p. 228), effectively blaming the victim. In retrospect, these

recommendations seem inconsistent. The only substantive harms against tricks that were actually presented in the report, allegedly indicating they would also be “victims,” were dealt with in a *single paragraph*. There, violence against the tricks was mentioned without any specification of who exercised this violence (pimps, police, or prostituted women) (p. 147). Furthermore, harms from the tricks’ childhoods (abuse and vulnerability) were said to be reinforced when they participated in prostitution, but this was not further discussed. Moreover, harms that affected other women were mentioned, as opposed to harms against the men in question. Thus, it was said that the trick is influenced by “the view on women and sexuality in the sex trade [which] in the long run makes impossible normal sexual relations with mutual emotions and responsibility between the parties” (p. 147). The suggestion that, among other things, such harms were proportional to what prostituted women were subjected to by tricks for purposes of liability, or that these harms otherwise would support not exempting prostituted persons from liability, was effectively rejected by the legislature above. A similar rejection had already been strongly voiced by a dissenting expert in the Inquiry (p. 241; Ekström, dissenting).

The dissenter in 1995 explained that although she approved the 1993 Prostitution Inquiry’s findings of harm, these suggested a completely different legal proposal than criminalizing *both* parties to deter them from prostitution. She wanted to criminalize only the trick, not the prostituted person, precisely on the rationale rejected by the Principal Investigator; i.e., the “sex trade is not a business deal between equal parties” (p. 241). Furthermore, she argued that “extremely few prostituted persons . . . have control of their lives” (p. 241). The parties were not merely slightly unequal in their bargaining power, and otherwise similarly situated and in control of their lives, the argument implies. This expert candidly concluded that the Inquiry’s own findings already had established that “the physical and mental harms the sex trade entails for the women reach far beyond the limits of cognition” (p. 241). The legal response should hence

unambiguously and clearly side with the vulnerable women in the fight against an undignified and inhumane sex trade. Not by continuing the punishment of women that has occurred through history, but by designating the liability to those who have the upper hand socially speaking, namely the male buyers . . . who are the foundation for the sex trade’s existence. (p. 241)

The expert further made an analogy with *usury*, where only one party is criminalized, although two persons are needed for that criminal act to take place (p. 241). This substantive dissent, as events unfolded, became Sweden’s official position in 1998 when the parliament passed the Women’s Sanctuary bill.

Arguments Supporting Toleration of Prostitution

In order to fully understand the Swedish legislature’s decision it is imperative to review the law’s benefits compared with other contemporary legal policies promulgated in the academic debate. One such idea is that states may better reduce the harms of prostitution by decriminalizing and legalizing certain forms of it. For instance, sociologist Ronald Weitzer, who has written briefly and unfavorably on the Swedish law on the basis of inaccurate data (*infra* p. 28), argues

along such lines. He takes the view that “prostitution cannot be *reduced* to gender oppression and is much more complex,” thus arguing for a shift in focus to “prostitution as a form of work” without denying “the continuing importance of mores and legal norms” (Weitzer 2007a, 144). Similarly, legal scholar Jane Scoular (2004) argues that “[v]iewing prostitution as the epitome of gender violence . . . obscure the contingencies and diversity of the structures under which it materializes” (p. 202; self citation omitted). However, these accounts evade that tricks overwhelmingly are men and prostituted persons are often women. Considering women’s generally subordinate position vis-à-vis men, such observations correctly suggest gender oppression. Weitzer’s (2007a) sweeping observations noting “variation across time, place, and sector . . . in terms of workers’ experiences as well as power relations between workers, customers, and managers” (p. 144) do not, without more, support the proposition that prostitution is *not* an expression of gender oppression, nor even that its connection to gender oppression is particularly complex.

The gender disparity in using and being used in prostitution is not complex and should be theoretically and empirically addressed—not evaded. It is notable that when discussing how “female customers . . . are a small fraction of the market but have important theoretical implications,” Weitzer (2009a) himself observes that “patterns of economic inequality between buyer and seller . . . can translate into unequal power relations” (p. 227). Such recognitions do not suggest prostitution being contingent, diverse, or a complex form of work. Rather, these observations suggest a practice of *sex inequality*, even when women buy men for sex. Nonetheless, Weitzer’s position implies that by reducing some instances of violence and increasing some safety precautions, the extreme power imbalance between the prostituted person and the trick is tolerable though not necessarily mitigated. This view appears implicit when, for instance, he admits that “indoor work” is not a safe practice per se, but nonetheless claims that “there is no doubt that it is safer than street-level work” (Weitzer 2007a, 145; cf. Weitzer 2007b, 28-30). One asks why even a reduced level of abuse is acceptable at all.

If hypothetically indoor- or other forms of prostitution would be marginally safer—a position hardly sustained on basis of the research Weitzer invokes (see *infra* p. 16 et seq)—supporting brothels on such a rationale avoids asking why prostituted persons should accept prostitution in the first place. The data reviewed above arguably show prostituted people did not genuinely choose it, and that they are unable to leave it. Weitzer’s stance appears to assume prostitution can never be eradicated, as were it the oldest profession rather than the oldest oppression. Following his line of thought, legalizing a licensing scheme that purports to control some of the abuse and tolerate the rest of it is the best that prostituted persons with no better alternatives may hope for. The Swedish Parliament, however, rejected this view. The legislature recognized that if prostitution stems from as well as causes inequality, it would be as contrary to equality imperatives to endorse it by decriminalization as it would be to criminalize those already subordinated by the phenomenon itself. Already the 1993 Prostitution Inquiry emphasized that any effective strategy

against prostitution was linked to promoting sex equality on all levels in society—from kindergarten to parental role models (see, e.g., SOU 1995:15 p. 16; cf. p. 29; English summary).

In a mutual and “equal” 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 compel his partner to be an oral receptor of semen against her wishes. Prostitution, however, very often is premised upon the idea that such considerations can be put aside, as evidenced by the documented harm and trauma in commercial sexual exploitation. Consequently, many purchasers feel entitled to demand whatever acts they paid for. This was apparent among the 103 responding London-trick interviewees, where 47% openly admitted to a greater/lesser degree that “women did not always have certain rights during prostitution,” and 25% openly admitted they believed “the very concept of raping a prostitute or call girl” to be “ridiculous” (Farley, Bindel & Golding 2009, 13). Similarly in Chicago, 43% of 113 trick-interviewees expressly stated that women “should do anything he asks” when paid (Durchslag & Goswami 2008, 18), and 22% of 110 tricks interviewed in Scotland openly admitted believing that the buyer is “entitled to do whatever he wants to the woman” (Farley et al. 2011, 7; $n = 110$).

The Swedish 1993 Prostitution Inquiry, not surprisingly, stated in their final report that “some purchasers” (an understatement) believe the money gives them “a right to treat the woman as they wish” (SOU 1995:15 p. 142). In light of the tricks’ own views of women in prostitution, Dworkin’s (1993) statement that with “the money he can buy a human life and erase its importance from every aspect of civil and social consciousness and . . . human dignity and human sovereignty” (p. 4) is clearly pertinent. Because of the extremely unequal position of power between him and the prostituted person, there are very few incentives for him not to do so, or for her to stop him. Legalization or decriminalization of prostitution, as will be argued in the next section, has not changed and cannot change these basic conditions of prostitution.

Regarding brothels (a common form of legal prostitution) and other indoor venues, researchers have noted how prostituted persons often are more vulnerable there than on the streets. This is due to their restricted physical scope for action, lack of effective escape routes, and highly reduced transparency from outside, while tricks and pimps benefit from greater privacy and discretion (see, e.g., Farley 2004, 1099-1103; citing studies and original data; Farley 2005; Raphael & Shapiro, 2005). This might not always be the case, and “vulnerability” as well as “safety” in this context are complex concepts indeed. However, those who insist that the indoor venues are “safer” often base such claims on questionable data, which should caution the reader.

For instance, in a recent Ontario Court decision in Canada invalidating a statute against “living on the avails” of prostitution (*Bedford v. Canada* 2010) which was used against pimps and traffickers, a study of legal brothels in Nevada was invoked (§§ 211- 13, 325 (e)) to support the practical outcome of the decision; third parties are not seen as exploiting the coercive circumstances of prostituted persons (see, e.g., §§ 429-31). However, the Court did not notice how the authors of this study admitted having gained access to brothels with help from the Nevada

Brothel Association and brothel attorneys (Brents & Hausbeck 2005, 294 n.1). The media's prior attention to the authors were implied to have made a favorable impression among these gatekeepers (p. 294 n.1). Other research-teams are, however, regularly denied entry into brothels (*see, e.g.,* Farley 2007a, 23; denied entry in 6 out of 14 Nevada brothels; Nemoto et al. 2003, 247; denied entry in 13 out of 25 parlors in San Francisco). Not surprisingly, the former researchers remarked that the prostituted women they interviewed "invoke feeling protected" while "managers and owners see themselves as protecting women from violence on the streets" (Brents & Hausbeck 2005, 271; for further critique of the decision in *Bedford v. Canada*, see *infra* p. 19 et seq).

Other attempts to favorably present brothels distinguish them on basis of their populations' childhood narratives, for instance claiming that "[c]hildhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers" (Weitzer 2009a, 219). However, Potterat et al. noted some time ago (1990), when studying 1022 prostituted women in Colorado Springs, that "the same woman may work [sic] in different settings, simultaneously or sequentially. Rigid stratification of prostitutes into 'high-class' or lower categories is not meaningful, either socially or ecologically" (p. 234). More recent samples also suggest that possibly the majority of prostituted persons drift between venues (Raphael & Shapiro 2004, 131; $n = 222$; Hedin & Månsson 1998, 28; $n = 23$; Kramer 2003, 191; $n = 119$; Farley 2004, 1099; citing NZ-study $n = 46$; 2007a, 29; $n = 45$). Nonetheless, researchers such as Weitzer (2009a) attempt to draw these less plausible distinctions despite the well documented mobility between different venues for prostituted persons.

It is interesting to read the two studies that Weitzer's claims above were based upon. One is from Australia, and did not survey any women in street prostitution. It was based on "call girls," with women in brothels as a "control group" (Perkins & Lovejoy 2007, 10). Furthermore, only 95 responded to the survey out of 244 women who responded to telephone calls, and half of the total calls were left unanswered (pp. 7, 161). That is an unusually high drop-out rate, but it receives no attrition-analysis. Moreover, virtually no information at all regarding drop-out rates or other sampling problems is provided regarding the brothel "control group" (pp. 10, 161). Altogether there appears thus to be a serious sampling bias at work, making results incomparable to studies including street prostitution. Weitzer then also cites a Bristol sample of 71 prostituted women in massage parlors compared to an equal number on the streets (Jeal & Salisbury 2007). Respondents below age 16 were declined (p. 876), though this is a common age in prostitution. The authors themselves raised concerns that "[t]he small sample size for each group may mean that important differences have not reached significance" (p. 879). Just as with the former study, such information is not passed on to Weitzer's readers.

