

# The Ideological Obstacle: Charging Pornographers for Sexual Exploitation

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## TABLE OF CONTENTS

INTRODUCTION TO PORNOGRAPHY AS A SCHOLARLY & POLITICAL PROBLEM .....	2
<i>Problems to Challenge Pornographers as Pimps: Ideological, Political, &amp; Legal</i> .....	3
PORNOGRAPHY AS A SOCIAL PRACTICE .....	5
<i>Abusive Conditions of Production</i> .....	7
<i>Coercive Preconditions: A Problem of Inequality</i> .....	9
<i>Addressing Critics Supporting Toleration of the Sex Industry</i> .....	12
<i>A Brief Note on Consumption Harms</i> .....	15
DEMOCRATIC THEORY: OBSTACLES & POTENTIALS TO CHANGE .....	18
<i>Classic Democratic Theory, Gender-Based Violence, &amp; the Sex Industry</i> .....	19
<i>Democratic Decision-Making &amp; Social Empowerment</i> .....	24
LEGISLATIVE & JUDICIAL POLITICS: POTENTIALS & OBSTACLES TO CHANGE .....	30
<i>On Case Selection</i> .....	30
<i>Sweden's Sex Purchase Law &amp; Legal Approach to Prostitution</i> .....	32
<i>Contrasting Sweden's Prostitution Position with Canada &amp; U.S.</i> .....	34
<i>Production Laws, as Distinguished from Dissemination Laws</i> .....	36
<i>Applying Prostitution Laws to Pornography: The Swedish Case</i> .....	38
The Swedish Constitutional Expressive Framework & Comparative Outlooks .....	41
Detailed Expressive Regulation & the "Principle of Exclusivity" .....	43
Child- & Adult Materials under the Constitution.....	45
Toward Non-Intervention (Negative Freedom) in Expressive Law .....	47
<i>Legislative Dismissals: the 1998 Sexual Crimes Committee's Analysis</i> .....	51
Counterfactual Doctrine: Violent Resistance & Dishonest Conduct; The Anna Odell Case ...	54
Filmed Sexual Offenses in Swedish Case Law .....	55
Concluding Legal Note on Application of Existing Procuring Law.....	58
AN ALTERNATIVE DEMOCRATIC THEORY .....	59
<i>Intersectionality: The Problem of Multiple Disadvantages</i> .....	60
<i>Representation &amp; Democratic Decision-Making</i> .....	61
<i>A Concluding Note</i> .....	64

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## **INTRODUCTION TO PORNOGRAPHY AS A SCHOLARLY & POLITICAL PROBLEM**

Pornography has been discussed as a problem in political science, in particularly since political activists and scholars associated with the women's movement in the mid 1970s analyzed it as an expression of male dominance.<sup>2</sup> In the early 1980s the analysis put forward by some scholars was sharpened, pornography now being defined as a "social practice" (as distinguished from depictions or representations) and as such "a systematic practice of exploitation and subordination based on sex which differentially harms women."<sup>3</sup> At the same time as this critique entered and stayed in the public discourse, with mixed success, the de facto availability of most type of adult pornography have increased, especially with the advent of the Internet. Several sources converge on the conclusion that so long as a person is intent upon finding particular materials, even of the most violent and brutal kind, the availability is virtually unlimited.<sup>4</sup>

Moreover, the content of mainstream pornography appears to have become more degrading, brutal, and abusive to women over the years. For instance, a recent quantitative content-analysis study suggested that "best-renting pornography films" in the U.S. in 2005 were much more aggressive and violent than only a decade before.<sup>5</sup> In addition, the study found that the comparatively few top selling movies that had been made by female producers contained as much (if not more) degrading and abusive acts directed against women as top selling materials made by male producers did.<sup>6</sup> Its authors concluded that "the female targets almost always

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<sup>2</sup> For early essays, see, e.g., Laura Lederer ed., *Take Back The Night* (Toronto: Bantam Books, 1982) (1980). For accounts of the early history of the women's movement and anti-pornography activism, see, e.g., Susan Brownmiller, *In Our Time* (NY: Random House, 1999), 295-325; Catherine Helen Palczewski, "The Feminist Anti-Pornography Movement and the Rhetorical Construction of Social Knowledge" (PhD Diss.: Northwestern University, 1994), 78-94 (accounting for early key works); Susan Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989), 72; cf. Donald Alexander Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989), 30 (enumerating early feminist anti-pornography organizations); Joan Kennedy Taylor, "Does Sexual speech Harm Women? The Split Within Feminism," *Stanford L. & Policy Rev.* 5 (Spring, 1994): 49-50.

<sup>3</sup> Proposed Ordinance Sec 1., to add Minneapolis City Code, Minn., Sec. 139.10(a)(1), 1st Reading, Nov. 23, 1983, reprinted in Catharine A. MacKinnon and Andrea Dworkin, eds., *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge, MA: Harvard Univ. Press, 1997), 427.

<sup>4</sup> See, e.g., Marty Rimm, "Marketing Pornography on the Information Superhighway," *Geo. L.J.* 83 (1995): 1849; Ragnhild T. Bjørnebekk and Tor A. Evjen, "Violent Pornography on the Internet: A Study of Accessibility and Prevalence," in *Children in the New Media Landscape: Games, Pornography, Perceptions*, ed. Cecilia von Feilitzen and Ulla Carlsson (Gothenburg: Nordicom, 2000), 185-206. For instance, already among third year high-school students in Sweden in 2003, among 97,6% of the boys who had ever looked at pornography, 11,9% reported seeing/using pornography containing explicit violence or coercion ( $n = 4343$ ). 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), 92. When searching for pornography presenting murder (so-called snuff pornography) on the file-sharing network "eMule" in March 2007, four authentic-looking movies were easily found.

<sup>5</sup> Chyng Sun et al., "A Comparison of Male and Female Directors in Popular Pornography: What Happens When Women are at the Helm?," *Psychology of Women Quarterly* 32, no. 3 (2008): 321. See also Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010), 63-75, for a more qualitative analysis of the *gonzo* genre in pornography, now practically occupying the "mainstream" where practices previously considered extreme abound virtually in complete lack of plot. This genre includes, inter alia, repeated anal sex, deep-throat gagging, oral urination, physical violence, ejaculation in faces, "anal-to-mouth," and multiple men entering women in two or more places. Women performers sometimes vomit, show uncontrollable tears from pain, and/or receive mental blackouts. *Ibid.*

<sup>6</sup> Sun et al., "Male and Female Directors," 317-20. The sample was composed of an equal number of randomly selected female-directed versus male-directed scenes ( $n = 122$ ) from 44 randomly selected *top selling* pornography movies ( $n = 250$ ).

exhibited pleasure or indifference toward the aggression inflicted on them . . . [and that such] female-directed films did not offer an alternative construction of sexuality and gender roles from their male counterparts.”<sup>7</sup>

Simply put, developments since the 1970s suggest that the women’s movement critique of pornography has not been effective, politically or legally; thus, a broader issue that this paper intends to shed light on is *why* the women’s antipornography movement has been unsuccessful. A review of the empirical harms of pornography, including the diversity of conclusions sometimes reached on the topic, will be made below. Furthermore, legal changes are understood as more important indices of the women’s antipornography movement’s success in this area than other public policy because legal change has an element of intransience—often grounded in constitutional interpretation—that makes it more permanent and stable. Other public policy is often subject to the whims of contingent political majorities or pluralities. Moreover, educational policies, public consciousness-raising, and similar non-mandatory approaches are not very effective remedies if considering pornography’s harmful effects below, in part because pornography consumers themselves do not receive an unambiguously negative effect by their consumption as for instance alcohol or drug consumers would.<sup>8</sup> Rather, as shown in psychological experimental research, the tendency among consumers is to search for more violent, extreme, and subordinating materials in order to be sexually aroused,<sup>9</sup> which further increases the demand for acts in pornography that are harmful to their performers.<sup>10</sup> In this light, democratic resistance to legal reform and attempts to displace laws in favor of less efficient policy options is a dynamic that might be subject to a special research project.

### **Problems to Challenge Pornographers as Pimps: Ideological, Political, & Legal**

This paper looks at a sub-question to the broader problem of why the women’s antipornography movement has not been successful. Prostitution is usually understood as a social practice where money is paid for sex. There appears to be a logical paradox then in that prostitution for pornography, where persons are paid for sex in front of a camera, is not typically seen as prostitution, legally or politically. Moreover, evidence shows (more below) that the sex in

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<sup>7</sup> Ibid., 321.

<sup>8</sup> See, e.g., Catharine A. MacKinnon, “On Sex and Violence: Introducing the Antipornography Civil Rights Law in Sweden,” in *Are Women Human? And Other International Dialogues*, ed. C.A. MacKinnon (Cambridge, MA: Harvard University Press, 2006), 103, who compares educational approaches against pornography consumption as an attempt “to argue with an orgasm,” and concludes that liability to civil damages for distributing or producing pornography would educate people more effectively.

<sup>9</sup> See Dolf Zillman, “Effects of Prolonged Consumption of Pornography,” in *Pornography: Research Advances and Policy Considerations*, ed. Dolf Zillman and Jennings Bryant (Hillsdale, N.J.: Erlbaum, 1989), 144-45 (showing tendency among subjects to choose more brutal materials only after a couple of weeks of exposure).

<sup>10</sup> See, e.g. Rimm, “Marketing Pornography,” 1891-92, who found surprisingly high demand for violent and abusive pornography on the internet when the actual use of 292,114 carefully categorized files were tracked, showing that 48,4% of the downloads contained either child-pornography (one third) or “paraphilic” content (two thirds) such as e.g. “sadoomasochism (B&D/S&M), fisting, urophilia, coprophilia, foreign objects . . . bestiality, and incest.” Ibid, 1885 (definition of “paraphilia”). Such findings suggest an economic incentive to exercise more violence against women and children exist to satisfy consumer demand. Cf. Attorney General’s Commission on Pornography, *Final Report*, 2 vols. (Washington, DC: U.S. Dept. of Justice, 1986), 787-88 [hereinafter Att’y General’s Comm., *Final Report*], available at <http://www.communitydefense.org/lawlibrary/agreport.htm> (presenting testimonies confirming similar modus-operandi and economic incentives among pornographers, even when it necessitated perpetrating permanent physical injuries on young girls).

pornography is typically supplied by persons who share the same social *preconditions* as those who are in prostitution generally. The pornography industry, just as the prostitution in general, typically purchase and procure sexual acts from vulnerable populations to produce their materials, exploiting sex inequality, vulnerability caused by prior child abuse, homelessness, poverty, and racism, among other things (more below). The de facto circumstances under which pornography is produced thus tend to be coercive, exploitative, and harmful; hence, it is relatively easy for pornographers to purchase acts that are unwanted or dangerous to those who perform them, even when not using physical force. Given that these conditions are similar, there appears to be less reason why the pornography industry should not be subjected to the same legal scrutiny as prostitution per se, as it could have very important implications for the population who are *exploited* in the industry.

The main objections to regulate pornography with prostitution or other laws have been to invoke concerns for the democratic value of freedom of expression (more below). However, it is one thing to regulate the dissemination and possession of resulting materials from a freedom of expression perspective, and another thing to regulate the production of such materials to the same laws as other business practices. Accordingly, just as publishers, newspapers, or printing activities are not given a *carte blanche* to violate applicable criminal, labor, and human rights laws in their production of expressive materials, one may argue that pornography production shouldn't either. Such a regulative approach does not "target" any expressive materials directly, whatever the merits of the individual material in terms of its contribution to a free and democratic society.

In this paper, I look more in detail at the narrower question what the political obstacles are to address the harms related only to the production of pornography with real people as outlined above—not the broader and more complex issue of how to regulate consumption or dissemination of pornography. However, it is generally true that the consumption of pornography, also non-violent materials, is documented to have desensitized societies to gender-based violence, inspiring sexual coercion and rape, and promoting sexual subordination, including racism with sexual overtones (more below). Thus, a broader second question may be asked whether, given that pornography systematically and severely contributes to and exploits one group's subordination to another, democracies are insufficient to their own ideals of providing equality among citizens when they do not regulate it effectively. I have dealt with this broader issue in publications elsewhere.<sup>11</sup> Here, I choose a more specialized and detailed approach. The insights that may be gained from understanding why the apparently less controversial issue of regulating the conditions of production is not resolved in a logically consistent manner might assist in explaining why democracies are unable to adequately address the more controversial issue of distribution of harmful pornography. Hence, this paper asks why the legal regulation of prostitution in democracies is rarely applied to the pornography industry.

The paper's starting point is first to analyze the social science and other empirical evidence of pornography as a social practice in order to properly frame the problem; thus, the paper does not adopt a "perspective" per se, such as a feminist, postmodernist, or sex equality approach, but is

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<sup>11</sup> Max Waltman, "Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the United States," *Political Research Quarterly* 63, no. 1 (2010): 218-237.

rather grounded in empirical evidence. Then, in order to answer the research question, it draws from relevant democratic theory, constitutional politics theory, legal scholarship, and comparative politics studies.

### **PORNOGRAPHY AS A SOCIAL PRACTICE**

Evidence below shows that the harms of pornography come in mainly two forms: production or consumption harms. Before looking directly at production harms, it is useful though to know what groups generally consume pornography. Although data on how many men or women have ever encountered pornography does not answer questions of its actual frequency of use,<sup>12</sup> there are more detailed studies that do. The conclusions which have been repeatedly confirmed in numerous detailed surveys from the U.S.,<sup>13</sup> Sweden,<sup>14</sup> Denmark,<sup>15</sup> Norway,<sup>16</sup> Hong Kong,<sup>17</sup> and Canada,<sup>18</sup> show that *regular* users are almost exclusively men—not women. The survey studies (footnotes 13-18) show striking gender differences with respect to females who rarely, if ever, actually use pornography; however, when they use pornography, the initiative surprisingly often

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<sup>12</sup> See, e.g., Jerry Ropelato, “Pornography Statistics 2007,” Top Ten Reviews (2007), <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics-pg5.html> (accessed May 13, 2010) (finding that 72% of visitors to internet pornography sites were men and 28% women, without further distinguishing accidental, brief, or systematically and habitual visits from each other).

<sup>13</sup> 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.

<sup>14</sup> Carl-Göran Svedin and Ingrid Åkerman, “Ungdom och pornografi,” in *Medierådet: Koll på porr*, ed. Ann Katrin Agebäck (Stockholm: Swed. Gov’t Council: Medierådet, 2006), 89-92 (*n* = 4,343 of third-year high school students); 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 (*n* = 2810 adult population); Sven-Axel Månsson, “Commercial Sexuality,” in Nat’l Inst. Public Health, *Sex in Sweden*, 263; 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, 106 (*n* = 718, high school students); Christina Rogala and Tanja Tydén, “Does Pornography Influence Young Women’s Sexual Behavior?” *Women’s Health Issues* 13 (2003): 41-42 (*n* = 841, median age 22, range 14-24, *ibid.*, 40); Tanja Tydén, Sven-Eric Olsson, and Elisabeth Häggström-Nordin, “Improved Use of Contraceptives, Attitudes Toward Pornography, and Sexual Harassment Among Female University Students,” *Women’s Health Issues* 11, no. 2 (2001): 90-91 (*n* = 345). Interestingly, in the Swedish national adult 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.

<sup>15</sup> Similar gendered consumption trends prevailed in Denmark as in Sweden, *see supra* note 14, although slightly higher in quantitative terms for both genders 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.

<sup>16</sup> See 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): 195 (sample of the adult Norwegian population, age 15 to 91, mean 43,6).

<sup>17</sup> See 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): 545-53 (studying consumption patterns among young adults age 18–27. *Ibid.*, 546).

<sup>18</sup> The conclusions drawn from the other enumerated countries above 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.

comes from a male partner.<sup>19</sup> By contrast more than half of the males seem to use pornography regularly—from a couple of times per month, up to daily use.<sup>20</sup> The surveys lend support to the proposition that pornography is produced primarily for men.

Taking into account that sexual acts performed on real persons in these visual materials end up as masturbation materials overwhelmingly for male consumers, numbers available suggest a form of mass prostitution through media that is disproportionately gendered.<sup>21</sup> Indeed, studies of tricks<sup>22</sup> indicate that half, or more, explicitly see pornography as just another form of prostitution.<sup>23</sup> Highlighting this association, 49% of a sample of 854 prostituted persons<sup>24</sup> in nine countries, found across five continents, reported being used in pornography, confirming numbers from previous studies.<sup>25</sup> Pornography, prostitution, and trafficking are thus not distinct and separate activities, but rather different modus of sex that is paid for; usually, it is unequally gendered with men overwhelmingly on the receiving end, and with women typically on the supply side (and some men too).

Unequal or not, the industry appears to be a huge source of economic revenue. 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.<sup>26</sup> Considering that much activity is illegal and unofficial, hence goes unreported, even these numbers are underestimations, as already in 1985 it was thoroughly documented that pornography production and distribution in the U.S. were under control of organized crime.<sup>27</sup> However, legitimate corporations are increasingly involved with distribution.<sup>28</sup> Moreover, while

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<sup>19</sup> See *supra* notes 13-18.

<sup>20</sup> See *supra* notes 13-18.

<sup>21</sup> Dworkin and MacKinnon also pioneered conceptualizing pornography as a form of prostitution.

<sup>22</sup> The word *trick* is used to denote a purchaser of sex in this article. Trick is a word frequently used by prostituted women themselves for men who buy 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.

<sup>23</sup> 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](http://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](http://www.eaves4women.co.uk/Documents/Recent_Reports/Men%20Who%20Buy%20Sex.pdf).

