

Prohibiting Purchase of Sex in Sweden: Impact, Obstacles, Potential, and Supporting Escape*

MAX WALTMAN* — WORKING PAPER

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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

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* Max Waltman, is a PhD Candidate at Stockholm University, dept. of Political Science, writing a dissertation on legal challenges to pornography and prostitution as violations of equality and other human rights, and how democratic systems have handled these challenges and addressed the harms documented in commercial sexual exploitation, focusing on Canada, Sweden, and the U.S.

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., Andrea Dworkin, *Pornography: Men Possessing Women* (London: Women's Press, 1981); Catharine A. MacKinnon, "Pornography, Civil Rights, and Speech," 20 *Harvard Civil Rights-Civil Liberties Law Review* 1 (1985); Gail Dines, Robert Jensen, and Ann Russo, *Pornography: the Production and Consumption of Inequality* (New York: Routledge, 1998); Rebecca S. Whisnant and Christine Stark, eds, *Not For Sale: Feminists Resisting Prostitution and Pornography* (Melbourne: Spinifex Press, 2004) (anthology); Christopher N. Kendall, *Gay Male Pornography: An Issue of Sex Discrimination* (Vancouver, Canada: UBC Press, 2004); Catharine A. MacKinnon, "Pornography as Trafficking," 26 *Michigan Journal of Int'l Law* 993 (2005); *Sex Equality*, 2nd ed. (New York: Foundation Press, 2007), chap. 10; David E Guinn and Julie DiCaro, Esq., eds., *Pornography: Driving the Demand in International Sex Trafficking* (Los Angeles: Captive Daughters Media / DePaul Univ. Int'l HR Law Institute, 2007) (anthology); See also Laura Lederer, ed., *Take Back the Night: Women on Pornography*, 1st ed. (New York: Morrow, 1980) (anthology), for some early key-works pertaining to such analysis.

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 1999,² criminalizing only those buying prostituted persons³ and not those being bought.

This article will present an analysis of the core reasons for the Swedish law and the legislative findings it was based on, then document its impact along with some of the more crucial obstacles to effective implementation. In this conjunction some of the critique against the law's basic foundation along with erroneous claims or disinformation promulgated in the international debate about the law's effects will be commented. Moreover, in order to realize its full potential, a comment on current case law that needs to be challenged in order to support escape from prostitution more efficiently will be made. This case law has gone virtually unnoticed outside Sweden, with few exceptions⁴ until the most recent commission of inquiry's report⁵ in July, 2010, responded positively to some, but not all, of the suggestions voiced in a joint submission⁶

² See Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.), which states that “[a] person who, otherwise than as previously provided in this Chapter [on Sexual Crimes], obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most six months. [This law] also apply if the payment was promised or given by another person.” Government Offices of Sweden, “Chapter 6 of the Swedish Penal Code 1962:700,” Official Website (semi-official translation with amendments up to Apr. 1, 2005), <http://www.sweden.gov.se/sb/d/3926/a/47455> (accessed Aug. 15, 2010).

³ The term “prostituted person” indicates that persons who are in prostitution are substantially placed there and kept there by acts of others, which the evidence indicates. While the term is used roughly synonymously with “person in prostitution,” it conveys more clearly the reality, discussed below, that most people who are found in prostitution are either pimped, trafficked, or coerced by social forces that include prominently poverty, racism, and sex inequality. Thanks to Professor Catharine A. MacKinnon for these definitions.

⁴ A bleak exception was provided by the U.N. Rapporteur on Violence against Women in 2007, Yakin Ertürk, who on the one hand noted that Swedish official government documents stated that “prostitution constitutes in and of itself a form of male violence against women, regardless of the consent of the women involved,” hence the “legislation regards women in prostitution as victims of male violence and therefore they do not face criminal sanctions under Swedish Law,” while on the other hand in a footnote to the discussion noting that in her communication with the government the latter had “clarified that Swedish penal legislation does not regard women in prostitution to be victims of male violence.” U.N. Human Rights Council [HRC], *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: Addendum; Mission to Sweden*, ¶ 41 & n.23, U.N. Doc. A/HRC/4/34/Add.3 (Feb. 6, 2007) (*submitted by* Yakin Ertürk). This U.N. Rapporteur did not further discuss nor question this inconsistency entailing that prostitution is legally treated as a “victimless crime” while official government documents appeared to claim otherwise.

⁵ Statens Offentliga Utredningar [SOU] 2010:49 *Förbud mot köp av sexuell tjänst, En utvärdering 1999–2008* [Prohibition Against Purchase of Sexual Service, A Review 1999-2008] [government report series] (Swed.) (summary in English at 29-44), available at <http://www.regeringen.se/sb/d/108/a/149142>.

⁶ Petitioners et al., *Förslag till regeringens utredning av sexköpslagen / Suggestions to the Government's Review of the Sex Purchase Act* (Sweden) (2010) (officially received by gov't commissioner March 17, 2010), available at http://www.statsvet.su.se/homepages/max_waltman.htm.

by myself and 12 other NGOs and individuals to vindicate the civil rights of the prostituted persons, particularly their right to damages directly from the trick⁷ for the harm he contributes to.

Legislative History: Findings, Conclusions, and Comparisons

In 1998, the Swedish Parliament adopted the law against purchase of sex by passing an omnibus bill on violence against women written by the government. The connection between gender-based violence and prostitution was elaborated in the 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, hence, 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 unworthy and unacceptable that men obtain casual sex with women against remuneration.⁸

This legislative analysis suggests that prostitution is a form of sex inequality and violence against women, exploiting and harming the prostituted person. Consistent with such an approach, the findings recognized by Parliament also emphasized existing unequal and often coercive preconditions of sexual inequality propelling women and girls into prostitution. As the bill stated: “The research that exists about prostitution shows . . . that the prostituted persons often are women who, in different ways, received a bad start in their lives and who early on were deprived of their self-respect and received a negative self-image.”⁹ Additionally, the bill noted that the “connection between prostitution and sexual abuse during childhood has become all the more apparent.”¹⁰

As indicated by the Swedish government in 1998, the majority of prostituted persons—somewhere between 55% to 90% according to various international studies—were subjected to

⁷ The word trick is used to denote a purchaser of sex in this article. Other such commonly used words are johns, punters, buyers, clients, or sex predators. Trick is a word frequently used by prostituted women themselves for men who buy them. It also refers to the many way these men “trick” them into performing more acts than what the men paid for, or cheating them by, e.g., refusing to pay after having sexually exploited them. See Melissa Farley, “‘Renting an Organ for ten Minutes’: What Tricks Tell Us about Prostitution, Pornography, and Trafficking,” in *Pornography: Driving the Demand in International Sex Trafficking*, ed. David E Guinn and Julie DiCaro (Los Angeles: Captive Daughters Media / DePaul Univ. Int’l Human Rights Law Institute, 2007), 147. Moreover, evidence presented further below of the preconditions to enter prostitution, and the treatment in commercial sex as such, shows a huge power-imbalance between trick and prostituted person which enables the former to exploit and subject the latter to degrading, dangerous, and inhumane treatment. In this sense, and considering that prostituted women use it themselves to denote the purchasers, the word trick fits the facts better than many others.

⁸ Proposition [Prop.] 1997/98:55 *Kvinnofrid* [approx: Women’s Sanctuary / Women’s Peace] [government bill], 22 (Swed.).

⁹ Prop. 1997/98:55 *Kvinnofrid*, 102-03.

¹⁰ *Id.* at, 103.

sexual abuse as children.¹¹ Many consequently run away from home, or are pushed into homelessness step-by-step, then to be exploited by tricks unscrupulously purchasing them for sex. In Sweden the number of children being sexually exploited is still “significant” according to a government report from 2004.¹² Recent findings among youth 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,¹³ corroborated in other recent nationally representative youth-surveys (including particular surveys on LGBT-populations)

¹¹ For original data, see, e.g., Melissa Farley et al., “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder,” in *Prostitution, Trafficking and Traumatic Stress*, ed. Melissa Farley (Binghamton, NY: Haworth Maltreatment & Trauma Press, 2003), 43, available at www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf, who found that 59% of all responding prostituted persons ($n = 448$) affirmed that they “[a]s a child, was hit or beaten by caregiver until injured or bruised.” An additional 63% ($n = 508$) affirmed they were “sexually abused as a child.” Ibid. However, it should be mentioned that these data most likely are underestimations. For instance, the authors note that asking about rape in prostitution is like asking a person in a combat zone if that person is being under fire. Ibid., 66. The study presumably underreports the frequency of violence compared to screening studies where, in order to avoid that the respondents minimize their experiences, a range of ostensive definitions of typical acts of violence are used. See, e.g., Eva Lundgren et al., *Captured Queen: Men’s Violence Against Women In “Equal” Sweden; A Prevalence Study*, trans. Julia Mikaelsson and Geoffrey French (Umeå: Brottsoffermyndigheten, 2002), 15-16. With regards to the time constraints of surveying or interviewing such a large population of prostituted persons as in Farley et al.’s study on the streets, in brothels while being interrupted by pimps, or in other public locations such as medical facilities, similarly stringent measures would have been difficult and time-consuming to employ, not the least considering all the other information asked for.

However, in-depth studies of persons who left the sex industry show higher frequencies of childhood abuse. See, e.g., Susan Kay Hunter, “Prostitution is Cruelty and Abuse to Women and Children,” 1 *Mich. J. Gender & L.* 91, 98-99 (1993) (85% of 123 survivors of prostitution reported being victims of incest as a child, 90% were physically abused, and 98% were emotionally abused); Mimi H. Silbert and Ayala M. Pines, “Entrance Into Prostitution,” *Youth & Society* 13 (1982): 479 (60% of 200 prostituted subjects had a prior history of sexual abuse during childhood from 3 to 16); Evelina Giobbe, “Confronting the Liberal Lies About Prostitution,” in *Living With Contradictions*, ed. Alison M. Jaggard (Boulder Colorado: Westview Press, 1994), 123, 126 & n.10 (organization WISPER conducted interviews with formerly prostituted persons in Minneapolis where 90% stated they had been assaulted and 74% stated they had been subjected to sexual abuse between 3 to 14 years of age; the project called “Mary Magdalene Project” found that 80% of prostituted women reported sexual abuse during childhood; the project called “Genesis House” reported the same for 94%); See also Ronald L. Simons & Les B. Whitbeck, “Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women,” *J. Fam. Issues* 12 (1991): 361 (finding, in a sample of 40 adolescent runaways and 90 adult homeless women in Des Moines, Ohio, that “early sexual abuse increases the probability of involvement in prostitution irrespective of . . . [other] factors”); Chris Bagley & Loretta Young, “Juvenile Prostitution and Child Sexual Abuse: A Controlled Study,” *Canadian J. Community Mental Health* 6 (1987): 5 (73% of the prostituted in the study were subjected to sexual abuse as children); Mimi H. Silbert and Ayala M. Pines, “Sexual Child Abuse as an Antecedent to Prostitution,” *Child Abuse & Neglect* 5 (1981): 407; Jennifer James & Jane Meyerding, “Early Sexual Experience as a Factor in Prostitution,” *Arch. Sexual Behavior* 7 (1977): 31; Silbert and Pines, “Early Sexual Exploitation,” 285-86. For citations to other studies, see, e.g., Ines Vanwesenbeeck, *Prostitutes’ Well-being and Risk* (Amsterdam Neth.: VU Uitgeverij, 1994), 21-4 (summarizing studies).

¹² Statens offentliga utredningar [SOU] 2004:71, *Sexuell exploatering av barn i Sverige, del 1* [Sexual Exploitation of Children in Sweden, part 1] [government report series] 15-16 (Swed.).

¹³ See Jonna Abelsson and Anna Hulusjö, *I sexualitetens gränstrakter: en studie av ungdomar i Göteborg med omnejd som säljer och byter sexuella tjänster* [At the Borders of Sexuality: A study of Youth in Gothenburg and Surroundings who sell or barter Sexual Services] (Gothenburg: Göteborgs Stad, Social resursförvaltning, 2008), 97-99.

adding socioeconomic factors and nationality as predictors to prostitution.¹⁴ These findings strongly suggest the law should be more efficiently implemented or amended to reach its full potential, including making escape from prostitution possible.

In most situations of prostitution coercive circumstances exist that push women into the sex industry, including subjection to sexual abuse as children, homelessness, sex and economic discrimination, and often racism.¹⁵ Correspondingly, a low age of entry in prostitution is generally corroborated internationally. For instance, 47% in a sample of 854 prostituted persons in nine countries found across five continents reported they entered under age 18 ($n = 751$).¹⁶ In another sample of 200 prostituted women in San Francisco, 78% entered under 18, and although “average” entry age for the whole sample was 16, a majority of 62% had started before 16, and “a number were under 9, 10, 11 and 12 when they started prostitution.”¹⁷ In this context it is to be noted that the government report from 1995 preceding the 1998 bill had, among other things,

¹⁴ Gisela Priebe and Carl-Göran Svedin, “Unga, sex och internet” [Youth, Sex, and Internet], in *Se mig: Unga om sex och internet* [See Me: Youth on Sex and Internet], ed. Ungdomsstyrelsen [Nat’l Board for Youth Affairs] (Stockholm: Ungdomsstyrelsen, 2009), 74-75, 110, 112, 135; Ungdomsstyrelsen, ”Erfarenheter av sexuell exponering och sex mot ersättning” [Experience of Sexual Exposure and Sex for Remuneration], in Ungdomsstyrelsen, *Se mig*, 156, 158, 161-69.

¹⁵ Regarding racism and discrimination, see, e.g., Swedish Nat’l Council for Crime Prevention (BRÅ), *The Organisation of Human Trafficking: A Study of Criminal Involvement in Sexual Exploitation in Sweden, Finland, and Estonia* (Stockholm: BRÅ, 2008), 8, available at <http://www.bra.se/>, which finds that regarding recruitment into trafficking to Sweden, Finland, and Estonia, “[p]overty and discrimination are two key structural factors emerging in the survey. Many of the women and girls recruited to the sex trade belong to minority groups in their home countries, such as the Russian-speaking minority in Baltic countries and the Roma people in Eastern Europe. . . . The majority come from the lowest social strata.” Cf. *Ibid.*, 36-43. Regarding race and economic discrimination, in the U.S. African American women and girls are overrepresented in prostitution. See, e.g., Jennifer James, *Entrance into Juvenile Prostitution: Final Report* (Washington, DC: National Institute of Mental Health, 1980), 17, 19 (finding African American girls, 4.2% of the population, were 25% of sample ($n = 136$) of prostituted girls interviewed in Seattle area). Interviews conducted with over 3000 “streetwalking prostitutes” for an outreach project in New York City found approximately half were African American, a quarter Hispanic, and the remaining quarter white. Barbara Goldsmith, “Women on the Edge,” *New Yorker*, Apr. 26, 1993, at 64, 65. See also Vednita Nelson, “Prostitution: Where Racism and Sexism Intersect,” 1 *Mich. J. Gender & L.* 81, 83 (1993) (“Racism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.”). Cf. Melissa Farley, Jacqueline Lynne, and Ann J. Cotton, “Prostitution in Vancouver: Violence and the Colonization of First Nations Women,” *Transcultural Psychiatry* 42 (2005): 242 (finding 52% of 100 prostituted women of First Nations descent, 1.7-7% of Vancouver population); Special Committee on Pornography and Prostitution in Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution in Canada*, vol. 2. (Ottawa, Can.: Supply & Services, 1985), 347 (“On the prairies . . . most of the prostitutes are young native women.”); See also Aboriginal Women’s Action Network (AWAN), “Statement Opposing Legalized Prostitution & Total Decriminalization of Prostitution,” Official Website (n.d.), <http://www.awanbc.ca/aboutus.html#Oppose> (accessed Aug. 25, 2010) (opposing proposed legal brothels for 2010 Vancouver Olympics).

¹⁶ Farley et al., “Prostitution in Nine Countries,” 40. For the countries included and related information, see *infra* note 19.