Already the Swedish 1993 Prostitution Inquiry acknowledged the need for "long time and close contact with prostituted women in order to acquire knowledge of their real situation" (SOU 1995:15 p. 144). Prostituted persons can be distrusted and stigmatized by the community, thus rarely trust researchers, public authorities, and support agencies (see, e.g., Raphael & Shapiro

2005, 967). One common strategy to approach this problem is to let formerly prostituted interviewers establish a sense of trust and empathy that other interviewers cannot (see, e.g., Silbert & Pines 1984, 863; 1981a, 408-09; Raphael & Shapiro 2002, 10). Nonetheless, Brents & Hausbeck (2005) above did all their interviews themselves (p. 272), as did the Bristol researchers (Jeal & Salisbury 2007, 880). The only exception is the Australian researchers whom Weitzer (2009a, 219) cited. They employed "women either currently working or formerly working in the sex industry" to conduct surveys (Perkins & Lovejoy 2007, 161). Interestingly though, Weitzer has strongly criticized prostitution "survivors" as interviewers for being biased when they "may have been likeminded" with researchers, or "did not see their own [prior prostitution] experiences as "work" or a choice" (Weitzer 2005a, 939; alterations in original; quoting Raphael & Shapiro 2002, 9; see also Weitzer, 2005b, 972). Although Weitzer criticizes anti-prostitution researchers for arguably using 'likeminded' interviewers, he fails to note that the Australian researchers on whose work he relies may also have employed "likeminded" interviewers. Lack of transparency generally, such as failing to reveal important partisanship as well as not properly accounting for sampling problems, can produce very strong bias.

Jurisdictions with legal prostitution

Without considering that prostitution in itself is exploitative, even so there has not been any tangible evidence of health, safety, or economic improvements for prostituted women in jurisdictions making purchase and procurement of sex legal in some forms. For instance, a 2008 New Zealand government committee inquiring into the prostitution laws found that violence against women in prostitution had continued after prostitution was decriminalized. The "majority" of prostituted persons as well as brothel operators felt that the Prostitution Reform Act of 2003 could do little about such violence (Prostitution Law Review Committee 2008, 14, 57). Rather, effects from legalization or decriminalization have been documented to make the situation worse, pushing the limits of what can be done to women. Legalization has generally been found to increase rather than reduce tricks' demands for "cheaper" or "unrestricted" sex, child prostitution (e.g., Netherlands becoming a pedophile-center of Europe), child sexual abuse, sexual harassment, and alcohol-related harms (see, e.g., Sullivan 2007, 188-89, 202; quotation marks, 206, 225-26; Raymond 2004, 1165; Farley 2004, 1092-94, 1116).

In the state of Victoria, Australia, prostituted women reported that legalization led to increasing competition and demands that women perform unsafe or high-risk practices and accept unwanted tricks (Sullivan 2005, 7). In Nevada, numerous testimonies tell about unsafe sex demanded by tricks as well as pimps, and during 3 years of research interviews there Melissa Farley received a number of accounts in which women were fired from legal brothels upon receiving a positive HIV test while the pimps who ran the brothels, and their assistants, appeared uninterested in the women's lives or their health (see Farley 2007a, 18, 21, 39-45). This is to be expected since the tricks and their money drive the business—not the women. Previous reports by women prostituted in Nevada legal brothels confirm that abuse and unsafe conditions are sys-

temic rather than occasional features: "We were strictly forbidden to use condoms unless the customer asked for one, as it took maximum pleasure away from the paying customer" (Ryan 1989, 23). Similarly there "were many different occasions where a woman was brutally beaten or raped by a john, but as long as he paid the house, it was kept quiet" (p.22). Reports have repeatedly confirmed that in Nevada "rapes and assaults by customers are covered up by management," contrasting with the image of legal brothels as the safe-zones of prostitution (Volkonsky 1995). Not surprisingly, as far back as in the 1980s Hobson (1987) found in Nevada "some of the worst features of legalized prostitution" (p. 227).

Indeed, legalization can never address the power imbalance between the trick and the prostituted woman, nor can it address, among other things, his demand for unsafe or high-risk sex (cf. Sullivan 2007, 106). That is what inequality looks like. Some academics and most courts, as well as the existing structure of laws in most jurisdictions, inadequately perceive these inequalities. In the recent case of *Bedford v. Canada* (2010), the Ontario court comes out as having failed in all these respects, striking down a statute against "living on the avails" of prostitution which was used against pimps and traffickers. The outcome is that third party involvement, without more, is principally regarded as beneficial for prostituted persons' security (see, e.g., ¶¶ 429-31), rather than being the exploitation that it is. Critics in Canada have noted how the *Bedford* case "takes away what little protection women had" and allows "johns, pimps, and brothel owners . . . the legal right to abuse women without consequence and to benefit from women's inequality" (Aboriginal Women's Action Network 2011).

The cultural impact of widespread and expanded prostitution, as might be the case in Canada after *Bedford*, is significant. Decriminalization is documented to be associated with a "prostitution culture" in public attitudes (see, e.g., Farley 2007a, 181-86). For instance, in a study comparing undergraduate men in California, Iowa, Oregon, and Texas ($n = 783$) with similar young men in Nevada ($n = 131$), the latter normalized and accepted sexual violence (e.g. rape myths), sexual exploitation, and prostitution to a significantly higher extent than the former (Farley, Stewart, & Smith 2007, 173-80). Such findings imply that once prostitution is legal, public support for those wanting to escape the industry will fade. Not surprisingly then in Victoria, Australia, where funding for exit programs had been legally guaranteed to be financed by licensing fees, the funds were never delivered while politicians expressed "unease" at the funds having been "lost or diverted" (Sullivan 2007, 163-64).

Legalization also promotes cross-jurisdictional trafficking as well as hidden, illegal, and street prostitution. In 1994 and 1995 the Amsterdam police's repeated counts estimated that approximately 75% of all prostituted persons "behind windows" in Red Light district De Wallen were foreigners (Bruinsma & Meershoek 1999, 107). Furthermore, 80% of all foreign prostituted persons were illegally in the country (p. 107). More recent reports suggest that over 75% of Amsterdam's 8000 to 11000 prostituted persons are from Eastern Europe, Africa and Asia (Simons 2008). Amsterdam's Mayor has stated that the legal reforms did not give more transparency or protection to women, but rather the opposite: "We realize that this hasn't worked, that

trafficking in women continues,' he said. 'Women are now moved around more, making police work more difficult'" (Simons 2008). Unfortunately, according to the most recent news, the Netherlands' response to their problems currently seem to be to enforce taxes on prostituted persons (Holligan 2011), hence exploiting and targeting those victimized even further.

There are accounts in Victoria, Australia, and similar indications in Nevada as well, suggesting that prostituted women and minors are regularly moved between legal and illegal venues by pimps for reasons appearing to be changes in demand, to avoid law enforcement scrutiny, and because minors would be paid more by johns and easier to control (Farley 2007a, 103-05, 118-22; Sullivan 2007, 202, 206, 225-26, 243). Similarly, Ryan (1989) remarked that legal brothels deliberately did not verify age among young recruits (p. 22). Thus, women (and possibly minors) may be moved from legal brothels in rural areas to illegal prostitution at conventions in Las Vegas, where prostitution is more profitable, with the rural brothels subsequently "laundering" this income to make it legal (Farley 2007a, 105, 121-22). Regarding inter-state trafficking, it is notable that the president of the Nevada Brothel Owners Association in 1994 claimed 90% of prostituted persons in legal brothels in Storey, Nye, and Lyon counties were out-of-state residents (Kuo 2005, 80). Concurring, among a sample of 45 women in legal Nevada brothels, 32 had moved there from another state in the U.S., and 58% had been in prostitution in other states (Farley 2007a, 104). Similarly, despite some pretenses of having a pimp-free environment, in Nevada 57% of a sample of 45 women in legal brothels told interviewers, despite their fears of being secretly recorded and punished, that they gave part of or all their earnings to someone *other* than the legal brothel's pimp, and half of all women in the sample believed that at a minimum, 50% of women in those brothels were *controlled* by external pimps (pp. 31-32; *cf.* Ryan 1989; discussing external pimps).

Additionally, evidence suggests that legalization or decriminalization will not improve the stigma for prostituted women. For instance, the New Zealand Prostitution Law Review Committee (2008) found that "[d]espite decriminalization, the social stigma surrounding involvement in the sex industry continues" (p. 154). For many prostituted persons in the Netherlands, getting social security through registering with authorities and paying taxes is not a realistic option. Particularly this is true if they have children in schools or other relatives who do not know about their involvement in prostitution, in which case the prostituted persons don't want it recorded anywhere (Daley 2001). Women clearly prefer anonymity over social "security," and getting out of the industry without leaving traces (*cf.* Holligan 2011; quoting Mariska). Similarly, the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2007) in Germany reports that although possibilities "to create the legal framework" for social insurance has existed, "few" prostituted persons have "made use of this option" (p. 79). Furthermore, the Ministry concluded that legalized prostitution reforms in general have "not been able to make actual, measurable improvements to prostitutes' social protection," nor to their "working conditions" (p. 79). Additionally, frequently accompanying legalization or decriminalization are zoning policies attempting to reduce some of prostitution's harmful secondary effects, such as harassment and

assaults against residents (often women and children) in areas where the market thrives, or lowered property values. However, these policies often put persons who are in prostitution into more remote areas, leading to an increased rather than decreased risk for “physical danger” to them, thus coercing many to continue in illegal venues (see, e.g., Farley 2004, 1094).

The Swedish Government and Parliament in 1998 apparently realized that one cannot fight gender inequality and keep prostitution as a viable option for women without resources. As long as prostitution is viewed as a viable situation and “work,” particularly for women, resulting in them being excluded or not competing with men on the regular job-markets, changing gender inequality at large becomes less likely. If there are men prepared and able to pay for prostituted persons, there is a surplus gendered economy that should be redistributed. Prostitution, on these terms, is antithetical to social equality. Just as *apartheid* couldn't exist alongside social equality, prostitution as such cannot either. Hence, reducing the number of persons in prostitution is imperative. As will be shown, the Swedish law has accomplished such a reduction in addition to reducing the demand for prostitution.