<sup>24</sup> 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 (see below).

<sup>25</sup> 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), 46 ( $n = 757$ ), available at [www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf](http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf); see also Farley, “Renting an Organ,” 145 (citing similar numbers from the WISPER (Women Hurt in Systems of Prostitution Engaged in Revolt) Oral History Project in 1990).

<sup>26</sup> Ropelato, “Pornography Statistics 2007,” <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics-pg2.html>. Nine countries were some data were available were South Korea, Japan, U.S., Australia, U.K., Italy, Canada, Philippines, Netherlands. Seven countries with incomplete data included in this study were China, Taiwan, Germany, Finland, Czech Republic, Russia, and Brazil. Ibid.

<sup>27</sup> See Att’y General’s Comm., *Final Report*, 291-97, 1037-238 (discussing and documenting organized crime involvement).

<sup>28</sup> See, e.g., Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Boston: Beacon Press, 2010), 50 et seq (discussing financial involvement from legitimate corporations); Timothy Egan, “Erotica Inc.: A Special Report;

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.<sup>29</sup> 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.<sup>30</sup>

### **Abusive Conditions of Production**

Regarding abusive conditions in the industry, many former pornography performers testify to the systematic threats, rapes, and violence regularly committed against women and children. Women and young girls are documented to have been tortured to increase the market value of the materials, resulting in permanent physical injuries.<sup>31</sup> Male participants also confirm that pornographers regularly force women, who manifestly resist it, e.g., to have anal intercourse.<sup>32</sup> Some have been coerced into pornography films already at age eight.<sup>33</sup> Others end up in pornography at a later age. An example of the latter is found in Linda Boreman, the performer in the pornography classic “Deep Throat,” who was cajoled at twenty-one into an initially personal relationship of two and a half years in which she suddenly found herself constantly threatened, battered, and raped, sometimes on a daily basis, and held in captivity while being used in pornography.<sup>34</sup> An in-depth study with fifty-five female survivors of prostitution in Portland, Oregon, reported that 53% were sexually tortured on average fifty-four times a year, often while made to participate in pornography.<sup>35</sup> Although some question that pornography is produced under such coercive or violent conditions as those documented in this sample, a significant body of evidence below unfortunately shows this study was not an exception, but rather symptomatic

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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.

<sup>29</sup> 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 (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: Harvard Univ. Press, 2006), 160-68 (documenting pornography made of rapes during Serb-led Genocide in Bosnia-Herzegovina).

<sup>30</sup> 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 with sexual murderers who made pornography, see, e.g., *French Estate v. Ontario* (A.G.) (1998), 38 O.R. (3d) 347, 350 (C.A.); *Schiro v. Clark*, 963 F.2d 962, 965 (7th Cir. 1992), *aff’d sub nom. Shiro v. Farley*, 510 U.S. 222 (1994); see also Hilary Kinnell, *Violence and Sex Work in Britain* (Cullompton, Devon, UK: Willan Publishing, 2008), 42 (reporting “peeping toms” making covert photography); *Helsingborgs tingsrätt* (TR) [Dist. Ct.] 2005-09-25, B 1230-05 p. 59 (Swed.) (“The Staffanstorps Case”) (prostituted woman testifying of unknowingly having “her sex documented”).

<sup>31</sup> Att’y General’s Comm., *Final Report*, 787-88 & n799.

<sup>32</sup> Att’y General’s Comm., *Final Report*, 773-74 (quoting from Los Angeles Hearings).

<sup>33</sup> “Minneapolis Press Conference, July 25, 1984,” transcribed in *In Harm’s Way*, ed. MacKinnon and Dworkin, 265 (“Statement of Ms. P.”).

<sup>34</sup> Linda Lovelace, *An Autobiography with Mike McGrady*. (Secaucus NJ: Citadel Press, 1980). See also “The Minneapolis Hearings: Government Operations Committee Sess. 1; Monday, Dec. 12, 1983, 1:30 P.M.,” transcribed in *In Harm’s Way*, ed. Dworkin and MacKinnon, 60-65 (testimony of Linda Marchiano; lie detector test accounted for at 205-213).

<sup>35</sup> Susan Kay Hunter, “Prostitution is Cruelty and Abuse to Women and Children,” 1 *Michigan Journal of Gender and Law* 91, 93-94 (1993).

of an industry in which violence and coercion are hidden behind cameras. Other than when materials are expressly violent, as they often are,<sup>36</sup> they simply cannot alone reveal if force was used to produce them. Moreover, because people withhold information when threatened or dependent on the industry, the possibility exists of more coercion.

Testimonial evidence on violence, coercion, and trauma during pornography production revealed in public hearings repeatedly mirror both quantitative and qualitative data on these subjects in the lives of prostituted women around the world, and cannot therefore simply be discarded as unrepresentative or anecdotal. For example, Linda Boreman was forced to have intercourse or fellatio every time she was made to perform for pornography, so was raped countless times, which also was revealed to be the case with the fifty-five Portland survivors previously mentioned of whom 78% were raped an average of forty-nine times a year, and 84% were victimized through aggravated assault an average of 103 times a year.<sup>37</sup> Converging with such data, other survivors from the pornography industry testify to constantly being covered with “welts and bruises.”<sup>38</sup> Independent testimonies in recent procuring and trafficking cases in Sweden suggest such violence (including welts and bruises) is not an exception in the sex industry.<sup>39</sup> Similarly, 70% of 200 prostituted females in San Francisco reported that purchasers raped or similarly victimized them “beyond the prostitution contract” on average 31.3 times.<sup>40</sup>

Studies conducted in other countries, for instance Canada, are indicative of similar levels of violence against prostituted persons where, e.g., the use of weapons such baseball bats, crowbars, or where the offender jerks the prostitutes woman’s head against a car’s dashboard or a wall, occur regularly.<sup>41</sup> These are all notable figures, particularly considering that rape is commonly and grossly underreported by prostituted persons themselves.<sup>42</sup> Not surprisingly, in 1995 the legislative history of the Swedish 1998 law against purchase of sex contained the statement 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.”<sup>43</sup> 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 (more below).

There are reasons to believe that circumstances are even less safe in those forms of prostitution in which a camera is present. For instance, among 854 active prostituted persons

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<sup>36</sup> See *supra* notes 4-10, with accompanying text. A Swedish government report in 1995 concluded, not surprisingly, that an international market existed in Sweden for “pornographic movies with a lot, and gross, violence.” See Statens offentliga utredningar [SOU] 1995:15 Könshandeln [government report series], 12 (Swed.).

<sup>37</sup> Hunter, “Prostitution is Cruelty,” 93-94.

<sup>38</sup> Att’y General Comm., *Final Report*, 784 (quoting from Washington D.C., Hearing, Vol. I., p.179-82.).

<sup>39</sup> See, e.g., Helsingborgs tingsrätt (TR) [Helsingborg Dist. Ct.] 2005-09-25, B 1230-05 *passim* (Swed.), *sentences modified by* Hovrätten över Skåne och Blekinge [Scania & Blekinge Ct. App.] 2006-01-11, B 2429-05, (Swed.); see also Stockholms tingsrätt (TR) [Stockholm Dist. Ct.] 2003-03-21, B 4205-02, at 13 *et seq.* (Swed.) (several testimonies of daily beatings, gang-rapes, and torture, by Nadja, Julia, Renata, and Olesia), *sentence modified by* Svea hovrätt [Svea Ct. App.] 2003-06-23, B 2831-03, at 15 *et seq.* (Swed.) (additional testimonies).

<sup>40</sup> Mimi H. Silbert & Ayala M. Pines, “Occupational Hazards of Street Prostitutes,” 8 *Crim. Just. & Behav.* 395, 397 (1981).

<sup>41</sup> Melissa Farley, Jacqueline Lynne, and Ann J. Cotton, “Prostitution in Vancouver: Violence and the Colonization of First Nations Women,” *Transcultural Psychiatry* 42 (2005): 250-51.

<sup>42</sup> Cf. Farley et al., “Prostitution in Nine Countries,” 57 & 66; SOU 1995:15 Könshandeln, 144.

<sup>43</sup> SOU 1995:15 Könshandeln, 142.

surveyed in the nine-country study previously mentioned, those 49% who reported they had been used by pimps or tricks to make pornography were diagnosed with statistically “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography.<sup>44</sup> Two thirds (68%) of all 840 responding prostituted persons in the study met clinical criteria for PTSD, *regardless* of whether prostitution was legalized or criminalized, and regardless in which form or site of prostitution they were prostituted such as indoors, brothel, or street prostitution, and these populations were not sampled among persons explicitly seeking help.<sup>45</sup> Additionally, suggesting doubts about the position recently taken in the case *Bedford v. Canada* in Ontario that PTSD “could be caused by events unrelated to prostitution,”<sup>46</sup> such as child sexual abuse, a 2009 Korean study involving forty-six former indoor-prostituted persons and a control group found that prostitution was strongly related to PTSD even when controlling for childhood abuse.<sup>47</sup> The symptoms in the nine countries were higher or equal to that of treatment-seeking Vietnam veterans.<sup>48</sup> The stronger association found in the nine country study between being used in pornography and increased trauma was also seen in a sample of prostituted women interviewed in *legal brothels* in Nevada.<sup>49</sup> This suggests that the condition of production in pornography, as a specific branch of prostitution, is particularly vicious and cruel to women.

### **Coercive Preconditions: A Problem of Inequality**

In the hereto most thorough public investigation of the conditions of production in the pornography industry, the U.S. Attorney General’s Commission 1985 Final Report devoted a whole chapter on “the use of commercial performers in the pornography industry.”<sup>50</sup> The report has, not surprisingly, been subject to intense and orchestrated media campaigns to discredit it on a number of erroneous claims, backed with lobby funds more than twice as large as that commission’s total budget.<sup>51</sup> These campaigns notwithstanding, the general preconditions and circumstances of production found in the larger population of prostituted women studied by researchers mirror those of female pornography performers found by this public inquiry. In the report it was hence concluded that persons used in pornography generally are “young, previously abused, and financially strapped,” and that the conditions in the industry entail “exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement.”<sup>52</sup> Furthermore, it was said that engagement in the industry would often injure their self-image substantially. The Commission also observed that while hypothetically there could be exceptions to their findings, tellingly “the

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<sup>44</sup> Farley, “‘Renting an Organ,’” 146, 422n298 (Pearson  $r = 126$ ,  $p = .001$ ,  $n = 749$ ).

<sup>45</sup> For more information on the samples and methods, *see* Farley et al., “Prostitution in Nine Countries,” 37-39.

<sup>46</sup> *Bedford v. Canada*, 2010 ONSC 4264, [2010] O.J. No. 4057 ¶ 353 (Can. Ont. Super. Ct.) (QL).

<sup>47</sup> 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): 942.

<sup>48</sup> Farley et al., “Prostitution in Nine Countries,” 44-48.

<sup>49</sup> Melissa Farley, *Prostitution and Trafficking in Nevada: Making the Connections* (San Francisco: Prostitution Research and Education, 2007), 37 ( $r = .392$ ,  $p = .009$ ,  $n = 44$ ).

<sup>50</sup> Att’y General’s Comm., *Final Report*, 836-900.

<sup>51</sup> *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), ix-xlix.

<sup>52</sup> *Ibid.*, 888.

industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us.”<sup>53</sup>

The majority of prostituted people have been subjected to sexual abuse and physical assault as children, somewhere between conservatively estimated 55% and less conservatively 90% according to numerous international studies.<sup>54</sup> Consequently, many run away from home or become homeless,<sup>55</sup> effectively living “on the street” and increasingly being exploited by pimps and tricks, including pornographers. A low age of entry is common. Forty-seven percent of 751 prostituted persons in nine countries reported entering prostitution under age eighteen.<sup>56</sup> Among a sample of 200 juvenile and adult, current and former, prostituted women in San Francisco, sixty-two percent started before age sixteen, and “a number” started “under 9, 10, 11 and 12.”<sup>57</sup> That is not an age when one has autonomy and power to choose one’s life’s further direction. Furthermore, because abuse and neglect of children may break their spirits and reduce their life chances, others will be able to abuse their vulnerability as adults in prostitution.<sup>58</sup>

As the preconditions attests to, most situations of prostitution were preceded by coercive circumstances that push women into the sex industry, including subjection to sexual abuse as

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<sup>53</sup> Ibid., 889.

<sup>54</sup> Farley et al. “Prostitution in Nine Countries,” 43 (finding that 59% of all responding prostituted persons ( $n = 448$ ) affirmed that they “[a]s a child, was hit or beaten by caregiver until injured or bruised”; an additional 63% ( $n = 508$ ) affirmed they were “sexually abused as a child”); Mimi H. Silbert and Ayala M. Pines, “Entrance Into Prostitution,” *Youth & Soc’y* 13 (1982): 479 (finding 60% of 200 prostituted subjects reported childhood sexual abuse from ages 3 to 16); In-depth studies of survivors show higher frequencies of abuse. See, e.g., Evelina Giobbe, “Confronting the Liberal Lies About Prostitution,” in *Living With Contradictions*, ed. Alison M. Jaggard (Boulder Colorado: Westview Press, 1994), 123 (referring to organization WISPER’s survivor interviews in Minneapolis, where 90% reported assault and 74% sexual abuse between 3 to 14 years of age); Hunter, “Prostitution is Cruelty,” 98-99 (finding 85% of 123 prostitution survivors reported child incest, 90% physical abuse, and 98% emotional abuse); Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of the prostituted women it worked with were sexually abused during childhood, and Genesis House in Chicago reported the same for 94%. Giobbe, “Confronting Liberal Lies,” at 126 n.10 (citing The First National Workshop for Those Working with Female Prostitutes. Wayzata, Minnesota, Oct. 16–18, 1985); see also Chris Bagley and Loretta Young, “Juvenile Prostitution and Child Sexual Abuse: A Controlled Study,” *Canadian J. Community Mental Health* 6 (1987): 5 (finding 73% of the study’s prostituted persons were subjected to child sexual abuse); Jennifer James and Jane Meyerding, “Early Sexual Experience as a Factor in Prostitution,” *Arch. Sexual Behavior* 7 (1977): 31; Ines Vanwesenbeeck, *Prostitutes’ Well-being and Risk* (Amsterdam Neth.: VU Uitgeverij, 1994), 21-4 (summarizing studies).

<sup>55</sup> See, e.g., Farley et al., “Prostitution in Nine Countries,” 43 (reporting 75% of 761 prostituted persons in nine countries had been homeless, either currently or in the past); Silbert & Pines, “Entrance Into Prostitution,” 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways and 96% of prostituted juveniles were runaways).

<sup>56</sup> Farley et al., “Prostitution in Nine Countries,” 40.

<sup>57</sup> Mimi H. Silbert & Ayala M. Pines, “Sexual Child Abuse as an Antecedent to Prostitution,” *Child Abuse & Neglect* 5 (1981): 410. Seventy percent of these respondents were under the age of 21 at the time of the interview. Ibid., 408.

<sup>58</sup> Silbert & Pines, “Child Abuse as Antecedent,” 410 (70% of those 200 prostituted women who were sexually abused as children explicitly reported that sexual abuse affected their entry into prostitution, while a greater number strongly indicated so in open-ended responses); cf. Ronald L. Simons and 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”). It is notable Silbert & Pines’s sample of 200 juvenile and adult prostituted women reportedly had an “almost total lack of positive social supports, and . . . an extremely negative self-concept and a depressed emotional state” when entering prostitution. Silbert & Pines, “Entrance into Prostitution,” 486.

children, homelessness, but *also* sex and economic discrimination, and often racism (more below). Accordingly, while samples of young adults prostituted in Sweden in the Gothenburg area confirmed high associations to prior childhood (sexual) abuse, neglect, and homelessness,<sup>59</sup> a nationally representative youth survey (including LGBT-populations) further corroborated such factors as well as controlling for and adding *socioeconomic factors* and *nationality* as predictors of entry to prostitution.<sup>60</sup> Regarding race and economic discrimination in the U.S., these intersect in the sense that *African American* women and girls are highly overrepresented in prostitution.<sup>61</sup> Similarly, in Canada *First Nation* women are overrepresented.<sup>62</sup> Additionally, as the Swedish National Council for Crime Prevention (BRÅ) recently found, poverty and discrimination are two key structural factors for recruitment into trafficking to Sweden, Finland, and Estonia.<sup>63</sup> Many trafficked women and girls belong to *minority groups* such as the Baltic Russian-speaking minority and the *Roma* people in Eastern Europe, and the “majority come from the lowest social strata,” as well as many were “single mothers” and unemployed.<sup>64</sup>

Various severe economic hardships exist for prostituted populations in such otherwise socioeconomically different countries as the U.S., South Africa, Canada, and Sweden, which keeps them trapped in the sex industry.<sup>65</sup> The exploitation that follows in prostitution, the symptoms, the trauma, often appear to entail a ruined psychic and social development for prostituted persons, as well as a lack of realistic alternative means for income.<sup>66</sup> Thus, prostituted

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<sup>59</sup> Jonna Abellsson & Anna Hulusjö, *I sexualitetens gränstrakter: en studie av ungdomar i Göteborg med omnejd som säljer och byter sexuella tjänster [Around the Borders of Sexuality: A Study of Youth in Gothenburg and Surroundings Who Sell or Barter Sexual Services]* 97–99 (2008).

<sup>60</sup> Gisela Priebe and Carl-Göran Svedin, “Unga, sex och internet,” in *Se mig: Unga om sex och 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,” in Ungdomsstyrelsen, *Se mig*, 156, 158, 161-69.

<sup>61</sup> 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 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.”).