¹⁷ Mimi H. Silbert and Ayala M. Pines, “Sexual Child Abuse as an Antecedent to Prostitution,” *Child Abuse & Neglect* 5 (1981): 410. Consistently, 70% of respondents were under age 21 at the interview, almost 60% were 16 or below, and “numbers were” age 10, 11, 12, and 13 years old. Mimi H. Silbert and Ayala M. Pines, “Occupation Hazards of Street Prostitutes,” *Crim. Just. Beh.* 8 (1981): 396; Silbert and Pines, “Abuse as Antecedent,” 408. The oldest respondent in the sample was 46, the youngest 10 (mean 22). *Ibid.*, 408.

corroborated findings from Swedish clinical- and outreach workers in Gothenburg with those from U.S. researchers Mimi Silbert and Ayala Pines' San Francisco-study with 200 prostituted women where 60% 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.¹⁸

Harm, Trauma, and Power-Imbalance in Prostitution

Regarding ongoing symptoms of harm in prostitution, the nine-country study found that 68% of prostituted persons ($n = 840$) met clinical criteria of posttraumatic stress disorder (PTSD) symptoms higher or equal to that of treatment-seeking Vietnam veterans regardless of whether prostitution was legalized or criminalized, and regardless whether it took place indoors, in brothels, on the streets, or in developing as opposed to fully industrialized countries.¹⁹ Such stringent clinical assessments of PTSD currently do not exist in Sweden, although professional practitioners treating psychological trauma testify to similar assessments of PTSD from working with prostituted women in Sweden.²⁰ For comparative purposes it is also notable that a recent study from Korea with 46 formerly indoor prostituted women (as opposed to outdoor/street) revealed significantly higher symptoms of PTSD and disorders of extreme stress not otherwise specified (DESNOS) compared to a control group, even though the mean number of days since leaving prostitution was as high as 573.12 (range: 16 to 2,190) and despite controlling for

¹⁸ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 104 (Swed.) (citing Mimi H. Silbert and Ayala M. Pines, "Early Sexual Exploitation as an Influence in Prostitution," *Social Work* 28 (1983): 286); See also Silbert and Pines, "Abuse as Antecedent," 410. For a reply to recent attempts to criticize Swedish legislative findings from 1995 and 1998 as not sufficiently relevant to the indoor-prostitution population, see discussion *infra* notes 148, 164-170, and accompanying text.

¹⁹ Farley et al., "Prostitution in Nine Countries," 44-48. Although respondents were sampled from varying forms of prostitution in the different countries, the standardized and validated tests for posttraumatic stress nonetheless exhibit the same results for all, and were replicated in all countries. The researchers interviewed and asked prostituted persons at the following locations; 1) on the streets in Canada, 2) in brothel, stripclub, street, or at massage parlors in Mexico, 3) at clinics for STD controls in Turkey (respondents *not* "seeking assistance/treatment"), 4) by local newspaper advertisement, drop-in shelter for drug addicted women, and peer-referred (snowball sampling) in Germany, 5) randomly sampled interviews in four different areas on San Francisco streets, 6) at a beauty parlor in Thailand and at a job training/nonjudgmental support agency in Northern Thailand, 7) at brothels, streets, and drop-in center for prostituted persons in Johannesburg and Capetown, South Africa, 8) at a nongovernmental organization (NGO) supporting approximately 600 women a week in Lusaka, Zambia, and 9) at support agencies in Bogota, Colombia. Male and/or transgendered persons were included in the Thai, South African, and U.S. samples. For more information on the samples and methods, see Farley et al., "Prostitution in Nine Countries," 37-39.

²⁰ "Common with all those women [prostituted in Sweden] are the severe post traumatic stress reactions that are manifested in the forms of serious mental disorders such as severe sleep- and concentration disorders, recurrent anxiety- and panic attacks, grave depressions, severe anorectic reactions, self-destructive behaviors combined with extensive problems of impulse control, and manifest or latent suicidality." Statement from the Crisis- and Trauma Center in Stockholm (*Kris- och Traumacentrum*), June, 28, 2005, quoted in Linda Karlsson, "Målsägandebegreppet vid vissa sexualbrott: köp av sexuella tjänster, människohandel och koppleri" [The Injured Party Concept in Certain Sexual Crimes—Purchase of Sexual Services, Human Trafficking, and Procuring] (examensarbete 20p i processrätt [L.L.B. thesis], Stockholm University, Spring Term 2006) (my translation)

mediating variables such as prior childhood abuse, childhood sexual abuse, and childhood sexual abuse by a significant other.²¹

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 the years 1967-1999, active ones ran a risk of murder eighteen times higher than in a comparable non-prostituted population.²² 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).”²³ Corroborating the high incidence of murder in prostitution already in 1985 Canada’s largest federal public inquiry into prostitution, the so-called Fraser Committee, quoted estimates that mortality for prostituted persons may be 40 times higher than the national average.²⁴ Not surprisingly, women in prostitution are documented as particularly vulnerable to victimization by serial murderers, who often target women (and men) who are prostituted.²⁵

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. Among 55 female prostitution survivors participating in a project in Portland, Oregon, it was found that 84% 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 more than once a week, often while pornography were made.²⁶ Mirroring such violent conditions, in the nine-country study previously mentioned, 49% ($n = 802$) of women reporting being used in pornography were diagnosed with “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography,²⁷ suggesting sexual exploitation in pornography is particularly vicious and cruel to women. Converging with such data, other survivors from the pornography industry testify to constantly being covered with “welts and bruises.”²⁸ Studies conducted in other countries, for instance Canada, are indicative of similar

²¹ Hyunjung Choi et al., “Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse,” *Violence Against Women* 15, no. 8 (2009): 935-36, 942, 945.

²² John J. Potterat et al. “Mortality in a Long-term Open Cohort of Prostitute Women.” *Am. J. Epidemiol.* 159, no. 8 (2004): 782-83.

²³ *Ibid.*, 783.

²⁴ Canada, *Report on Pornography and Prostitution*, 350.

²⁵ See, e.g., Eric W. Hickey, *Serial Murderers and their Victims*, 3rd ed. (Belmont, CA: Wadsworth Pub, 2002), 252-53.

²⁶ Hunter, *supra* note 11, at 93-94.

²⁷ Melissa Farley, “Renting an Organ,” 146, 422n298 (Pearson $r = 126$, $p = .001$, $n = 749$).

²⁸ Attorney General’s Commission on Pornography, *Final Report*, 2 vols. (Washington, DC: U.S. Dept. of Justice, 1986) [hereinafter: Att’y General’s Comm., *Final Report*], 784, available at <http://www.communitydefense.org/lawlibrary/agreport.htm> (quoting from Washington D.C., Hearing, Vol. I., p. 179-82.).

levels of violence against prostituted persons where the use of weapons such as baseball bats and crowbars occur regularly, or where the offender jerks the prostitutes woman's head against a car's dashboard or a wall.²⁹ 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.³⁰ Accordingly, already in 1995 the Swedish Commission of Inquiry reported that

[i]t is common that women in the sex trade are subjected to various forms of violations such as physical abuse and rape. Some purchasers conceive the situation such as that they, since they're paying, have a right to treat the woman as they wish. The purchaser thinks that he has not only paid for particular sexual services, but also paid for the woman's right to a human and dignified treatment.³¹

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 commission described a typical case where a "club" selling pornographic movies also produced their own materials in their basement where any paying male guest could perform, i.e., having sex with women the club supplied.³² 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.³³ According to her testimony, corroborated by similar reports from other girls, this event had followed upon two "seasoning" sessions where at the first one she had sex with 1 man. However, already at the second session, where she also thought she would have sex with 1 or a few "chosen models," she ended up having to serve 3 or 4 men from a crowd of 30-40 who had paid approximately \$10 to enter the basement. For their sex with her she was remunerated with less than \$100. Because she was still in great financial stress she accepted yet another session despite the pornographers having apparently already pushed her limits, which is symptomatic for the imbalance in power that propels women into these dangerous and unwanted situations. At the last time the crowd was even bigger than before, and instead of serving 3 or 4

²⁹ Farley, Lynne, Cotton, "Prostitution in Vancouver," 250-51.

³⁰ See, e.g., Helsingborgs tingsrätt (TR) [Dist. Ct.], 2005-09-25, B 1230-05, pp. 58-59 (Swed.), *overruled by*, Hovrätten över Skåne och Blekinge (HovR) [Ct. App.], 2006-01-11, B 2429-05, (Swed.) (Katarina's damages dismissed), for a testimony by Katarina who was forced by violence and/or threats to have intercourse two or three times every day by a procurer in whose house she lived in for almost two months, entrapped in part because procurers took her money. Katarina's testimony *corroborated by Niculeta's*. Helsingborgs tingsrätt (TR) [Dist. Ct.], *supra*, pp. 48-56. *See also* Stockholms tingsrätt (TR) [Dist. Ct.], 2003-03-21, B 4205-02 (Swed.) (several testimonies by Nadja, Julia, Renata, and Olesia of daily beatings, gang-rapes, and torture. "Welts and bruises" mentioned by independent witnesses, e.g., at 14, 16, 21 (trans. from *blåmärken*)), *sentence modified*, Svea hovrätt (HovR) [Ct. App.], 2003-06-23, B 2831-03 (Swed.) (additional testimonies).

³¹ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 142 (Swed.).

³² *Id.* at 96.

³³ *Id.* at 96-97.

men she now had to serve 10 men accordingly as mentioned above. The commission stated that she had fared very bad from these 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.³⁴ Similarly regarding exposure to danger in indoor prostitution, the commissioners reported:

Police and social workers who work with prostituted persons claim that crimes of violence are commonly occurring also in indoor prostitution. . . . At those moments when a woman is alone with a customer at the premises she is however completely exposed, and runs huge risks to be subjected to abuse, rape, or theft.³⁵

Comparative Observations

Deeming from the obviously dangerous situations women have entered into above, not unexpectedly there are often severe economic hardships forcing them to stay there, aside from factors such as child sexual abuse or neglect which may contribute in seasoning them to accept prostitution. This holds in South African³⁶ prostitution as well as in Sweden³⁷, Canada³⁸, or the United States. For comparative purposes, it is interesting to look also at forms of prostitution in the U.S. that are not always treated as prostitution by popular perceptions or in law, and see whether the same conditions prevail. Taking into account that sexual acts performed on real persons in visual pornography materials end up as masturbation materials overwhelmingly for male consumers (females only accounting for a tiny fraction of the demand),³⁹ numbers available

³⁴ *Id.* at 97.

³⁵ *Id.* at 143.

³⁶ See, e.g., Chandré Gould, *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City*, in collaboration with Nicole Fick from Sex Worker Education and Advocacy Taskforce (SWEAT) (Pretoria: Institute for Security Studies, 2008), 115, available at <http://www.iss.co.za/pgcontent.php?UID=3797>, who found in a survey “that the majority of sex workers . . . enter the industry as a result of ‘financial need,’” defining financial need as “those who said they entered the industry to meet pressing financial obligations or to meet basic needs—they went into sex work for survival.”

³⁷ See further discussion below, notes 62-69, and accompanying paragraphs.

³⁸ “Overwhelmingly, prostitutes cite economic causes as the reason they are on the streets. . . . Whatever the individual motivation, prostitution is a means of making a living.” Canada, *Report on Pornography and Prostitution*, 376-77.

³⁹ Data from the General Social Survey (U.S.) in 1973, 1994, and 2000-2, showed that “regardless of technological context, pornography use is . . . predominantly male [and] young males are the predominant users[.]” Timothy Buzzell, “The Effects of Sophistication, Access and Monitoring on Use of Pornography in Three Technological Contexts,” *Deviant Behavior* 26 (2005): 127. The data on consumption from the U.S. General Social Surveys are comparatively crude, operationalizing consumption as having “seen an x-rated film in the past year,” distinguishing between movie theatres or VCRs, or whether respondents had “used a pornographic website in the last 30 days.” *Ibid.*, 117. Hence, the survey cannot with certainty distinguish, e.g., *accidental* from *systematic* use. However, a representative sample of 4,343 third-year high school students from Sweden offers substantially more grounds for the same conclusion. Only 6.5% of the girls used pornography more than a couple of times a year (5% once in a month or so, 1.3% once in a week or so, 0.2% more or less every day), and usually initiated by male partners. By contrast, 9.9% of boys used it every day, 27% a couple of times per week, and 27.9% a couple of times

is evidence of a form of mass prostitution through media.⁴⁰ A recent estimation found that merely those revenues that were reported in a sample of sixteen countries totaled \$97.06 billion in 2006—a sum larger than the combined revenues of top technology companies Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink.⁴¹ Considering that much activity is illegal and unofficial,⁴² hence goes unreported, even these numbers are underestimations.

per month. See Carl-Göran Svedin and Ingrid Åkerman, “Ungdom och pornografi,” [Youth and Pornography] in *Medierådet: Koll på porr*, ed. Ann Katrin Agebäck (Stockholm: Swed. Gov’t Council: Medierådet [Media Council], 2006), 89-92. Males more often used pornography alone whereas females encountered it in company, or a male used it together with her. *Ibid.*, 92.

Similar gendered consumption trends, although slightly higher in quantitative terms for both genders, were found among a representative sample of 688 Danish heterosexual adults age 18-30 (sample slightly above education average). Gert Martin Hald, “Gender Differences in Pornography Consumption among Young Heterosexual Danish Adults,” *Arch. Sex. Behav.* 35 (2006): 577-85. In this sample, where 97.8% of men and 79.5% of women had ever watched pornography, of those who consumed it 3 times a week or more 38.8% were men and 6.9% were women. Similarly, of those consuming it 1-2 times per week 28.8% were men and 11.4% were women. *Ibid.*, 582. The men also consumed it significantly more alone (e.g. during masturbation) (men 48.2%, women 8.7%), and had been exposed at significantly younger age (men 13.2, women 14.9), and spent significantly more time per week consuming it (men 80.8 minutes on average, women 21.9). *Ibid.*, 582. Furthermore, men (32.7%) preferred watching anal intercourse sex significantly more than did women (17.4%), and women (35.6%) preferred softcore pornography significantly more than did men (18.7%) (playboy/playgirl-type materials excluded from pornography definition). *Ibid.*, 583.

The general consumption trends above seem to confer with the Swedish adult population included in a national sample ($n = 2810$). See National Institute of Public Health, *Sex in Sweden: On the Swedish Sexual Life*, ed. Bo Lewin (National Institute of Public Health, Swed.; Stockholm, 2000), 343-44, app. 1, D44-46. Researchers studying this national data noted that “[p]ornography is made mainly by men, for men. . . . [and t]here is much to indicate that women can, above all, be regarded as passive recipients rather than active consumers.” Sven-Axel Månsson, “Commercial Sexuality,” in Nat’l Inst. Public Health, *Sex in Sweden*, 263. The conclusions drawn also confer with a Canadian sample of 198 adult women surveyed at a fitness-center in Ontario, where those who had consumed pornography mostly did it after a male partner had initiated it. Kelli-an Lawrence and Edward S. Herold, “Women’s Attitudes toward and Experience with Sexually Explicit Materials,” *The Journal of Sex Research* 24 (1988): 168. Interestingly, in the Swedish national sample more women than men perceive “ordinary TV” as a source for pornography consumption, despite that “explicitly pornographic films are almost never shown on the ordinary TV channels,” suggesting *female over-reporting* due to different definitional frameworks. Månsson, “Commercial Sexuality,” 257.

Studies made in other countries corroborate the findings made above on gendered consumption patterns. See e.g., Mohsen Janghorbani, Tai Hing Lam, and The Youth Sexuality Study Task Force, “Sexual Media Use by Young Adults in Hong Kong: Prevalence and Associated Factors,” *Archives of Sexual Behavior* 32, no. 6 (2003): 543 (studying consumption patterns among young adults age 18–27 of “any sexually explicit materials primarily developed or produced to arouse sexual interest or provide erotic pleasure.” *Ibid.*, 546); Bente Træen, Kristin Spitznogle, and Alexandra Beverfjord, “Attitudes and Use of Pornography in the Norwegian Population 2002,” *Journal of Sex Research* 41 no.2 (2004): 193–200. The same gender disparity has also been repeatedly *corroborated* in several other Swedish studies of young adult populations. See, e.g., E. Häggström-Nordin, U. Hanson, and T. Tydén, “Associations between Pornography Consumption and Sexual Practices among Adolescents in Sweden,” *International Journal of STD & AIDS* 16 (Feb., 2005): 102-03; Christina Rogala and Tanja Tydén, “Does Pornography Influence Young Women’s Sexual Behavior?” *Women’s Health Issues* 13 (2003): 39-43; Tanja Tydén, Sven-Eric Olsson, and Elisabeth Häggström-Nordin, “Improved Use of Contraceptives, Attitudes Toward Pornography, and Sexual Harassment Among Female University,” *Women’s Health Issues* 11, no. 2 (2001): 87-94.

⁴⁰ Andrea Dworkin and Catharine MacKinnon pioneered conceptualizing pornography as a form of prostitution.

⁴¹ Ropelato, “Pornography Statistics 2007,” <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics-pg2.html>. Nine countries where some data were available were South Korea, Japan, U.S.,

In light of the size and gender-imbalance of the pornography arm of commercial sexuality, it should not be surprising that studies made with tricks indicate that half, or more, explicitly see pornography as just another form of prostitution.⁴³ Further highlighting this association, 49% of a sample of 854 prostituted persons in nine countries, found across five continents, reported

Australia, U.K., Italy, Canada, Philippines, Netherlands. Seven countries with incomplete data included in this study were China, Taiwan, Germany, Finland, Czech Republic, Russia, and Brazil. Ibid.