Impact of Swedish legislation

In 1995 the Swedish 1993 Prostitution Inquiry estimated that there were 2500-3000 prostituted women in Sweden, among whom 650 were on the streets (SOU 1995:15 p. 10, 99). Now, in contrast, published literature and other evidence in 2008 suggest there are approximately 300 women in street prostitution, and 300 women and 50 men who advertise on the internet (Holmström 2008, 314). Holmström (2008) notes that many studies show prostituted persons may be prostituted in several arenas though (p. 314; cf. Potterat et al. 1990, 234; Hedin & Månsson 1998, 28; Kramer 2003, 191; Raphael & Shapiro 2004, 131; Farley 2004, 1099; 2007a, 29), suggesting some of these 650 persons may have been counted more than once (cf. SOU 2010:49 p. 118). On the other hand she believes some persons may have been missed due to how the social work related to these estimations was organized and what arenas were examined (Holmström 2008, 314). However, considering the need to be visible to attract potential tricks, it is hardly likely that any extensive prostitution would occur without being detected (cf. SOU 2010:49 p. 120). Thus, although there have been a few reports of, e.g., very small prostitution operations in more closed ethnic communities in Sweden where advertisements were spread with cards or by word of mouth (*see* Pogosyan 2011, 54-55; interviewing law enforcement), nonetheless these activities apparently did get reported to the police. Moreover, no data suggest that such forms of less publicly visible prostitution are occurring more extensively in Sweden per capita than elsewhere among the Nordic Neighbors. In any case, comparable methods with similar limitations have been used in Denmark and Norway (see below) to approximate the population of prostituted persons. Particularly considering the enormous national differences in quantity of prostitution suggested by these estimations (see below), for purposes of rough national comparisons the numbers appear sufficiently valid.

Hence, in Denmark where purchase of sex is legal, there were at least 5567 persons visibly in prostitution, among whom 1415 were on the streets (Holmström & Skilbrei 2008a, 14). Sweden's prostitution population thus is approximately a tenth of its neighbor Denmark's, even though Denmark only has a population of 5.6 million (Statistics Denmark 2011), while Sweden has 9.4 million (Statistics Sweden [SCB] 2011). A so-called sex workers organization in Denmark attempts to claim that the number on street prostitution in Copenhagen was over-reported by 1000 persons by an NGO named *Reden*, which works with prostituted women in outreach programs (see Sexarbejdernes Interesse Organisation [SIO] 2010). However, indoor prostitution numbers, such as the so-called "clinic prostitution" which on its own accounted for as many as 3278 (Holmström & Skilbrei 2008a, 14), were based primarily on advertising and not on any information from Reden (Bjønness 2008, 107). Thus, even if SIO's claim were accurate, Denmark's prostitution population as a whole would still be 12 times larger than Sweden's per capita—as opposed to about 15 times larger when assuming no over-reporting.

Norway is a neighboring country to Sweden in the West with 4.9 million people (Statistics Norway 2011). Using similar methods of approximation in 2007 when purchasing sex was still legal in Norway, there were 2654 prostituted women of whom 1157 were on the street—that is, well over 8 times more per capita compared to Sweden's 600 women (Tveit & Skilbrei 2008, 220-21; among those not on the street in Norway, numbers were based on internet or paper advertisements, and on those who sought support from social agencies. *See also* Holmström & Skilbrei 2008a, 13).

According to both Swedish NGOs and government agencies in Stockholm, Gothenburg and Malmö, prostitution "virtually disappeared" from the street right after the sex-purchase law came into force (Socialstyrelsen 2008b, 33). In Stockholm, for instance, numbers of tricks were reported by police to have decreased by almost 80% in 2001 (Opitz 2001). Street prostitution eventually came back, but at a reduced scale. As reported in 2007, in Stockholm social workers encounter only 15 to 20 prostituted persons per night, whereas prior to the law they encountered up to 60 (Socialstyrelsen 2008b, 33). In Malmö social workers encountered 200 women a year prior to the law, but one year after the law there were only 130, and in 2006 only 66 (p. 33). Similar data from Gothenburg indicate that street prostitution declined even further after the law came into force, from 100 persons a year to 30 persons a year between 2003 and 2006 (p. 34). Despite many unfounded rumors (see below) of a stronger move from the street to the internet or to other indoor prostitution venues after the Swedish law's enactment compared to, e.g., Denmark or Norway, no information, empirical evidence, or other research suggests that this has actually happened (cf. SOU 2010:49, 118-21, 151-52).

The National Criminal Investigation Department's (2003) telephone interceptions soon after the law's inception showed that traffickers/pimps were disappointed with Sweden's market for prostitution (p. 34). The latter's clandestine brothels are now fairly small enterprises, with police raids rarely finding more than 3-4 prostituted women at one time (Rikspolisstyrelsen 2009, 10), which is to be compared with the 20-60 women commonly included in certain criminal opera-

tions in the rest of Europe (SOU 2010:49, 122). Criminal entrepreneurs are forced to operate through complex indoor arrangements to assuage customers' fears of getting caught, using several apartments and avoiding staying too long at one place, or arranging more costly escort routines. This development is corroborated by telephone interception, testimonies from prostituted women, police in the Baltic States, and by almost all preliminary investigations (Nat'l Criminal Invest. Dept. 2003, 34). From the perspective of cross-jurisdictional pimping/trafficking it is also notable that in 2008 no large groups of visible foreign women were prostituted in Sweden as there were in Norway, Denmark and Finland (Holmström & Skilbrei 2008, 16-17), not to mention the Netherlands (see *supra* p. 19 et seq).

Moreover, passing the law in 1998 seems almost by itself to have changed the public attitude. In 1996 a survey-study showed that only 45% of women in Sweden and 20% of men wanted to criminalize a male sex purchaser (Månsson 2000, 249; $n = 2783$). In 1999, 81% of women and 70% of men wanted to criminalize purchase of sex; in 2002, 83% of women and 69% of men; and in 2008, 79% of women and 60% of men favored the law (Kuosmanen 2008, 361-62). Although the drop-out rate was considerably high in the 2008 survey of 2500 respondents, with only 43% of the men and 57% of the women responding (pp. 359-60; $n = 1134$), its results are nonetheless consistent with the other surveys made in 1999, 2002, and 1996. The young adult population (18-38), particularly women, appears most in favor of the law (p. 363).

Notably, a question about the "sale of sex" was also introduced in the latest survey, with the author Jari Kuosmanen interpreting answers as if the public might not view prostitution as a problem of gender inequality and male dominance because two thirds of the women and half the men also wanted to criminalize the "sale of sex" (p. 367). However, in their latest report, the Swedish National Council for Crime Prevention (BRÅ 2010) made a remark on the more "gender neutral character" of this question compared to those in previous surveys asking about similar issues. Kuosmanen's choice of wording might have made respondents believe they were being asked about procuring, pimping, or trafficking ("sale of sex"), rather than about whether prostituted persons themselves should be criminalized (BRÅ 2010, 70-71). Indeed, in 1996 when Månsson (2000) used gendered wordings ("A woman accepts money for a sexual contact. Should the woman's action be regarded as being criminal?") (p. 249; original emphasis), he found that only 42% of women wanted to criminalize the prostituted woman (p. 250). In contrast, the 1999 survey found 78% of women wanted to criminalize (again, using gender *neutral* words) "selling sex" (Kuosmanen 2008, 367; quoting 1999 survey). In fact, the documented coercive circumstances propelling women into prostitution and keeping them there (see above) entail that prostituted women are "sold" rather than "selling sex." To the extent that respondents in 2008 have begun to see the reasons for the Swedish law as such, they would more likely associate "the sale of sex" with pimps and traffickers as opposed to prostituted women.

Furthermore, from 1996 to 2008 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% (Månsson 2000, 238; Kuosmanen 2008, 368). 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 he had increased, or started purchasing sex outside Sweden, or changed to purchasing sex in “non-physical” forms (Kuosmanen 2008, 372-73).⁷

Although Kuosmanen (2008) expresses some concern about slight underreporting in his questionnaire compared to 1996 when criminalization was not in place (pp. 377-78), his comment seems overly cautious considering the completely anonymous procedure that researchers clearly communicated to all respondents (p. 359). Considering that a significant proportion of the male population would be the same in two studies (1996 and 2008), the reported decrease is indeed large and possibly an overestimation. Nonetheless, having presented his national survey data on purchases of sex on numerous occasions I'm struck by how many people ask whether self-reported anonymous crime surveys have any reliability. Thus, it should be noted that this method has repeatedly been shown reliable in a number of scientific reviews. As far back as the 1980s, Huizinga and Elliot (1986) took the view that “accumulated research on the reliability and validity of self-report delinquency measures has consistently supported the conclusion that these measures have acceptable levels of reliability and validity as judged by conventional social-science standards” (p. 294; multiple citations omitted). Furthermore, after discussing “instances” of lower validities among Black respondents in the U.S., it was nevertheless concluded that “self-report measures are among the most promising of our measures of criminal behavior and are, perhaps, the only measures capable of meeting the needs of both descriptive and etiological research” (pp. 323-24). Similarly, Junger-Tas and Marshall (1999) found that “[t]he self-report method has outgrown its childhood diseases; it is now a true-and-tried method of research” (p. 354). Consistent with their conclusion, Thornberry and Krohn (2000) concluded that “[t]here are no fundamental challenges to the reliability of these data. . . . self-reported measures of delinquency are as reliable as, if not more reliable than, most social science measures” (p. 72).

⁷ The internal drop-out rate for the first question regarding experience of purchasing sex was 11% ($n = 1009$) for both genders (Kuosmanen 2008, 368 n.51). This rate was probably unnecessarily large due to the confusion added by also asking whether respondents had ever “fantasized” or “could consider” purchasing sex (p. 368), as opposed to just asking respondents whether they had actually paid for sex with someone. Many who did not pay for sex were thus put in a position of having to reflect on their mental state—a much more complex issue than reflecting on their actual behavior. Indeed, the author recognizes that the questions were “very sensitive” (p. 368 n.49). The author also cautions about some minor differences: whereas the survey questions in 1996 asked about purchase for being “sexually together with someone,” the survey in 2008 added “sex with physical contact” in parenthesis to confirm with what is criminalized under case law (p. 368 n.50). Additionally, a few respondents who would not admit a sex purchase on a direct question would nonetheless describe details of such purchase further on in the survey, which is a behavior consistent with other Swedish surveys on purchase of sex (Kuosmanen 2011, 256-57). Counting these additional responses the number of male sex purchasers would approximate 9% in the 2008 survey (p. 368 n.52). However, since underreporting was presumably present in the 1996 survey as well (see Månsson 2000, 239-40), the lower numbers are accurate for comparative purposes. Questions regarding experiences of being bought for sex (as opposed to purchasing it) have a drop-out rate of approximately 35% in Kuosmanen's national population sample (Kuosmanen 2008, 375 n.56). Nonetheless, 7 women (1.6%) and 6 men (2%) apparently reported having been bought for sex (p. 375). One from each gender responded that they stopped because of the law, and one woman said she began being prostituted in less visible forms.