<sup>62</sup> See, e.g., Farley, Lynne, and Cotton, “Prostitution in Vancouver,” 242 (finding 52% of 100 prostituted women of First Nations descent, 1.7-7% of Vancouver population); Special Committee, *Pornography and Prostitution in Canada*, 347 (“On the prairies . . . most of the prostitutes are young native women.”).

<sup>63</sup> 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), 36-43.

<sup>64</sup> *Ibid.*, 56.

<sup>65</sup> See, e.g., 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 (United States); Chandré Gould, *Selling Sex in Cape Town: Sex Work and Human Trafficking in a South African City*, (Pretoria: Institute for Security Studies, 2008), 115, available at <http://www.iss.co.za/pgcontent.php?UID=3797> (“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”); Special Committee on Pornography and Prostitution in Canada, *Pornography and Prostitution in Canada*, vols 1 & 2 (Ottawa, Can: Supply & Services, 1985), 376-77 (“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.”);

<sup>66</sup> Cf. Judith Lewis Herman, “Introduction: Hidden in Plain Sight; Clinical Observations on Prostitution,” in *Prostitution, Trafficking, and Traumatic Stress*, ed. Melissa Farley, 11.

persons are rarely reintegrated into the community on equal terms. In effect, they get stuck in “coercive circumstances” from which they cannot escape. This situation is reflected in survey responses from nine countries with prostituted persons where 89% ( $n = 785$ ) explicitly stated they wanted to leave prostitution, but could not make that happen.<sup>67</sup> Such results document sexual slavery, not a job.<sup>68</sup> Apart from poverty and desperation factors such as child sexual abuse, homelessness, sex discrimination, and racial or ethnic discrimination thus propel persons into prostitution. Thus, prostitution in pornography is also *practice of inequality* where historically subordinated groups in society are particularly vulnerable to be sexually exploited.

### **Addressing Critics Supporting Toleration of the Sex Industry**

Other legal policies are often promulgated in the academic debate that, to various degrees, advocate that states may better reduce the harms of prostitution by accepting certain forms of it as more or less inevitable. For instance, sociologist Ronald Weitzer takes the view that “prostitution cannot be *reduced* to gender oppression and is much more complex,” thus arguing for a shift in focus to “prostitution as a form of work” without denying “the continuing importance of mores and legal norms.”<sup>69</sup> Similarly, legal scholar Jane Scoular argues that “[v]iewing prostitution as the epitome of gender violence . . . obscure the contingencies and diversity of the structures under which it materializes.”<sup>70</sup> However, these accounts evade that tricks overwhelmingly are men and prostituted persons are often women. Such observations indicate gender oppression. Weitzer’s sweeping observations noting “variation across time, place, and sector . . . in terms of workers’ experiences as well as power relations between workers, customers, and managers”<sup>71</sup> do not, without more, support the proposition that prostitution is *not* an expression of gender oppression, nor even that its connection to gender oppression is particularly complex.

The gender disparity in using and being used in prostitution is not complex and should be theoretically and empirically addressed—not evaded. It is notable that when discussing how “female customers . . . are a small fraction of the market but have important theoretical implications,” Weitzer himself observes that “patterns of economic inequality between buyer and seller . . . can translate into unequal power relations.”<sup>72</sup> Such recognitions do not suggest prostitution being contingent, diverse, or a complex form of work. Rather, these observations suggest a practice of *sex inequality*, even when women buy men for sex. Nonetheless, Weitzer’s position implies that by reducing some instances of violence and increasing some safety precautions, the extreme power imbalance between the prostituted person and the trick is tolerable though not necessarily mitigated. This view appears implicit when, for instance, he admits that “indoor

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<sup>67</sup> Farley et al., “Prostitution in Nine Countries,” 51, 56.

<sup>68</sup> Considering tricks and pimps who buy/sell persons for sex in nine countries where 89% of prostituted persons *explicitly* say they want to leave but cannot, 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.” Convention to Suppress the Slave Trade and Slavery, art. 1(1), Sept. 25, 1926, 60 L.N.T.S. 253 (entered into force Mar. 9, 1927).

<sup>69</sup> Ronald Weitzer, “Prostitution as a Form of Work,” *Sociology Compass* 1, no.1 (2007): 144.

<sup>70</sup> Jane Scoular, “Criminalizing ‘Punters’: Evaluating the Swedish Position on Prostitution,” *Journal of Social Welfare and Family Law* 26, no. 2 (2004): 202 (self citation omitted).

<sup>71</sup> Weitzer, “Prostitution as a Form of Work,” 144.

<sup>72</sup> Ronald Weitzer, “Sociology of Sex Work,” *Annual Review of Sociology* 35 (2009): 227.

work” is not a safe practice per se, but nonetheless claims that “there is no doubt that it is safer than street-level work.”<sup>73</sup> One asks why even a reduced level of abuse is acceptable at all.

Regarding brothels (a common form of legal prostitution) and other indoor venues, researchers have noted how prostituted persons often are more vulnerable there than on the streets. This is due to their restricted physical scope for action, lack of effective escape routes, and highly reduced transparency from outside, while tricks and pimps benefit from greater privacy and discretion.<sup>74</sup> It might not always be the case, and “vulnerability” and “safety” are complex concepts in this context indeed. However, those who insist that the indoor venues are “safer” often base such claims on questionable data, which should caution the reader.

For instance, in a recent Ontario Court decision in Canada invalidating a statute against “living on the avails” of prostitution which had been used against pimps and traffickers,<sup>75</sup> a study of legal brothels in Nevada was invoked,<sup>76</sup> which supported the practical outcome of the decision that third parties were not seen as exploiting the coercive circumstances of prostituted persons.<sup>77</sup> However, the Court did not notice how the authors of this study admitted having gained access to brothels with help from the Nevada Brothel Association and brothel attorneys.<sup>78</sup> The media’s prior attention to the authors were implied to have made a favorable impression among these gatekeepers.<sup>79</sup> Other research-teams are, however, regularly denied entry into brothels.<sup>80</sup> (*see, e.g.,* Farley 2007a, 23; denied entry in 6 out of 14 Nevada brothels; Nemoto et al. 2003, 247; denied entry in 13 out of 25 parlors in San Francisco). Not surprisingly, the former researchers remarked that the prostituted women they interviewed “invoke feeling protected” while “managers and owners see themselves as protecting women from violence on the streets.”<sup>81</sup>

Other attempts to favorably present brothels distinguish them on basis of their populations’ childhood narratives, for instance claiming that “[c]hildhood abuse (neglect, violence, incest) is part of the biography of some prostitutes, though it is more common among street workers”<sup>82</sup> (Weitzer 2009a, 219). However, John Potterat and colleagues noted some time ago (1990), when studying 1022 prostituted women in Colorado Springs, that “the same woman may work in different settings, simultaneously or sequentially. Rigid stratification of prostitutes into ‘high-

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<sup>73</sup> Weitzer, “Prostitution as a Form of Work,” 145; *cf.* Ronald Weitzer, “Prostitution: Facts and Fictions,” *Contexts* 6, no. 4 (2007): 28-30.

<sup>74</sup> 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): 950-64; Jody Raphael and Deborah L. Shapiro, “Reply to Weitzer,” *Violence Against Women* 11, no. 7 (2005): 965-70.

<sup>75</sup> *Bedford v. Canada*, 2010 ONSC 4264, [2010] O.J. No. 4057 ¶¶ 259–72, 379 (Can. Ont. Super. Ct.) (QL).

<sup>76</sup> *See, e.g., id.* ¶¶ 211- 13, 325 (e)

<sup>77</sup> *See, e.g., id.* ¶¶ 429–31.

<sup>78</sup> Barbara G. Brents & Kathryn Hausbeck, “Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy,” *Journal of Interpersonal Violence* 20, no.3 (2005): 294 n.1.

<sup>79</sup> *Ibid.*

<sup>80</sup> Farley, *Prostitution in Nevada*, 23 (denied entry in 6 out of 14 Nevada Brothels); 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 (denied entry in 13 out of 25 parlors in San Francisco).

<sup>81</sup> Brents & Hausbeck, “Violence & Brothel Prostitution,” 271.

<sup>82</sup> Weitzer, “Sociology of Sex Work,” 227.

class' or lower categories is not meaningful, either socially or ecologically.”<sup>83</sup> More recent samples also suggest that possibly the majority of prostituted persons drift between venues.<sup>84</sup> Nonetheless, researchers such as Weitzer attempt to draw these less plausible distinctions, and basing it on questionable data.<sup>85</sup>

The research review so far strongly suggest that the question to ask is not how we can produce “feminist” pornography, but rather *why should we produce pornography?* And, perhaps more importantly, *why* should any woman have to be prostituted to produce it? No empirical evidence has suggested it is not typically prostituted persons, frequently homeless children and teenagers, or simply coerced, poor, unequal, or desperate women who figure in the materials. If there were a convincing preponderance of empirical evidence showing where mass-consumed pornography was made under non-coercive conditions or circumstances of social equality between the sexes, such data would indeed deserve to be considered. However, such evidence exist only in the form of basically unverified claims of a large prevalence of “home-made” or “amateur” pornography that would be different in such regards. For instance, in Sweden such claims without citations were recently made by journalists, social commentators, and even law professors in debates conducted in public forums,<sup>86</sup> despite that to date no evidence or data exist on the prevalence of such pornography compared to materials produced by the organized

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<sup>83</sup> John J. Potterat et al. “Estimating the Prevalence and Career Longevity of Prostitute Women,” *Journal of Sex Research* 27, no. 2 (1990): 234.

<sup>84</sup> Jody Raphael & Deborah L. Shapiro, “Violence in Indoor and Outdoor Prostitution Venues,” *Violence Against Women* 10, no. 2 (2004): 131 (*n* = 222); 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 (*n* = 23); Lisa A. Kramer, “Emotional Experiences of Performing Prostitution,” in *Prostitution, Trafficking and Traumatic Stress*, 191 (*n* = 119); Farley, *Prostitution in Nevada*, 29 (*n* = 45); Farley, “Bad for the Body,” 1099 (citing NZ-study *n* = 46).

<sup>85</sup> The first of the two studies that Weitzer’s claims above were based upon is from Australia, and did not survey any women in street prostitution. It was based on “call girls,” with women in brothels as a “control group.” Roberta Perkins and Frances Lovejoy, *Call Girls: Private Sex Workers in Australia* (Crawley: Univ. W. Aust. Press, 2007), 10. Furthermore, only 95 responded to the survey out of 244 women who responded to telephone calls, and half of the total calls were left unanswered. *Ibid.*, 7 & 161. That is an unusually high drop-out rate, but it receives no attrition analysis. Moreover, virtually no information at all regarding drop-out rates or other sampling problems is provided regarding the brothel “control group.” *Ibid.*, 10 & 161. Altogether there appears thus to be a serious sampling bias at work, making results incomparable to studies including street prostitution. Weitzer then also cites a Bristol sample of 71 prostituted women in massage parlors compared to an equal number on the streets. 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. Respondents below age 16 were declined, *Ibid.*, 876, though this is a common age in prostitution. The authors themselves raised concerns that “[t]he small sample size for each group may mean that important differences have not reached significance.” *Ibid.*, 879. Just as with the former study, such information is not passed on to Weitzer’s readers.

<sup>86</sup> See, e.g., Madeleine Leijonhufvud, “Hemma-porren stärker sexindustrin” [Home-Made Porn Strenghtens the Sex Industry], *Newsmill*, December 29, 2008, <http://www.newsmill.se/> (accessed Feb. 11, 2010) (author is Criminal Law Professor); Alexa Wolf, “Madeleine Leijonhufvuds porrförbud håller på att förverkligas av hemma-porren” [Madeleine Leijonhufvud’s Porn Prohibition is being Made Real by Home-Made Porn], *Newsmill*, December 27, 2008, <http://www.newsmill.se/> (accessed Feb. 11, 2010) (author is journalist and TV-producer); Elin Grelsson, “Amatörporr kan hota både industrin och sexuella normer” [Amateur Porn can Threaten the Industry as well as Sexual Norms], *Newsmill*, December 26, 2008, <http://www.newsmill.se/> (accessed Feb. 11, 2010) (author is freelance writer and commentator); Carl Johan Rehbinder, “Hemma-porren är den nya sexuella revolutionen” [Home-Made Porn is the New Revolution], *Newsmill*, January 3, 2009, <http://www.newsmill.se/> (accessed Feb. 11, 2010) (author claims to be an artist, photographer, producer of a webpage, and writer of a collection of short stories, all with sexual content); See also Anna Lyrenäs, “Internet dödar porren” [Internet Kills Porn], *Arena*, no. 5, 2009, 12-15 (author is student at school of journalism).

industry. Similarly, no evidence exist showing female-directed materials would be made under different conditions, i.e., under less coercive circumstances, or under conditions of social equality, than what has already been documented.<sup>87</sup> What seems also in need to be asked, though it is not the primary concern for this paper, is whether existing coercive circumstances that are necessary to produce pornography will spill over onto the consumer, in the sense that “he” will want to subordinate or brutalize other women in order to experience in reality what he is experienced through mediation in pornography?

### **A Brief Note on Consumption Harms**

Compared to prostitution in the flesh, pornography has a specific circular power that reinforces sexual inequality. Making women perform as sexual puppets (as “acting” objects), it eroticizes sexual subordination of women for consumers, who then find existing and further subordination justified. This effect has been persistently documented on “normal” men as well as some women. Meta-analyses from 1995 of scholarly experimental literature showed that explicitly violent as well as non-violent sexual materials (except mere pictorial nudity) increase various rape-myths significantly, such as victim-blaming, and increase aggression, sexual callousness, disinterest in the suffering of others, and desensitization to violence against women, regardless of mediating/moderating variables.<sup>88</sup> A more recent meta-analysis from 2010 has confirmed beyond cavil that experimental and nonexperimental studies converge in showing a “significant overall relationship between pornography consumption and attitudes supporting violence against women.”<sup>89</sup> Contrary to what was reported in 1995, where experimental studies were said to exhibit a significant effect while nonexperimental studies were not, this study shows otherwise.<sup>90</sup> Another recent analysis from 2009 similarly found that studies consistently show, across experimental and nonexperimental conditions and differing populations, that

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<sup>87</sup> A recent comparison, published in 2008, of an equal number of randomly selected female-directed versus male-directed scenes ( $n = 122$ ) from 44 randomly selected *top selling* pornography movies ( $n = 250$ ) suggests not only that the content of materials are not much different with women as directors, but that neither is the level of violence, aggression, and degrading treatment women performing in pornography must endure. Sun et al., “Male and Female Directors,” 317-20. It is, of course, not possible to disprove by 100% something that appears having never existed. However, in a world where women are yet sexually and socially unequal to men, the existence of a production of “sexually explicit media that are primarily intended to sexually arouse the audience” employing real women under uncoercive circumstances, and conditions of mutual equality, even if directed or produced by women, must necessarily be subject to skepticism.

<sup>88</sup> Mike Allen, et al., “Exposure to Pornography and Acceptance of Rape Myths,” *J. Comm.* 45, no. 1 (Winter 1995): 18-19; Mike Allen, Keri Brezgel and Dave D'Alessio, “A Meta-Analysis Summarizing the Effects of Pornography II Aggression After Exposure,” *Human Comm. Res.* 22, no. 2 (Dec. 1995): 258; Cf. Elisabeth Oddone-Paolucci, Mark Genius and Claudio Violato, “A Meta-Analysis of the Published research on the Effects of Pornography,” in *The Changing Family and Child Development* ed. Mark Genius, Elisabeth Oddone-Paolucci and Claudio Violato (Aldershot: Ashgate, 2000) 48, 52-53.

<sup>89</sup> See Gert Martin Hald, Neil Malamuth, and Carlin Yuen, “Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies,” *Aggressive Behavior* 36 (1) (2010): 18. Significantly higher correlations were found between such attitudes and the use of sexually violent pornography compared with nonviolent pornography, but the latter relationship was also found significant.

<sup>90</sup> Hald, Malamuth, and Yuen, “Pornography and Nonexperimental Studies,” 15.

pornography use risks sexually aggressive outcomes, particularly for men who score high on other risk factors for this behavior.<sup>91</sup>

Prolonged experimental exposure to common non-violent pornography was previously found to produce unfounded beliefs in sexual promiscuity as well as acceptance of male dominance and female servitude,<sup>92</sup> a significant leniency toward rapists when judging rape cases, and a reduced concern for those victimized as well as self-assessed proclivity in men to force sex on women.<sup>93</sup> These results converge with more recent actual self-reports, in one case from a large ( $n = 2972$ ) representative sample of U.S. college men, where correlations between consumption and sexually coercive behavior were significant for all, and dramatically for highly predisposed men.<sup>94</sup> The latter studies of correlations between pornography consumption and actual sexual aggression controlled for other known predictors of sexual aggression.<sup>95</sup> Hence, they could establish that pornography consumption causes men, in varying frequencies, to report, “e.g., using a position of power over a woman to get her to engage in unwanted oral sex, holding a woman down and causing her pain in an attempt to get her to engage in unwanted intercourse, etc.,” or “arguing heatedly, yelling and/or insulting, pushing, hitting the other person, and hitting with something hard.”<sup>96</sup>

The findings above are consistent with reports from prostituted persons of how clients often force them to imitate pornography. In the San Francisco study mentioned above ( $n = 200$ ), 193 women had reported rape, of whom twenty-four percent made unsolicited comments that rapists referred directly to pornography and insisted that victims enjoyed the rape and extreme violence.<sup>97</sup> Forty-seven percent in the nine-country study mentioned above ( $n = 802$ ) reported being upset by attempts at making them imitate pornography.<sup>98</sup> A woman attested for a group of survivors during a public hearing in Minneapolis: “Men witness the abuse of women in

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<sup>91</sup> 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.