⁴² Already in 1985 it was thoroughly documented that pornography production and distribution in the U.S. were under control of organized crime, see Att’y General’s Comm., *Final Report*, 291-97, 1037-238 (discussing and documenting organized crime involvement), although legitimate corporations are apparently increasingly involved with distribution. See, e.g., Timothy Egan, “Erotica Inc.: A Special Report; Technology Sent Wall Street into Market for Pornography,” *New York Times*, October 23, 2000, A1 (discussing and documenting distribution). Cf. Richard C Morais, “Porn Goes Public: High Technology and High Finance are making the Smut Business Look Legitimate; How did this Happen?” *Forbes*, June 14, 1999 (concluding that “as pornography becomes more appallingly graphic, it is becoming more mainstream. Phone companies, cable companies, hotel chains and now investment bankers are all part of the act.”).

Moreover, while much pornography is made by organized criminal enterprises, some amount is also made in the context of war, or during genocide by soldiers for the purpose of propaganda, or to be kept as trophies. See, e.g., Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (London, UK: Penguin Books Ltd., 1998), 10, 162-63 (unpaginated section of photos) (documenting pornography made by Japanese soldiers of women they subjected to sexual violence, including rape, in China); Catharine A. MacKinnon, “Turning Rape into Pornography: Postmodern Genocide,” *Ms.*, July/August 1993, reprinted in *Are Women Human? And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard Univ. Press, 2006), 160-68 (documenting pornography made of rapes during Serb-led Genocide in Bosnia-Herzegovina); Catharine A. MacKinnon, “Rape, Genocide, and Women’s Human Rights,” 17 *Harvard Women’s Law Journal* 5, 12, 14 (1994) (discussing role of pornography in conditioning Serbian population to perform Genocide).

Additionally, there are numerous individual men such as “amateurs,” freelancers, boyfriends or other intimates, rapists, sex murderers, pimps, and tricks who make materials, often involving regularly prostituted women. See, e.g., Robert K. Ressler, Ann Wolbert Burgess, and John E. Douglas, *Sexual Homicide: Patterns and Motives* (Lexington, MA: Lexington Books, 1988), 63 (documenting souvenir-photographs taken before sexual murders of nude victims); Cf. Eric W. Hickey, *Serial Murderers and their Victims*, 3rd ed. (Belmont, CA: Wadsworth Pub, 2002), 28; For legal cases of sexual murderers making pornography, see, e.g., *French Estate v. Ontario (A.G.)* (1998), 38 O.R. (3d) 347, 350 (C.A.) (dismissing claims of two families to control dispensation of “videotapes depicting the rape, torture and brutalization of their daughters at the hands of Paul Bernardo and Karla Homolka”); *Schiro v. Clark*, 963 F.2d 962, 965 (7th Cir. 1992) (describing defendant’s “pictures of the lifeless naked body of Laura Luebbehusen covered with blood and bruises[.]”, *aff’d sub nom.* *Shiro v. Farley*, 510 U.S. 222 (1994). Generally, for pornography made during prostitution, see, e.g., Farley et al., “Prostitution in Nine Countries,” 46 (finding 49% ($n = 802$) of prostituted persons in nine countries reported being used in pornography); Susan Kay Hunter, “Prostitution is Cruelty and Abuse to Women and Children,” *Michigan Journal of Gender and Law* 1 (1993): 93-94 (53% of fifty-five female survivors of prostitution in Portland, Oregon, testified of sexual torture on average fifty-four times a year, often while made to participate in pornography); Hilary Kinnell, *Violence and Sex Work in Britain* (Cullompton, Devon, UK: Willan Publishing, 2008), 42 (reporting “peeping toms” making covert photography); For Swedish legal cases in this category, see, e.g., Helsingborg’s District Court [Hb. Dist. Ct.] B 1230-05, 2005-09-25, p. 59 (Swed.) (“The Staffanstorps Case”) (prostituted woman testifying of unknowingly having “her sex documented” at least at two occasions in the house of abusive pimp).

⁴³ Rachel Durchslag and Samir Goswami, *Deconstructing The Demand for Prostitution: Preliminary Insights From Interviews With Chicago Men Who Purchase Sex* (Chicago: Chicago Alliance Against Sexual Exploitation, 2008), 13-14, www.chicagohomeless.org/files/images/Deconstructing_the_Demand_For_Prostitution.pdf; Melissa Farley, Julie Bindel and Jacqueline M. Golding, *Men Who Buy Sex: Who They Buy and What They Know* (London: Eaves, 2009), 21, www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf.

being used in pornography ($n = 802$), confirming numbers from previous studies.⁴⁴ Similarly, the Swedish prostitution commission in 1995 had observed that it “is often also the same women who participate at the production of pornography as in the sex trade [prostitution].”⁴⁵

Regarding the economic conditions among women in pornography, former pornography performers in the U.S. had described typical financial situations making women enter pornography model agencies similar to economic factors influencing women to enter prostitution in general, such as having a kid in a hospital, being an illegal alien lacking a green card, or simply not earning enough at regular low-status jobs.⁴⁶ Such statements were corroborated by the findings of the U.S. Attorney General’s Commission on Pornography in 1985, who noted that the personal backgrounds among pornography performers were similar with those in other forms of prostitution who had been studied by other researchers.⁴⁷

Numerous interviews were conducted by the Attorney General’s Commission, and readings on the subject in such varying sources as the industry’s own publications, collection of testimonies from producers-, performers-, and law enforcement personnel-, along with a review of published interviews in pornography- or popular magazines. Conflicting statements about these conditions were noted, such as when one performer who two years earlier had “declared” before a Senate subcommittee the “myth” of “unhappy childhoods”⁴⁸ later testified to the commission of early sexual abuse along with “many other models.”⁴⁹ When these different sources were analyzed together, including the conflicting accounts, the commission noted that even if evidence might be regarded as limited, it was

generally true of commercial pornography’s use of performers: (1) that they are normally young, previously abused, and financially strapped; (2) that on the job they find exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement; and (3) that in their personal lives they will often suffer substantial injuries to relationships, reputation, and self-image.⁵⁰

The Commission particularly observed that while hypothetically there could be exceptions to all their findings which “an extremely thorough investigation” might reveal, tellingly “the

⁴⁴ Farley et al., “Prostitution in Nine Countries,” 46. See also Melissa Farley, “‘Renting an Organ for ten Minutes’: What Tricks Tell Us about Prostitution, Pornography, and Trafficking,” in *Pornography: Driving the Demand*, eds. Guinn and DiCaro, 145 (citing similar numbers from the WISPER (Women Hurt in Systems of Prostitution Engaged in Revolt) Oral History Project in 1990).

⁴⁵ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 136 (Swed.).

⁴⁶ Laura Lederer, “Then and Now: An Interview with a Former Pornography Model,” in *Take Back the Night: Women on Pornography*, ed. Laura Lederer, 1st ed. (New York: Morrow, 1980), 58-59.

⁴⁷ See Att’y General’s Comm., Final Report, 859n983.

⁴⁸ Att’y General’s Comm., *Final Report*, 857 (citing *Effect of Pornography on Women and Children: Hearings before the S. Subcomm. on Juvenile Justice, Comm. on the Judiciary*, 98th Cong. 315 (1984) (Statement of Veronica Vera)).

⁴⁹ *Ibid.*, 857.

⁵⁰ *Ibid.*, 888.

industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us.”⁵¹

Not unexpectedly the Attorney General’s Commission’s *Final Report*, having documented conditions of pornography performers and the industry with a hereto unprecedented stringency, received an outcry of media attention orchestrated substantially by pro-pornographers. It is notable to the situated observer that a similar negative media bias (albeit not yet as strong as this U.S. counterpart) is currently present in Sweden, responding to the recent publication of the current government commissioned review on the Swedish law. Moreover, some of the older critique against the Swedish law’s basic foundation, along with erroneous claims or disinformation about its effects (see further below)⁵² have since 1999 been promulgated in the international debate in an almost similarly concerted fashion. Considering this convergence of public responses in two different countries it should be important to study how media distorts and influences public opinion, not simply to rebut the many fallacies in particular cases of legal challenges to prostitution and pornography (even if important in itself), but also to prevent history from repeating itself.

For example, the U.S. Commission on Pornography had been appointed in 1985 by then Attorney General William French Smith. However, the press later dubbed the commission the “Meese Commission” after his predecessor, attempting to de-legitimize it by associating it with what some have called an “almost universally despised man”⁵³ who, indeed, did announce its formation but was unresponsive to its further needs, ignored its recommendations, and ridiculed it by publicly receiving its *Final Report* under a semi-nude statue of the “Spirit of Justice.”⁵⁴ A month before the report’s release, the “Media Coalition”—an interest group consisting primarily of publishers and distributors, some involved with pornography—paid Gray & Company, then Washington’s largest public relations firm, up to \$900’000 for (in the words of Gray) “a ‘strategy designed to further discredit the Commission.’”⁵⁵ Grays’s budget was more than twice that of the Commission’s \$400’000, and their instructions were to persuade the Attorney General himself, the White House, and leaders of both political parties that the final report was (again, in Gray’s words) “so flawed, so controversial, so contested and so biased, that they should shy away from publicly endorsing the document.”⁵⁶ Some of the invented claims promulgated and successfully becoming “conventional wisdom” in most media coverage of the report were that “[t]his

⁵¹ Ibid., 889.

⁵² See *infra* notes 145-190, and accompanying text.

⁵³ Catharine A. MacKinnon, “The Roar on the Other Side of Silence,” in *In Harm’s Way: The Pornography Civil Rights Hearings*, ed. Catharine A. MacKinnon and Andrea Dworkin (Cambridge, MA: Harvard Univ. Press, 1997), 14.

⁵⁴ See, e.g., Michael J. McManus, “Introduction,” in *Final report of the Attorney General’s Commission on Pornography*, ed. Michael J. McManus (Nashville, Tenn.: Rutledge Hill Press, 1986), xvii-xviii, xxiii.

⁵⁵ Ibid., xlvi (quoting letter from Steve Johnsson, Senior VP. of Gray & Co, to John M. Harrington, Exec. VP. of the Counsel for Periodical Dist. Ass., June 5, 1986).

⁵⁶ Ibid., xlvi (quoting Johnsson).

campaign to infringe on all our rights’ is the work of ‘religious extremists,’” and that “[i]f the effort to stop pornography succeeds, its leaders will be encouraged to force their ‘narrow and social agenda on the majority,’”⁵⁷ however inaccurate and ignorant to the plight of the population exploited by the industry these claims were.

Contrary to claims of extremism and religiosity, the commissioners actually represented a broad spectrum of political views, including four conservatives, three liberals, and four “middle of the roaders.”⁵⁸ This commission’s members had the courage to change their views significantly during the course of investigation based on the facts they confronted. Dr. Park Elliot Dietz, for instance, initially held a *liberal* position toward pornography, but later wrote a personal statement (including concurring members at various instances) in the final report stating, inter alia, that pornography “is used as an instrument of sexual abuse and sexual harassment.”⁵⁹ He considered also, apart from the situation of performers, the effects of consumption on society—a subject unfortunately beyond the purview of this article⁶⁰—and in this context compelled the nation to *not tolerate* pornography, but to

⁵⁷ Ibid, xlvi (quoting Johnsson).

⁵⁸ McManus, “introduction,” xxxvi.

⁵⁹ Attorney General’s Comm., *Final Report*, 47 (Personal statement by commissioner Elliot Dietz. Commissioner Cusack *Concurring*).

⁶⁰ For a short review of contemporary evidence on negative pornography consumption effects, see Max Waltman, “Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the United States,” *Political Research Quarterly* 63, no. 1 (2010): 220-21. However, after my article was written a newer and more accurate meta-analysis published in 2010 again confirmed, this time beyond cavil, that both experimental and nonexperimental studies converge in showing a “significant overall relationship between pornography consumption and attitudes supporting violence against women.” Gert Martin Hald, Neil Malamuth, and Carlin Yuen, “Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies,” *Aggressive Behavior* 36 (1) (2010): 18. Similarly, a more recent analysis and literature review from 2009 found that studies consistently show, across experimental and nonexperimental conditions and differing populations, that pornography use risks sexually aggressive outcomes, particularly for men who score high on other risk factors for this behavior. See Drew A. Kingston, Neil M. Malamuth, Paul Fedoroff & William L. Marshall, “The Importance of Individual Differences in Pornography Use: Theoretical Perspectives and Implications for Treating Sexual Offenders,” *J. Sex Research*, 46, no. 2-3 (2009): 216.

The findings in the controlled study literature are consistent with reports from prostituted persons of how clients often force them to imitate pornography. See, e.g., Mimi H. Silbert and Ayala M. Pines, “Pornography and Sexual Abuse of Women,” *Sex Roles* 10, no. 11/12 (1984): 863-64; Farley et al., “Prostitution in Nine Countries,” 44, 46; Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections* (San Francisco: Prostitution Research and Education, 2007), 37; *In Harm’s Way*, ed. MacKinnon and Dworkin, 116 (testimony by T.S.). Women and girls who are not prostituted have also repeatedly testified about similar coercion to imitate pornography as have prostituted persons. See, e.g., *In Harm’s Way*, 214-15 (letter from Flora Colao, founder/director of programs for sexual assault survivors), 423-24 (written submission of Gail Kielson, Boston MA), et passim; Att’y General’s Comm., *Final Report*, 777 (citing National Women Judge Conference, Oct. 1986). The connections with women in prostitution, the Swedish prostitution commission also observed in 1995:

[According to] the Prostitution Unit in Gothenburg [social outreach workers], it is not unusual that men approach prostitutes with a pornography magazine and points out at the pictures what sexual services they want to have performed. Prostituted women also report, according to the Prostitution Units, that the sex purchasers nowadays, inspired by the pornography, ask for more unusual and more gross sexual services than before. Statens offentliga utredningar [SOU] 1995:15 *Könshandeln*, 135 (Swed.).

strike the chains from America's women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.⁶¹

Turning to Sweden again, it may often be popularly perceived (however accurate or misleading) as a social democratic welfare state very different from a perceived liberal framework governing welfare politics in the U.S. Nonetheless, regarding economic constraints propelling women into prostitution, even in Sweden strapped conditions in prostitution prevailed in 1995 similar with, if not identical to those mentioned in the Attorney General's Commission's *Final Report*. A prostituted woman interviewed by the Swedish commissioners, described in somewhat objectifying terms as a "blond, fairly tall, and well-built 45 year old woman"⁶² (probably an attempt to present her as not among the most vulnerable populations, however questionable), stated she had a prior history of childhood neglect, institutional foster care at age 16, and other kinds of adolescence problems, and had apart from a couple of years of regular work or homemaking been prostituted on the streets for 25 years.⁶³ Herself, she stated she was not among those worst off in terms of exposure to violence and abuse, even claiming she could choose her customers carefully,⁶⁴ but nonetheless said that most of all she wanted to end her prostitution but could not, just as 89% of the women in the mentioned nine-country study had explicitly reported.⁶⁵ The obstacles to her escape she described in the following ways:

Most of all, I want to end prostitution. 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

Furthermore, from the commissioners' interviews with 60 tricks, where 50 responded they had used pornography, 6 men openly reported they "used to get inspiration from pornography magazines for various intercourse positions, which they later wanted to perform with some prostitute." Ibid., 136. Cf. Melissa Farley et al., "Attitudes and Social Characteristics of Men Who Buy Sex in Scotland," *Psychological Trauma: Theory, Research, Practice, and Policy* (in press, Aug. 2010) (quoting trick saying "[s]ome guys watch a lot of pornography and expect their partners to perform certain acts. They'll either pressure their partner to a certain point or then go and get what they want."); Durchslag and Goswami, *Deconstructing Demand (Chicago)*, 2, 13, 27, 30 (interviewee tricks frequently mentioned re-enacting scenes from pornography with prostituted women); Farley, Bindel and Golding, *Men Who Buy Sex (London)*, 26 (many tricks stated pornography informed their requests of prostituted women and non-prostituting sex partners, and others stated pornography consumption led to their purchase of sex). Along similar lines, the Swedish commission had found that "[m]any purchasers in the sex trade [prostitution] are high-consumers of pornography." SOU 1995:15 *Könshandeln*, 136.

⁶¹ Ibid, 51 (Personal statement by commissioner Elliot Dietz. Chairman Hudson, Commissioners Dobson, Lazar, Garcia and Cusack *Concurring*)

⁶² Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 73 (Swed.).

⁶³ *Id.* at 73-75.

⁶⁴ *Id.* at 75.

⁶⁵ Farley et al., "Prostitution in Nine Countries," 51, 56 ($n = 785$).

burdensome and difficult to walk the streets. It is onerous to stand here. Everyone watches me. They know what I am doing and what I am good for. I all the more seldom walk around during daylight.⁶⁶

Moreover, the Swedish government commission revealed many other voids in the social safety net, e.g., prostituted women with mental disorders who frequently were encountered by outreach workers. At such times the commission had 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.”⁶⁷ Due to the exploitation that follows in prostitution, the symptoms, the trauma, the ruined psychic and social development it entails for the prostituted persons as well as the lack of realistic alternative means for income that follow, prostituted persons are rarely reintegrated into the community on equal terms. Instead they get stuck in “coercive circumstances” that may be recognized legally as sexual violence (including rape) in international law,⁶⁸ and from which they then cannot escape. Contributing to these conditions that they do not want and this situation which they cannot leave, which is in fact a de facto form of slavery,⁶⁹ are numerous bureaucratic obstacles and barriers similar to those mentioned by the Swedish woman above. Just to mention one instance of this problem in Nevada, where prostitution is legal in several counties, women shelters do not admit women with children, pets, HIV, communicable diseases,

⁶⁶ SOU 1995:15 *Könshandeln*, 75.