Although it is always necessary to review how questions have been worded along with other relevant validity issues, this method per se does not appear to have any significant problems of reliability.

The Swedish law's results have inspired other countries to adopt aspects of the model, among them Norway (Straffeloven ch. 19 § 202a), Iceland (see, e.g., CEDAW Comm. 2011 ¶¶ 3-5), and to some extent South Korea (Statutes of South Korea, Act No. 7212; Act 7196 arts. 6:1, 21:1) and the United Kingdom (Policing and Crime Act 2009 ch. 26 §§ 14-15; Eng., Wales & N. Ir.). A similar law was proposed in India (see *Times of India* 2005). Considering the changed situation in Sweden after the law was adopted, its deterrent effects are obvious even though conviction rates are not staggering. Convicted sex purchases went from 10 in 1999, to 29 in 2000, 38 in 2001, 37 in 2002, 72 in 2003, 48 in 2004, 105 in 2005, 114 in 2006, 85 in 2007, 69 in 2008, 107 in 2009, and 326 convictions in 2010 (Nat'l Criminal Statistics Database, Sweden; numbers include orders for summary penalty and district court sentences, but not appeals and not persons simultaneously convicted for more serious offenses). Lately, however, there have been dramatic increases in reported crimes of sex purchase (although reports may not result in convictions). In 2010 as many as 1251 were reported, which is quite an increase compared with the hitherto highest annual number of 460 reported in 2005 (Ibid). There were also 231 reported purchases of a sexual act from a child (under age 18), where the penalty maximum is 2 years (see BrB 6:9). This increase in 2010 seems due in part to particular funds allotted to enforcement by the government's action plan against "prostitution and trafficking," and to one large local case of organized pimping in Jämtland (northern Sweden) (see Tidningarnas Telegrambyrå (TT) 2010; Helmersson & TT 2010).

Critique and Biased Information on the Swedish Law

Despite its substantial impact in terms of reducing prostitution, there are still some serious obstacles to overcome for the law to reach its full potential, further dealt with in the next section. However, there is also some biased information and criticism about the law, dealt with here. Regarding scholarly criticism of the law in Sweden, one of the more dominant voices belongs to an author of a history of ideas dissertation from 2009, Susanne Dodillet (2009). She probably has received additional attention because her scholarly work has so far been specialized on prostitution laws, as opposed to that of other scholars in Sweden who might have been critical of the law. Criticizing also the German law, which legalizes certain forms of prostitution, for its political motivations and lack of explicit gender perspective, but not for decriminalizing prostitution which she prefers (see, e.g., pp. 550-54), her thrust of argument supports models like the German one over the Swedish approach. In her dissertation she tries to argue that indoor prostitution was less documented by the 1993 Prostitution Inquiry than outdoor venues, implying that this alleged problem weakens the Inquiry's findings sufficiently to undermine the law's justification.

For instance, in conjunction with saying that the knowledge obtained from social workers and police mostly covers women in street prostitution, the Inquiry's final report further had stated the following: "We also know that many women in massage parlors and in other indoor prostitution have formerly been active in street prostitution and that the description therefore may be valid also for them" (SOU 1995:15 p. 102). Dodillet omitted this latter crucial statement in her dissertation by selecting a quote from a shorter statement in the summary, attempting to convey the impression that the Inquiry's evidence was almost exclusively based on populations prostituted on the street (Dodillet 2009, 367; quoting SOU 1995:15 p. 11). In retrospect it is important to consider that legislators had recognized that it is common for women in prostitution to drift between venues, and that this evidence particularly suggests that preconditions for women's entry into prostitution overlap whether they are found outdoors or indoors. Such shifting between venues has long been widely known in the international scholarly community (see, e.g., Potterat et al. 1990, 234, quoted *supra* p. 17) and was also corroborated in research on Swedish prostituted women published at the time of the bill's passage (Hedin & Månsson 1998, 28). These same findings have been repeatedly corroborated in more recent research (see, e.g., Kramer 2003, 191; Raphael & Shapiro 2004, 131; Farley 2004, 1099; 2007a, 29).

Furthermore, the 1993 Inquiry recognized that indoor venues exhibited similar dangers of violence and abuse toward prostituted persons as those in outdoor venues, referring to research and testimonial evidence obtained by professionals (see SOU 1995:15 p. 143). Swedish researchers at the time, who had studied prostitution, found no venue to be less harmful, safer, or better for the women than the other (Hedin & Månsson 1998, 120). These findings are consistent with the later nine-country study in which post traumatic stress disorder was diagnosed at virtually the same levels, regardless of prostitution venue (Farley et al. 2003, 44-48, 56; $n = 827$; see pp. 37-39 for sampling procedure). Additionally, the 1993 Inquiry referred to a 1992 report from Gothenburg about women with experience from indoor "sex clubs" (SOU 1995:15 p. 139). The report "described various psychic damages which these women have received from their activities and which converge with those that prostitution causes. The difference between optic (sex-shows, posing), and physical prostitution is also marginal, and the work in sex clubs is therefore often a way in to prostitution proper for many young women" (p. 139). Contrary to Dodillet's analysis that indoor prostitution was not sufficiently accounted for by the legislature, the decision made by Parliament appears to have relied on a reasonable apprehension of harm.

Apart from Dodillet's attempt to present the legislative findings as having been incomplete at the time, her treatment of the Swedish legislation lacks an expected and indeed necessary political discussion of all the new research in support of the legislature's decision. Particularly considering the high stakes involved for women currently in prostitution, such research should not be disregarded simply because one is doing a work on the history of ideas. Its absence from her account undoubtedly gives the impression that her analysis—rather than openly examining whether a pioneering, even bold, or simply a reasonable decision was made by the legislature—is predetermined early on to show otherwise, thus biased.

In addition to critique voiced in the academy, there are numerous ill-founded rumors circulating about Sweden's law on prostitution in the international debate. For instance, in South Africa, the Sex Worker Education and Advocacy Taskforce (SWEAT 2009) promulgated some such claims about the Swedish situation in a submission to the South African Law Reform Commission. As their primary source of information they are citing Swedish prostitution commentator (now a PhD Candidate in Anthropology) Petra Östergren's unpublished piece posted on her homepage (p. 41; citing Östergren n.d.). Nowhere in their submission does SWEAT cite published research from Sweden, and the official reports summarized by Östergren were published in 2000 and 2001, i.e., just after the law took effect in January 1999. Hence, many of her claims have now been proven inaccurate, or when they are accurate she—apparently in order to discredit the legislative intentions—misattributes certain effects to the law per se, rather than to its judicial interpretation which, admittedly, has not been optimal (see further below).

When Östergren refers to official reports she argues that “[a]ll of the authorities say there is no evidence that prostitution was lower overall,” and that “hidden prostitution had probably increased” (Östergren n.d.; see also SWEAT 2009, 41; citing Östergren). Data before and after the law took place as well as comparative data from other Nordic countries (see above) undoubtedly show these claims are not correct. Additionally, she claims that women in street prostitution faced a tougher “time” after the law's enactment with, among other things, more demands for unsafe sex and more violent tricks (Östergren n.d.; see also SWEAT 2009, 41-42; citing Östergren). Women in legal prostitution also claim that legalization increases competition and demands for unsafe and dangerous sex acts, and there is research corroborating their observations (*supra* p. 18 et seq). Not surprisingly, the National Board of Health and Welfare's 2000 report that Östergren cites is, according to the Board's own homepage, “not valid anymore” (Socialstyrelsen n.d). As early as 2003, the Board expressed doubts about such claims:

While *some* informants speak of a more risk-filled situation, few are of the opinion that there has been an increase in actual violence. Police who have conducted a special investigation into the amount of violence have not found any evidence of an increase. Other research and the responses of our informants both indicate a close connection between prostitution and violence, regardless of what laws may be in effect. (Socialstyrelsen 2004, 34; emphasis added)

Additionally, the Board noted in a 2007 report that opinions vary among prostituted women, some still preferring the street over restaurants and nightclubs, as well as over the internet which one likened to “buying a pig in a poke” because it makes dismissing unwanted tricks harder. (Socialstyrelsen 2008b, 28). Although Östergren may be correct that some tricks are no longer prepared to testify against traffickers since they themselves are now criminals (Östergren n.d.; see also SWEAT 2009, 42; citing Östergren), it is notable that the Gothenburg Police report having “received anonymous tips from clients who suspect human trafficking” (Socialstyrelsen 2008b, 48). Östergren also argues that it is difficult for prostituted persons to cohabit, implying

their partner could be charged for pimping under procuring laws, but no such real cases (as opposed to hypothetical ones) are mentioned (Östergren n.d.).

Furthermore, few persons outside of Sweden seem to know how Östergren selected her sample of 20 prostituted women interviewees to whom she refers frequently. Clues are given in her book published in Swedish in 2006. There, Östergren explicitly states she did not attempt to contact or hold interviews with “sellers of sex” who had “primarily bad experiences of prostitution” (Östergren 2006, 168), but, rather, intentionally sought women with “completely different experiences” since the former, she claims, were “the only ones heard in Sweden” (p. 169).⁸ Similarly, her 2003 graduate thesis refers to interviews with fifteen female “sellers of sex” of whom “most . . . have a positive view of what they do” (Östergren 2003, 17). Thus, when she mentions “informal talks and correspondence with approximately 20 sex workers since 1996” (Östergren n.d.) in her English-language piece, she apparently refers to respondents who were selected precisely because they had positive views of the institution of prostitution. When writing that “[m]ost of the sex workers I have interviewed reject the idea that there is something intrinsically wrong with their profession” (n.d.), evidently she should have informed the reader that the interviewees were selected precisely because they had this view, and that critics were excluded.