<sup>92</sup> Dolf Zillman and Jennings Bryant “Effects of Prolonged Consumption of Pornography on Family Values,” *J. of Family Issues* 9, no. 4 (Dec. 1988): 518-44.

<sup>93</sup> Dolf Zillman, “Effects of Prolonged Consumption of Pornography,” in *Pornography: Research Advances and Policy Considerations*, ed. Dolf Zillman and Jennings Bryant (Hillsdale, N.J.: Erlbaum, 1989) 127, 131-38, 145-47 (summarizing studies). Non-violent pornography received higher effects than violent pornography, albeit effects were more pronounced for normal men with some degree of psychoticism. *Ibid.*, 148-150 (citing study by James Check); See also Daniel G. Linz, Steven Penrod and Edward Donnerstein, “Effects of Long-Term Exposure to Violent and Sexually Degrading Depictions of Women,” *J. of Personality & Social Psych.* 55, no. 5 (1988): 766 (finding less sympathy and decreasing empathy towards those victimized by rape after exposure); Dolf Zillman and Jennings Bryant, “Effects of Massive Exposure to Pornography,” in *Pornography and Sexual Aggression*, ed. Neil M. Malamuth and Edward Donnerstein (Orlando: Academic Press, 1984), 133-35 (moderately and massively exposed subjects to non-violent materials recommended lower punishment for rapists, trivialized sexual abuse, were less supportive of women’s liberation movement, and men’s callousness toward women increased exponentially).

<sup>94</sup> Neil M. Malamuth, Tamara Addison, and Mary Koss, “Pornography and Sexual Aggression. Are There Reliable Effects and Can We understand Them?” *Ann. Rev. Sex Res.* 11 (2000): 75-81. Pornography was operationally defined by asking respondents of their use of Playboy, Penthouse, Chic, Club, Forum, Genesis, Gallery, Oui or Hustler. *Ibid.*, 63.

<sup>95</sup> See Malamuth, Addison, and Koss, “Pornography and Sexual Aggression.”; Vanessa Vega and Neil M. Malamuth, “Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors,” *Aggressive Behavior* 33 (2007) ( $n = 102$ ).

<sup>96</sup> Malamuth, Addison, and Koss, “Pornography and Sexual Aggression,” 63-64.

<sup>97</sup> Silbert and Pines, “Pornography and Abuse of Women,” 863-64.

<sup>98</sup> Farley et al., *Prostitution in Nine Countries*, 44, 46.

pornography constantly, and if they can't engage in that behavior with their wives, girlfriends, or children, they force a whore to do it."<sup>99</sup> A Swedish 1993 government appointed commissioner and former Supreme Court Justice, Inga-Britt Törnell, similarly noted that according to

the Prostitution Unit in Gothenburg [social outreach workers], it is not unusual that men approach prostitutes with a pornography magazine and points out at the pictures what sexual services they want to have performed. Prostituted women also report, according to the Prostitution Units, that the sex purchasers nowadays, inspired by the pornography, asks for more unusual and more gross sexual services than before.<sup>100</sup>

Furthermore, from the commissioners' interviews with 60 tricks, where 50 responded they had used pornography, 8 men reported they "sometimes bought or rented a pornography film instead of going to a prostitute" and 6 men reported they "used to get inspiration from pornography magazines for various intercourse positions, which they later wanted to perform with some prostitute."<sup>101</sup> Moreover, the commission had found that johns often were consumers, and that "[m]any purchasers in the sex trade [prostitution] are high-consumers of pornography." Additionally, it noted that it "is often also the same women who participate at the production of pornography as in the sex trade [prostitution]."<sup>102</sup>

Women and girls who are not prostituted have also repeatedly testified about similar coercion as the former.<sup>103</sup> An agency for battered women asked clients whether abusers used pornography and conservatively estimated, one half did.<sup>104</sup> In a rape case, six adolescent boys gang-raped a juvenile while reenacting a specific pornography magazine's outlay.<sup>105</sup> Specialized agencies meet an increasing number of survivors of throat-rape, sometimes reporting assailants were referring to the movie *Deep Throat* prior to their assault.<sup>106</sup> Sexual objectification in media and culture is common today, and is accelerated by the influence of pornography which steadily trickles down into the mainstream culture.<sup>107</sup> This would predictably result in increased coercion simultaneously with social desensitization, and an accelerating demand for prostitution as well as for pornography and other forms of objectified sex. This paper restricts its inquiry to the issue of

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<sup>99</sup> *Harm's Way*, 116 (testimony by T.S.)

<sup>100</sup> Statens offentliga utredningar [SOU] 1995:15 *Könshandeln* [Sex Trade] [government report series], 135 (Swed.).

<sup>101</sup> *Ibid.*, 136.

<sup>102</sup> *Ibid.*, 136.

<sup>103</sup> See, e.g., Att'y General's Comm., *Final Report*, 767-835; *Harm's Way*, 108-21, 145-47, 260-65, 370-425 et passim; Diana E.H. Russell, *Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment* (Beverly Hills CA: Sage, 1984), 125-26.

<sup>104</sup> *Harm's Way*, 423-24 (written submission of Gail Kielson, Boston MA). For a comparative documentation of possession of pornography among child molesters, see, e.g., "Helms Amendment No. 780. Exhibit 1: 'Research on Pornography: Evidence of Harm.'" *Cong. Rec.* 137 (1991) p. 17560 (introduced July 10th), p. 18899 (passed July 18th) (citing, *inter alia*, testimony from an LAPD Detective describing how 80 percent of 700 arrested child molesters during ten years possessed either adult or child pornography). (Text from: *Congressional Record Permanent Digital Collection*); Accessed: May 09, 2009.

<sup>105</sup> Att'y General's Comm., *Final Report*, 777 (citing National Women Judge Conference, Oct. 1986).

<sup>106</sup> *Harm's Way*, 214-15 (letter from Flora Colao, founder/director of programs for sexual assault survivors).

<sup>107</sup> See generally American Psychological Ass'n (APA), *Report of the APA Task Force on the Sexualization of Girls*, ed. Eileen L. Zurbriggen et al. (Washington DC, 2007), [www.apa.org/pi/wpo/sexualization.html](http://www.apa.org/pi/wpo/sexualization.html) (reviewing research); Catharine A. MacKinnon, "X Underrated," *The Times Higher Education Supplement*, May 20, 2005, 18 et seq. (analyzing the role of pornography and how it increasingly influences mainstream culture).

how to apply prostitution laws on pornographers, although the broader issue of how to address consumption of pornography per se also merits attention.

### **DEMOCRATIC THEORY: OBSTACLES & POTENTIALS TO CHANGE**

Considering the empirical evidence previously reviewed on the amount of exploitation, abuse, and discrimination involved in commercial sex raises many questions why existing laws against such practices have not been applied to stop them. One obstacle relates to the fact that production of most pornography literally feeds on social vulnerability among performers, whom for various reasons mentioned have been subjected to coercive circumstances such as early childhood abuse, poverty, or social discrimination. Thus, most existing laws against sexual abuse or exploitation, such as rape laws, or laws against sexual coercion, torture, and assault have never adequately addressed the daily and harmful exploitation of social inequality that is the modus operandi of the industry. Hence, the typical “sex contract” in the industry is only consensual on paper; i.e., the overwhelming majority of persons in prostitution, whether in pornography or in other venues, are demonstrably in a situation with lack of real and acceptable alternatives but to submit to exploitation, even when they knowingly risk further abuse and serious harms.

Bluntly put, but as prostitution survivors typically describe their experiences, one person in legal brothel prostitution said it was “like you sign a contract to be *raped*,” another one said “[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, *rape*, violated,” and a third one explained that she “cried all the time” during her first six month in legal prostitution.<sup>108</sup> Accordingly, prostitution has been described as paid rape by many prostituted persons, tricks, and observers alike.<sup>109</sup> No prostituted persons can, however, use a rape law in such circumstances when that law is premised on ostensive use of violence or threats, or which require evidence of such in order to legally establish non-consent—a typical approach taken under many rape laws.<sup>110</sup> For instance, the Swedish Criminal Code’s rape provision is premised upon a showing of express force or threats to such ends, with an exception only for persons being in a “helpless state.”<sup>111</sup> If prostituted persons can, say, negotiate the price, arguably they are not “helpless”; however, evidence reviewed above overwhelmingly show they are exploited under circumstances that are coercive.

Much social change aiming at promoting social equality in democracies generally, which pornography apparently contravenes (see above), have historically been institutionalized by establishing new personal or collective rights and corresponding government responsibilities. However, assuming efforts to promote equality need to be both broad enough to be effective, as well as not overly sweeping and arbitrary, it should be noted from the above that the documented

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<sup>108</sup> Melissa Farley, *Prostitution in Nevada*, 34 (emphasis added).

<sup>109</sup> See, e.g., Giobbe, “Liberal Lies,” 121 (noting survivors described it “like rape”); Farley, “Bad for the Body,” 1100 (noting “survivors view prostitution as almost entirely consisting of unwanted sex acts or even, in one person’s words, paid rape”); Melissa Farley, “Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly,” 18 *Yale Journal of Law & Feminism* (2006), 131 (quoting trick saying “If you look at it, it’s paid rape”).

<sup>110</sup> See generally Catharine A. MacKinnon, *Sex Equality*, 2nd ed., University Casebook Series (New York: Foundation Press, 2007), 779 et seq (discussing, inter alia, different degrees of requirements for a showing of violence, threats of violence, and similar forced conditions under various state rape laws in the U.S.).

<sup>111</sup> Brottsbalken [BrB] [Criminal Code] 6:1, *paras.* 1-2 (Swed.).

harms associated with pornography production are not simply related only to gender inequality, but also to problems of poverty, child abuse and neglect, racism, ethnic or other forms of social discrimination (e.g., discrimination of lesbian, gay, bisexual, and transsexual (LGBT) persons). These complex circumstances must be seriously considered for any political and legal strategy to be effective. Hence, in this section I will account for major problems with democratic accountability regarding such constituencies that are most exposed to the harms, particularly with regards to the production of pornography. The outlook of this more theoretical section progresses from the perspective of how conceptualizations of democracy and equality have developed historically, beginning the analysis at the founding structures of modern liberal democracies which (as the later empirical analysis will reveal) is still a major obstacle to change.

### **Classic Democratic Theory, Gender-Based Violence, & the Sex Industry**

One of the main features of early concepts of democracy, as opposed to autocracy or rule by inheritance, was the principle of rough proportional decision-making among either the citizenry or their elected representatives. For instance, in the ancient Greece democracy and in republican Rome, comparatively few additional political rights associated with modern forms of democracy existed for those regarded as citizens (already a small minority). The dangers of the relatively unbridled principles of decision-making in such democracies notwithstanding, it was notably seen to have significant merits over the potential tyranny of dictatorship by Niccolò Machiavelli, among others, who generally preferred popular rule over elite authoritarianism on the rationale that including populations in the government process would produce more stability and better judgments, in part since various factions would then be forced to compromise and collaborate.<sup>112</sup> This view was later subject to intense scrutiny by modern liberal thinkers, however. For instance, John Stuart Mill disfavored granting the masses power by popular vote, believing they would use it to lash out arbitrarily against privilege and wealth and demand more substantive equality. In his seminal *On Liberty* (1859), Mill goes to some length in outlining the view that with more substantive social equality, people will not adequately appreciate what he saw as socially productive contributions made by individual “geniuses,” wealthy and privileged as they often were.<sup>113</sup> Not surprisingly in his *Considerations on Representative Government* (1961), published a couple of years later, he outlined a complex representative democracy that included a franchise graded according to wealth and education.<sup>114</sup>

In taking a stand against granting too much power to popular democratic decision-making, Mill reiterated a theme from early contract theorists, such as John Locke, whom sought a more restricted state concerned mainly with protecting life, liberty, and private property.<sup>115</sup> Similarly, Mill’s ideas are reminiscent of liberals such as James Madison and Montesquieu, whom sought a number of checks and balances to control democratic legislatures so they would not make far-

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<sup>112</sup> See, e.g., Niccolò Machiavelli, *Machiavel's Discourses Upon the First Decade of T. Livius*, trans. E.D., 2nd ed. (London, 1674) (ca. 1513-19), chs. 3-6, 55-58, available at <http://eebo.chadwyck.com/home>.

<sup>113</sup> John Stuart Mill, *On Liberty*, ed. introd. by Gertrude Himmelfarb (Harmondsworth: Penguin, 1985) (1859), ch. 3.

<sup>114</sup> See David Held, *Models of Democracy*, 3rd ed. (Cambridge, UK: Polity Press, 2006), 86-87 (citing Mill).

<sup>115</sup> John Locke, *Two Treatises of Government* (Hamilton, Ont.: McMaster Univ. Arch. Hist. Econ. Thought, 2000) (1690), Ch. IX, available at <http://www.efm.bris.ac.uk/het/locke/government.pdf>.

reaching decisions too easily.<sup>116</sup> One of Locke's main concern was that the "state" would use its power arbitrarily by, for instance, violating the sanctity of the private sphere.<sup>117</sup> Montesquieu and Madison expressed a similar fear that some collective "faction" would control the state, invidiously using its power against their opponents.<sup>118</sup> Indeed, many political regimes, from left to right, representing "factions" of the population, have retorted with the powers of the state and tortured and deprived their opponents of their life, liberty, and property. Political persecutions in South America during the Cold-War, arbitrary punishments of imagined or real dissidents in the former Soviet Union, and genocides performed on Croatian populations in Kosovo may all be examples of precisely the kind of atrocities thought to be guarded against by the teachings of Locke, Montesquieu, and Madison. However, as noted most incisively by Robert Dahl already in 1956, the remedy of an assortment of constitutional checks and balances to such horrors may be insufficient, as "in the absence of certain social prerequisites, no constitutional arrangements can produce a nontyrannical republic. The history of numerous Latin-American states is, I think, sufficient evidence."<sup>119</sup> Dahl's remark may be just as valid for exploitative abuse in the pornography industry, which de facto are extensively tolerated among many nations.

Similarly as state-sanctioned terror often targets a distinct social, political, religious, ethnic, or national group selected on basis of their group membership, acts of gender-based violence are generally systematic and performed by one clearly distinct social group against another group selected on basis of their gender.<sup>120</sup> Hence, the form of state action envisaged as dangerous in classic liberal theory, particularly in the conceptualization of freedom as best being preserved by minimal state intervention (negative freedom), is merely one of several ways that social factions (such as men) may exercise their powers over others (women). Inequality itself can also be perceived as another form of power; economic inequality may lead to exploitation, e.g., when a person is vulnerable to starvation or severe social exclusion. The state does not necessarily need to be directly involved in exercising this power for it to be exercised, though in terms of the state's legal architecture it is indirectly involved in its exercise. Similarly, gender inequality may entail that many women do not possess enough social power to avoid exploitative relations with men. Gender subordination and inequality are thus circumstances which make persons particularly vulnerable to abuse of power, and conversely, as recognized by the United Nation's Declaration on the Elimination of Violence Against Women (1993), "violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men."<sup>121</sup> Women may fear violence, thus accept an exploitative situation. There is, in other words, a reciprocal relationship between gender-based abuse and gender inequality.

As men belonging to a privileged class among men, Locke, Montesquieu, Madison, and Mill most likely had no need for protection of liberty and life in the private sphere. However, what they more obviously had a need for was a "social contract" protecting them from arbitrary

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<sup>116</sup> On Montesquieu and Madison, see generally Held, *Models of Democracy*, 65-75.

<sup>117</sup> See generally Locke, *Two Treatises*, ch. IX.

<sup>118</sup> See e.g. Held, *Models of Democracy*, 65-75.

<sup>119</sup> See Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), 83.

<sup>120</sup> See Catharine A. MacKinnon, "On Torture," in *Are Women Human*, 17-27, for a critical political and legal analysis of gender-based violence compared to state-sanctioned terror in terms of their common patterns.

<sup>121</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmbl. *para* 6, U.N. doc. A/RES/48/104 (Dec. 20, 1993) [hereinafter 1993 U.N. Declaration on VAW].

intrusions from other men in their private sphere, or protecting them from a totalitarian state acting on behalf of factions of other men. Locke's famous critique of Thomas Hobbes willingness to confer power in the hands of one sovereign ruler is instructive to their perspective:

To ask how you may be guarded from harm or injury on that side, where the strongest hand is to do it, is presently the voice of faction and rebellion. As if when men, quitting the state of Nature, entered into society, they agreed that all of them but one should be under the restraint of laws; but that he should still retain all the liberty of the state of Nature, increased with power, and made licentious by impunity. This is to think that men are so foolish that they take care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay, think it safety, to be devoured by lions.<sup>122</sup>

The power of the state is likened to that of the animal king, whereas the power of private actors is seen as little more than a nuisance. Much has been written about the deficiencies of this view in terms of the limited concept of politics it offers in not adequately recognizing gendered power in the putatively private sphere.<sup>123</sup> One clear-cut formulation of why much liberal thought did not adequately account for private actors' abuse of power is that "if men don't need it, women don't get it."<sup>124</sup> The implication is that political issues of power and inequality are recognized if men, as a group, can relate to them—e.g., religious persecution, harassment at work (even sexual), or racial discrimination. Issues such as rape, domestic abuse, and prostitution are not easily recognized in the collective experiential framework of men. Among the six examples of power mentioned it may be noted that the first three are primarily visible in public, whereas the other largely occur either in private (rape, domestic abuse), or even when they might be visible in public they tend to be regarded as "private business" (prostitution).