⁶⁷ *Id.* at 109.

⁶⁸ The legal concept of “circumstances that are coercive” was probably first coined by the Rwanda Tribunal in the highly influential case of *Akayesu* (1998) in the process of defining “sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive.” Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chambers Judgment ¶ 688 (Sept. 2, 1998), *aff’d*, Case No. ICTR-96-4-T, Appeal Chambers Judgment, ¶¶ 423-424 (June 1, 2001), *available at* <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>. In the Tribunal’s opinion “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances...” *Id.* In this context the court suggests that the presence of a hostile armed militia or group of men by itself can create circumstances during which women may find themselves coerced to submit to sexual demands, such as doing gymnastic exercises nude in public. *Id.* Similarly, women in prostitution are often forced by circumstances around them at the moment, such as being threatened with violence if refusing to perform specific acts, or they are forced to act by circumstances in their lives generally such as homelessness, poverty, racism, discrimination, childhood sexual abuse, neglect, and the need for survival. The Rwanda Tribunal also held that sexual violence “is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” *Id.* ¶ 688. Applying the tribunal’s definition then, prostitution could be a form of sexual violence even when not technically constituting intercourse, or physical contact, such as online-prostitution, phone-sex, or in pornography.

⁶⁹ Considering tricks and pimps who buy/sell persons for sex in nine countries where 89% ($n = 785$) of prostituted persons *explicitly* say they want to leave but cannot, Farley et al., “Prostitution in Nine Countries,” 51, those prostituted persons are apparently in a “status or condition . . . over whom any or all of the powers attaching to the right of ownership are exercised.” Slavery Convention, art. 1 (1), Sept. 25, 1926, 60 L.N.T.S. 253, 263. Kathleen Barry’s definition of a situation of prostitution that you cannot leave as “sexual slavery” is also to the point. Kathleen Barry, *Female Sexual Slavery* (1979; repr., New York: Avon Books, 1981), 40.

criminal records, or who has not been drug-free for a specified time or who was recently released from prison—in effect creating insurmountable barriers to escape for many prostituted women.⁷⁰

Tricks, who are exploiting their situation, tend to know all relevant facts about women in prostitution; i.e., that they are economically strapped, subjected to violence and other grave hardships, and often being pimped or trafficked. Prostitution researchers have long since confirmed that tricks are aware of the prostituted persons' victimized situation, while tending to deny their own abusive contributions. This, Melissa Farley and associates' interviews with tricks from London, Chicago, and Scotland vividly confirm,⁷¹ as have other researchers like Martin Monto and Andrea Di Nicola et al.⁷² Hence, the remark in the government bill passed by the Swedish Parliament in 1998 stating “that ‘ordinary men’ who are often married or cohabiting, are involved in an activity which they should be aware of is destructive . . . particularly for the women they are buying sexual services from[.]”⁷³ In the bill's recognitions of that prostituted persons often have been subjected to a life-time suffering, and in rejecting a proposal for a double criminalization that had been raised by the commission themselves who in 1995 thought

⁷⁰ Farley, *Prostitution in Nevada*, 159.

⁷¹ An interview study of 103 men who buy sex in London, solicited through newspaper advertisements for anonymous interviews against remuneration, found that “34% of the interviewees estimated that between 30-40% of all women in prostitution were [abused as children], and 35% thought that 50-90% were.” Farley, Bindel and Golding, *Men Who Buy Sex (London)*, 4 (summary). Moreover was found that “[a]lmost all (96%) bought sex indoors, and many reported that they were aware of pimping, trafficking and other coercive control over those in massage parlour, brothel, and escort prostitution. These men were frequently aware of the vulnerability and risk factors for entry into prostitution including not only childhood abuse, but also lack of alternative job choices, coercive control and homelessness.” Ibid. “Forty-four per cent of the men believed that prostitution had a very or extremely negative effect on the prostitute. Only 19% felt that prostitution had a very or extremely positive effect on the prostitute. The positive effect they referred to was primarily a financial benefit. . . . Of the men interviewed, 55% believed that a majority of women in prostitution were lured, tricked or trafficked.” Ibid., 14-16. In another similar interview study from 2008 with 113 tricks in Chicago, 66% of interviewees responded that “economic necessity” is the cause of female prostitution, 27% that the majority are “homeless,” 57% believed the majority had “experienced some type of childhood sexual abuse,” 32% believed the majority's age of entry to be below eighteen, 41% “said” they tried to “help or rescue a woman in prostitution when she was being harmed,” 49% said “prostitution exploits a woman's sexuality,” 42% that “prostitution causes both psychological and physical damage,” and 27% described “the prostitute-pimp relationship as exploitative and harmful.” Durchslag and Goswami, *Deconstructing Demand (Chicago)*, 20-23. In another interview study with 110 tricks in Scotland as many as 85% stated that the prostituted women do not like the sex of prostitution, and 73% noted that women are prostituted only because of “economic necessity.” Jan Macleod et al., *Challenging Men's Demand for Prostitution in Scotland: A Research report Based on Interviews with 110 Men Who Bought Women in Prostitution* (Glasgow, UK: Women's Support Project, 2008), 20-21, www.prostitutionresearch.com/ChallengingDemandScotland.pdf.

⁷² Martin A. Monto, “Female Prostitution, Customers, and Violence,” *Violence Against Women* 10, no. 2 (2004): 177 (stating about tricks that “though they may not acknowledge their part in the system, many are aware that prostitutes are victimized in the course of their activities.”); Andrea Di Nicola and Paolo Ruspini, “Learning from Clients,” in *Prostitution and Human Trafficking: Focus on Clients*, eds. A. Di Nicola et al. (New York: Springer, 2009), 231-32 (finding “many similarities among clients in the selected countries [Italy, Netherlands, Romania, Sweden]. . . . In particular, what is more striking is the shared . . . awareness of exploitation and the related neutralization techniques. . . . ‘No, you don't know. Of course I don't ask for the residence permit. It doesn't matter to me if they have it or not. If tomorrow they are kicked out onto the street, bad luck. I have nothing to do with it.’ (Dutch Client) ‘If I could differentiate [between forced and voluntary, DZ/RS], it would probably not influence my choice. . . . It is totally wrong of course.’ (Dutch Client)”) (brackets in original).

⁷³ Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill], 22 (Swed.).

it would also have a deterrent effect on the women among other things,⁷⁴ it was said that the trick exploits her (or his) situation and therefore only the trick shall be punished.

Even the government makes the assessment that . . . it is not reasonable also to criminalize the one who, at least in most cases, is the weaker part whom is 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.⁷⁵

Assessing Alternative Approaches: Swedish Model vs. Legalization

In order to further understand the Swedish legislature's decision, it is important to review the benefits of the Swedish law in comparison with other contemporary legal policies promulgated in the academic debate such as the idea (however accurate or not) that states may better reduce the harms of prostitution by decriminalizing and legalizing certain forms of it, as opposed to criminalizing the tricks and decriminalizing the prostituted persons. To begin with, rather than

⁷⁴ See Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 221 (Swed.) (Törnell, Principal Investigator), where the investigators, except for dissenters (see below), recommended also criminalizing the prostituted woman in order to deter her from entering/continuing prostitution. Further, while they recognizing her as the most harmed "party," men were also said to be "victims, in some senses." *Id.* at 227. Moreover, the women's difficult situation was not deemed sufficient to "exempt her from liability for her actions." *Id.* at 228. From a retrospective, these recommendations by the principal investigator (with a background as a Supreme Court Justice) seem quite inconsistent. For instance, the only harms against men were dealt with in a single paragraph in the report. *Id.* at 147. Here, violence against tricks were mentioned without any specification who exercised this violence (pimps, police, or prostituted women?), and harms from their childhood (abuse and vulnerability) were said to be reinforced when they participated in prostitution, however, without it being discussed further. Moreover, harms that affected other women *rather* than the men in question were discussed, such as that 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." *Id.* at 147. The suggestion that such harms, compared with what women in prostitution were subjected to by tricks, could excuse not exempting prostituted persons from liability was squarely rejected by the government. See *infra* note 75, and accompanying text. This suggestion was also rejected by a dissenting expert in the commission. *Id.* at 241 (Ekström, dissenting). The dissenter explained that although she agreed on the commission's findings, they suggested otherwise in terms of legal recommendations. She wanted to criminalize only the trick on precisely the rationale that was rejected by the Principal Investigator; i.e., that the "[s]ex trade is not a business deal between to equal parties," and that there "are extremely few prostituted persons who can be said to have control over their lives." *Id.* (Ekström, dissenting). The dissenter elaborated this position further:

The physical and psychic harms the sex trade entails for the women reach far beyond the limits of cognition. This is a finding the investigation has established. According to my view, the community should unambiguously and clearly side with the vulnerable women in the fight against an undignified and inhuman 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. It is the men/buyers who are the foundation for the sex trade's existence, and who shall be criminalized. *Id.*

The dissenter further compared her proposed legal solution with the crime of *usury*, where only one party is criminalized although (as with prostitution) two persons are needed for the criminal act to take place. *Id.* In terms of political analysis, one may wonder why the other commissioners did not endorse this logic of the dissenter's argument, which eventually became the position the legislature adopted in 1998 when passing the Act.

⁷⁵ Prop. 1997/98:55 *Kvinnofrid*, 104.

decriminalizing the purchase of sex across the board, or legalizing a licensing scheme purporting to offer women with no better alternatives to stay put in prostitution being sexually exploited day in and day out by men in the thousands, the Swedish Parliament recognized that if prostitution stems from as well as causes inequality,⁷⁶ it would be as contrary to equality imperatives to endorse it by decriminalization as it would be to criminalize the ones already subordinated by the phenomena itself. The preceding commissioner already herself had emphasized that any effective strategy against prostitution was linked to promoting sex equality:

Measures for the prevention of prostitution should be taken on several levels. Parental attitudes to sexuality and sex roles are of the utmost importance. In order for children to grow up into responsible and equal women and men, it is necessary that they have gender equal role models and an emotionally affectionate and secure childhood. In ‘kindergarten’ and in schools, girls and boys must be allowed to be equally visible and to use all parts of their ability. In community life, women and men must be valued equally.⁷⁷

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 demand 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, which the documented harm and trauma in commercial sexual exploitation evidences to. With “the money he can buy a human life and erase its importance from every aspect of civil and social consciousness and conscience and society,”⁷⁸ Andrea Dworkin once wrote. Such an analysis, even the Swedish government commission acknowledged when stating that “some purchasers” (some is actually an understatement) believe the money gives them “a right to treat the woman as they wish” and that they also bought her “rights to a human and dignified treatment.”⁷⁹ Because of the extremely unequal position of power between him and the prostituted person, there are no incentives for him not to do so, or for her to stop him. The trick need not to stop when it hurts, need not care whether what he does is uncomfortable, and need not care whether he insults her. This becomes even more evident where legalization or decriminalization of prostitution has been implemented, despite the perceptions that making the sexual exploitation of women legal and subject it to regulations would transform an age-old oppression into a harm-free work environment.

⁷⁶ This conclusion was suggested by the government commission in 1995. *See*, note 77, and its accompanying quotation. However, the analysis was further strengthened in the 1998 government bill. *See supra* notes 8-10, and accompanying text.

⁷⁷ SOU 1995:15 *Könshandeln*, 16 (Swedish summary). *Cf.* at 29 (English summary).

⁷⁸ Andrea Dworkin, “Prostitution and Male Supremacy,” *Michigan Journal of Gender and Law* 1 (1993): 4.

⁷⁹ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 142 (Swed.).

Nowhere have there been evidence of health-, safety-, or economic improvements for prostituted women under laws making the purchase and procurement of sex legal.⁸⁰ Rather, contrary effects have been extensively documented. Legalization/decriminalization pushes the limits of what can be done to women. In the state of Victoria, Australia, a prostituted woman participating in a survey reported legalization leads to competition and increasing demands that women perform harmful practices and accept unwanted tricks.⁸¹ Numerous testimonies from brothels in Nevada tell about unsafe sex demanded from tricks as well as pimps, and during 3 years of research interviews in Nevada, 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.⁸² Similar accounts of brothels- or other indoor "management" condoning men's violence against and abuse of women in legal prostitution in the U.S. are found elsewhere.⁸³ This is to be expected since the tricks and their money drive the business—not the women. The main reason for why HIV among prostituted women in jurisdictions where prostitution occurs under regulatory regimes is not reduced is because legalization can never address the power imbalance between the trick and the prostituted woman, and, among other things, his demand for unsafe or high-risk sex.⁸⁴ That is how inequality looks like.

Not unexpectedly legalization has also been found to increase alcohol-related harms, child sexual abuse, sexual harassment, child prostitution (e.g., Netherlands becoming a pedophile-

⁸⁰ For instance, in 2008 a recent New Zealand government committee inquiring into the prostitution laws found that violence against women in legal prostitution had continued after it was decriminalized. Not only the "majority of sex workers felt that the law could do little about violence that occurred," *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington, NZ: Ministry of Justice), 14 [hereinafter: *NZ 2008 Prostitution Report*], but among all respondents, including brothel operators, "[t]he majority felt that the PRA [Prostitution Reform Act of 2003] could do little about the violence that occurred." *NZ 2008 Prostitution Report*, 57 (quoting Brothel operator saying "clients getting stroppy will always happen. This was the case before the Act and after it.").

⁸¹ Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (N. Amherst, MA: Coalition Against Trafficking in Women, 2005), 7, http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf.

⁸² See Farley, *Prostitution in Nevada*, 18, 21, 39-45.

⁸³ A woman prostituted in Nevada stated: "Once you were alone in your room with a customer you had no protection from him. 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." Jayme Ryan, "Legalized Prostitution: For Whose Benefit?" *Sojourner*, July, 1989, at 22. Cf. Anastasia Volkonsky, "Legalizing the 'Profession' Would Sanction the Abuse," *Insight on the News*, February 27, 1995, at 22 (stating that "contrary to the common claim that the brothel will protect women from the dangerous, crazy clients on the streets, rapes and assaults by customers are covered up by management."); See also Barbara M. Hobson, *Uneasy Virtue: The Politics of Prostitution and the American Reform Tradition* (New York: Basic Books, Inc., 1987), 227 (finding "some of the worst features of legalized prostitution in the Nevada system.").

⁸⁴ See Mary Sullivan, *Making Sex Work: A Failed Experiment with Legalized Prostitution* (Spinifex Press: North Melbourne, Vic. Australia, 2007), 106. Cf. Farley, *Prostitution in Nevada*, 39-45.

center of Europe), and tricks demands for “cheaper” or “unrestricted” sex.⁸⁵ It will not improve the stigma—women in Germany, the Netherlands, and New Zealand clearly prefer anonymity over social “security”, and getting out of the industry without leaving traces.⁸⁶ Furthermore, the common policy of “zoning” as a response to secondary effects of an expanded market puts women in prostitution in remote areas “at increased, not decreased, risk of physical danger,” forcing many to continue in illegal prostitution instead.⁸⁷ Additionally, there is concurrence among scholars that legalization promotes cross-jurisdictional trafficking, hidden-, illegal-, and street prostitution; Dutch legal brothels consist of 70-80% trafficked women (Amsterdam window-prostitution included).⁸⁸ Prostituted women and minors in Nevada, the Netherlands, and Victoria, Australia, are regularly moved between legal and illegal venues by pimps for reasons such as money laundering, changed demand, and avoiding law enforcement scrutiny.⁸⁹ Pimps, of

⁸⁵ Sullivan, *Making Sex Work*, 188-89, 202 (quotations), 206, 225-26; Janice Raymond, “Prostitution on Demand: Legalizing the Buyers as Sexual Consumers,” *Violence Against Women* 10, no.10 (2004): 1165; Farley, “Bad for the Body,” 1092-94, 1116 (citations omitted).

⁸⁶See, e.g., *NZ 2008 Prostitution Report*, 154 (finding that “[d]espite decriminalization, the social stigma surrounding involvement in the sex industry continues.”); Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, *Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes* (Rostock: Publikationsversand der Bundesregierung, 2007), 79, available at <http://www.bmfsfj.de/> (finding that “[a]lthough it has been possible to create the legal framework to enable contracts of employment to be concluded that are subject to social insurance, few have as yet made use of this option. The Prostitution Act has thus up until now also not been able to make actual, measurable improvements to prostitutes’ social protection.”); Suzanne Daley, “New Rights for Dutch Prostitutes, But No Gain,” *New York Times*, August 12, 2001, sec. 1 (reporting from the Netherlands that “for many prostitutes, the first problem is going public with what they do. ‘They have children who are in school,’ said Ms. ten Broeke. ‘Their parents, sometimes their husbands, don’t know what they do. They don’t want it written down anywhere.’”).