Not only activists but also scholars outside Sweden have repeatedly cited Östergren's English piece (omitting the Swedish ones) and other sources of biased information without noticing any of these problems. Jane Scoular in two articles cites “Östergren's interviews with women, who reported experiencing greater stress and danger on the streets” after the 1998 law took effect (2010, 20; cf. 2004, 200), without mentioning Östergren's bias in selection of interviewees. Furthermore, in 2010 Scoular put forward a number of claims contrary to the substantial amount of research made in the last years. For instance, she claims that no Swedish report “has provided a straightforward comparison” before and after the law's enactment (Scoular 2010, 18). Then, apparently contradicting this claim, she writes that “the *consistent message* across a number of evaluations and sources . . . is of a temporary reduction in street sex work, leading to the displacement of women and men into *more hidden* forms of sex work and the *worsening* of conditions for those who remain” (p. 18; emphasis added). Among the five citations Scoular provides to support these claims are two reports published just one year after the law was enacted,

⁸ The quoted section reads more fully: “Most sellers of sex I've met did not primarily have bad experiences of prostitution. Neither have they been in situations similar to coercion. That I have not attempted to make contact with this group of sellers of sex is due to many reasons. Women who are subjected to threats and are harmed by prostitution first and foremost need competent practical and emotional support. They do not need to be confronted with just another researcher or journalist who will inquire into their lives. That could make more harm than good. Neither would this type of interviews assist me in my work. I have wanted to know what opinions sellers of sex have, and what they think, and not document how women can be hurt or damaged by prostitution. So instead of doing interviews with sellers of sex with mostly bad experiences, I've taken part of stories and opinions that are already documented. [5 citations by Swedish authors] That I'm not inquiring more into the [documentation of victimization, abuse, and exploitation in prostitution] here, in this book, is because these stories are practically the only ones heard in Sweden—and because one cannot understand and discuss prostitution in all its complexity if women with completely different experiences are not also heard” (Östergren 2006, 168-69).

and one published just two years after its introduction. Finally, without referring to any specific page therein she cites (p. 19 n.27) two of the National Board of Health and Welfare's reports quoted above which, contrary to her conclusions, expressed serious doubts regarding claims of such a worsening situation. Nonetheless Scoular's article's main stipulation is inferred from all this biased information, namely that "apparently contrary legal positions produce similar results on the ground . . . in part, due to law's involvement in wider forms of governmentality that operate to support a wider neo-liberal context" (p. 38).

Ronald Weitzer, in turn, cited one of Scoular's pieces along with another unpublished author's work to support his statement that "[i]ndependent assessments indicate that Sweden's law has not had the salutary effects claimed by advocates" (Weitzer 2009b, 100; citing without page Scoular 2004). In the same way, Janet Halley and her co-authors cited Östergren's English piece along with that of another activist to support the claim that prostitution became more hidden and dangerous after the law took effect (Halley et al. 2006, 396 nn. 206 & 207). They claimed that "it is *clear* that the reform made the life of the remaining sex workers (local and migrant) much harder" (p. 397; emphasis added). Halley et al. second-handedly cited a Swedish "administrative report" from the city of Malmö from 2001 and "others" (i.e., reports) that were allegedly quoted in a Norwegian report from 2004 (see p. 397 n.209), but they omit the later more authoritative (and translated) National Board of Health and Welfare report quoted above which reached a different conclusion (see Socialstyrelsen 2004, 34). The 2008 Prostitution Inquiry's final report, of course, establishes that the claims about a worsening situation are baseless (SOU 2010:49 pp. 127-30).

One thing one has to agree with Östergren on, however, is that Swedish politicians are not well informed if they, without qualification, claim that the law "protects" women who are prostituted (Östergren n.d.). The courts unfortunately eliminated these persons' rights to be regarded as injured parties (see further below). Contrary to the judiciary's interpretation, the state should take affirmative responsibility for providing support and assistance to women wishing to leave prostitution, including by permitting them to seek reparations for the damage inflicted upon them from those who inflicted that damage, including tricks. This, the law has not yet accomplished. This failure opens the door to advocates of other alternatives, such as legalization of prostitution across the board. Research suggests that such decriminalization, even if partial, exposes more people to sexual exploitation and increases their abuse while in prostitution (see *supra* p. 18 et seq). Regrettably, while Östergren notes that prostituted persons now have "neither the rights of the accused or the victim" (Östergren n.d.), she does not conclude that they *should* have the rights of a "victim," including an assessment of damages. In fact, in the debate she has done the opposite. Responding to the question of what she thought about a right to damage claim assessments for women in prostitution, to be paid for by the tricks who exploited them, Östergren was quoted by the media saying she "had difficulties imagining that these women (who were interviewed in the course of working with the book) would regard this to be a good proposal" (Julander 2008). The journalist did not indicate that Östergren's interviewees were selected pre-

cisely because they *said* they had positive experiences of prostitution, and that those with negative experiences were deliberately excluded (see above).

The fact that Östergren as well as other sources of biased information have so often been uncritically cited without noticing their obvious flaws, particularly outside Sweden, is symptomatic. Prostitution is a powerful industry supported by apologists such as researchers and social commentators, who in turn influence public opinion whether their information is accurate or not. This also happened to the 1985 Attorney General's Commission on Pornography in the U.S., which was surrounded by false rumors that were repeatedly parroted in the media until they became so-called conventional wisdom (see, e.g., McManus 1986, xlv-xlviii; MacKinnon 1997, 14, 21-22)

Obstacles to & Potential for Effective Implementation

Considering the law's judicial interpretation after its enactment, there are some substantial obstacles to effective implementation. Contrary to much of the biased information about the Swedish law, its case law has not been sufficiently highlighted either in international media or in scholarly debate. Until those victimized are compensated and helped further, and enabled to leave the sex industry, the situation will not be fully addressed. Here, the law could be more strengthened, consistent with its intent. A logical corollary suggested by the evidence presented so far is to recognize that tricks, by exploiting the coercive circumstances that push persons into the sex industry (see above), harm those persons by making them perform sex for money, hence should be liable for recompense (cf. Petitioners et al. 2010, 21). Civil damages thus put the accountability where it belongs: among the tricks, who take advantage of the power imbalance in prostitution to purchase other persons for sex, and so violate these persons' rights to humanity, equality, and dignity (cf. Petitioners et al. 2011, 3). Taking into account that many tricks usually have money, such civil liability provides an economic opportunity to change prostituted persons' situations which the public does not have to pay for directly, although the perpetrators will.

To a certain extent the government and its 2008 Prostitution Inquiry acceded to some of the suggestions on civil damages, which have been lobbied for since 2006 (for early suggestions, see, e.g., Schyman & Waltman 2006; Schyman et al. 2008; Mot. 2009/10:Ju393; Petitioners et al. 2010). Moreover, the parliamentary Committee on Justice's majority has recently gone further and emphasized that existing law already provides various venues for prostituted persons to claim damage awards from tricks that were not previously noted by the government (see Bet. 2010/11:JuU22 pp. 11-12). These further clarifying observations by Parliament were quite likely in part a response to more pressures by parliamentary minorities (see Mot. 2009/10:Ju393, pp. 1-3; Mot. 2010/11:Ju10 pp. 1-2; Mot. 2010/11:Ju11 pp. 1-3, Mot. 2010/11:Ju323 pp. 1-2; Mot. 2010/11:Ju293 pp. 2, 6) as well as from public opinion registered at the end of the recent legislative process to amend the Swedish law against purchase of sex (see, e.g., open editorials by Schyman et al. 2011a; 2011b; 2011c). Some of the available venues for claiming damages, fur-

ther described below, will entail more practical obstacles than others. However, by emphasizing all of them Parliament has now illuminated options that previously seemed to have been regarded as hypothetical rather than real options, and that thus were not effectively used. Following such statements from the legislature, these hitherto dormant options have a potential to be regarded as more desirable by practicing lawyers in order to strengthen prostituted persons' rights. Hence, the doctrine might change to allow for much more civil remedies in the years to come.

Civil proceedings are often intertwined with criminal proceedings in the Swedish legal system, although they can be separately instigated or separated from the criminal trial later on (see RB ch. 22, secs. 1, 3, 5-7). Under the Swedish Code of Judicial Procedure (RB) a right to present damage claims and get them judicially assessed usually follows by default for a person, so far as she/he is considered the party "against whom the offense was committed or who was affronted or harmed by it" (RB chap. 20, sec. 8:4). In such cases s/he is referred to as the "injured party" (*målsägande*) (*id.*) and his or her claims are partially represented by the prosecutor (RB chap. 22) and (at least for provisions falling under the Criminal Code's Chapter 6 on Sexual Offenses) by a victim's legal counsel (1 § Lag om målsägandebiträde [1988:609]). This standing as injured party is not technically necessary for a person to be able to claim and prove the amount of their damages; i.e., to get the claim judicially processed (see, e.g., Bet. 2010/11:JuU22 p. 11; cf. Diesen 2008, 122-24). However, the prosecutor has no formal obligation to support claims by other than the injured party (see RB 22:2). Children who witnessed crimes committed against a parent, for instance, have received damages without being regarded as the injured party (Diesen 2008, 122-24). Such an "intermediate" standing raises issues that may pose practical obstacles for the person claiming damages (cf. p. 124). For example, will s/he get a legal counsel publicly appointed, or will s/he have to proceed *pro se* (i.e., on their own) or through a private counsel? Furthermore, how should compensation for counseling be determined, including for the opposing party in cases of a lost trial? Nonetheless, as an alternative venue it extends the options to seek awards for damages to a larger number of persons. Still, the fact that no prostituted person has ever received damage awards under the Sex Purchase Law since its enactment suggests that existing law might need further improvements for any civil venues to be effectively used (cf. Hägg et al. 2011).⁹

An important although unfortunate judicial decision in the application of the Sex Purchase Law was made in 2001. The Supreme Court, in a cursory opinion consisting of four sentences, affirmed rulings from lower courts that interpreted the so-called protected interest under the law in the context of determining the penalty for a man who had purchased a woman to perform oral sex on him in a parked car. This was deemed "a standard case" by the appeals and supreme

⁹ It should also be noted that under the Swedish Tort Liability Act, there appear to be more demands for scrutiny in assessing whether a defendant caused damages to the plaintiff when the latter is not regarded as an injured party (see Diesen 2008, 123 n.13; noting that some specific torts [SkL 2:3] are unavailable for persons not regarded as an injured party).