Despite its formidable impact on our democratic systems, the classical liberal public/private dichotomy is beginning to be replaced by a more nuanced view of power in numerous contemporary sources of international law; gender-based violence in the private as well as public spheres is now regarded a human rights violation that states are obliged to provide adequate protections and remedies for.<sup>125</sup> Deeming from the influential sway of liberalism, this could

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<sup>122</sup> Locke, *Two Treatises of Government*, 144-45, ¶ 93 ("harm" in first sentence omitted in source reprint).

<sup>123</sup> Carole Pateman's seminal work on social contract theory are among the more prominent in political theory. See Carole Pateman, *The Sexual Contract* (Cambridge, UK: Polity Press, 1988).

<sup>124</sup> MacKinnon, "On Torture," 26.

<sup>125</sup> See, e.g., Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, pmbl. 9, arts. 3(4), 4(2), July 11, 2003, available at <http://www.africa-union.org> (last visited April 14, 2005) [hereinafter African Protocol] (entry into force Nov. 26, 2005) (repetitiously mentioning gender-based- alternatively violence against women as practices incompatible with provisions guaranteeing human rights and the elimination of all forms of discrimination); Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará), June 9, 1994, arts. 6 & (a), 33 I.L.M. 1534, 1536 (entry into force Mar.5, 1995) ("The right of every woman to be free from violence includes... [t]he right of women to be free from all forms of discrimination..." Wordings suggest discrimination and violence interrelated and inseparable); Fourth World Conference on Women, Sept. 4-15, 1995, *Beijing Declaration and Platform for Action*, ¶ 118, U.N. Doc. A/CONF.177/20/Rev.1. [hereinafter: *Beijing Declaration*] ("Violence against women... have led to domination over and discrimination against women by men."); 1993 U.N. Declaration on VAW, pmbl. para 6 (recognizing that implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) would contribute to the elimination of violence against women and "that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men"); See also Comm. on the Elimination of Discrimination Against Women, 8<sup>th</sup> Sess., *General Recommendation No. 12*, U.N. Doc A/44/38 (Mar. 6, 1989) (considering that art. 2, 5, 11, 12 and 16 of the

hardly have been an easy task to accomplish in the international legal community, not to mention getting individual states to comply with such norms. Converging with the implication of Dahl's candid remark that no constitutional arrangements can guarantee respect for human rights, feminists since long have understood that classic liberal constitutional arrangements could not guarantee that sex discrimination or gender-based violence were adequately addressed by domestic legislatures or courts. For individual nations to act on the existing international consensus on gender-based violence, something more apparently is needed. In this context, it is notable that Laurel Weldon and Mala Htun, with their original dataset drawn from 70 nations, have shown that the decisive factor causing governments to comprehensively address violence against women is whether or not there exists an autonomous feminist social mobilization that draws attention to such issues; factors such as the proportion of women in government, number of "left" parties, or national wealth have hitherto been negligible.<sup>126</sup>

However, in the case of adult pornography (as distinguished from gender-based violence more generally) comprehensive and effective policies are still virtually absent in every state, despite that international human rights law exhibits similar systematic consensus even in this more limited area. Already in 1992, the United Nation's monitoring body for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) identified "pornography" as a practice that "contributes to gender-based violence," and held that states parties were obliged to "take all legal and other measures . . . including . . . civil remedies and compensatory provisions"<sup>127</sup> to fight it. Moreover, the U.N. Human Rights Commission has issued a General Comment on how to interpret the International Covenant on Civil and Political Rights (ICCPR) in terms of *balancing* women's equality to men versus the competing interest of freedom of expression in 2000. The Commission followed the CEDAW Committee's view of pornography, thus held that since "pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material."<sup>128</sup> This norm on how to respond to the problems of pornography, now evolved under CEDAW and ICCPR, has also been seen independently expressed or repeated in other international legal forums.<sup>129</sup>

The fact that existing laws or policies in modern democracies are ineffective in addressing any of the substantial harms from pornography were recognized and made heard by the women's

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CEDAW Convention "require the States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life.").

<sup>126</sup> Laurel S. Weldon & Mala Htun, "The Civic Origins of Professive Policy Change: Combating Violence Against Women in Global Perspective, 1975-2005," Manuscript Revised & Resubmitted to the American Political Science Review (2012).

<sup>127</sup> Comm. on the Elimination of Discrimination Against Women, 11<sup>th</sup> Sess., *General Recommendation No. 19*, ¶¶ 11-12, 24(t, t(i)). U.N. Doc. A/47/38 (Jan. 30, 1992).

<sup>128</sup> Human Rights Comm., 68th Sess., 1834th Mtg., *General Comment No. 28*, ¶ 22, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

<sup>129</sup> For instance, states parties agreed in the 1995 Beijing Declaration that "[i]mages in the media of violence against women... including pornography, are factors contributing to the continued prevalence of such violence," *Beijing Declaration*, *supra* note 125, ¶ 118, and the more recent 2005 African Union's Protocol on Women's Human Rights urged states to "take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography." African Protocol, *supra* note 125, art. 13(m).

movement already in the 1970s; organizations were formed, taking visible actions such as picketing outside pornography stores, organizing marches and rallies.<sup>130</sup> When the pornography movie *Snuff* was released in the United States in 1976, which presented murder and dismemberment of a woman as erotic entertainment, it ignited feminist opposition to pornography in Canada and the U.S. where feminists picketed, demonstrated, and committed civil disobedience against the film. The demonstrations were occasionally violent.<sup>131</sup> Nevertheless, the women's movements against pornography in America and elsewhere, such as in Sweden,<sup>132</sup> have not resulted in a similar change as compared with the broad changes in policy approaches to gender-based violence.

Legal challenges (as distinguished from agenda-setting by social movements' per se) have been largely unsuccessful.<sup>133</sup> The commercial pornography industry tends to enjoy a de facto freedom of liability, even though it engages in a form of prostitution which is usually regulated outside the media industry (more below). Not surprisingly, obscenity law in the U.S.—still the existing legal tool for *directly* regulating distribution of adult pornography there—has been considered arbitrary, ineffectual, and is used increasingly seldom since the last 20 years.<sup>134</sup> Similarly in Canada, heterosexual pornography that was once held dehumanizing and degrading

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<sup>130</sup> See generally Brownmiller, *In Our Time*, 295-325; Lederer ed., *Take Back The Night*, (early critical essays); see also Palczewski, "Feminist Anti-Pornography Movement," 78-94 (accounting for early key works); cf. Downs, *New Politics of Pornography*, 30 (enumerating early feminist anti-pornography organizations); Kennedy Taylor, "The Split Within Feminism," 49-50. Notable early organizations against pornography in the U.S. were: (a) Women Against Violence Against Women (WAVAW), formed in L.A. in 1976, see Brownmiller, *In Our Time*, 298; Lederer, *Take Back The Night*, 15; (b) Women Against Violence in Pornography And Media (WAVPAM) in Berkeley, California, see Brownmiller, *In Our Time*, 299; (c) the largest organized attempt against pornography by the women's movement, i.e., the Women Against Pornography (WAP) formed 1979 and based in New York City, see *ibid.*, 303-12. Some known activists during the early days were Julia London, Susan Brownmiller, Robin Morgan, Gloria Steinem, Andrea Dworkin, Kathleen Barry, Diana Russell, Laura Lederer, Lynn Cambell, Amina Abdur Rahman, Dorchen Leidholdt and others. In Canada the critique against pornography was similar as in the U.S. A small women's organization called Women Against Violence Against Women (WAVAM) picketed outside the screening of *Snuff* already in 1977, see Cole, *Sex Crisis*, 72, and another group calling themselves "Wimmin's Fire Brigade" even took credit for bombing three video stores in 1982 that were part of a pornography chain in the Vancouver area. Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto: University of Toronto Press, 1994), 78-79.

<sup>131</sup> Brownmiller, *In Our Time*, 297-98; Lederer, *Take Back The Night*, 15; Susan Cole, *Pornography and the Sex Crisis* (Toronto: Amanita Enterprises, 1989), 72. The analysis and courage of radical feminist writer Andrea Dworkin, among others, was particularly influential in this movement.

<sup>132</sup> For an interesting anthropological analysis of Sweden's feminist antipornography movement, see Whitney Russell, "Peace for Women: Swedish Feminism and the Pornotopia," (master's thesis, Central European University), available at [http://www.etd.ceu.hu/2011/russell\\_whitney.pdf](http://www.etd.ceu.hu/2011/russell_whitney.pdf).

<sup>133</sup> See, e.g., Waltman, "Rethinking Democracy," esp. 224-234, which is a prior article of mine analyzing legal challenges in Canada and the United States.

<sup>134</sup> See, e.g., Jason Krause, "The End of the Net Porn," *ABA Journal*, Feb. 2008, 52-56 (describing declining obscenity prosecutions); Todd Lochner, "Karma Police: Strategic Behavior in Obscenity Prosecutions" (Paper presented at the annual meeting of the Western Political Science Ass'n, Las Vegas: Nevada, 2007), 30-32 (describing arbitrariness and ineffectiveness); Clay Calvert and Robert D. Richards, "Vulgarians at the Gate: Privacy, Pornography and the End of Obscenity Law as we Know It," 34 *Southwestern Univ. Law Review* 427-432 et seq (2005) (describing declining prosecutions under heading "Mainstreaming of Adult Entertainment & The Prosecutorial Vacuum: Ideal Conditions for Overtaking Obscenity Laws", citing various sources); cf. Clay Calvert and Robert Richards, "The Free Speech Coalition & Adult Entertainment: An Inside View of the Adult Entertainment Industry, its Leading Advocate & the First Amendment," 22 *Cardozo Arts & Entertainment Law Journal* 247, 282-84 & et passim (2004) (describing declining prosecutions); Downs, *New Politics of Pornography*, 20-21 (discussing declining prosecutions and problems of applying obscenity laws).

by the Supreme Court, thus criminal under a harm-based obscenity law,<sup>135</sup> have become legal again by judicial interpretation.<sup>136</sup> Consuming adult pornography is also de facto legal in western democracies. As social policy programs aiming to facilitate escape for persons in the sex industry are currently not clearly grounded in law (these persons are generally not regarded as victimized unless additional offenses have been judged committed against them), their concerns are subject to the whims of political majorities. By contrast, persons victimized by other forms of gender-based violence tend to have legal rights against both the perpetrators and the state. When competing for scarce public resources, these distinctions will most likely matter.

### **Democratic Decision-Making & Social Empowerment**

To inquire what the democratic obstacles are to challenge the exploitation in the pornography industry, the works of Ian Shapiro, Iris Marion Young, Jane Mansbridge, and Kimberle Crenshaw may provide some insights. They have analyzed how democracy might be rethought in order to empower historically subordinated groups to account for their perspectives and interests. Included among such groups are, as shown in the review above, those whom are vulnerable to exploitation in the pornography industry. Analyzing historical legal challenges to the pornography industry in light of this body of political theory should therefore provide insights in how to construe a democratic framework that more successfully facilitates challenges to the pornography industry.

Iris Marion Young has, accordingly, analyzed obstacles that underprivileged social groups face vis-à-vis privileged groups in terms of unequal influence over democratic decision-making.<sup>137</sup> Persons that are used in pornography share many commonalities of under-privilege, such as prior vulnerability to child abuse, neglect, homelessness, poverty, or being members of racially discriminated groups. Although Young's work does not treat these populations in particular, many of her general conclusions appear applicable to them. She has, among other things, criticized the concept of deliberative democracy in much of her work. In these writings one may see that although her focus is on similar democratic elements that many early liberals

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<sup>135</sup> Factum of the Intervener Women's Legal Education and Action Fund ¶¶ 4-5, in the case of *R. v. Butler*, [1992] 1 S.C.R. 452, reprinted in Women's Legal Education and Action Fund (LEAF), *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Montgomery, Can: Emond Montgomery, 1996), p. 204 (describing content of seized materials presenting women (some appearing to be children) being raped, performing sex on superiors, and penetrated in "every orifice" by penises and objects, all while themes of racism and sexism in comments such as "bitch" or "hole" were abundant, accompanied by denigrating treatment such as ejaculation in women's faces) [hereinafter: Factum of LEAF in *Butler*].

<sup>136</sup> See *R. v. Price*, 2004 BCPC 103 [2004], B.C.J. No. 814 ¶ 59 (making legal materials where, inter alia, a man verbally abuses a woman, then bends her backwards over a toilet while urinating into her mouth, furthermore "punishing" her when it overflows by scrubbing the toilet bowl with her head all the while she is "obviously not consenting" according to the acquitting judge); *R. v. Ronish*, [1993] CarswellOnt 75 (Prov. Div.) at paras. 5-11, 18 C.R. (4<sup>th</sup>) 165, *aff'd Hawkins*, 15 O.R. (3d) 549 (C.A.) (making legal materials presenting men who repeatedly ejaculate into women's mouths); *R. v. Hawkins*, [1992] CarswellOnt 1940 ¶¶ 5-13 (Gen. Div.), *aff'd R. v. Hawkins* (1993), 15 O.R. (3d) 549 (C.A.), *sub nom. R. v. Ronish*, [1993] CarswellOnt 133 (making legal materials presenting women presented as sexually insatiable and constantly looking for sex with strangers);

<sup>137</sup> The paragraphs below on Young draw primarily from the following works: Iris M. Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990); Iris M. Young, "Polity and Group Difference: A Critique of the Ideal of Universal Citizenship," in *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory* (Bloomington, IN: Indiana Univ. Press, 1990), 114-37; Iris Marion Young, *Inclusion and Democracy* (Oxford, UK: Oxford University Press, 2000); Iris M. Young, "Activist Challenges to Deliberative Democracy," *Political Theory* 29, no. 5 (Oct. 2001): 673-84.

turned against, e.g., unchecked freedoms for legislatures to make decisions (see above), she did not conclude that a concept of negative freedom coupled with constitutional separations of powers alone would best protect against the whims of unchecked democratic decision-making. Her approach entails that to make democracies more equal, the state must also provide historically underprivileged groups with affirmative and proactive policies.

Examples from local forms of more open and accessible government are instructive to Young's theory: Citing Jane Mansbridge's work on New England town meetings, Young notes that women, Blacks, the working-class, or poor people did not participate in public meetings to the same extent as men, white, or other members of the middle- and educated classes, and the perspectives and experiences of the former were not accounted for as much as those of the latter.<sup>138</sup> Among other things, single mothers and old people had difficulties to attend meetings, and white middle-class men generally presumed they had authority and also had an advantage in being more trained to speak persuasively.<sup>139</sup> The social dynamics at work at the New England town meetings tended to silence historically underprivileged groups—a dynamic which Amy Gutman's work confirmed in the context of community control of schools; thus, she showed how an increased democratic control led to increased social segregation on racial grounds in many American cities.<sup>140</sup>

For a theory of justice to be useful, Young argues that it must consider some substantial social issues and not be too general, abstract, or detached,<sup>141</sup> as has sometimes been the case with theories of deliberative democracy. Accordingly, a theory on public deliberation should build on actual evidence of empirical access to democratic institutions. Are different groups' conflicting perspectives, experiences, and interests adequately addressed (such as women's stronger interest in, and men's lesser interest in, fighting gender-based violence or pornography)? In consequence with her findings she concluded that a reason why political activists who seek to make societies more equal often eschew existent legislative forums is that such deliberative arenas tend to favor existing power relationships; social activist movements challenging inequality therefore tend to rely on actions outside the established decision-making procedures.<sup>142</sup>

One may read Weldon and Htun's recent large quantitative work on the decisive factors that brought states to adopt comprehensive policies to fight gender-based violence in light of Young's theory. As such, the former corroborate strongly and empirically the assumption that many social perspectives of historically discriminated groups cannot adequately influence the democratic process from "inside"; when controlling for the extent of autonomous feminist organizations that are formally situated outside established legislative arenas, neither did the number of women in government have any significant impact on policies, nor the number of "progressive" left-parties, religious parties, or similar independent factors.<sup>143</sup> The question is what to do if social

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<sup>138</sup> Young, "Polity & Group Difference," 121 (citing Jane Mansbridge, *Beyond Adversary Democracy* (New York: Basic Books, 1989)).

<sup>139</sup> Ibid.

<sup>140</sup> Ibid (citing Amy Gutmann, *Liberal Equality* (Cambridge, MA: Cambridge Univ. Press, 1980), 191-202).

<sup>141</sup> Young, *Justice & Politics of Difference*, 4.

<sup>142</sup> Young, "Activist Challenges to Deliberative Democracy," et passim.

<sup>143</sup> Weldon & Htun, "Civic Origins."

mobilization among autonomous feminist organizations, or others whom oppose sexual exploitation, do not have any *political impact*?