⁸⁷ Farley, “Bad for the Body,” 1094.

⁸⁸ Farley, *Prostitution in Nevada*, 200n573. Cf. Marlise Simons, “Amsterdam Tries Upscale Fix for Red-Light District Crime,” *New York Times*, February 24, 2008, sec. A10 (reporting how “[i]n a report about the sex trade, Karina Schaapman, a former prostitute and now a member of the City Council, described a police face book with some 80 ‘violent pimps’ of whom only 3 were Dutch-born. She said more than 75 percent of Amsterdam’s 8,000 to 11,000 prostitutes, including 1,000 men, were from Eastern Europe, Africa and Asia. Mr. Cohen, the mayor [of Amsterdam], recalled that in 2000, the Dutch legalized prostitution, intending to make the sex trade more transparent and protect women by giving them work permits. ‘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.’”).

⁸⁹ Janice Raymond, “Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution,” in *Prostitution, Trafficking, and Traumatic Stress*, ed. Melissa Farley, 320; Sullivan, *Making Sex Work*, 243; Farley, *Prostitution in Nevada*, 103-05, 118-21; Farley’s sources in Nevada confirm, as do Australian sources, see Sullivan, *Making Sex Work*, 202, 206, 225-26, that girls under age 18 are paid more by johns and easier to control, and that women and minors are moved back and forth from legal to illegal prostitution, such as in Las Vegas hotels as opposed to rural country brothels. Money-laundering happens, e.g., during conventions in Las Vegas where illegal prostitution is more profitable than prostitution in rural legal brothels, meaning that brothel owners move persons from the rural areas to Las Vegas, then “launders” money as income from the legal brothels despite that it was derived from escort- and other illegal forms of prostitution. Farley, *Prostitution in Nevada*, 121-22. Additionally, regarding inter-state trafficking, 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. Neither the Mann Act, see Transportation for Illegal Sexual Activity and Related Crimes 18 U.S.C. § 2421-22, nor other statutes have been successfully used in cases of trafficking to legal brothels in Nevada. Law enforcement personnel often seems to believe that when women say they are “happy” with the money there is no one who “persuades, induces, entices, or coerces” them “to travel in interstate or foreign commerce . . . to engage in prostitution,” § 2422, failing to inquire

course, also do not disappear with legalization. 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 50% also said that they were controlled by pimps outside the brothel.⁹⁰

Not surprisingly, and as Farley and Mary Sullivan have asserted, everywhere where prostitution becomes decriminalized or legalized sex exploitation expands.⁹¹ Indeed, legalization have been seen to promote a "prostitution culture" shown, among other accounts, in attitudinal surveys comparing undergraduate men in California, Iowa, Oregon, and Texas ($n = 783$) with similar young men in Nevada ($n = 131$), finding the latter's significantly higher normalization and acceptance of sexual violence (e.g. rape-myths), sexual exploitation, and prostitution.⁹² Consequently, one cannot avoid concluding that once prostitution is legal then public support for those wanting to escape the industry will also fade, regardless of assertions to the contrary among proponents of legalization. Indeed, this was exactly what happened in Victoria, Australia, where funding for exit programs for persons wanting to leave prostitution had been legally guaranteed to be financed by revenues from licensing fees. However, these funds were never delivered, and some politicians expressed "unease" for these funds having been "lost or diverted."⁹³

In line with the critical position vis-à-vis legalization taken by the Swedish government and its legislature, 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, there are even less chances of changing gender inequality. One simply cannot fight gender inequality and keep prostitution as a viable option for women without resources. If there are men prepared and able to pay for prostituted women, there is a surplus gendered economy that should be redistributed to women. This holds for South Africa as much as it does for Sweden, Canada, or the United States. Prostitution, on these terms, is antithetical to social equality. Just as *apartheid* cannot exist alongside social equality, prostitution as such cannot either.

into their substantive entry conditions or whether there might be a reverse incentive to testify considering their limited options to charge traffickers, claim civil remedy, or get any substantial support thereafter. See Farley, *Prostitution in Nevada*, 103. Furthermore, there are documented ties in Nevada legal prostitution with organized crime from international locations outside the U.S., such as Russia, Romania, and other places. *Ibid.*, 118-21. Moreover, motorcycle gangs are involved and have "fought turf wars not only in Nevada but also in other countries where prostitution is legal – the Netherlands and Australia." *Ibid.*, 127 (citing Philip Williams, Professor at University of Pittsburgh, personal communication, Aug. 31, 2006).

⁹⁰ Farley, *Prostitution in Nevada*, 31-32.

⁹¹ See generally, Farley, *Prostitution in Nevada*; Sullivan, *Making Sex Work*; Sullivan, *When Prostitution Becomes Work*.

⁹² Melissa Farley, Mary Stewart, and Kyle Smith, "Attitudes toward Prostitution and Sexually Coercive Behaviors of Young Men at the University of Nevada at Reno," in Farley, *Prostitution in Nevada*, 173-80. Cf. Farley, *Prostitution in Nevada*, 181-86.

⁹³ Sullivan, *Making Sex Work*, 163-64.

Impact of Swedish Legislation

From what has been shown of the conditions of prostitution, it seems not an overstatement to say it “is impossible to use a human body in the way women’s bodies are used in prostitution and to have a whole human being[.]”⁹⁴ Hence, reducing the number of persons in prostitution necessarily leads to reducing the number of ruined lives. The most visible effect of the Swedish law is exactly this; it has reduced the demand for prostitution as well as the amount of persons involved in it. In 1995 the Swedish government commission estimated that there were 2500-3000 prostituted women in Sweden, among whom 650 were on the streets.⁹⁵ In contrast, now there are approximately 300 women in street prostitution, and 300 women and 50 men who advertise on the internet, according to a 2008-review of published literature and evidence.⁹⁶ Similarly, in Denmark there are at least 5567 persons visibly in prostitution among whom 1415 were on the streets.⁹⁷ Hence, Sweden’s prostitution population is approximately a tenth of its neighbor Denmark’s where purchase is legal, even though Denmark only has a population of 5,5 million while Sweden has 9,3.⁹⁸ Comparatively, in Norway, a neighbor in the West with 4,9 million people,⁹⁹ it was estimated that there were 2654 prostituted women of whom 1157 were on the street in 2007,¹⁰⁰ which is more than 4 times compared to Sweden’s 600 women, and almost 8 times more per capita if considering the population difference.

According to both NGOs and the police in Stockholm, Gothenburg and Malmö, the sex trade vanished more or less entirely from the street right after sex-purchase law came in force. In

⁹⁴ Dworkin, “Prostitution and Male Supremacy,” 3.

⁹⁵ SOU 1995:15 *Könshandeln*, 10, 99 (Swed.).

⁹⁶ Charlotta Holmström, “Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion” [Prostitution and Trafficking for Sexual Purposes in Sweden: Extent, Occurrence, and Research], in *Prostitution i Norden* [Prostitution in the Nordic], ed. Charlotta Holmström and May-Len Skilbrei (Copenhagen: Nordiska ministerrådet [Nordic Council of Ministers], 2008), 314.

⁹⁷ Charlotta Holmström and May-Len Skilbrei, “Nordiska prostitutionsmarknader i förändring: En inledning” [Nordic Markets for Prostitution in Change: An Introduction], in *Prostitution i Norden*, ed. Holmström and Skilbrei, 14. There has been an attempt primarily by a so-called sex workers organization in Denmark, *Sexarbejdernes Interesse Organisation* (SIO), to claim that street prostitution in Copenhagen has been overestimated with 1000 persons, attributing this purported overreporting to an NGO called *Reden* who works with prostituted women in outreach programs. See ”Pressemeddelelse: Svensk rapport bygger på forkerte tal for Danmark; Nu må Reden sige sandheden,” Official Website (July 4, 2010), <http://s-i-o.dk/wordpress/?p=58>. Although even if SIO’s claim would be accurate, as a whole Denmark’s prostitution population is still many times larger than Sweden’s. Moreover, the numbers on indoor prostitution, particularly so-called “clinic prostitution” on its own estimated at 3278, see Holmström and Skilbrei, “Nordiska prostitutionsmarknader,” 14, were based primarily on advertising, and not any information from Reden. See Jeanett Bjonness, “Holdninger til prostitution i Danmark” [Attitudes toward Prostitution in Denmark], in *Prostitution i Norden*, ed. Holmström and Skilbrei, 107. Assuming 1415 is the correct number for outdoor prostitution it would still only constitute a fourth of prostitution in Denmark, hence it seems unlikely that street prostitution could be so significantly lower as SIO claims.

⁹⁸ *Wikipedia: The Free Encyclopedia*, s.v. “List of countries by population,” http://en.wikipedia.org/wiki/List_of_countries_by_population (accessed April 11, 2010).

⁹⁹ *Wikipedia*, s.v. “List of countries by population.”

¹⁰⁰ Holmström and Skilbrei, “Nordiska prostitutionsmarknader,” 13 (among those not on the street in Norway, the numbers were based on those who sought support from social agencies, or who’s advertisement were found on internet or in a paper).

Stockholm, the numbers of tricks were reported by police to have decreased almost by 80% in 2001.¹⁰¹ Street prostitution then 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 60.¹⁰² 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 there were only 66.¹⁰³ In Gothenburg data indicate street prostitution declined from 100 to 30 persons a year only between 2003 and 2006.¹⁰⁴

Succinctly, the National Criminal Investigation Department's wiretapping now show traffickers and pimps are disappointed with low demand in Sweden. Their clandestine brothels are fairly small enterprises, police raids rarely finding more than 3-4 prostituted women at one time.¹⁰⁵ These criminal entrepreneurs are forced to operate through complex indoor arrangements to satisfy customer's fears of getting caught, using several apartments and avoid staying too long at one place. This "necessity [for] several premises" has been corroborated in telephone interception (wiretapping), testimonies from prostituted women, police in the Baltic States, and in almost all preliminary investigations.¹⁰⁶ Consequently, in 2008 no large groups of visible foreign women were prostituted in Sweden as there were in Norway, Denmark and Finland.¹⁰⁷

Moreover, the passing of the law seems, by itself, to have changed public attitude. In 1996, three years before the law took effect, a survey-study made by Sven-Axel Månsson showed only 44% of women in Sweden and 20% of men wanted to criminalize a male sex purchaser.¹⁰⁸ In 1999, 81% of women and 70% of men wanted to criminalize purchase of sex, and in 2008, 79% of women and 60% of men favored the law.¹⁰⁹ The young adult population (18-38), particularly

¹⁰¹ Caspar Opitz, "Gatans sexhandel minskar" [Street Sex Trade Decreases], *Dagens Nyheter* [Daily News], June 29, 2001, at 7.

¹⁰² Socialstyrelsen (SoS) [The National Board of Health and Welfare], *Prostitution in Sweden 2007*, authored by Annika Eriksson and Anna Gavanas (Stockholm: Socialstyrelsen, 2007), 33, available at http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/8806/2008-126-65_200812665.pdf.

¹⁰³ Ibid.

¹⁰⁴ Ibid, 34.

¹⁰⁵ Rikspolisstyrelsen [Nat'l Crim. Invest. Dept., Sweden], *Lägesrapport 10: Människohandel för sexuella och andra ändamål 2007-2008* [Situation Report no. 10: Trafficking for Sexual and other Purposes 2007-2008], elaborated by Kajsa Wahlberg, Lotta Jagefjord, and Matilda Hult (Stockholm: Rikspolisstyrelsen, 2009:1), 10; See also National Criminal Investigation Dept. Sweden, *Trafficking in Women: Situation Report no. 5*, elaborated by Kajsa Wahlberg and Camilla Örndahl (Sweden: RKP KUT Report 2003:b), 34 (noting reduced demand after 1999).

¹⁰⁶ Nat'l Criminal Invest. Dept., *Trafficking Report no. 5*, 34.

¹⁰⁷ Holmström and Skilbrei, "Nordiska prostitutionsmarknader" [Nordic Markets for Prostitution], in *Prostitution i Norden*, ed. Holmström and Skilbrei, 16-17.

¹⁰⁸ Sven-Axel Månsson, "Commercial Sexuality," in National Institute of Public Health, *Sex in Sweden: On the Swedish Sexual Life 1996*, ed. Bo Lewin (National Institute of Public Health, Swed.; Stockholm, 2000), 249 ($n = 2783$).

¹⁰⁹ Jari Kuosmanen, "Tio år med lagen: Om förhållningssätt till och erfarenheter av prostitution i Sverige" [Ten Years with the Law: On Approaches to and Experiences of Prostitution in Sweden], in *Prostitution i Norden*, ed. Holmström and Skilbrei, 361-62. While the drop-out rate was considerably high in the 2008-survey ($N = 2500$), with only 43% of the men and 57% of women responding ($n = 1134$), its results nonetheless are consistent with other surveys made in 1999, 2002, and with a study made in 1996 before the law took effect. Ibid., 359-60.

women, is most in favor of the law.¹¹⁰ Here it is notable that a question about the “sale of sex” was also introduced in the latest survey, the author Jari Kuosmanen interpreting the answers as if the public might not view prostitution as a problem of gender inequality and male dominance because two thirds of women and half the men also wanted to criminalize the “sale of sex.”¹¹¹ However, the Swedish National Council for Crime Prevention (BRÅ) notes in their latest report that the more “gender neutral character” of his question than in previous surveys asking about similar issues might have made respondents believe they were rather surveyed about their view of procuring or trafficking (“sale of sex”) than about prostituted persons.¹¹² Indeed, Månsson’s survey from 1996 used gendered wordings (“*A woman accepts money for a sexual contact. Should the woman’s action be regarded as being criminal?*”) and only found 42% women wanted to criminalize the prostituted woman.¹¹³ In contrast, another survey conducted the same year the law took effect (1999) found 78% women wanted to criminalize—again, using gender neutral words—“to sell sex.”¹¹⁴ In fact, the documented coercive circumstances propelling women into prostitution and keeping them there (see above) entail that prostituted women are rather “sold” than “selling sex”. To the extent that respondents in 2008 have begun to understand the reasons for the Swedish law they would more likely associate “the sale of sex” with pimps and traffickers, as opposed to prostituted women.

Furthermore, the number of men reporting the experience of purchasing sex (before as well as after the law took effect) in the national population samples seems to have dropped from 12,7% to 7.6% from 1996¹¹⁵ to 2008.¹¹⁶ Being directly asked in 2008 about the effects of the law

¹¹⁰ Ibid., 363.

¹¹¹ Ibid., 367.

¹¹² Brottsförebyggande rådet (BRÅ) [Swedish National Council for Crime Prevention], *Prostitution och människohandel för sexuella ändamål: En första uppföljning av regeringens handlingsplan; Rapport 2010:5* [Prostitution and Human Trafficking for Sexual Purposes: A First Evaluation of the Government’s Action Plan; Report 2010:5], authored by Anna Eklund and Stina Holmberg (Brottsförebyggande rådet: Stockholm, 2010), 70-71.

¹¹³ Månsson, “Commercial Sexuality,” 249 (original emphasis).

¹¹⁴ Kuosmanen, “Tio år med lagen,” 367 (citing 1999-study by survey institute SIFO).

¹¹⁵ Månsson, “Commercial Sexuality,” 238.

¹¹⁶ Kuosmanen, “Tio år med lagen,” 370. The internal drop-out rate for this question was 11% ($n = 1009$) both genders. Ibid., 368n51. Most likely the drop-out is unnecessary large because the survey did not restrict itself to asking respondents whether they had actually paid for sex with someone, and not also asking whether they ever had “fantasized” or “could consider” doing so. Ibid., 368. Hence, respondents who did not pay for sex are nonetheless put in a “sensitive” position where they need to reflect on their mental state as opposed to actual behavior. Indeed, the author recognizes that these questions were “very sensitive,” according to individual written open responses. Ibid., 368n49. The author also cautions for some minor differences in the survey questions in 1996 compared to 2008. The former asked about purchase for being “sexually together with someone” while the latter added “sex with physical contact” in parenthesis in order to confirm more strictly with what is criminalized under case law. Ibid., 368n50. Additionally, some respondents would not admit a sex purchase on a direct question, but would nonetheless describe details further on in the survey. Counting these responses, the number of male sex purchasers would approximate 9% in the 2008 survey. Ibid., 368n52. However, underreporting was most likely present in the 1996 survey as well according to its author. See Månsson, “Commercial Sexuality,” 239-40. Moreover, Kuosmanen expresses some concern of slight underreporting in the 2008 questionnaire compared to 1996 when criminalization was not in place, Kuosmanen, “Tio år med lagen,” 377-78, which seems overly cautious though considering the total anonymity procedure the researchers clearly communicated to all respondents. Ibid. 359.

on their purchase of sex, 5 men responded they completely quit, 2 men decreased, and 1 changed his venues for purchasing. No one said they had increased, or started purchasing sex outside Sweden, or changed into purchasing sex in “non-physical” forms.¹¹⁷ It should be noted that the anonymous self-reported methodology in criminology have repeatedly been shown reliable in a number of studies.¹¹⁸ Other countries are now also starting to adopt aspects of the Swedish model, among them Norway, Iceland, and South Korea, and to some extent the United Kingdom. A similar law was proposed in India.¹¹⁹ Considering the changed situation in Sweden after the law was adopted, its deterrent effects are obvious even though convictions rates are not staggering. These went from 10 in 1999, 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, and 107 convictions in 2009.¹²⁰ Lately there have been dramatic increases in reported crimes though. For the first 7 months in 2010 as many as 1611 crimes were reported, which may be compared to the previously highest annual number reported in 2005 of 460.¹²¹

¹¹⁷ Ibid., 372-73. Questions regarding experience of selling of sex has a very large fall-out rate, and the remaining sample is very small, although five women and four men one of each gender says they have been bought for sex. One from each gender responded they stopped because of the law, and one woman said she began selling in less visible forms. Ibid., 375-76.