Courts (NJA 2001-07-09 p. 533). The district as well as court of appeals had argued in detail (although differing on the exact level of penalty) that the so-called “consent” from the prostituted person suggests the offense is committed “primarily” against the “public order,” more than against her as a “person” (NJA 2001-07-09 pp. 529, 532). The implication was that she would not genuinely consent to a crime against herself as a person. However, none of the legislative findings or contemporary research on prostitution documents a condition of freedom required for the “consent” on which these courts relied to be meaningful (cf. Petitioners et al. 2010, 17). These courts literally ignored that prostituted persons’ alleged consent is overwhelmingly fictional—exploiting someone’s desperate position, lack of options, or prior abusive conditions that season them for prostitution is not a situation to which a person can legitimately consent.¹⁰

The decision in 2001 appears to ignore most of the legislative history from the 1990s that suggested prostitution to be a form of sex inequality related to gender-based violence, and the prostituted person to be effectively victimized by the trick (see above). It also runs contrary to principles emphasized as late as 2005, when Parliament amended the criminal code’s chapter on sexual offenses to include purchase of sex (the latter having been a free-standing statute from 1999 until then). Here it was stated that the “legislation on sexual offenses is a legislation to protect against sexual violations, and shall not be premised on archaic notions of adult people’s voluntary sexual life” (Prop. 2004/05:45 p. 22). The 2001 Court appears thus not only to ignore many facts about prostitution, but also to express precisely such archaic notions when assuming that a prostituted person’s consent is genuinely voluntary. In the District Court it had further been remarked that the prosecutor had only called the woman in the capacity of witness (NJA 2001-07-09 p. 529), as opposed to calling her as an injured party. Together with the fact that no damages were sought, even though they technically could have been regardless of her procedural status (see above), this decision suggests that prosecutors are implicated as well in the interpretation of sex purchase as a more or less “victimless” crime.

In a more recent case, the Court of Appeals for Western Sweden convicted tricks and imposed conditional sentences and fines in 2007 and recognized certain circumstances in prostitution as coercive under the law. These circumstances, together with other factors, justified the higher level of sanctions, but the tricks were not ordered to pay damages. After a completed sexual act, one of them had introduced an acquaintance when the prostituted person, in the court’s words, was “in such a subordinate position against the two men that it must have appeared as a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited” (*Hovrätten för Västra Sverige* 2007, 9-10). The prostituted person was here understood to be in a situation in which

¹⁰ Consequently, since consent to prostitution is overwhelmingly fictional and invalid, it is also wrong to say that prostituted people themselves are contributing to their own exploitation when being subject to the coercive circumstances documented as preconditions to prostitution. In other words, it is not the victim’s “fault” (otherwise, gross negligence may diminish a person’s entitlement to damages under the Swedish Tort Liability Act [SkL chap. 6, sec. 1:1]).

genuine consent was not possible. In prostitution, this is usual. Nonetheless the prostituted person was not regarded as an injured party, nor were *damages* merited by such exploitation and victimization awarded. Thus, it appears as if the judicial system has not yet regarded prostituted persons as being victimized or exploited by tricks, contrary to what the legislative history, more recent research, and other evidence strongly suggest (see above).

Civil Remedies as a Support for Escape

Under the Swedish Criminal Code “fines accrue to the State” (BrB 25:7), as opposed to civil damage awards which go directly to persons who have been harmed (see above). There is no current scheme for redirecting the fines collected from individual tricks to any particular program for relief or support to prostituted persons in need. In other words, under the current case law there is a lack of individual accountability from the trick to the person the trick has exploited through his/her purchase. If the state decides to help or support prostituted persons it may do so using the public budget which, at least up until now, has been a political decision as opposed to a legal obligation. The National Board of Health and Welfare’s recent account of “interventions against prostitution” through social work and similar activities—many financed through public funds—raised concerns that the efficiency of such interventions in Sweden is not well documented though (Socialstyrelsen 2008a, 82-85). This suggests it may be difficult to assess whether attempts to provide a remedy or an “exit strategy” to persons who want to leave prostitution have been successful in Sweden. In the 2008 Prostitution Inquiry’s final report are indications of serious deficiencies in this area, with prostituted persons and survivors reporting a lack of specialized care and treatment as well as a common absence of necessary and adequate knowledge among professionals they encountered (SOU 2010:49 p. 232). Several of the prostituted or formerly prostituted persons consulted stated, in the slightly neutralizing words of the 2008 Inquiry, how “it *occurs* that those who seek help encounter an inadequate response by the professionals who are working with these issues” (p. 232; emphasis added). Considering the inadequacy of existing remedies for persons facing a decision whether to exit prostitution or not, it is disappointing that courts have not yet (at least until now) awarded them damages from tricks which could facilitate such decisions by providing them financial funds and legal restitution.

As implied by the National Board of Health and Welfare in their referral response to the government regarding the 2008 Prostitution Inquiry’s final report (Socialstyrelsen 2010, 7), legally recognizing prostituted persons as injured parties would strongly affirm the notion that they should be covered under the Social Welfare Service Act’s provision for “Crime Victims.” This national provision imposes duties for the Local Social Welfare Boards, including the duty “to promote that anyone who has been subjected to crime, and her or his closely related ones, receive support and help” (SoL 5:11). Considering prostituted persons as crime victims under this provision shifts the support to those who want to exit prostitution from being primarily based on political decisions to being based on Swedish law. Hence, support becomes less subject to the whims of democratic majorities. Although there appears to be no legally agreed upon definition

of “crime victim” in Sweden, in a resolution the U.N. General Assembly (1985) defined victims of crime to mean “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering . . . through acts or omissions that are in violation of criminal laws operative within Member States” (Annex ¶ 1). The evidence of prostitution’s harm compellingly shows that tricks, at a minimum, inflict mental injury or emotional suffering, acting clearly in violation of Swedish criminal laws. It is to be noted that the Swedish Constitution was amended in 2011 with an explicit (as opposed to implied) recognition of Sweden’s membership in the United Nations (RF 1:10).

One unfortunate effect of the Supreme Court decision in 2001 was to establish the judicial view of sex purchase as a crime of low priority. The District Court had argued that a crime directed primarily against the public order per se entailed a lower punishment than crimes against persons (NJA 2001-07-09 p. 529). Although the penalty was slightly raised in the higher courts, the trick was nonetheless only subject to monetary fines (pp. 532-33). Many law enforcement officers and prosecutors subsequently regarded the sex purchase law as having comparably low priority when assigning resources to enforce it. They explicitly referred to the penalty level as determining their priorities. Consequently, the 2008 Prostitution Inquiry reports how police stated they could bring “many times more” legal cases against tricks if enforcement were prioritized; prosecutors agreed, with both partly blaming the low penalty level for their not doing so (SOU 2010:49 p. 217). Apparently, one problem mentioned by anti-trafficking police in Gothenburg is that, traditionally, the police evaluate success in terms of total jail time and number of convictions (Johansson & Nygren 2010, 9). Not surprisingly then, National Criminal Detective Inspector Kajsa Wahlberg admits that a “higher penalty would perhaps also make the police prioritize these crimes more” (*Expressen* 2010, 9). In fact, such a change might now happen with the legislative raise of penalty maximum from six months to one year imprisonment, taking effect from July 1, 2011 (see Bet. 2010/11:JuU22).

However, since the law’s enactment only five persons had in 2009 been sentenced to anything more than fines, such as conditional sentences. None have been imprisoned under the sex purchase law itself, despite the fact that its maximum penalty has so far been 6 months (SOU 2010:49 pp. 210-13). Tellingly, a Supreme Court Justice himself was convicted in May 2005 for purchase of sex from a male prostituted person, then fined approximately US\$6,000 (Wierup 2005a; 2005b). The Justice managed to keep his appointment (Hellberg 2007). The fact that the law’s application leaves much to ask for is not an argument against criminalizing purchase of sex, of course, but an argument for interpreting the Swedish law more strongly, including as a crime primarily against the person, and not primarily against the public. Some initiatives have been underway in this regard, recently from the government (see below), but particularly from some members of Parliament (see, e.g., Mot. 2009/10:Ju393, pp. 1-3; Mot. 2010/11:Ju10 pp.1-2; Mot. 2010/11:Ju11 pp. 1-3, Mot. 2010/11:Ju323 pp. 1-2; Mot. 2010/11:Ju293 pp. 2, 6).

Sweden is still dealing with some of the myths about consensual prostitution encountered everywhere. This seems to be another reason why some prostitution is patently ignored by law

enforcement, indicating there is discrimination among different prostituted populations on the ground. Such discrimination appears to happen despite the 2008 Prostitution Inquiry's correct conclusion that "a consequence of the Swedish view on prostitution is that it is not possible to make any distinction between so-called voluntary and involuntary prostitution" (SOU 2010:49 p. 249). Contrary to such statements and the research evidence on prostitution, many law enforcement officers have expressed views contending that domestically prostituted women are often meaningfully consenting, as opposed to foreign women who, assisted by third-party profiteers, are often believed to be coerced (*see* Siring 2008, 341-43; quoting and citing interviews with police officers). For instance, in a press interview one prosecutor who was even hired as an expert in the 2008 Prostitution Inquiry effectively distinguishes, along with a concurring police officer, voluntary from involuntary prostitution by stating there are "persons who prostitute themselves who do not do this under coercion, hence it may therefore be viewed as less serious," implying by their discussion that those who do so under coercion are usually foreign nationals (Jansson 2010).

On the contrary, some particular categories of foreign prostituted adult women appear to spark little law enforcement activity. To cite personal experience, when I passed a large casino in Stockholm three evenings in a row in June, 2010, usually three or more adult women of South Asian origin—apparent ages ranging from 25 to 60, and with excessively fashionable clothes—waited at the entrance. They had similar tired facial expressions as prostituted women I encountered on the streets of Cape Town in April 2010. Not surprisingly, the 2008 Prostitution Inquiry reports that "[l]aw enforcement in Stockholm, Gothenburg, and Malmö . . . suspects [sic] that purchases of sex occur in restaurants, casinos, and on the regular ferry transports to and from Sweden. However, any regular surveillance against purchasers of sex in these venues is not made" (SOU 2010:49 p. 194). Similarly, law enforcement report "suspicions" but are not conducting any "regular" activities against prostitution in conjunction with "pornography-/strip clubs and so-called speakeasies in their area" (p. 194). The various distinctions effectively made by law enforcement could indicate an implicit categorization of prostituted persons according to the implied voluntary/involuntary division, in order to decide what prostitution is harmful as opposed to harmless and to prioritize resources accordingly. Other considerations, such as substantial variation in the degree of obstacles to enforcement encountered in various venues, may be present of course. Nonetheless, no such clear rationale for these distinctions emerges.