Although gender-based violence in general is still a huge problem, what distinguishes it from the politics surrounding the pornography industry is that, given the evidence of harm (see above), there is less evidence of political progress regarding the latter. If assuming that formal arenas for decision-making are part of the problem, Young suggests some concrete systemic remedies that might illustrate what is in the way for democracies to challenge the production of pornography. Because the classic liberal rules of representation and decision-making tend to reinforce social inequality, she suggested various systems of affirmative proactive policies as a complement. In the context of politics that affect those victimized by the sex industry, her suggestions might include: (a) public support for “self-organization” of groups (e.g., survivors or persons who are used in the sex industry) in order “that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of the society”; (b) institutional mechanisms that oblige decision-makers to account for the perspectives voiced by such groups (e.g., being legally obliged to give special consideration to their briefs or submissions, or to account for potential consequences of policies on basis of appropriate data); (c) a veto-power for issues immediately affecting them as a group (e.g., legal reform).<sup>144</sup>

Moreover, along the lines of public proactive approaches, Young has suggested quotation of members from socially subordinated groups in various representative settings; this would be less difficult for special commissions, public hearings, courts, and similar bodies working at the lower level with regard to specifically important issues (e.g., legal reform of pornography regulation); however, for some large groups it might be an appropriate measure at the highest government level (e.g., quotas for women in legislatures).<sup>145</sup> Quotas, just as the other forms of proactive policies mentioned above, provide a balance against arbitrary judgments from privileged classes in part since the latter are obliged to confront social experiences and circumstances that they are unaware of (having lived in ignorance thereof).<sup>146</sup> For instance, during public deliberations a perceived but nonetheless biased “common good” tend to be invoked, which privileges the already privileged social groups.<sup>147</sup> Such bias may be the case, e.g., with the idea that the common good benefits from as much freedom of expression as possible.<sup>148</sup>

Quotas of historically subordinated groups, such as survivors from the pornography industry, directly into various political bodies may balance perceptions of “common good.” Moreover, these groups are often better situated to predict the effects of policies that affect them, thus should be represented during policy deliberations in order to increase public knowledge.<sup>149</sup> Lastly, and perhaps most important, some groups benefit from the fact the existing inequalities

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<sup>144</sup> These modifications of Young’s proposals draws from Young, “Polity & Group Difference,” 124, and Young, *Justice & Politics of Difference*, 184.

<sup>145</sup> Young, *Inclusion & Democracy*, 141-53.

<sup>146</sup> Young, *Justice & Politics of Difference*, 185-86.

<sup>147</sup> Young, *Inclusion and Democracy*, 40-44.

<sup>148</sup> For an analysis of how pornography silence women in society, see Catharine A. MacKinnon, “Francis Biddle’s Sister,” in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard Univ. Press, 1987), 192-97.

<sup>149</sup> Young, *Justice & Politics of Difference*, 186.

and exploitation continue<sup>150</sup>—mainly the pornography consumers themselves; however, all men benefit indirectly at some point from the lowering of women’s social status that pornography contributes to, just as all white men may benefit from everyday racial discrimination.

Ian Shapiro, while discussing Foucault, Weber and Plato, appears to follow Young’s perspective; arguing that hierarchies are sometimes a legitimate part of democracies, and that power may indeed be ubiquitous, Shapiro nonetheless rejects that “domination” must be ubiquitous (as, e.g., when a teacher sexually harasses a student rather than “requiring” her to do homework).<sup>151</sup> Studying inequalities in democracies caused by social domination (e.g., economic distribution, racial and ethnic hatred, and sex equality issues in rape- and abortion laws), Shapiro also looks at how domination can be countered by institutional mechanisms. Corroborating the perspective of Young, he finds consensus by deliberative politics as insufficient on its own; he notes that if previously excluded groups were to be better represented, this may reduce some problems of social domination.<sup>152</sup> Although Shapiro does not discuss pornography per se, it may be seen as an example where domination of women and desensitization of consumers work against a rational deliberative politics.

Not surprisingly, similarly as Young suggested a veto-power for underprivileged groups in issues immediately affecting them as a group,<sup>153</sup> Shapiro suggests means for groups to “appeal, delay, and in extreme cases even veto—but only those who *are vulnerable* to the powers of others because they have basic interests at stake in a given setting.”<sup>154</sup> People with experience from the sex industry (and at some point most women and children in society) are “vulnerable” in particular to the powers of the former, whether in terms of being vulnerable to exploitation or vulnerable to pornography’s attitudinal influence on its consumers (such as tricks) and their behaviors (see above). Jane Mansbridge has also suggested that political representation of women would promote equality, particularly in contexts of conflicting interests and “mistrust” between the genders, and where women’s interest historically have been unarticulated.<sup>155</sup> Pornography poses such a conflict of interests and mistrust between the sexes, and the politics that regulates it has indeed ignored women’s voices and interest throughout history.

However, as Mansbridge recognizes, the relevant descriptive representation may be contingent with issue and context.<sup>156</sup> Considering the issue of pornography, descriptive representation of an equal amount of women to men may create an illusion that deliberation is equal and fair when, in fact, it is difficult to know how these particular women may represent those *victimized* by pornography. As is evident from the research above, prostituted women are most likely subjected to the worst negative effects of production as well as consumption, along with battered women. In addition, certain intersectional factors such as race and class may increase the exposure to the harm from the sex industry; this is evident, for instance, when considering how race is often associated with particular forms of subjugating sexual exploitation

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<sup>150</sup> Ibid., 185.

<sup>151</sup> Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), 4, cf. 36-39.

<sup>152</sup> Shapiro, *Democratic Theory*, 35-49.

<sup>153</sup> Young, *Justice & Politics of Difference*, 184.

<sup>154</sup> Shapiro, *Democratic Theory*, 5.

<sup>155</sup> Jane Mansbridge, “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes’,” *The Journal of Politics* 61, no. 3. (August 1999): 628-57.

<sup>156</sup> Mansbridge, “Should Blacks/Women Represent,” 638.

and abuse.<sup>157</sup> Women in legislatures—i.e., politically active women—may share different commonalities than the former groups regarding their exposure to the harms of pornography. Moreover, research on political mobilization in male dominated contexts, particularly in party-politics and political organizations, suggests the existence of certain parameters or group-dynamics tending to exclude women who are critical of male dominance, favoring those less critical.<sup>158</sup>

Any effective democratic strategy to empower those victimized by pornography must account for the fact that their perspective might not be articulated adequately by a general descriptive representation of politically active women in legislatures. In certain contexts it could even be counterproductive, offering pro-pornographers false legitimacy by symbolic gender representation. In contrast a stronger legal emphasis, especially on human and civil rights law that is grounded in findings of social subordination such as those presented in the review above, may counter the influence of legislative deliberation regardless of who's representing whom. In this sense, international law and other authorities provide a factually more accurate basis for promoting equality, perhaps less elusive than the deliberation among a descriptively gender-representative group of legislators.

The difficulties associated with finding adequate representation are corroborated, again, by Weldon and Htun's (2012) findings above that the most decisive factor against gender-based violence was autonomous feminist organizing. It appears easier to amass the support to challenge gender-based violence outside legislative arenas. Such social mobilization may be assumed to have been formed by persons who, if not having experienced, at least share the similar perspective as those whom have been exposed to gender-based violence; subsequently, persons so engaged deem gender-based violence to be one of the highest political priorities, and in that sense are "representative" to those whom they address politically. However, in the case of those exploited in the pornography industry, or those exposed to its harms (which at some point may mean every woman who is discriminated on basis of sex, as pornography contributes to sex discrimination, see above), social mobilization have historically not given any tangible results. Thus, the problems appear more complex.

Kimberle Crenshaw, the legal scholar who coined the term political and legal concept of *intersectionality*,<sup>159</sup> has not written particularly about the pornography industry, although her

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<sup>157</sup> See, e.g., Catharine A. MacKinnon, "From Practice to Theory, or What is a White Woman Anyway?" *Yale J. L. & Feminism* 4 (1991): 21 (arguing that "what [abuse] is done to white women [in pornography] can be done to any woman, and then some."). See also MacKinnon, "Keeping it Real: On Anti-'Essentialism'," in *Women's Lives, Men's Laws* (Cambridge MA: Harvard University Press, 2005), 89. See generally Gail Dines, "The White Man's Burden: Gonzo Pornography and the Construction of Black Masculinity," *Yale J. L. & Feminism* 18 (2006): 283-98.

<sup>158</sup> See, e.g., Ottar Hellevik and Torild Skard, *Norske kommunestyrelser: Plass for kvinner?* (Oslo: Universitetsforlaget, 1985), 95; see also Ingrid Pincus, *The Politics of Gender Equality Policy: a Study of Implementation and Non-Implementation in Three Swedish Municipalities* (PhD Diss., Örebro University, 2002), et passim; Gunnilla Björk, *Att förhandla sitt medborgarskap: kvinnor som kollektiva politiska aktörer i Örebro 1900-1950* (PhD Diss., Stockholm University, 2000), et passim; Drude Dahlerup, *Blomster & Spark: Samtaler med kvindelige politikere i Norden* (Stockholm: Nordiska Ministerrådet, 1985), et passim.

<sup>159</sup> For the origins of the seminal political and legal theory of intersectional discrimination and how to challenge it, see Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 *U. of Chicago Legal Forum* 139, 139-67 (1989); For an application to gender-based violence, see Kimberle Crenshaw, "Mapping the Margins:

analysis of multiple structures of social oppression is applicable to some extent nonetheless. In an early and influential article which, among other things, analyzed how “Black women are marginalized in the interface between antidiscrimination law and race and gender hierarchies,”<sup>160</sup> Crenshaw made use of an analogy of a basement filled with people. I believe her analogy is also an appropriate one for the democratic obstacles to those who are exploited in the pornography industry:

Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual preference, age and/or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who are *not* disadvantaged in any way reside. In efforts to correct some aspects of domination, those above the ceiling admit from the basement only those who can say that “but for” the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. Those who are multiply-burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.<sup>161</sup>

As previously mentioned, many sex industry survivors have described their experiences as “paid rape,” day out and day in.<sup>162</sup> The abuse they endured might have rendered rape legally “but for” the fact that they were *paid* for sex, which tend to be the case because multiple disadvantages in their lives have created such coercive circumstances that essentially force them into prostitution. Hence, their “but for” are too many: the early child abuse and neglect, the early runaways, the homelessness, the poverty, the criminality they had to commit to survive (such as stealing food or money), involvement with the juvenile justice system, the racism and discrimination they endured when seeking help. Following Crenshaw, however, “those above” tell prostituted people they are not “singularly” burdened by disadvantage, thus have too many stains to be put among the groups permitted to squeeze through the hatch that would enable them some restitution. In a sense the analogy is consistent with the victim-blaming that prostituted people through centuries have been exposed to, being regarded as “dirty” and themselves responsible for the wrongs they’ve endured. Indeed, prostituted people are not “singularly” burdened by one disadvantage. As cogently illustrated in Crenshaw’s metaphor, this is why challenging their oppression is so difficult. The main character in one of Andrea Dworkin’s novels tells the same story with a different vocabulary;

even if there’s laws by the time they have hurt you you are too dirty for the law; the law needs clean ones but they dirty you up so the law won’t take you; there’s no crimes they committed that are crimes in the general perception because we don’t count as to crimes[.]<sup>163</sup>

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Intersectionality, Identity Politics, and Violence Against Women of Color,” 43 *Stanford L. Review* 1241, 1241-99 (1991).

<sup>160</sup> Crenshaw, “Demarginalizing the Intersection,” *supra* note 159, at 151.

<sup>161</sup> *Id.* at 151-52.

<sup>162</sup> See *supra* notes 108-111, for citations an accompanying text.

<sup>163</sup> Andrea Dworkin, *Mercy* (New York: Four Walls Eight Windows, 1992), 303.

Crenshaw argues that if law (or, as I would argue in the context of political theory, *if democracy*) “instead began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”<sup>164</sup> In the light of Crenshaw’s appeal, it does not appear as a coincident that Weldon and Htun (2012) found clear evidence of what causes successful challenges in democracies to violence against women per se (see above), whereas finding such evidence with respect to the pornography industry appears more difficult. Because victimization and exploitation in pornography is an intersectional problem of multiple disadvantages, and violence against women in general can be presented as a problem with a singular non-intersectional rationality on basis of gender, the latter is easier to address politically and legally. A theory that addresses the problems for groups who are multiply disadvantaged and situated in a complex intersection between conflicting democratic imperatives, as people who are prostituted in pornography evidently are, is more likely to be useful for other groups that are singularly disadvantaged in less complex situations. In the metaphor of Crenshaw: “When they enter, we all enter.”<sup>165</sup>

Moreover, empowering historically subordinated groups would also need a stronger emphasis on *civil* remedies that could give prostituted people or other people who were harmed by the social practice of pornography the initiative to use the law—as opposed to *criminal* law, which is dependent on prosecutorial discretion and public priorities. The civil rights approach in fighting the harms from pornography was pioneered by lawyer Catharine A. MacKinnon and writer Andrea Dworkin in the United States,<sup>166</sup> and has been proposed in several jurisdictions and countries, passed as law in one American city but subsequently invalidated by a judicial review which was summarily affirmed in the Supreme Court, but binding only for the 7th Circuit.<sup>167</sup> These antipornography civil rights laws are subject to much analysis in academic as well as popular venues, including by the author to this paper.<sup>168</sup> However, in this paper the analysis is restricted to the ideological, political, and legal obstacles of applying existing prostitution laws to the production of pornography, and does not deal with new legislation.

## **LEGISLATIVE & JUDICIAL POLITICS: POTENTIALS & OBSTACLES TO CHANGE**

### **On Case Selection**

Most jurisdictions probably have some laws regulating prostitution. However, their laws differ in their rationales and impact vis-à-vis the ones who are prostituted, the pimps, and the tricks. Many nations have also signed international agreements to combat *sex trafficking* between as well as within their borders. The international legally binding definition of trafficking includes

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<sup>164</sup> Crenshaw, “Demarginalizing the Intersection,” *supra* note 159, at 167.

<sup>165</sup> *Id* (internal quotation marks omitted).

<sup>166</sup> See, e.g., Catharine A. MacKinnon and Andrea Dworkin, eds., *In Harm’s Way: The Pornography Civil Rights Hearings* (Cambridge, MA: Harvard Univ. Press, 1997).

<sup>167</sup> Indianapolis, Ind. Code § 16-3(q) (1984), *available at* <http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/AppB1.htm>, *invalidated in* American Booksellers Ass’n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff’d mem* 475 U.S. 1001 (1986) (6-3).

<sup>168</sup> Waltman, “Rethinking Democracy”; see also Waltman, “Sweden’s Prohibition,” 463-68, which argues for a stronger civil rights approach under the existing Swedish Sex Purchase Law.

“the abuse of power or of a position of vulnerability . . . for the purpose of exploitation”<sup>169</sup> by any third party. In its interpretive notes, abuse of “a position of vulnerability” was further defined as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>170</sup> In light of the evidence from the sex industry surmised above, empirically this definition appears to include most forms of prostitution where third parties are involved.<sup>171</sup> However, this definition is not applied accordingly in practice.

Furthermore, notable legal scholars have argued that the empirical evidence as well as a number of applicable human rights instruments and other legal sources supports the view that most adult pornography violates international trafficking law.<sup>172</sup> According to this analysis, not only do pornographers “traffic” in sex, but the materials themselves usually promote the demand for trafficking as well, and inspire consumers to perform various unwanted or dangerous acts with prostituted persons.<sup>173</sup> International anti-trafficking instruments already put obligations on numerous democratic nations to reduce prostitution and the demand for it.<sup>174</sup> These conditions, it is thus argued, create a legal foundation to craft sound legislation, with adequate and (where needed) narrowly tailored means as well as suitable remedies for those victimized, which may curb the activity of pornographers and the dissemination of their materials.<sup>175</sup> Nonetheless, as yet no democratic nation has taken on this challenge to adult pornography.

A jurisdiction with an apparent potential for success in challenging at least the production side of pornography, on basis of prostitution or trafficking laws, is Sweden. As shown below, in 1999, and for the first time in the world, prostitution *per se* was legally recognized in Sweden to be a form of sex inequality related to gender-based violence, typically exploiting and harming the

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<sup>169</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, T.I.A.S. No. 13127, 2237 U.N.T.S. 319 (entered into force Dec. 25, 2003) [hereinafter Palermo Protocol]

<sup>170</sup> Rep. of the Ad Hoc Comm. 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, ¶ 63, U.N. Doc. A/55/383/Add.1 (Nov. 3, 2000) [hereinafter *Travaux Préparatoires* to the Palermo Protocol].

<sup>171</sup> See also Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, *Integration of the Human Rights of Women and a Gender Perspective*, ¶ 42, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) [hereinafter *U.N. 2006 Trafficking Report*] (reporting that “prostitution as actually practised in the world usually does satisfy the elements of trafficking”); Catharine A. MacKinnon, “Trafficking, Prostitution, and Inequality,” 46 *Harv. C.R.-C.L. L. Rev.* 271, 299-300 (2011). For further evidence and arguments, see Max Waltman, “Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law,” 33 *Michigan Journal of International Law* 133 (2011).

<sup>172</sup> See generally Catharine A. MacKinnon, “Pornography as Trafficking,” 26 *Michigan J. of Int’l Law* 993-1012 (2005).

<sup>173</sup> *Id.* at 999, & passim.

<sup>174</sup> Palermo Protocol, art. 9(5) (“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.”); see also Special Rapporteur on the Human Rights Aspects of the Victims of Trafficking in Persons, Especially Women and Children, *Integration of the Human Rights of Women and a Gender Perspective*, ¶¶ 29-30, 50-78, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) (by Sigma Huda) [hereinafter *U.N. 2006 Trafficking Report*] (discussing importance of and approaches for reducing demand); U.N. High Comm’r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, ¶ 4, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) (“Strategies aimed at preventing trafficking shall address demand as a root cause of trafficking.”).