¹¹⁸ See David Huizinga and Delbert S. Elliot, “Reassessing the Reliability and Validity of Self-Report Delinquency Measures,” *Journal of Quantitative Criminology* 2, no. 4 (1986): 294 (stating 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.[multiple citations]); see also Ibid., 323-24 (concluding, after discussing “instances” of lower validities among Black respondents in the U.S., 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”); Josine Junger-Tas and Ineke Hean Marshall, “The Self-Report Methodology in Crime Research,” 25 *Crime & Just.* 291, 354 (1999) (stating that “[t]he self-report method has outgrown its childhood diseases; it is now a true-and-tried method of research.”); Terence P. Thornberry and Marvin D. Krohn, “The Self-Report Method for Measuring Delinquency and Crime,” in *Measurement and Analysis of Crime and Justice*, ed. David Duffee, vol. 4, *Criminal Justice 2000* (Washington, DC: Nat’l Inst. of Justice, 2000), 72 (“There are no fundamental challenges to the reliability of these data. . . . [S]elf-reported measures of delinquency are as reliable as, if not more reliable than, most social science measures.”).

¹¹⁹ See “Anti-Prostitution Laws in for Drastic Revamp,” *Times of India*, Oct. 1, 2005 (reporting about an “amendment, proposed by the department of women and child and awaiting cabinet clearance, [which] provides for three-month imprisonment and a fine of Rs 20,000 for the patrons. The department has also proposed to do away with Sections 8 and 20 of the Immoral Trafficking Prevention Act (ITPA), which makes soliciting a punishable offence. The proposed change is being justified on the grounds that most sex workers are victims of circumstances. The perception that most engage in prostitution due to compulsions has also led the department to drop Section 20 of ITPA, which provides for the eviction of prostitutes.”)

¹²⁰ National Criminal Statistics Database, Sweden, available at Swedish National Council for Crime Prevention statistics, <http://www.bra.se>.

¹²¹ Ibid. The reasons for this recent jump seem due to particular funds allotted by the government’s action plan against “prostitution and trafficking”, and one large local case of organized pimping. See “Anmälda sexköp har fördubblats” [Reported Sex Purchases Doubled], *Tidningarnas Telegrambyrå* (TT) [Newspapers’ Telegram Agency], July 27, 2010; “Dubbelt så många sexköp anmäls” [Twice as Many Sex Purchases Reported], *Svenska Dagbladet* [Swedish Daily Post], July 28, 2010 (citing TT).

Obstacles to Effective Implementation

However, the Swedish law could even be even more strengthened, consistent with its intent. Until the victims are compensated and helped further, enabled to leave the sex industry, the situation will not be fully addressed. There have to be three parts to any adequate scheme: 1) decriminalize *and support* the prostituted people, 2) criminalize the buyers strongly, and 3) criminalize third party-profiteers. In this sense, the Swedish law is unfinished, much due to its treatment by the judiciary. After the law was passed, the courts had to interpret the level of penalty. In this context, the Supreme Court 2001 summarily affirmed rulings by lower courts holding that when a man makes use of a prostituted person her so-called “consent” entails the offense is committed against the “public order,” and not against her as a “person”.¹²² Hence, her right to assessment of civil damages was not recognized, and the penalty was lower than it could have been otherwise.

By the Swedish National Board of Health and Welfare’s own account of “interventions against prostitution,”¹²³ e.g., by social work, there is no systematic or effective approach in Sweden to provide a remedy, or an “exit strategy”, to women who want to leave prostitution. Therefore the decision by the courts to deny monetary damages from tricks is highly disappointing. It is notable that none of the conditions or observations of prostitution recognized in the legislative findings, or in contemporary research, document a condition of freedom required for the “consent” on which the Supreme Court relied to be meaningful. The courts ignore that the prostituted persons’ so-called consent is overwhelmingly fictional—exploiting someone’s position of desperation is not a situation to which a person can legitimately consent. The court also gives no attention to the legislative history showing that Parliament regarded prostitution to be a form of gender-based violence and its intent to help those who are victimized.

The Supreme Court decision also meant that the crime is in effect now technically regarded as a “low priority” crime, and only fined. For instance, a Supreme Court justice was convicted

¹²² Nytt Juridiskt Arkiv [NJA] [National Reporter] 2001-07-09 p. 529 (Swed.) (holding that “[i]n the Act Prohibiting Purchase of Sexual Services the consent is a requirement if there is to be a crime. It is not stated, as is the case with the act mentioned above prohibiting genital mutilation, that consent does not exempt from liability. The way the prohibition is articulated therefore leads one’s thoughts into that the act is not to be seen as primarily a crime against person but instead as a crime against public order, for which crime a consent as above will have no significance [since the prostituted person then may not dispose the protected interest]. Already the condition that the one who has carried out the sexual service is called by the prosecutor as a witness speaks in favor of that this is the case. With respect to this it will in deciding the level of penalty for the act initially be of significance that the act is to be viewed as a crime against public order and that prostitution is not a socially acceptable phenomenon in the community.” (Dist. Ct.), *aff’d mem* (HD) (Sup. Ct.) case no. B 3947-00, with slightly higher penalty. *Id.* at 533.

¹²³ Socialstyrelsen (SoS) [The National Board of Health and Welfare], *Interventioner mot prostitution och människohandel för sexuella ändamål: En systematisk kartläggning med kompletterande intervjuer av svenska insatser* [Interventions Against Prostitution and Human Trafficking for Sexual Purposes: A Systematic Review with Complementing Interviews of Swedish Efforts] (Stockholm: Socialstyrelsen, 2008), www.socialstyrelsen.se/publikationer2008/2008-112-4 (accessed Apr. 27, 2010).

for purchase of sex but managed to keep his job, while being fined approximately US\$ 5,800.¹²⁴ Similarly, many law enforcement officers and prosecutors regard the crime as low priority when assigning resources to enforce it, blaming the penalty level as determining their priorities.¹²⁵ These are not arguments against criminalizing purchase of sex, but arguments for interpreting the Swedish law more strongly; as a crime against the person also, and not only against the public. Some initiatives are underway in this regard but Sweden is still dealing with some of the myths about consensual prostitution encountered everywhere, which seems to be another reason why some prostitution is patently ignored by law enforcement indicating on the ground there is unofficial discrimination of different prostituted populations.¹²⁶

¹²⁴ Lasse Wierup, "HD-ordförande skämtar om domarens sexköp" [Supreme Court Chief Justice Jokes about the Justice's Sex Purchase], *Dagens nyheter* [Daily News], May 26, 2005; Anders Hellberg, "Sexköpsdömd HD-domare tillbaka på jobbet" [Supreme Court Justice Convicted for Sex Purchase Back at Work], *Dagens Nyheter* [Daily News], May 18, 2007.

¹²⁵ See Statens Offentliga Utredningar [SOU] 2010:49 *Förbud mot köp av sexuell tjänst, En utvärdering 1999–2008* [government report series], 217 (Swed.) (reporting police say they could bring "many times more" legal cases against tricks if prioritized, and that prosecutors agree in part but blame the low penalty level); See also Magnus Hellberg and Daniel Siksjö, "Bilderna inifrån lägenhetsbordellen: Forskare greps efter sexbesöket i hyreshuset" [The Pictures from Inside the Apartment Brothel: Researcher Apprehended after Sex Purchase in the Apartment Building], *Kvällsposten* [Evening Post], May 23, 2010, at 8-11 (quoting Nat'l Criminal Detective Inspector Kajsa Wahlberg saying "A higher penalty would perhaps also lead to that the police prioritize these crimes more."); Ann Johansson and Per Nygren, "Polisen tar tuffare tag mot sexköparna runt Rosenlund" [Police Being Tougher Against Sex Purchasers around Rosenlund], *Göteborgs-Posten* [Gothenburg Post], Apr. 11, 2010, sec. "Söndagsreportage" at 9 (noting police traditionally consider success in terms of total jail time and number of convictions).

¹²⁶ While the latest government commission of inquiry concluded 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 *Förbud mot köp*, 249, contrary to their statement and the evidence many law enforcement officers express the view that domestically prostituted women are often meaningfully consenting, as opposed to trafficked foreign women who are often believed to be coerced. See Annelie Siring, "Sexhandel, sexköpslagstiftning och myndighetsförståelse: Ett svenskt exempel" [Sex Trade, Sex Purchase Legislation, and Public Authority Knowledge: A Swedish Example], in *Prostitution i Norden*, ed. Holmström and Skilbrei, 341-43 (quoting and citing from interviews with police officers). In an interview in the press one prosecutor, who was even herself hired as an "expert" in the latest government commission, discriminates between "voluntary" and "involuntary" prostitution when stating on the one hand that purchasing "a girl who's been subjected to trafficking" should give a higher penalty, and on the other stating that there are "persons who prostitute themselves who *do not do this under coercion*, hence it may therefore be viewed as less serious." See Sanna Jansson, "Få sexköpare åker fast i regionen" [Few Purchasers of Sex are Caught in the Region], *Göteborgs Fria tidning* [Gothenburg Independent], Jan. 21, 2010, www.goteborgsfria.nu/artikel/82208 (emphasis added) (quoting prosecutor Kristina Ehrenborg-Staffas). A police officer named Jonas Bergqvist is said to agree with the prosecutor. *Id.* On the other hand regarding some prostituted women with a particular foreign background, the opposite view seems to hold. On personal experience passing a large casino in Stockholm three evenings in a row in June, 2010, usually three or more women of South Asian origin, some appearing well over age 50 and some just above 20, all with excessively fashionable cloths stood by the entrance each evening simply waiting, with a tired and blank facial look similar to prostituted women on the streets in Cape Town seen in April. Not surprisingly, the latest government commission of inquiry reports that "[l]aw enforcement in Stockholm, Gothenburg, and Malmö . . . suspects [sic] that it occurs purchases of sex on 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 *Förbud mot köp*, 194. Considering that scouting or monitoring a casino with hidden cameras (most likely already put in place by the management) should not take as much resources from the police compared to clandestine apartment-brothels and street prostitution where such surveillance *are* regularly done, and that expensive police raids just to apprehend

For instance, further evidence of conflicting opinions in the judiciary appeared in another ruling from 2007, where an administrative court of appeal taxed a prostituted person based on a discretionary assessment.¹²⁷ As the complainant pointed to, that decision leads to “that prostituted persons, in order to be able to pay taxes, are coerced to continue[.]”¹²⁸ Even jurisdictions such as the state of Nevada that have legalized prostitution in certain counties, with all the attendant harm, refuse to make it worse by taxing the abuse.¹²⁹ Considering the legislature’s recognition that the tricks know, or should know, that their purchase of sex is “destructive” to the prostituted persons,¹³⁰ and to help the prostituted persons to get away from prostitution,¹³¹ decisions on damages would offer a stronger incentive for the victim of crime to testify against their exploiters. Today, case law has efficiently eliminated such incentive. Although some courts lately have switched direction and begun to recognize some circumstances in prostitution as coercive, hence justifying a higher level of penalty for tricks in those cases, no damages merited by such victimization have been awarded.¹³²

Because of the experiences from the Swedish courts, any country considering the Swedish model would do better not copying the Swedish statutory wordings defining prostitution as “purchase of sexual service.”¹³³ Prostitution is an abuse and exploitation of women, not an acceptable “service” provided on the market. Instead, one could legally define the tricks’ (clients) purchase in prostitution as “the purchase of a person for sex,” which would make it more difficult to interpret it as a regular business service for taxation purposes, or as a crime against public order and not against a “person”.

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

tricks, third party profiteers, or to hear victims and witnesses would be less needed, altogether implies an informal discrimination of certain prostituted populations and venues.

¹²⁷ Kammarrätten i Stockholm (KR) [Admin. Ct. App.] Mål 2231-06, 2007-03-19 (Swed.).

¹²⁸ *Id.* at 1.

¹²⁹ Brendan Riley, “Prostitution Tax Dies,” *Casper Star-Tribune* (Wyoming), Apr. 9, 2009, www.trib.com/articles/2009/04/09/news/breaking/doc49de76207e5ba596445857.txt.

¹³⁰ See *supra* note 73, and accompanying text.

¹³¹ See *supra* note 75, and accompanying text.

¹³² See, e.g., Svea Hovrätt (HovR) [Ct. App.] mål B 3065-07, 2007-12-18, s. 9-10 (convicting a trick to a higher penalty, but *not* to pay damages, since after the completed sexual act he introduces an acquaintance when the prostituted person has “been in such a subordinate position against the two men that it must have been considered a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited.”). The prostituted person was from the Court of Appeal’s view in effect understood to be in a situation in which genuine consent was not possible. In prostitution, this is usual.

¹³³ Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.).

government commission of inquiry in their recently published report acceded to some of these suggestions lobbied for since 2006 by myself and others.¹³⁴ The commission now takes the view that in some cases purchase of sex may also be a “crime against person” simultaneously as it is also a public harm (e.g., because prostitution promotes sex inequality), but not in all instances as we proposed. The issue of whether both are protected interests has to be individually assessed in each and every case, they say.¹³⁵

The report offers no systematic review of the literature on trauma and harm in prostitution, apart from brief citations to older legislative history. The research review made concerns mainly the “occurrence” of prostitution, and the judicial application of the law in Sweden. In answering what are the law’s protected interests, rather than seeking an answer in social evidence of the conditions of prostitution for the persons involved, legal doctrine and scholarship on the abstract concept of a protected interest is extensively discussed with such far-fetched analogues as bankruptcy law and criminal falsification, 1930s scholarship being key sources of the doctrine.¹³⁶ Besides avoid asking the right research questions by relying on literature indifferent to whether prostituted persons are injured or not, 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.¹³⁷

¹³⁴ See, e.g., Petitioners et al., *Förslag till regeringens utredning*; Petitioners et al., “Torskarna ska betala skadestånd”; Gudrun Schyman and Max Waltman, Op-Ed., “Ge skadestånd till prostitutionens offer” [Give Damages to the Victims of Prostitution], *Dagens Nyheter*, July 25, 2006, at “DN-debatt” (additionally discussing damages and pornography, proposing Catharine A. MacKinnon/Andrea Dworkin’s antipornography civil rights ordinance).

¹³⁵ Statens Offentliga Utredningar [SOU] 2010:49 *Förbud mot köp av sexuell tjänst, En utvärdering 1999–2008* [gov’t report series] at 247-51 (Swed.).

¹³⁶ SOU 21010:49, *Förbud mot köp*, 247-51. For instance, treatise on bankruptcy law from 1937 is quoted and paraphrased: “An examination should be undertaken in each particular case of whether a person is so directly affected by the crime that she or he should be entrusted with exercising the public function a penal claim entails.” *Id.* at 250-51, cf. at 42 (English summary) (quoting/paraphrasing from Ivar Agge, “Ett par spörsmål angående målsäganderätt vid konkursförbrytelser” [A Couple of Issues regarding Injured Person Law in Bankruptcy Offenses], 1937 *Tidskrift utgiven av Juridiska Föreningen i Finland (JFT)* [Finnish Law Ass’n Law Review] 265(18), 273 (1937).