Further judicial decisions symptomatic of the apparent discrepancy between the legislative perspective and that of practitioners in the judicial system have appeared. In the Stockholm Administrative Court of Appeal's ruling from 2007, tax authorities were given permission to tax a prostituted person based on income she was assumed to have had from prostitution, but which she never reported (*Kammarrätten i Stockholm* 2007). As the complainant pointed out, following the decision's logic "prostituted persons, in order to be able to pay taxes, are coerced to continue" (p. 1). This administrative court decision is remarkable in light of the fact that jurisdictions such as Nevada, which has legalized prostitution in certain counties in spite of its harms,

refused to make it worse by taxing the abuse (Riley 2009). (However, the opposite seems presently to be the case in the Netherlands. See Holligan 2011.) Considering the Swedish legislature's recognition that tricks know or should know that their purchase of sex is "destructive" to the prostituted persons (Prop. 1997/98:55 p. 22), and given the imperative to help prostituted persons to get away from prostitution (p. 104), decisions such as the Stockholm Administrative Court of Appeal's appear highly counterproductive. At a minimum, the reasons generally for entry into prostitution are coercive circumstances such as desperation and lack of viable options. Under such conditions a discretionary taxation does not constitute any deterrent function. Rather, it looks more like public exploitation of their prostitution. Decisions on damages, in contrast, would offer a stronger incentive for the victim of crime to testify against individual tricks, hence deter the latter from purchasing sex.

When deciding who is the injured party, the Code of Judicial Procedure's statement that it is the one who is harmed or affronted by the offense (RB chap. 20, sec. 8:4) effectively entails that if a law is ambiguous, an inquiry should be made into its underlying reasoning regarding the interest(s) the law is meant to protect. The experiences from the Swedish courts in this regard suggest that any country considering the Swedish law preferably should not copy the statutory wordings defining prostitution as "purchase of sexual service" (BrB 6:11), even though these wordings have never been referred to by any court in their interpretation of the law's protected interest. The wordings were also only subject to limited disagreement in the legislative process regarding possible alternatives (see Prop. 2004/5:45 pp.103, 107). They are also not determinative regarding who is considered the injured party according to the Code of Judicial Procedure (RB 20:8), and in some cases damages can even be paid out regardless of who or what is regarded as the injured party. Evidence nonetheless suggests that prostitution is an abuse and, at a minimum, an exploitation of people and as such not an acceptable "service" provided on the market. Therefore, one could instead use statutory wordings for the tricks' purchases in prostitution as "the purchase of a person for sex."¹¹ This would more clearly indicate that prostitution is not a regular business service for taxation purposes, or primarily a crime against public order as opposed to a crime against a person (cf. Petitioners et al. 2011, 2 n.3).

The government's reading of the law, which follows their Inquiry on this point, suggests that some cases of sex purchase may be a crime against a person simultaneously as they are also a public harm (e.g., because prostitution promotes sex inequality). According to the government, the issue of whether both are protected interests has to be individually assessed in each and every case (Prop. 2010/11:77 p. 15; cf. SOU 2010:49 p. 247-51). This assessment becomes very important because it influences what legal support may be offered to a prostituted person who intends to claim damages. However, the 2008 Inquiry's final report never offered a systematic review of the literature on preconditions to, and trauma and harm in prostitution, which would further have

¹¹ This wording was originally introduced by Catharine A. MacKinnon.

illuminated the issue of who is the injured party or who shall be entitled to claim damages under the law. The issue of the prostituted persons' legal standing under the law was to be investigated according to the Inquiry's charter (see Kommittédirektiv 2008:44 pp. 4, 6). Some newer findings on the Swedish situation in these regards were accounted for by the Inquiry though. They clearly corroborated those that were available when the legislature passed the Women's Sanctuary bill in 1998. For instance, the 2008 Inquiry stresses strong associations between being prostituted in Sweden and having a prior history of child sexual abuse, neglect, and serious mental health problems, citing more recent studies (see, e.g., SOU 2010:49 pp. 96, 116-17, 121). As a whole, however, the Inquiry's research review mainly included studies on the "occurrence" of prostitution in Sweden, and the judicial application of the law.

When the Inquiry attempts to answer the question of what the law's protected interests are, and hence the legal standing of the prostituted person, instead of looking to social evidence about the conditions of prostitution they extensively discuss legal doctrines and scholarship on the abstract concept of a protected interest. Even such far-fetched analogs as bankruptcy law and criminal falsification, with 1930s scholarship being key sources of the doctrine, are invoked in their analysis (see generally pp. 247-51; see also pp. 42, 250-51; quoting/paraphrasing Agge 1937, 273). This approach avoids asking the right research questions by relying on literature that is indifferent as to whether prostituted persons are injured or not. Furthermore, what is principally problematic with this approach is that certain questions, particularly regarding entrenched social discrimination and inequality, cannot be adequately addressed by existing doctrines because the existing doctrines are themselves part of the problem. Not surprisingly then, the 2008 Inquiry concludes "that neither legal text nor doctrine gives any clear and unambiguous answer to the question of who is an injured person" (SOU 2010:49, 250).

Swedish legal scholarship attempting to analyze what is the protected interest under the Sex Purchase Act (regardless whether favoring a civil remedy or not) has so far not adequately considered the kind of social evidence accounted for in this article. Rather, the approach is almost exclusively to consult legal doctrines (see, e.g., Diesen 2008; Träskman 1998; 2005; Lernerstedt & Hamdorf 1999/00; 2000/01; *see also* Schultz 2008, 93-125; primarily on trafficking/procuring and tort law). An example of such an approach is Per Ole Träskman, who in a 2005 article implies that prostituted persons themselves are not a protected interest under the law:

In the government's bill, prop. 1997/98:55 [the Women's Sanctuary bill], purchase of sex was equated . . . with *violence* in general. This may, however, be perceived as a rather exaggerated opinion which hardly has public support, and it does therefore not entitle the conclusion that the protected interest of the criminalization is individual in the same sense as the interest that is protected through the criminalization with respect to crimes against life and health, bodily integrity, or the sexual integrity. (Träskman 2005, 79)

The lack of empirical basis for these claims is apparent in the fact that Träskman's article never presents any alternative analysis of all the social evidence suggesting that prostitution in fact *is* a form of sex inequality related to gender-based violence, exploiting and harming the

prostituted person. Such evidence informed the conclusions made in the Women's Sanctuary bill in 1998 (see above), suggesting that existing laws against gender-based violence were inadequate to protect women in prostitution from exploitation and harm. The coercive circumstances leading to entry into prostitution as well as the conditions while there, which were recognized by the government (see above), appear to make the sex purchase similar to a form of "paid rape"—an analogy for prostitution consistently used by survivors and tricks alike (cf. Giobbe 1994, 121; Farley 2004, 1100; 2006, 131; 2007a, 34; Farley et al. 2003, 66 n.4).

Furthermore, Träskman's article never presents any data indicative of his alleged lack of public support for what he refers to above as "equating" prostitution with "violence in general." Public opinion polls have consistently showed strong public support for the sex purchase law since it took force in 1999 (see above). In my experience many people who support the law also wonder, when told, why prostituted persons are not regarded as the injured party or why they have not received damages under it. Hence, a substantial part of the public support for the law reasonably views prostitution as a form of sex inequality related to gender-based violence that harms the prostituted person, fully consistent with the law's legislative history.¹² With such a view the protected interest arguably is individual in the same sense as for other crimes like trafficking, sexual harassment, sexual coercion, and rape; i.e., the law is intended to stop the harms tricks are causing to prostituted persons when exploiting these persons' coercive circumstances to purchase them for sex, thereby also violating their right to humanity, equality, and dignity (cf. Petitioners et al. 2011, 2-4).¹³

¹² Kuosmanen (2011) found that among those men (60%) and women (79%) wanting to retain the prohibition, 8% of the women and 16% of the men "agreed, either wholly or in part" with a statement formulated as "'State-run brothels ought to be introduced in Sweden'" (p. 254), which might appear slightly contradictory. However, these numbers were quite small and do not come close to resembling such a tacit public opinion assumed to exist by Träskman (2005, 79). Moreover, these numbers do not *per se* suggest that even these few respondents could not *also* consider prostitution a form of gender-based violence. One hypothesis suggested by Kuosmanen (2011) is that such respondents might simply "desire" to "control" prostitution through criminalization in some settings, state supervision in others (pp. 254-55).

¹³ Tsachi Keren-Paz makes an argument for civil damage awards to some prostituted persons from tricks buying trafficked sex (Keren-Paz 2010). In order for tricks to be liable for damages the distinction of "forced" prostitution is introduced (as opposed to non-forced) "due to illicit pressure by traffickers" (p. 309). Examples enumerated by Keren-Paz of such "pressures" are "violence, the threat of violence, psychological intimidation, confiscation of traveling documents, lies about what awaits the victim if caught by the police, false imprisonment, or similar tactics of intimidation" (p. 309). However, these are only a few of the many coercive social forces leading to conditions where prostituted people do not have control over the "number" of tricks they have to "'serve,' . . . the practices in which they are made to engage," nor "how much money (if any) will remain in their hands" (Ibid). Conditions like these often appear because of a power imbalance between the trick and the prostituted person, commonly produced by the latter's coercive life-circumstances such as homelessness, poverty, subjection to prior sexual abuse and childhood neglect, sex discrimination and/or societal racism (see above). Thus, it appears awkward generally "to maintain that a non-forced prostitute," defined as not under any illicit pressure, "can and in fact does consent to the way she is treated by the client" (p. 315). In this light, Keren-Paz's additional remark that "the non-forced prostitute" may sue the trick depending "to what extent non-forced prostitutes are free from other kinds of coercion" (p. 315) entails strong implications when considering the overwhelming empirical data accounted for in this article on coercive preconditions for prostitution (see above). Keren-Paz's article does not itself discuss such social evidence further, but doing so would have strengthened his argument for damages and more clearly extended its potential

Political Obstacles to the Recognition of Civil Remedies

It is unfortunate that neither the 2008 Inquiry nor the ensuing government bill considers strengthening the venues for seeking damage awards in all cases. Granted, the specific amount in each particular instance could still have to be judicially assessed on a case by case basis. However, such a development appears to be obstructed considering that when the government and their 2008 Inquiry proposed the general raise of the penalty maximum to 1 year, they qualified it by the statement that the raise “is not meant to change the choice of sanction for all sex purchase crimes,” and that if “there isn’t any aggravating circumstance the penalty level would, for many sex purchases, . . . *still stay* on daily fine-level” (SOU 2010:49 p. 245; emphasis added; cf. Prop. 2010/11:77 p. 11). The current practice of handing out daily fines as opposed to imprisonment was established when courts interpreted the crime as primarily committed against the public order, which lower courts said entailed a lower punishment than crimes against persons (NJA 2001-07-09 p. 529). When the government makes this statement indicating that many cases could (or even should) be sentenced similarly in the future, they appear to accept the prior interpretations for many cases holding the law as “primarily not” concerning a crime against a person (p. 530). Thus, the government itself complacently lends legitimacy to current prosecutorial practices of not calling prostituted persons as injured parties and only as witnesses in such cases. Similarly, these unfortunate statements lend indirect support to a generally unsupportive judicial attitude toward assessing damages, even though technically the latter is possible without calling any injured party in the proceedings (see above). The fact that no prostituted person has received damages under the Sex Purchase Law through any venue since its enactment suggests a need for more judicial support, in whatever forms available (cf. Hägg et al. 2011).