<sup>175</sup> MacKinnon, “Pornography as Trafficking,” 1006-12.

prostituted person.<sup>176</sup> Hence, contrary to many other jurisdictions in the world where prostitution is situated among crimes against morality, decency, or the public order, with a resulting criminalization of both the prostituted person and the trick, the Swedish statute only criminalized those who buy prostituted persons, *not* those being bought: “A person who . . . obtains themselves a casual sexual relation in return for payment, shall be sentenced for *purchase of sexual service* to a fine or imprisonment for at most one year.”<sup>177</sup> From January 1999 to July 1, 2011, the maximum penalty was imprisonment for at most six months.<sup>178</sup> Other countries have since 1999 started to adopt aspects of the Swedish model, including Iceland,<sup>179</sup> Norway,<sup>180</sup> and, to some extent, South Korea<sup>181</sup> and the United Kingdom.<sup>182</sup> A similar law was also proposed by the Government of India.<sup>183</sup> However, I will focus on Sweden since this law along with Sweden’s legal view on prostitution in general, has existed for the longest time there, with its potential for application on pornography.

### Sweden’s Sex Purchase Law & Legal Approach to Prostitution

Since the end of the 1970s some relatively obscure efforts to criminalize tricks, based partly on a gender-equality rationale understanding that buying women for sex was exploitive, started to emerge in the Swedish legislature and elsewhere, but did not bear fruit.<sup>184</sup> Responses

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<sup>176</sup> The analysis of Sweden’s legislative history in this respect below is drawn from two previous publications of mine. Max Waltman, “Sweden’s Prohibition of Purchase of Sex: The Law’s Reasons, Impact, and Potential,” *Women’s Studies International Forum* 34, no. 5 (2011): 450-58; Waltman, “Ending Trafficking,” *supra* note 171, at 137-46.

<sup>177</sup> Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.). In the legislative history it was explicitly stated that although purchase of sex necessitates “involvement from the one who offers the casual sexual relation . . . liability for complicity . . . may . . . not accrue with respect to the ‘seller.’” Prop. 1997/98:55 Kvinnofrid [approx “Women’s Sanctuary”] [government bill] p. 137 (Swed.).

<sup>178</sup> The raise to a one-year maximum imprisonment was made possible by an Act of Parliament. See Lag om ändring i brottbalken [An Act Amending the Criminal Code] (Svensk författningssamling [SFS] 2011:517) (passed 282 to 1, 66 absent). For the government’s rationales for this raise, see Justitiekommitténs betänkande [Bet.] 2010/11:JuU22 Skärpt straff för köp av sexuell tjänst [Raised Punishment for Purchase of Sexual Service] [parliamentary committee report] (Swed.) (May 12, 2011) [hereinafter Bet. 2010/11:JuU22 Skärpt straff] (making a few additional legislative remarks and proposing Parliament to pass the executive government’s bill: Proposition [Prop.] 2010/11:77 Skärpt straff för köp av sexuell tjänst [government bill] (Swed.) [hereinafter Prop. 2010/11:77 Skärpt straff]). For further legislative history to this amendment, see Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering 1999–2008 [Prohibition Against Purchase of Sexual Service: An Evaluation 1999–2008] [government report series] (Swed.) [hereinafter SOU 2010:49 Förbud mot köp].

<sup>179</sup> See Comm. on the Elimination of All Forms of Discrimination Against Women, “Response to the Recommendations Contained in the Concluding Observations of the Committee Following the Examination of the Fifth and Sixth Periodic Reports of the State Party on 8 July 2008 (Iceland),” U.N. Doc. CEDAW/C/ICE/CO/6/Add.1 (May 27, 2011).

<sup>180</sup> Almindelig borgerlig Straffelov (Straffeloven) [Criminal Code] Ch. 19, § 202a (Nor.), available at <http://www.lovdato.no/cgi-wift/ldles?doc=/all/nl-19020522-010.html>.

<sup>181</sup> Statutes of S. Korea, Act No. 7196: Act on the Punishment of Procuring Prostitution and Associated Acts (Mar. 22, 2004); Statutes of S. Korea, Act No. 7212: Act on the Prevention of Prostitution and Protection of Victims Thereof (Mar. 22, 2004).

<sup>182</sup> Policing and Crime Act (2009) Chap. 26 (U.K.), available at <http://www.legislation.gov.uk/ukpga/2009/26>.

<sup>183</sup> See *Anti-Prostitution Laws in for Drastic Revamp*, Times of India, Oct. 1, 2005, available at [http://articles.timesofindia.indiatimes.com/2005-10-01/delhi/27864103\\_1\\_prostitution-laws-immoral-trafficking-prevention-act](http://articles.timesofindia.indiatimes.com/2005-10-01/delhi/27864103_1_prostitution-laws-immoral-trafficking-prevention-act).

<sup>184</sup> See, e.g., Yvonne Svanström, “Criminalising the John: A Swedish Gender Model?” in *The Politics of Prostitution*, ed. Joyce Outshoorn (Cambridge, UK: Cambridge Univ. Press, 2004), 233 (mentioning that from 1983 to 1993 some fifty parliamentary minorities submitted party or member bills (“motions”) that were never passed, of which approximately thirty proposed criminalizing the trick or both the trick and prostituted person).

submitted to a 1981 government report, for example, effectively argued that prostitution would “disappear if there was not a demand” and that a law against tricks would “improve equality between the sexes and prevent undue exploitation of socially deprived women.”<sup>185</sup> These ideas went no further until American lawyer Catharine A. MacKinnon in 1990, during a speech together with writer Andrea Dworkin, organized by the umbrella association Swedish Organization for Women’s and Girls’ Shelters (ROKS) under its first chair Ebon Kram, independently of this history argued publicly that gender inequality and sexual subordination could not be fought effectively by assuming a gender symmetry that empirically does not exist.<sup>186</sup> Thus, in an unequal world, she argued, a law against men purchasing women is called for, together with no law against the people, mainly women, being bought for sexual use; hence, “ending prostitution by ending the demand for it is what sex equality under law would look like.”<sup>187</sup> ROKS held regular yearly meetings with members of the Swedish Parliament, where the criminalization of tricks was an agenda item in 1992, 1994, and 1995.<sup>188</sup>

After years of concerted effort pursuant to this theory, pushed forward in the legislature mainly by female politicians,<sup>189</sup> in 1998 the Swedish Parliament passed an omnibus bill (the *Kvinnofrid* bill) on men’s violence against women that situated prostitution and the new law in the context of sex inequality.<sup>190</sup> The connection between gender-based violence and prostitution was elaborated in the government bill, inter alia, by noting the relationships between the two commissions that had inquired into these issues:

Both the Commission on Violence Against Women and the Prostitution Inquiry thus raise issues that in major parts pertain to relationships between men and women—relationships that have significance for sex equality, in the particular case as well as in the community at large. In this way the issues can be said to be related with each other. Men’s violence against women is not consonant with the aspirations toward a gender equal society, and has to be fought against with all means. In such a society it is also undignified and unacceptable that men obtain casual sex with women against remuneration.<sup>191</sup>

In addition to these statements, recognitions of exploitation and abusive conditions in prostitution related to sex inequality—i.e., how girls and women are socially subordinated thus made particularly vulnerable to exploitation and abuse—were expressed in the law’s legislative

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<sup>185</sup> Prop. 1981/82:187 om vissa åtgärder mot prostitutionen [government bill] at 44–45 (Swed.) (summarizing and selectively quoting responses to a 1981 government report from considerate parties (*remissinstanser*) arguing in similar terms for criminalizing only the trick).

<sup>186</sup> For MacKinnon’s speech in 1990 as it was translated then, see Catharine A. MacKinnon, “Pornografi och jämställdhet” [Pornography and Gender Equality], in *Pornografi: Verklighet eller Fantasi?* trans. Amanda Golert & Pia Laskar, ed. ROKS [Swedish Organization for Women’s and Girls’ Shelters] (Stockholm: ROKS, 1991), 69.

<sup>187</sup> Catharine A. MacKinnon, “On Sex and Violence: Introducing the Antipornography Civil Rights Law in Sweden,” in *Are Women Human? And Other International Dialogues* (Cambridge, MA: Belknap Press of Harvard Univ. Press, 2006) (containing the English text of the 1990s speech), 101; see also MacKinnon, “Pornografi och jämställdhet,” 69 (Swedish translation).

<sup>188</sup> Svanström, “Criminalizing the John,” 236.

<sup>189</sup> Ibid.

<sup>190</sup> Bet. 1997/98:JuU13 Kvinnofrid [parliamentary committee report] (Swed.) (passed) (proposing Parliament to pass Prop. 1997/98:55 Kvinnofrid [approx. “Women’s Sanctuary”] [government bill]).

<sup>191</sup> Prop. 1997/98:55 Kvinnofrid [gov’t bill] 22.

history.<sup>192</sup> The legislative findings also emphasized that prostituted women were persons who often had deprived childhoods, were neglected, and early on were deprived of a sense of self-worth.<sup>193</sup> Additionally, a strong association between prostitution and sexual abuse during childhood was noted.<sup>194</sup> Thus, social inequality and other coercive preconditions, such as being sexually abused and traumatized when vulnerable as a child, were understood to propel women and girls into prostitution. The 1993 Prostitution Inquiry had also emphasized that any effective strategy against prostitution was linked to promoting sex equality on all levels in society, e.g., by equal treatment of boys and girls in kindergarten, and by providing gender-equal parental role models.<sup>195</sup> This view was repeated in the government's 1998 omnibus bill's introductory quotes above, where fighting prostitution was related to similar broader gender equality imperatives that animated policies against men's violence against women.

By having recognized that if prostitution stems from as well as causes inequality, it would be as contrary to equality imperatives to endorse it by decriminalization as it would be to criminalize those already subordinated by the phenomenon itself; hence, the Swedish government in 1998 clearly understood that in order to buy sex, tricks as well as pimps exploit prostituted persons' coercive circumstances and that the prostitution transaction is asymmetrical and unequal. This was also the explicit reason why Parliament in 1998 rejected a proposal that had been raised by the government's 1993 Prostitution Inquiry's majority that suggested that prostituted persons should also be criminalized (the government sided with a minority instead).<sup>196</sup> The 1993 Inquiry's majority had thought that criminalization of prostituted persons would, inter alia, deter them from entering or continuing prostitution.<sup>197</sup> Nonetheless, the Parliament accepted the executive government's conclusion to the contrary, the latter having stated that "it is not reasonable also to criminalize the one who, at least in most cases, is the weaker part who is *exploited* by others who want to satisfy their own sexual drive."<sup>198</sup> The Swedish Parliament's views when passing the 1999 Sex Purchase Law, hence, suggests that prostitution is a form of sex inequality related to gender-based violence, exploiting and harming the prostituted person.

### **Contrasting Sweden's Prostitution Position with Canada & U.S.**

Many jurisdictions in the U.S. and in Canada appear to hold a view of prostitution contrary to Sweden's. Prostituted persons are often criminalized in the former countries, along with tricks, with the exception of ten counties in Nevada where the purchase of sex is legal, as could happen

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<sup>192</sup> Some of these Swedish findings as reported above, and particularly those vivid descriptive recognitions of the abusive and exploitative reality of prostitution that were found in the government report preceding the omnibus bill on violence against women that contained the Sex Purchase Law. *See* SOU 1995:15 *Könshandeln: Betänkande av 1993 års Prostitutionsutredning* [The Sex Trade: Final Report of the 1993 Prostitution Inquiry] [government report series] (Swed.) [hereinafter SOU 1995:15 *Könshandeln*].

<sup>193</sup> Prop. 1997/1998:55 *Kvinnofrid* [government bill] 102-03.

<sup>194</sup> *Id.* at 103.

<sup>195</sup> SOU 1995:15 *Könshandeln* [government report series] p. 16, 29 (Swed.).

<sup>196</sup> For further discussion of the conflict between the majority and minority in the 1993 Inquiry, and how the government eventually favored the minority's view, *see* Waltman, "Sweden's Prohibition," 455.

<sup>197</sup> SOU 1995:15 *Könshandeln* [gov't report series], 221.

<sup>198</sup> Prop. 1997/98:55 *Kvinnofrid* [gov't bill] 104 (emphasis added); *see also* Bet. 1997/1998:JuU13 *Kvinnofrid* [parliamentary committee report] (Swed.) (dismissing minority motions proposing criminalizing both parties).

in Canada as well.<sup>199</sup> By criminalizing both “parties” these jurisdictions appear to endorse a view more similar to that of the majority opinion in the Swedish 1995 Prostitution Inquiry, who was later overrun by the government and Parliamentary majority. According to this view, inter alia, to criminalize prostituted people is assumed to deter them from prostitution,<sup>200</sup> and the fact that they already have a difficult situation is not regarded as sufficient to exempt them from liability.<sup>201</sup> Alternatively, by decriminalizing purchase of sex in some venues, such countries perhaps do not legally recognize the inequality and exploitation suffered by prostituted people as serious enough to criminalize the tricks, or they regard the latter legal solution as counterproductive. However, evidence strongly suggests that legalization further exacerbates the harms to prostituted people, in part because it implicitly sanctions prostitution.

Moreover, decriminalization cannot address the power imbalance between the trick and the prostituted person and, among other things, the documented demand for unsafe or high-risk sex.<sup>202</sup> In the state of Victoria, Australia, prostituted women for instance reported that legalization led to increasing competition and demands that women perform unsafe or high-risk practices and accept unwanted purchasers.<sup>203</sup> In New Zealand, a government committee in 2008 reported that the “majority” of prostituted persons as well as brothel operators felt that the Prostitution Reform Act of 2003 could do little about violence against women in prostitution.<sup>204</sup> In 2008 Amsterdam’s Mayor told the *New York Times* that legalization did not result in more transparency or protection to women, but rather the opposite: “‘We realize that this hasn’t worked, that trafficking in women continues,’ he said. ‘Women are now moved around more, making police work more difficult’”<sup>205</sup> Similarly, a German federal government report in 2007 found that the reforms which legalized certain forms of indoor prostitution in general have “not been able to make actual, measurable improvements to prostitutes’ social protection,” nor to their “working conditions.”<sup>206</sup> Rather, effects from legalization or decriminalization have been documented to make the situation worse, pushing the limits of what can be done to women.

In Nevada, numerous testimonies tell about unsafe sex demanded by tricks as well as pimps, and during 3 years of research interviews there Melissa Farley received a number of accounts in

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<sup>199</sup> A court in Ontario in 2010 struck down more or less all prostitution laws except the more severe trafficking regulations. See *Bedford v. Canada (A.G.)*, 2010 ONSC 4264, [2010] O.J. No. 4057 (Ont. Super. Ct.) (QL). The Ontario Court of Appeals reversed some of the lower court’s decisions, but not the more controversial “living on the avails” provision; the latter provision had been used against pimps, but is now subject to a constitutional rewrite which narrows its reach. See *Bedford v. Canada (A.G.)*, 2012 ONCA 186, 109 O.R. (3d) 1.

<sup>200</sup> SOU 1995:15 *Könshandeln* [gov’t report series], 221.

<sup>201</sup> *Id.* at 228.

<sup>202</sup> See, e.g., Mary Sullivan, *Making Sex Work: A Failed Experiment with Legalized Prostitution* (Spinifex Press: North Melbourne, Vic. Australia, 2007), 106, 264–65.

<sup>203</sup> Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (N. Amherst, MA: Coalition Against Trafficking in Women International, 2005), 7, [http://action.web.ca/home/catw/attach/Sullivan\\_proof\\_01.pdf](http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf).

<sup>204</sup> *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington, NZ: Ministry of Justice, 2008), 14, 57, <http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report/documents/report.pdf>.

<sup>205</sup> Marlise Simons, “Amsterdam Tries Upscale Fix for Red-Light District Crime,” *New York Times*. February 24, 2008, A10.

<sup>206</sup> *Report by the German Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes* (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007), 79, <http://www.bmfsfj.de/BMFSFJ/Service/Publikationen/publikationsliste,did=100352.html>.

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.<sup>207</sup> Farley's accounts are corroborated by other survivors who have testified that legal brothels "strictly" forbade them to use condoms, unless requested by the purchaser, as "it took maximum pleasure away from the paying customer."<sup>208</sup> Similarly, others have testified that brutal beatings and rape occurred regularly in Nevada, and were covered up by management as long as the perpetrating purchaser paid the "house."<sup>209</sup> Moreover, 57% of Farley's sample of 45 women in legal brothels in Nevada told interviewers, despite their fears of being secretly recorded and punished, that they gave part of or all their earnings to someone *other* than the legal brothel's pimp, and half of all women in the sample believed that at a minimum 50% of women in those brothels were controlled by external pimps.<sup>210</sup>

Thus, as shown above, public inquiries and research from Nevada, Germany, New Zealand, the Netherlands, and Australia, where prostitution is legal at certain places, corroborate that decriminalization typically increases exploitation in prostitution without improving or controlling health, safety, or the purchasers and pimps' demand for unsafe and dangerous sex. This is to be expected since prostitution is intrinsically unequal and exploitative, and the purchasers' money drives the business—not the needs of prostituted persons.

### **Production Laws, as Distinguished from Dissemination Laws**

Today, almost any form of pornography content can be made with virtual media techniques, whether violent, dehumanizing, degrading, unequal or not. It is therefore unpersuasive to assume that pornographers need to purchase real persons to perform sex to enjoy their freedom of expression—a common way of defending pornography is to invoke expressive freedoms (see more below)—especially when the purchase takes place under exploitative and coercive circumstances. Thus, even assuming there are expressive protections for the pornography materials themselves under Swedish law (see more below), there seems to be a lack of convincing reasons why its *production* should not be judged according to standards imposed on activities related to prostitution, such as trafficking, procuring, or the purchase of sex.

From a comparative perspective, the U.S. Supreme Court in cases ranging from subjects such as animal cruelty to child pornography and picketing, has said that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute."<sup>211</sup> However, this statement is quite simplified and has obviously not been adhered to, which is particularly evident when looking at the decades of litigation on obscenity in the U.S., where virtually no one

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<sup>207</sup> Melissa Farley, *Prostitution in Nevada*, at 18, 21, 39-45.