¹³⁷ Not reviewing empirical evidence on the issue of harm in prostitution, as opposed to consulting legal doctrines, is very common in Swedish legal scholarship when analyzing what is the protected interest under the Sex Purchase Act. There have so far been inadequate discussions with no citations to the kind of necessary studies accounted for in this article, which makes the various conclusions reached at best based on “common sense,” and at worst based on doctrinal orthodoxies and ignorance. This lack of citations to empirical studies can be observed in the following works: Christian Diesen, “Målsägande?” [Injured Person?], in *Festskrift till Lars Heuman* (Stockholm: Jure, 2008), 119-145; Per Ole Träskman, “Den som betalar för sex är en brottsling. Om den svenska kriminaliseringen av sexköp som ett medel för att motverka prostitutionen” [The One Who Pays for Sex is a Criminal. On the Swedish Criminalization of Sex Purchase as a Means to Counter the Prostitution], *Nordisk Tidskrift for Kriminalvidenskab* [Nordic Journal of Criminology] (2005): 73-92; Claes Lernestedt and Kai Hamdorf, “Sexköpskriminaliseringen: till skydd av vad?; del II” [The Sex Purchase Criminalization: For the Protection of What?; Part II], 2000/01 no. 1 *Juridisk tidskrift vid Stockholms universitet (JT)* [Stockholm University Law Review] 111, 111-31; Claes Lernestedt and Kai Hamdorf, “Sexköpskriminaliseringen: till skydd av vad?; del I” [The Sex Purchase Criminalization: For the Protection of What?; Part I], 1999/00 no. 4 *Juridisk tidskrift vid Stockholms universitet (JT)* 846, 846-58; Per Ole Träskman, “Går det att tygla lustan? Om straffbar pornografi,

For instance, racial segregation in schools in the American South was perfectly consistent with the existing constitutional doctrine of “separate but equal” established in *Plessy v. Ferguson* (1896)¹³⁸ until the Civil Rights Movement successfully challenged it in *Brown v. Board of Education* (1954). Then, the Supreme Court realized that although legal doctrines “cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”¹³⁹ To settle its case the Court went beyond the purview of doctrinal thinking and looked at *relevant* social evidence; a common practice in litigation nowadays labeled the “Brandeis Brief” after the first recognized lawyer systematically arguing a case in 1907 supported primarily by non-legal data.¹⁴⁰ Hence, *Brown* held that

‘separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.’ . . . Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.[Multiple social science citations] Any language in *Plessy v. Ferguson* contrary to this finding is rejected. . . . Separate educational facilities are inherently unequal.¹⁴¹

Similarly with the “Brandeis Brief” approach being crucial to the decision in *Brown*, the empirical evidence reviewed in this article show that prostitution is just as “inherently unequal” as racial educational segregation, if not more, and harmful whatever existing legal doctrines hold. In its simplest form prostitution imposes a de facto sexual serfdom on overwhelmingly desperate persons living under coercive circumstances. As such it exhibits a complete disregard for these people’s human and sexual worth that would never be accepted in any regular “occupation”, far less in sexual relationships resembling the slightest approximate equality. When the Swedish commissioners state that their proposed raise of penalty maximum to 1 year from 6 months “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 should, for many sex purchases, . . . still stay on daily fine-level,”¹⁴² they effectively accept the 2001 Supreme Court summary decision to deny civil rights for prostituted persons under the law, despite being under no constitutional obligation barring them from questioning Swedish judicial decisions.

Furthermore, reading the commission’s enumeration of purportedly non-exclusive examples of aggravating conditions, considering how conservative and disinterested Swedish lawyers have

pedofili och prostitution” [Can Lust be Curbed? On Criminal Pornography, Pedophilia, and Prostitution], 1998 no. 3-4 *Tidskrift utgiven av Juridiska Föreningen i Finland* (JFT) [Finnish Law Ass’n Law Review] 352, 352-73.

¹³⁸ *Plessy* held that “[t]he object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.” *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896).

¹³⁹ *Brown v. Board of Education*, 347 U.S. 483, 489 (1954).

¹⁴⁰ Louis D. Brandeis School of Law, “*The Brandeis Brief*,” Brandeis Law School, <http://www.law.louisville.edu/library/collections/brandeis/node/235> (accessed Aug. 24, 2010).

¹⁴¹ *Brown*, 347 U.S. at 494-95 (quoting Kansas court without citation).

¹⁴² SOU 2010:49 *Förbud mot köp*, 245.

so far been in interpreting and applying this law it seems likely that many regularly prostituted persons will be denied injured person status, if legislators uncritically adopt their suggestions. Conditions mentioned are young age, a “particularly unprotected or vulnerable situation”, psychological illness, psychological disability, “visible” intoxication, “exploiting a position of dependency”, lack of language skills, organized prostitution, receiving multiple tricks simultaneously or 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.¹⁴³

Whether or not prostituted persons actually have a clinical PTSD-symptom or any other of the above conditions, being in a situation having as the only realistic option to enter prostitution is nonetheless a situation where men are sexually exploiting a position of *vulnerability*, hence violating those persons’ right to equal and respectable treatment and bodily integrity. The commission, in contrast, already suggest distinguishing some persons as ineligible for damage awards if, e.g., theirs is *not* a “particularly unprotected or vulnerable situation[.]”¹⁴⁴ So when is it “particularly” vulnerable then? And why isn’t vulnerability as such enough? Effectively narrowing recompense to the above enumerated classes of prostituted persons is to ignore the pain, suffering, and harm inherent in prostitution as such that made conscious politicians fighting to pass the law in the first place. The law’s affirmative legislative history, contrary to what the commission derives from abstract doctrines unrelated to prostitution, does not distinguish persons with a clinical diagnosis of PTSD or those who lacked language skills, but effectively pointed to the coercive circumstances leading to their entry into prostitution, the exploitation of their dire situation by pimps and tricks who contribute more harm to the already existing sufferings whether or not any additional “aggravating” factors exist. This should be a crime against the person in itself, and not only an offense again the public interest of promoting gender equality.

Critiques & Disinformation regarding the Swedish Law

Besides the current evaluations, there is naturally a big-mouthed domestic as well as international opposition to the law who wants to legalize prostitution across the board. Among them, there is a common misconception that brothel- (indoor) prostitution (generally the form of prostitution legalized or decriminalized) is safer than street- (outdoor) prostitution. This notion is implicitly taken as an argument, however incorrect, in favor of offering legal alternatives for brothel operators. Critics of the Swedish approach often try to present countries that make legal certain forms of indoor prostitution in a more favorable light by such claims. For instance, while admitting that “indoor work” is not a safe practice per se, sociologist Ronald Weitzer nonetheless

¹⁴³ *Id.* at 240-41.

¹⁴⁴ *Id.* at 240.

claim that “there is no doubt that it is safer than street-level work,”¹⁴⁵ which goes contrary to what other researchers have found.¹⁴⁶ He also claim that “[c]hildhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers,”¹⁴⁷ citing only two studies that fail to offer sufficient and reliable data to this end.

To begin with, several studies indicate that a majority of women in street prostitution have additionally been prostituted in one or more types of indoor prostitution, and vice versa,

¹⁴⁵ Ronald Weitzer, “Prostitution as a Form of Work,” *Sociology Compass* 1 (2007): 145. Cf. Weitzer, “Prostitution: Facts and Fictions,” *Contexts* 6, no. 4 (2007): 28-30. Weitzer takes the view that prostituted women and pornography performers are engaging in “a form of work” and that the sex industry “cannot be reduced to gender oppression and is much more complex[.]” Weitzer, “Prostitution as Work,” 144. Cf. Jane Scoular, “Criminalizing ‘Punters’: Evaluating the Swedish Position on Prostitution,” *Journal of Social Welfare and Family Law* 26, no. 2 (2004): 202 (“Viewing prostitution as the epitome of gender violence . . . obscure the contingencies and diversity of the structures under which it materializes [self-citation omitted].”). As other proponents of this view, Weitzer repeatedly evade that pornography users and tricks overwhelmingly are men, and prostituted persons overwhelmingly are women, which—considering women’s generally subordinate position vis-à-vis men—precisely suggests a gender oppression. Sweeping observations noting “variation across time, place, and sector . . . in terms of workers’ experiences as well as power relations between workers, customers, and managers,” *ibid.*, 144, do not, without more, qualify the proposition that the sex industry is not an expression of gender oppression. Nor does such variation indicate, by itself, that variation is “complex” with regards to gender. The gender disparity in using and being used in the industry is not complex, and should be theoretically and empirically addressed—not evaded. Having written numerous articles explicitly or implicitly arguing for a de facto legalization of brothel prostitution, nowhere in these does he theoretically confront the condition that an overwhelming majority of prostituted persons are women, and users are almost entirely men, with the exception of noting that “female customers . . . are a small fraction of the market but have important theoretical implications.” Ronald Weitzer, “Sociology of Sex Work,” *Annual Review of Sociology* 35 (2009): 227. However, it is never clarified what, exactly, those implications are. This remarkable lack of discussion can be further observed in the following works: Ronald Weitzer, “Why Prostitution Initiative Misses: Measure Q in Berkeley Fails on 3 Counts,” *San Francisco Chronicle*, Sept. 26, 2004, sec. E3; “New Directions in Research on Prostitution,” *Crime, Law & Social Change* 43 (2005): 211-35; “Flawed Theory and Method in Studies of Prostitution,” *Violence Against Women* 11, no. 7 (2005): 934-49; “Rehashing Tired Claims About Prostitution: A Response to Farley and Raphael and Shapiro,” *Violence Against Women* 11, no. 7 (2005): 971-77; “Prostitution as a Form of Work,” *Sociology Compass* 1 (2007): 143-55; “The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade,” *Politics & Society* 35, no. 3 (2007): 447-75; “Legalizing Prostitution: Morality Politics in Western Australia,” *British Journal of Criminology* 49, no. 1 (2009): 88-105; “The Mythology of Prostitution: Advocacy Research and Public Policy,” *Sexuality Research and Social Policy* 15, no. 1 (2010): 15–29.

¹⁴⁶ Other researchers have noted how prostituted persons often are more vulnerable in indoor prostitution than on the streets due to their restricted physical scope for action, lack of effective escape routes, and highly reduced transparency from outside, while the trick and the pimp acquires a significantly larger amount of discretion. *See, e.g.*, Melissa Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harm Women Even if Legalized or Decriminalized,” *Violence Against Women* 10, no. 10 (2004): 1099-1103 (citing studies and original data); Melissa Farley, “Prostitution Harms Women Even If Indoors: Reply to Weitzer,” *Violence Against Women* 11, no. 7 (2005); Jody Raphael and Deborah L. Shapiro, “Reply to Weitzer,” *Violence Against Women* 11, no. 7 (2005). Many research-teams have faced the dilemma of being denied entry to brothels. One was even cited by Weitzer himself to support his claims. *See infra* note 149. Another team interviewed Asian women prostituted in “massage parlors” in San Francisco and were denied recruiting respondents in thirteen out of twenty-five parlors. Tooru Nemoto et al., “HIV Risk Among Asian Women Working at Massage Parlors in San Francisco,” *AIDS Education and Prevention* 15, no. 3 (2003): 247. Nonetheless, among those interviewed 62% “had been physically beaten by a customer,” *Ibid.*, 250, suggesting higher rates in parlors denying entry. Similarly, Melissa Farley and associates were denied to speak with prostituted women in 6 out of 14 legal brothels in Nevada. Farley, *Prostitution in Nevada*, 23.

¹⁴⁷ Ronald Weitzer, “Sociology of Sex Work,” 219.

including pornography and brothels.¹⁴⁸ Hence, distinctions between indoor- vs. outdoor prostitution can be assumed to have a weak explanatory value regarding claims about the women's social background and preconditions. Nonetheless, Weitzer tries to draw on studies with questionable data to argue such distinctions can be made. Weitzer's first citation of a Bristol sample of seventy-one prostituted women in massage parlors compared to an equal number of Bristol women in street prostitution,¹⁴⁹ is notable in that respondents were not allowed to participate if being below age sixteen, which is a common age in prostitution.¹⁵⁰ Further, it is not surprising that two of fifteen visited massage parlors did not allow interviews, but particularly remarkable that the authors themselves raise concerns that "[t]he small sample size for each group may mean that important differences have not reached significance,"¹⁵¹ apparently not disturbing to Weitzer who does not discuss the issue.

Regarding his second citation from Australia, it is a study which did not survey any women in street prostitution, only "call girls," with women in brothels as a "control group."¹⁵² Drop-out rates were unusually high. For call girls, 304 telephone numbers (listed advertisements) were called, although at one number sometimes even four women would answer. However, only half of the total calls were answered.¹⁵³ In sum researchers spoke with 244 women, but finally only 95 responded to the survey. That is a drop-out rate well over half the sample, even without considering the many unanswered calls.¹⁵⁴ Remarkably, no attrition-analysis is presented by these authors. Similarly, no information on how the "control group" of women in brothels were sampled are provided except for noting that they responded to the same questionnaire without, however, specifying drop-out rates or other important information.¹⁵⁵ Hence, most likely there is a serious sampling bias of which we don't know the parameters. Therefore the results cannot be compared with other studies which have included street workers, contrary to what Weitzer apparently assumes. Although reported percentage of child-sexual abuse or early sexual

¹⁴⁸ See, e.g., Farley, *Prostitution in Nevada*, 29; Farley, "'Bad for the Body,'" 1099 (citing studies). Cf. Ulla-Carin Hedin and Sven-Axel Månsson, *Vägen ut! Om kvinnors uppbrott ur prostitutionen* [The Way Out! On Women's Break-Up From Prostitution] (Stockholm: Carlsson Bokförlag, 1998), 28;

¹⁴⁹ N. Jeal and C. Salisbury, "Health Needs and Service Use of Parlour-Based Prostitutes Compared with Street-Based Prostitutes: A Cross-Sectional Survey," *BJOG: An International Journal of Obstetrics & Gynaecology* 114, no. 7 (2007): 875-881.

¹⁵⁰ *Ibid.*, 876 (stating "we decided prospectively not to interview any sex worker under the age of 16 years; in the event, the lowest declared age was 19 years."). However, no procedure for validating the age are accounted for, nor for securing respondents' trust in submitting such potential criminal implications vis-à-vis management. See further discussion on such procedures *infra* notes 157-163, and accompanying text. For accounts of common ages of entry into prostitution, see *supra* notes 12-18 and accompanying text.

¹⁵¹ Jeal and Salisbury, "Health Needs," 879.

¹⁵² Roberta Perkins and Frances Lovejoy, *Call Girls: Private Sex Workers in Australia* (Crawley: Univ. W. Aust. Press, 2007), 10.

¹⁵³ *Ibid.*, 7.

¹⁵⁴ *Ibid.*, 7, 161.

¹⁵⁵ *Ibid.*, 10, 161.

experiences in the Australian study are comparably low,¹⁵⁶ since methodology and sampling procedure leave so much else to ask for it is unscholarly to cite the study in support for claiming childhood abuse being more common among persons in street- as opposed to brothel prostitution.

Furthermore, Weitzer has not accounted for how his sources approached methodological problems involved with interviewing prostituted persons. For instance, they did not employ formerly prostituted interviewers who are known able to establish a sense of trust and empathy other interviewers cannot, as did Silbert and Pines,¹⁵⁷ nor account for any alternative measures to secure the trust of respondents.¹⁵⁸ In other instances he criticizes some studies for employing prostituted women per se while approvingly citing others who do without further explanation.¹⁵⁹ Particularly important for the purpose of validity, since prostituted persons are distrusted and stigmatized by the community, and therefore rarely have confidence in those around them, including researchers, public authorities, and support agencies, it is absolutely crucial that the respondent can obtain a sense of trust toward their interviewer to reveal essential details on abuse, and that they won't get judged adversely because they do not leave prostitution and thereby continues to be subjected to harm.¹⁶⁰ Even the Swedish government commission, preceding the passage of the law, acknowledged that what is needed is "long time and close contact with prostituted women in order to acquire knowledge of their real situation."¹⁶¹ According to the Commission, a survival strategy was even said to "entail that the more gross violence . . . the less becomes her propensity to report it."¹⁶² Consequently, studies applying

¹⁵⁶ Ibid., 137-40.

¹⁵⁷ Mimi H. Silbert and Ayala M. Pines, "Pornography and Sexual Abuse of Women," *Sex Roles* 10, no. 11/12 (1984): 863 ("interviewers reflected the makeup of the sample population [which] maximized their credibility with the subjects (who, in general tend to be distrustful of the 'straight world') and their understanding of the jargon terms and lifestyle issues."); Silbert and Pines, "Abuse as Antecedent," 408 ("interviewers . . . have been juvenile and/or adult prostitutes who have been victims of sexual assault."); See also Raphael and Deborah L. Shapiro, *Sisters Speak Out: The Lives and Needs of Prostituted Women in Chicago; A Research Study* (Chicago: Center for Impact Research, 2002), 10, www.impactresearch.org/documents/sisterspeakout.pdf ("Twelve survivors of prostitution were recruited and trained to orally administer an extensive questionnaire").

¹⁵⁸ For instance, the Bristol research team cited by Weitzer never confronted these issues. See Jeal and Salisbury, "Health Needs," 876 (accounting for no particular procedure to secure the trust of respondents). See also Ibid., 880 (recognizing the help of outreach workers to "administer" questionnaires).