It is to be noted that the 2008 Inquiry was under no constitutional or other obligation barring them from questioning previous judicial decisions. Similarly, the protected interest could be *both* public and person at the same time, which is reflected when the courts say “primarily” (see above), and which is also now explicitly recognized by the government (Prop. 2010/11:77 pp. 14-15). The 2008 Inquiry, e.g., exemplified this duality of protected interest with an analogy to the *child pornography offense* which, despite being found among “Crimes against Public Order” in the Criminal Code’s Chapter 16, nonetheless can recognize children as injured parties with a

applications. An additional source of confusion for a scholarly article essentially dealing with “trafficking,” “equality,” and “slavery,” (Keren Paz 2010 et passim) is its sole reliance on the common law framework. Neither are there any references to modern trafficking law such as the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention Against Transnational Organised Crime (U.N. General Assembly 2000) and its jurisprudence (see, e.g., U.N. Econ. & Soc. Council, Comm’n on Hum. Rts. 2006, ¶ 42; reporting that “prostitution as actually practised in the world usually does satisfy the elements of trafficking”), nor to other human rights and equality law such as the Slavery Convention (1926) or the Convention on the Elimination of All Forms of Discrimination Against Women’s article against trafficking/prostitution (CEDAW 1981, art. 6). This lack of a human rights discourse makes Keren-Paz’s arguments seem archaic at times. For further discussion of the Swedish law and civil damages for sex purchase in light of international trafficking law, see my forthcoming article in the *Michigan Journal of International Law*, volume 33.

corresponding right to damage claims (SOU 2010:49 pp. 250-51). Furthermore, the 2008 Inquiry's own statement that the Sex Purchase Law "is more of a crime against a person than a crime against the public order, even if its background has elements of both" (p. 81) appears inconsistent with their belief that after their proposed amendments many sex purchases would "still stay on daily fine-level" (p. 245). Thus, the Sex Purchase Law may prove to be more open for damage claims if prosecutors or the prostituted persons themselves simply start to claim damages under it.

Swedish lawyers have so far appeared uninterested in interpreting and applying this law, as well as other provisions regulating prostitution, in ways favorable toward prostituted persons (see also Petitioners et al. 2010, esp. 16-29). In this light, it is troublesome to note the 2008 Inquiry's enumeration of some "typical examples" (SOU 2010:49 p. 240) of aggravating conditions that are thought to indicate a tougher assessment of penalty, as this could be conservatively read as a suggestion (especially for defense attorneys) that prostituted persons not included in these examples are not to be seen as injured parties nor as otherwise eligible for damage awards.¹⁴ The aggravating conditions mentioned were, for example, young age, a "particularly unprotected or vulnerable situation," mental disorder, mental disability, "visible" intoxication, "exploiting a position of dependency," lack of language skills, organized prostitution, receiving multiple tricks simultaneously or one directly after another, or the act(s) taking place under a "prolonged sequence," and "coercion-like or degrading elements," such as bondage, spitting, urination or defecation (SOU 2010:49 pp. 240-41). Whether or not prostituted persons actually have a clinical PTSD-symptom or any other of the above conditions, the desperation and vulnerability which commonly leads to entering prostitution nonetheless creates a situation where tricks are also violating those persons' right to humanity, equality, and dignity when purchasing them for sex (cf. Petitioners 2011, 3).

Conveying an impression that many offenses will still be judged according to the 2001 doctrine, the 2008 Inquiry could be read to imply a distinction whereby some prostituted persons are ineligible for damage awards (or are ineligible for legal support in claiming them as injured parties) if their situation is not, e.g., "particularly unprotected or vulnerable" (SOU 2010:49 p. 240). One wonders whether vulnerability will not be enough in itself. This is relevant to ask when considering, inter alia, the Inquiry's own rejection of distinguishing voluntary from "involuntary prostitution" (p. 249; cf. p. 59). Furthermore, the question seems pertinent in light of the Inquiry's reference to more recent studies finding strong associations between being prostituted in Sweden, and having a prior history of child sexual abuse, neglect, and serious mental health problems (see, e.g., pp. 96, 116-17, 121). Such findings further strengthen prior legislative his-

¹⁴ However, in conjunction with enumerating these typical aggravating circumstances the Inquiry themselves indirectly could be seen as countering such a restrictive and conservative reading when justifying a more nuanced assessment of penalties: "Even if the crime *as yet* has not *always* been perceived as a crime against person, we take the view that circumstances concerning the persons who are exploited are important to consider when the act's penal value is assessed." (SOU 2010:49 p. 240; emphasis added).

tory conclusions that persons generally enter prostitution as a consequence of coercive circumstances outside their control (see above). Hence, such circumstances should be enough for civil damages, whether the persons were “particularly” vulnerable or not.

Also worrisome is that the government's proposal, without explanation, took out *mental disorder* from the enumerated examples of aggravating circumstances pertaining to the penal value (Prop. 2010/11:77, 21). The 2008 Inquiry's enumeration above included mental disorder, as opposed to *mental disability* which is still retained. The psychological/psychiatric concept “mental disorder” includes Post Traumatic Stress Disorder (PTSD) (American Psychiatric Ass'n 2000, 467-468), a response to extreme abuse that is very common among prostituted persons (see, e.g., Farley et al. 2003, 44-49, 56 et seq; Choi et al. 2009). Mental disorder might still be invoked under the category of “other circumstances” that may implicate a stronger punishment according to the government's bill (Prop. 2010/11:77, 22). But an explicit recognition had been a stronger indication of legislative intent, and thus would arguably appear more relevant for the courts' penalty and damage assessments.

Taking into account that the 2008 Inquiry admitted that “adequate relief and assistance efforts are of essential importance for the people who are being exploited or have been exploited in prostitution” (SOU 2010:49 p. 231), their implied rejection of prosecutorial support for civil remedies in many cases is disconcerting. It is particularly so when considering that the Inquiry itself does “not put forward any concrete proposals in these regards,” more than to “particularly emphasize the value of such continuous and sustainable efforts” (p. 231). It appears inconsistent, based on the Inquiry's own standpoint that the current law “was aimed at improving the situation for the vulnerable persons in prostitution” (p. 231), not to support monetary civil rights remedies to facilitate escape for most persons in prostitution. Most persons in prostitution *are* “vulnerable.” Effectively narrowing recompense to a smaller class, such as the enumerated one above, appears to ignore the pain, suffering, and harm inherent in prostitution per se which presumably led those conscious members of Parliament and parliamentary lobbyists, most of whom were women (see Svanström 2004, 236), to fight to pass the law in the first place.

The thrust of the legislative history, for damage purposes, effectively points at coercive circumstances leading to persons' entry into prostitution, and at the exploitation of their profoundly difficult and unequal situation. The exploiters, i.e., pimps and tricks, thus contribute more harm to those who are already suffering. Such is the case whether or not any additional aggravating factors exist. Harming a person this way by purchasing them for sex should be recognized as a violation of their right to humanity, equality, and dignity; i.e., as a crime against the person in itself, and not primarily as an offense against the public interest of promoting gender equality, or any other public order interest (cf. Petitioners et al. 2011, 3). An individual who was bought for sex and did herself/himself not experience being harmed by the act would probably not seek such damage awards from the trick. A tacit argument sometimes occurs implying that since these civil rights would deter potential tricks, they would infringe the rights of a hypothetical group of persons to “sell sex.” However, any legislature or judiciary should balance

the rights, interests, and imperatives at stake. When considering the compelling interests of those being harmed and exploited in prostitution and their need for a means of escape, of which the evidence accounted for in this article is overwhelming, such arguments appear profoundly unbalanced and detached from the documented realities of prostitution.

Conclusions

The Swedish law against purchase of sex which criminalized tricks and decriminalized prostituted people was founded on the recognition of prostitution as overwhelmingly unequal, exploitative, and harmful to prostituted persons. This law has had a significantly impact on the demand for prostitution, as well as on the size of the population of prostituted persons. It is evident in the significantly lower population of prostituted persons in Sweden compared, *inter alia*, with Sweden's Nordic neighbors. Furthermore, a lower percentage of men in Sweden purchase sex than before the introduction of the law. Additionally, there is now a palpable reluctance among traffickers to pimp prostituted persons in Sweden since the law's passage.

However, due to judicial interpretation after its enactment, the law's potential to support prostituted persons and aid their escape has been significantly reduced. This situation could be improved considering the law's legislative history and the social evidence compellingly converging on the conclusion that tricks exploit and abuse the humanity, equality, and dignity of prostituted persons (cf. Petitioners et al. 2011, 3). Such a recognition coupled with a corresponding interpretive change would more strongly support prostituted persons in claiming civil damage awards directly from tricks. This in turn would create a means of facilitating escape from the sex industry. A shift in perspective along these lines would also compel municipalities and other public agencies in Sweden to regard prostituted people more unambiguously as victimized by crime, and to be obliged under the law to help and support them. Moreover, these added elements arguably strengthen the law's deterrent function when tricks realize that any person they've exploited may later sue them. Thus, an effective strategy to combat prostitution should decriminalize and support the prostituted persons, strongly criminalize the tricks, and criminalize third party-profiteers (though the last is a topic beyond this article's scope). Other nations now have an unprecedented opportunity to adopt the positive features of the Swedish law, and to make sure its current shortcomings are remedied.

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