¹⁵⁹ Weitzer assumes there exist unbiased observers of prostitution, arguing prostitution "survivors" in contrast are biased as interviewers if they "may have been likeminded" with researchers, or when they "did not see their own [prior prostitution] experiences as "work" or a choice[.]" Weitzer, "Flawed Theory," 939 (alterations in original; quoting Raphael and Shapiro, *Sisters Speak Out*, 9). See also Weitzer, "Rehashing Claims," 972. However, he sees no problem in citing Perkins and Lovejoy in support of his position, see Weitzer, "Sociology of Sex Work," 219, who did also employ "women either currently working or formerly working in the sex industry" to conduct surveys. Perkins and Lovejoy, *Call Girls*, 161. Whether these women were "likeminded" with the authors or not cannot be discerned, as opposed to those scholars criticized by Weitzer. Lack of transparency, however, can produce strong bias. Furthermore, in its impact neutrality to viewpoints may often, rather than being "unbiased", constitute an advocacy for status quo (if not simply being an expression of ignorance).

¹⁶⁰ See Raphael and Shapiro, "Reply to Weitzer," 967 (arguing that those who have left prostitution have made clear that they often failed to seek help because of the fear to be adversely judged by social services agencies).

¹⁶¹ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 144 (Swed.).

¹⁶² *Id.* at 144.

stringent clinical criteria such as PTSD-symptoms in measuring trauma from harm among prostituted persons, such as the nine-country study ($n = 854$) made by Farley and associates, did not find any differences related to whether the prostitution venue was indoor or outdoor.¹⁶³

In a dissertation in the discipline of history of ideas from 2008 another critic, Susanne Dodillet, who favors the German model of legalization attributes unwarranted corollaries to the condition that indoor prostitution was less documented in 1995 by the government's commission, trying to imply the findings were too weak for passing the law by, among other things, selectively quoting certain statements in their report while omitting other related ones.¹⁶⁴ For instance, in conjunction with saying that the knowledge obtained from social workers and police mostly covers women in street prostitution the commissioner further stated "We also know that many women in massage parlors and in other indoor prostitution earlier have been active in street prostitution and that the description therefore may be valid also for them."¹⁶⁵ Dodillet omitted this latter crucial statement by selecting a quote from a shorter statement in the summary.¹⁶⁶

In retrospect it is important to consider that legislators were aware 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. These observations were not only noted by the commissioners in 1995, but also corroborated in Swedish research published at the time of the bill's passage in 1998,¹⁶⁷ as well as it has been repeatedly noted in more recent scholarly work as mentioned above.¹⁶⁸ Furthermore, considering the commission's observations that indoor venues exhibited similar symptoms of harm to the prostituted persons as outdoor venues,¹⁶⁹ and taken together with Swedish researchers at the time of the bill's passage (if not earlier) finding that no prostitution venue is less harmful, safer, or better for the women than the other,¹⁷⁰ contrary to Dodillet's analysis the decision made by the legislature relied on a reasonable apprehension of harm.

¹⁶³ Farley et al., "Prostitution in Nine Countries," 44-48.

¹⁶⁴ See Susanne Dodillet, *Är sex arbete? Svensk och tysk prostitutionspolitik sedan 1970-talet* [Is Sex Work? Swedish and German Prostitution Politics since the 1970s] (Stockholm: Vertigo förlag, 2009), 365-74.

¹⁶⁵ Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [government report series], 102 (Swed.).

¹⁶⁶ Dodillet, *Är sex arbete*, 367 (quoting SOU 1995:15 *Könshandeln*, 11).

¹⁶⁷ Hedin and Månsson, *Vägen ut!*, 28.

¹⁶⁸ Farley, "'Bad for the Body,'" 1099 (citing studies); Farley, *Prostitution in Nevada*, 29.

¹⁶⁹ Apart from the commission's reference to research and testimonial evidence obtained by professionals emphasizing the dangers of indoor prostitution, see SOU 1995:15 *Könshandeln*, 143, it was also mentioned, e.g., that women with experience from indoor sex clubs encountered "various psychic damages . . . which confers with those that prostitution causes. The difference between optic (sex-shows, posing [private shows]), and physical prostitution is also marginal, and the work on sex clubs is therefore often a way in to prostitution proper for many young women." *Id.* at 139.

¹⁷⁰ See, e.g., Hedin and Månsson, *Vägen ut*, 120; Cf. Farley et al., "Prostitution in Nine Countries," 44-48 ($n = 840$) (post traumatic stress disorder diagnosed at same levels, regardless of prostitution venue), 37-39 (account of sampling procedure); Choi et al., "PTSD and DESNOS," 935-36, 942, 945 (forty six formerly indoor prostituted women revealed significantly higher PTSD and other stress disorders compared to a control group of age and

Apart from her attempt to present the legislative findings as being incomplete at the time, Dodillet's 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 which, particularly considering the high stakes involved for women currently in prostitution, cannot be disregarded simply because she has made 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 and therefore biased.

In addition to critique voiced in the academy, there are numerous unfounded 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) promulgated some erroneous claims about the Swedish situation in a submission to the South African Law Reform Commission (SALRC) where they, as their primary source of information, cite Swedish prostitution commentator (now a PhD Candidate in Anthropology) Petra Östergren's unpublished piece posted on her homepage.¹⁷¹ Nowhere in their submission does SWEAT cite published research from Sweden, and the various 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 false, or when they are accurate she—apparently in order to discredit the legislative intentions—misattributes them to the law *per se*, rather than to its judicial interpretation.

Regarding Östergren's reference to official reports, she claims "all of the authorities say there is no evidence that prostitution was lower overall" and that "hidden prostitution had probably increased."¹⁷² Comparative data before and after the law took place as well and comparative data from the other Nordic countries undoubtedly show these claims were erroneous.¹⁷³ Additionally, she claims that women in street prostitution have a tougher "time" entailing more "dangerous men" because of rising competition.¹⁷⁴ Women in legal prostitution also claim that competition and demands of unsafe and dangerous sex acts increases, and they are corroborated by researchers.¹⁷⁵ Not surprisingly, the 2000-report from the National Board of Health and Welfare

education-matched Korean non-prostituted women, although 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).

¹⁷¹ South Africa Law Reform Commission Discussion Paper 1 Project 107 Sexual Offences Adult Prostitution, authored by Eric Harper, Dianne Massawe, and Vivienne Mentor-Lalu, Sex Worker Education and Advocacy Taskforce (SWEAT) (2009), 41 [hereinafter: SWEAT Law Reform Submission] (citing Petra Östergren, "Sexworkers Critique of Swedish Prostitution Policy," Official Website (n.d.), http://www.petraostergren.com/pages.aspx?r_id=40716 (accessed April 11, 2010)).

¹⁷² Östergren, "Sexworkers Critique." See also SWEAT Law Reform Submission, at 41 (citing Östergren).

¹⁷³ See *supra* notes 95-117, with accompanying text.

¹⁷⁴ Östergren, "Sexworkers Critique." See also SWEAT Law Reform Submission, at 41-42 (citing Östergren).

¹⁷⁵ See *supra* notes 80-93, with accompanying text.

that Östergren cited is, according to their own homepage, “not valid anymore.”¹⁷⁶ Furthermore, in the following report from 2003, the Board announces that they

cannot state with certainty whether there has been an increase of violence Some informants speak of greater risks . . . few have observed an actual increase Police who have studied the occurrence of violence have not found any evidence of an increase. . . . The interview data and other research indicate that violence and prostitution are closely linked, whatever sort of legislation may be in effect.¹⁷⁷

Additionally, the latest 2007-report from the Board noted that opinion varies among prostituted women, some preferring the street over restaurants and nightclubs, as well as over the internet which they likens with “buying a pig in a poke” because internet make dismissals harder.¹⁷⁸ Although Östergren may be correct in that some tricks are no longer prepared to testify against traffickers since they are now criminals,¹⁷⁹ it is notable that the Gothenburg Police report having “received anonymous tips from clients who suspect human trafficking.”¹⁸⁰

It is also obvious that SWEAT are uninformed about how Östergren selected her 20 prostituted women interviewees, accounted for in a book of her, published in Swedish in 2006 by a commercial publisher.¹⁸¹ There, Östergren makes it fully clear that she did not attempt to make contact with “sellers of sex” who had “bad experiences of prostitution,” but intentionally sought women with “completely different experiences” since she claims, albeit exaggeratingly, that the former are “the only ones heard in Sweden.”¹⁸² When she mentions “informal talks and correspondence with approximately 20 sex workers,”¹⁸³ she in fact refers to respondents selected

¹⁷⁶ Original “*Denna publikation gäller inte längre.*” The National Board of Health and Welfare (Swed.), Official Homepage, <http://www.socialstyrelsen.se/publikationer2000/2000-3-5> (accessed April 11, 2010).

¹⁷⁷ Socialstyrelsen (SoS) [The National Board of Health and Welfare], *Prostitution in Sweden 2003*, authored by Eva Ambesjö, Annika Eriksson and Merike Lidholm (Stockholm: Socialstyrelsen, 2003), 9, available at http://www.socialstyrelsen.se/Lists/Artikelkatalog/Attachments/10488/2004-131-28_200413128.pdf.

¹⁷⁸ Socialstyrelsen (SoS), *Prostitution in Sweden 2007*, *supra* note 102, at 28.

¹⁷⁹ Östergren, “Sexworkers Critique.” See also SWEAT Law Reform Submission, at 42 (citing Östergren).

¹⁸⁰ Socialstyrelsen (SoS), *Prostitution in Sweden 2007*, 48.

¹⁸¹ Petra Östergren, *Porr, horor och feminister* [Porn, Whores, and Feminists] (Stockholm: Pocketförlaget, 2006).

¹⁸² *Ibid.*, 168-69. The quoted section reads: “Most sellers of sex I’ve met do not foremost 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 faire badly from prostitution do 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. [note to 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 due to that these stories are practically the only ones heard in Sweden—and because one cannot understand and discuss prostitution in all its complexity if not women with completely different experiences also are heard.”

¹⁸³ Östergren, “Sexworkers Critique.”

precisely because they have a positive view of the institution of prostitution. The fact that her interviews are uncritically cited extensively outside Sweden without noticing their obvious flaws, including in academic work,¹⁸⁴ is symptomatic to the fact that prostitution is a powerful industry supported by apologist that include researchers and social commentators, like Östergren, who in turn influence public opinion whether their information is accurate or not.¹⁸⁵ This also happened to the U.S. 1985 federal commission on pornography, which was surrounded by false rumors repeatedly parroted in the media until becoming “conventional wisdom.”¹⁸⁶

However, one thing one has to agree with Östergren on is that Swedish politicians are not well informed if claiming that the law “protects” women still in prostitution. The courts unfortunately eliminated these persons’ rights to be regarded as injured parties. 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 by 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, which research has shown exposes more people to exploitation and increases their abuse in prostitution.¹⁸⁷ Unfortunately, while Östergren in her piece notes that prostituted persons now have “neither the rights of the accused or the victim,”¹⁸⁸ she does not conclude that they *should* have the rights of an assessment of damages, as victims. In fact, in the debate she has done the opposite.¹⁸⁹

¹⁸⁴ See, e.g., Scoular, “Criminalizing ‘Punters,’” 200, who cite “Östergren’s (2004) interviews with women, who reported experiencing greater stress and danger on the streets [after the 1998-law took effect,]” as well as claiming that “Östergren’s interviews with women reveal feelings of only being heard as victims, expressing gratitude for the law.” *Ibid.*, at 202.

¹⁸⁵ For instance, blatantly deceptive in her English piece, Östergren says that “[m]ost of the sexworkers I have interviewed reject the idea that there is something intrinsically wrong with their profession,” however, without informing the reader that the interviewees were selected precisely because they had this view, and critics were intentionally excluded. Moreover, it is said to be 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. See Östergren, “Sexworkers Critique.”

¹⁸⁶ See *supra* notes 55-61, and accompanying text.

¹⁸⁷ See *supra* notes 80-93, and accompanying text.

¹⁸⁸ Östergren, “Sexworkers Critique.”

¹⁸⁹ Responding to the question of what she thought about a right to damage claim assessment for women in prostitution after such proposal had been raised by myself and others (politicians, lawyers, psychiatrists, and researchers) in an open editorial, see Petitioners et al., “Torskarna ska betala skadestånd till de prostituerade” [Tricks Shall Pay Damages to Prostituted Persons], *Newsmill*, Nov. 4, 2008, <http://www.newsmill.se/artikel/2008/11/03/torskarna-ska-betala-skadestand-till-de-prostituerade> (accessed Aug. 22, 2010), Östergren responded that 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 [Note that these women were interviewed because they *said* they had positive experiences of prostitution, and those with negative experiences were deliberately excluded. See *supra* notes 181-182 and accompanying text].” Oscar Julander, “Schyman: Torskarna ska stå för skadestånd” [Schyman: Tricks Shall Pay Damage Awards], *Expressen*, Nov. 3, 2008 (citing Östergren), available at <http://www.expressen.se/1.1356458>.

In a number of British trafficking cases decided in 2009, the injured parties submit psychiatric reports showing the PTSD-symptoms of the prostituted persons and additional inquiries about the injured parties' sufferings and situation before as well as after the case. These are used by a judge to assess damages in a partly separate civil procedure.¹⁹⁰ Similarly, the Swedish courts can individually assess the prostituted person's situation under the law, which has been suggested to the government recently in an attempt to clarify that the law does not preclude an injured party's right on behalf of the prostituted person. Such a procedure would not mean, as some have erroneously perceived in various more or less informal discussions, that any woman could find a man at the local bar and solicit him for prostitution, then claim damage awards in civil court. As with any civil suit, a court must determine whether there is sufficient evidence of harm to the woman to ground a damage claim. The kind of evidence of harm in prostitution presented in this article cannot be fabricated in such an instance, but would not be difficult to document in real cases where appropriately invoked.

Concluding Remark

Other countries have an unprecedented opportunity to adopt all the positive features of the Swedish law, and make sure current shortcomings are remedied. Any effective strategy to combat prostitution must decriminalize and support the prostituted people, strongly criminalize the buyers, and criminalize third party-profiteers. In this context, it should be mentioned that nothing stops individual states to extend the use of the Palermo Protocol to charge tricks for trafficking when they "receive" persons who are effectively pimped. Liability as "an accomplice" could already be applied on tricks,¹⁹¹ and since trafficking would not exist without the demand, extending the protocol to cover those who receive a pimped person is a logic corollary from its article 9 stating that "States Parties shall adopt or strengthen legislative or other measures . . . to discourage the *demand* that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking,"¹⁹² even if its preparatory works did not specifically mention tricks.¹⁹³

¹⁹⁰ AT v. Dulghieru, [2009] EWHC 225, 2009 WL 364337 (Queen's Bench Div.) (U.K.) (Westlaw); AT, NT, ML, AK v. Gavril Dulghieru, Tamara Dulghieru, [2009] EWHC 225, 2009 WL 364337 (Queen's Bench Div.) (U.K.) (Westlaw).

¹⁹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention Against Transnational Organized Crime art. 5, ¶ 2(b), Nov. 2, 2000, G.A. Res. 25, 55th Sess., Annex II, at 53-62, U.N. Doc. A/55/383. [hereinafter: Palermo Protocol]

¹⁹² Palermo Protocol, *supra* note 191, art. 9, ¶ 5 (emphasis added).

¹⁹³ See U.N. GAOR, 55th Sess., "Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions: Addendum; Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto", ¶¶ 62-86, at 12-16, U.N. Doc. A/55/383Add.1 (Nov. 2, 2000) [hereinafter: The Palermo Protocol's "Interpretive Notes"]; Cf. U.N. GAOR, 55th Sess., *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, ¶¶ 1-120, at 1-22 U.N. Doc. A/55/383 (Nov. 2, 2000).

Perhaps more importantly, many cases of pimping involve direct coercion, but virtually all entail the “abuse of power or of a position of vulnerability” of the prostituted person, which is one of the central definitions of trafficking according to the protocol.¹⁹⁴ This is also exactly what the trick does: he abuses the prostituted person’s position of vulnerability (and his power over her) when purchasing her/him for sex. The research shows that this condition of vulnerability typically includes a group of young women and children being prostituted to older men under conditions of mostly desperate social circumstances, usually poverty, combined with prior sexual abuse that often leads to homelessness, sky-high levels of traumatic stress, and social stigmatization and marginalization (see above). Along these lines the *travaux préparatoires* of the protocol defined “the abuse of a position of vulnerability” as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”¹⁹⁵ If the vast majority of prostituted people were not in such a situation, 89% in nine very different countries and places for prostitution would not say that they want to leave the sex industry but cannot ($n = 785$).¹⁹⁶ Courts can easily investigate and substantiate these facts in individual cases. Several studies also indicate the majority of tricks understand that such are the conditions for prostituted persons, but nonetheless proceed to purchase sex.¹⁹⁷

¹⁹⁴ Palermo Protocol, *supra* note 192, art 3(a) (defining that “[t]rafficking in persons” shall mean the . . . receipt of persons, by means of the threat or use of force or other forms of coercion, . . . of the abuse of power or of a position of vulnerability . . . for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation[.]”).

¹⁹⁵ The Palermo Protocol’s “Interpretive Notes,” *supra* note 193, at ¶ 63.

¹⁹⁶ Farley et al., “Prostitution in Nine Countries,” 51.

¹⁹⁷ See *supra* notes 71-72.