<sup>208</sup> Jayme Ryan, "Legalized Prostitution: For Whose Benefit?" in *Sojourner: Women's Forum*, July, 1989, at 23.

<sup>209</sup> Anastasia Volkonsky, "Legalizing the 'Profession' Would Sanction the Abuse" *Insight on the News* (Feb. 27, 1995), available at [http://findarticles.com/p/articles/mi\\_m1571/is\\_n9\\_v11/ai\\_16709484/?tag=content;col1](http://findarticles.com/p/articles/mi_m1571/is_n9_v11/ai_16709484/?tag=content;col1); cf. Ryan, "Legalized Prostitution," 22 (stating that 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").

<sup>210</sup> Farley, *Prostitution in Nevada*, at 31-32.

<sup>211</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010) (quoting *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949))) (internal quotation marks omitted).

ever raising the possibility that such material may depict actual rapes or other offenses.<sup>212</sup> It is also notable that there are several conflicting state court decisions on whether or not pornography production should be regarded as prostitution. For instance, *People v. Kovner* held in 1978 that New York City’s prostitution statute could be applied to pornography, and has not been overruled.

This court is not unmindful of the fact that a literal interpretation of the prostitution laws, and their vigorous enforcement may create potentially a chilling effect on the exercise of First Amendment freedoms . . . . However, when a State undertakes to regulate a social evil such as prostitution, or pornography, it has a greater power to regulate the nonverbal physical conduct which may occur than to suppress depictions or descriptions of the same. (*United States v. O’Brien*, 391 U.S. 367, reh den 393 U.S. 900.) While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act.<sup>213</sup>

Similarly, in the *United States v. Roeder* (1975), the Tenth Circuit Court of Appeals held that transporting women across state lines for the purpose of participating in various sexual acts for hire to produce a movie depicting those acts violated the federal Mann Act, and was found unprotected by the First Amendment.<sup>214</sup> However, there is apparently no controlling federal case in the U.S. with respect to applicability of traditional adult prostitution offenses to pornography production.<sup>215</sup> A California state case, *People v. Freeman* (1988),<sup>216</sup> sometimes cited by legal scholars as an indication of the contrary,<sup>217</sup> was eventually determined under a state law, without support from the First Amendment. The California Supreme Court, basing their holding on a naïve assumption that there was no “purpose of sexual arousal or gratification” (a purpose required according to relevant state statutes) behind the paying of “acting fees,” did not view pornography production as prostitution under the particular statutes existing in California at the

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<sup>212</sup> For recent federal decisions, see *United States v. Little*, 365 Fed. Appx. 159 (11th Cir. 2010) (affirming convictions for obscenity charges in Middle Dist., Fla., but vacating sentence enhancement for pecuniary gain); *United States v. Extreme Assocs*, 431 F.3d 150, 161 (3rd Cir. 2005), *rev’g and remanding* 352 F. Supp. 2d 578 (W.D. Pa., 2005), *cert. denied* 547 U.S. 1143 (2006). The couple behind Extreme Associates, Inc., Rob Zicari and his wife, Janet Romano, were convicted after plea-bargain, July 1, 2009. See Paula Reed Ward, “Porn Producer, Wife get 1-year Jail Terms: Acrimonious Obscenity Case Took 7 Years,” *Pittsburgh Post-Gazette*, July 2, 2009, <http://www.post-gazette.com/pg/09183/981250-53.stm>.

<sup>213</sup> *People v. Kovner*, 96 Misc.2d 414, 417-18, 409 N.Y.S.2d 349 (N.Y. Sup. Ct. 1978).

<sup>214</sup> *United States v. Roeder*, 526 F.2d. 736, 739 (10th Cir. 1975).

<sup>215</sup> MacKinnon, *Sex Equality*, 1352 (“The larger question of whether sex acts that customers pay to watch are prostitution is unsettled in law”).

<sup>216</sup> *People v. Freeman*, 758 P.2d 1128 (Cal. Sup. Ct., 1988).

<sup>217</sup> Ann Bartow, “Pornography, Coercion, and Copyright Law 2.0,” 10 *Vand. J. Ent. & Tech. L.* 799, 820-821 & n.88; Ann Bartow, “Copyright Law and Pornography: Reconsidering Incentives to Create and Distribute Pornography,” 39 *U. Balt. L.F.* 75, 75 & n.2 (2008); Morrison Torrey, “Thoughts About Why the First Amendment Operates to Stifle the Freedom and Equality of a Subordinated Majority,” 21 *Women’s Rights L. Rep.* 25, 27 & n.9 (1995).

time.<sup>218</sup> However, even though the opinion contained speculative remarks on the issue, and attempted to distinguish itself from *Roeder*,<sup>219</sup> it has little precedential First Amendment merit.<sup>220</sup>

For instance, following California's application for review to the U.S. Supreme Court, Justice O'Connor recognized "that the State has a strong interest in controlling prostitution within its jurisdiction and, at some point, it must certainly be true that otherwise illegal conduct is not made legal by being filmed"<sup>221</sup>; hence, O'Connor's opinion lends no support to the contention that prostitution related offences are protected per se during the course of pornography production. *Certiorari* was consequently denied for lack of jurisdiction, on the observation "that the state court's statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion."<sup>222</sup> The case has by legal scholars since been cited among those exemplifying the current doctrine on the limits of federal jurisdiction,<sup>223</sup> and notably not among First Amendment cases.

The essential point here is that a law governing production *does not* per se target the resulting materials, whether or not those are dehumanizing, violent, or otherwise reprehensible; thus, it would seem as if little substantial expressive interests would be raised if using prostitution laws to regulate *the production* of pornography. As Sweden is the only jurisdiction among the three nations discussed above that has a clear substantive gender equality approach to prostitution, was the first in the world to legislate on this rationale, further inquiry will look at Sweden as the most receptive democracy for applying the notion of two distinguishable legal interests with regards to pornography production.

### **Applying Prostitution Laws to Pornography: The Swedish Case**

An idea had been proposed by the 1993 Prostitution Inquiry to extend the criminal prohibitions on *procuring*<sup>224</sup> to pornography and strip-club businesses.<sup>225</sup> The 1993 Inquiry had candidly recognized "[p]ornography production to be, in reality, prostitution in front of the camera," and that through the materials the prostituted person's "degradation can then be preserved and repeated during a long time."<sup>226</sup> Thus was also emphasized some potentially more harmful practice of pornography production, compared to non-pornography prostitution.

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<sup>218</sup> *People v. Freeman*, 758 P.2d 1128, 1131 (Cal. Sup. Ct., 1988) (emphasis added). See also Sara H. Garb, "Sex for Money is Sex for Money: The Illegality of Pornographic Film as Prostitution," 13 *Law & Inequality* 281, 281 et seq (1995), for a critical analysis of judicial decision on application of prostitution laws to pornography production.

<sup>219</sup> *Freeman*, 758 P.2d at 1134-35 ("[In] *Roeder* . . . the defendant film producer actually participated in the sexual conduct in the film, for which he transported the woman across state lines.")

<sup>220</sup> See *Freeman*, 758 P.2d at 1130-33 (making various remarks about potential First Amendment issues).

<sup>221</sup> *California v. Freeman*, 488 U.S. 1311, 1313 (1989) (O'Connor, Circuit Justice, 9th Cir., 1989).

<sup>222</sup> *Id.* at 1314-1315

<sup>223</sup> See, e.g., Michael Esler, "Michigan v. Long: A Twenty Year Retrospective," 66 *Alb. L. Rev.* 835 passim (1993); Jason M. Halper, "Harris v. Reed: A New Look at Federal Habeas Jurisdiction over State Petitioners," 58 *Fordham L. Rev.* 493, 512 n.23 (1989).

<sup>224</sup> The offense of *normal procuring* is committed by a "person who promotes" or a person who "in an improper way financially is exploiting a person who has casual sexual relations in return for payment." Maximum imprisonment is *four years*. BrB 6:12(1) (Swed.). There is also *gross procuring*, with a maximum penalty of eight years, where "special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person." BrB 6:12(3) (Swed.). The Palermo Protocol on trafficking, *supra* note 174, is ratified and located in BrB 4:1a, with a maximum penalty of ten years.

<sup>225</sup> SOU 1995:15 *Könshandel*, 31 (Swed.) (english summary).

<sup>226</sup> SOU 1995:15 *Könshandel*, 136.

The 1993 Inquiry's suggestion to view pornographers as pimps had first been dismissed in the government's omnibus bill of 1998 in one paragraph, on the limited explanation that the Inquiry had not considered enough the "consequences" to freedom of expression and freedom of the press; the issue was thus sent back for further inquiry in a new committee.<sup>227</sup> In 1998, the government thus appointed a parliamentary committee with members from all parties to make a total review of the existing sexual offenses in the criminal code. It was this particular committee that would also cover the issue of extending procuring laws to pornography production. In the charter (*direktiv*) of the 1998 Sexual Offenses Committee, the government noted the seeming inconsistency that the existing procuring law, which proscribes the promotion or undue exploitation of sex for money, was not applied to "a person who is paying another person to participate in pornography movie . . . despite that his incentive often is financial gain."<sup>228</sup> Nonetheless, refusing again to specify what was wrong with the prior suggestions, the government now stated that the new committee was to investigate how the procuring provision could be extended "in some other way."<sup>229</sup> Furthermore, a "starting point" for this new inquiry was to avoid "infringements in the constitutional regulations of freedom of the press and expression," and consequently not to "propose a general prohibition against pornography"<sup>230</sup> (e.g., a law against distribution or sale).

A general impression one is given is that the Swedish executive government in the 1990s was never fond of the idea of using procuring laws against pornographers; they might simply have responded outside pressures in their instructions to the committees. Following Weldon and Htun's (2012) findings that initiatives for comprehensive policies against gender-based violence in the general are found outside the government (see above), the government's apparent disengagement on the issue of pornography production also makes sense. This conclusion is also strengthened by the many minority motions raised in Parliament during this period, calling for empirical investigations of pornography's harms in terms of its connection to exploitation, abuse, sex inequality and discrimination in society.<sup>231</sup> One such attempt, even sponsored by a Member

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<sup>227</sup> Proposition [Prop.] 1997/98:55 Kvinnofrid [government bill] p. 106 (Swed.).

<sup>228</sup> Kommittédirektiv [dir.] 1998:48 Översyn av lagstiftningen om sexualbrott [gov't committee directive] p. 12 (Swed.), available as appendix in SOU 2001:14 Sexualbrotten: Ett ökat skydd för den sexuella integriteten och angränsande frågor [government report series] p. 609 (Swed.).

<sup>229</sup> Ibid.

<sup>230</sup> Ibid.

<sup>231</sup> See, e.g., Motion till Riksdagen [Mot.] 2001/02:K348 *Pornografins utveckling* [The Evolution of Pornography] [parliamentary motion] (Ewa Larsson and Kia Andreasson; Greens) (Swed.) (demanding the appointment of an investigation reviewing the evolution of pornography, noting that "now it is a cruel exploitation of female children and young women in the name of profit," further asking "how do various researchers view the associations between pornographic film, rapes, and other sexual violence?"); Mot. 2001/02:Ub348 *Jämställdhetsarbete mot pornografi* [Gender Equality Work Against Pornography] (Christina Nenes and Göte Wahlström; Social Democrats) (referring to pornography in terms of "the forces which . . . actively counteract the work for gender equality."); Mot. 2000/01:K351 *Pornografi i kabelTV-kanaler* [Pornography in Cable TV-Channels] (Birgitta Sellén and Rigmor Stenmark; Center party) (noting, inter alia, associations between pornography consumption and "brutally executed" rapes, urging politicians to take action in order to "reduce the possibility to 'spur' people to . . . rape women (and men)."); Mot. 2000/01:K375 *TV-kanaler med pornografiska sändningar* [TV-Channels with Pornographic Broadcasts] (Carina Hägg, Birgitta Ahlqvist, and Agneta Brendt; Social Democrats) (noting "probable" connections between "the use of pornographic movies and making use of sexual epithets, sexual harassment, and sexual assault" and urging government to propose more restrictions on TV-broadcasts in this area); Mot. 1999/2000:K304 *Pornografiska sändningar* [Pornographic Broadcasts] (Hägg, Ahlqvist, Brendt; Social Democrats) (content same as in *supra* Mot. 2000/1:K375); Mot. 2000/01:N310 *Export av pornografiskt material*

of Parliament who had been appointed to Committee herself, wished to extend the government’s directive to include a comprehensive review which would “analyze pornography from a gender-political perspective, and from this analysis propose further measures with special emphasis on preventing harmful effects on young people.”<sup>232</sup> However, neither the conditions of pornography production or its consumption harms, and even less “young people,” were addressed by the 1998 Committee. Such calls were also dismissed by parliamentary majorities.

Perhaps not surprisingly then, the Swedish 1998 Committee eventually dismissed the suggestion to extend procuring laws to cover pornography production. In 2001, their final report argued that although the purpose of “protecting those who participate in pornographic pictures and movies” did not aim at the constitutional rights to produce or disseminate printed matter per se, they viewed the “actual restrictions” caused by extending the procuring provision to be “so significant” that a constitutional amendment to the laws regulating freedom of the press and expression was needed.<sup>233</sup> The government itself then dropped the issue entirely when amending the criminal code’s chapter on sexual offenses in 2004.<sup>234</sup> In light of the fact that procuring laws would not themselves necessarily address expression per se—i.e., the laws could be restricted simply to specific conduct done during their production, but not the distribution or sale of the resulting materials—the Committee’s legal conclusion as well as their express refusal to suggest a constitutional amendment (which they were entitled to, as constitutional Amendments are regularly made in Sweden, see below) needs to be further analyzed.

Following Young and Crenshaw (see above), historically disadvantaged groups such as sex industry survivors or even women in general, are systemically ignored or silenced to a larger extent in modern democracies than are men. In our case, legislative minorities in Parliament who favored more proactive actions than the Committee’s did not have any sufficient impact (see above). A strong unifying theme among those dissenting voices where their gender-equality perspective and critical analysis of pornography; similarly, a strong unifying theme from the majority who opposed such attempt appears to have been their disinterest in the perspectives of

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[Export of Pornographic Materials] (Carina Hägg; Social Democrat) (noting “probable” connections between pornography use and sexual coercion and violence, remarking that the European Union, which should prioritize gender equality, should investigate export of pornography, recognizing the harmful contribution by pornography particularly to development countries that are fighting AIDS); Mot. 1998/99:K224 *Videovåld och pornografi* [Video Violence and Pornography] (Margareta Viklund; Christian Democrat) (noting that pornography is a multi-billion industry, presents women and girls as slaves to men, contributes to “the oppression of women”, is a “threat against the security” for females, is made up, inter alia, by filmed and photographed sexual abuse, “encourage rape, incest, abuse, torture, and murder on women and girls. . . . and claims women enjoy rape and abuse,” demanding a government review and a strategy against pornography); Motion 1998/99:K285 *Pornografi* [Pornography] (Gudrun Schyman et al.; Left Party) (similar content as in *infra* Mot. 1997/98:K342 ); Mot. 1997/98:K342 *Pornografi m.m.* [Pornography etc.] (Johan Lönnroth et al.; Left Party) (noting uselessness of current laws against violent pornography, stating that “[c]ontempt for women is the essence of pornography . . . presentations of women as an object . . . enjoying violence and torture mirror this contempt. . . . The pornography industry is . . . the largest cause to that the sexualized violence in society has increased,” urging government, inter alia, to review legislation on “female-degrading pornography” and, in the meantime, to restrict it); Mot. 1997/98:K319 *Pornografisk reklam* [Pornographic Advertising] (Elisa Abascal Reyes et al.; Greens) (urging, inter alia, government to propose laws against ads with pornographic commercials, finding their content to be “clearly degrading to women” and “a clear expression of hateful incitements against women”).

<sup>232</sup> [Mot.] 1999/2000:Ju710 *Pornografi* [parliamentary motion] (Ulla Hoffmann et al.; Left Party) (Swed.) (dismissed 49-251).

<sup>233</sup> SOU 2001:14 *Sexualbrotten*, 415.

<sup>234</sup> Proposition [Prop.] 2004/5:45 *En ny sexualbrottslagstiftning* [government bill] (Swed.).

those exposed to the harms from pornography. Before we further analyze these political problems from a democratic theory perspective, we need to address the question to what extent the specific legal arguments raised by the Committee were consistent or not with legal doctrines in Sweden. Only by doing so can we assess more precisely whether or not the Committee handled the matter arbitrarily; to the extent they did so will indicate the seriousness of the democratic problem.

### ***The Swedish Constitutional Expressive Framework & Comparative Outlooks***

Sweden's constitutional system with respect to expression is divided into three codes, all of whom are *fundamental laws* with superior status vis-à-vis other laws. First, a general framework is found in the Instrument of Government (*Regeringsformen*) (the "Instrument") which contains rights, responsibilities, and aspirational imperatives.<sup>235</sup> The Instrument cannot be amended, just as the two additional fundamental laws on expression cannot (see more below), without two similar majority parliamentary decisions with one election in between, among other things.<sup>236</sup>

The Instrument guarantees everyone "freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way . . . [and] freedom to procure and receive information and otherwise acquaint oneself with the utterances of others."<sup>237</sup> It further sets forth a number of general principles similar to other liberal democracies that permit limits to these freedoms. For instance, restrictions may be imposed when laid down in law, inter alia, "with regard to . . . the prevention and prosecution of crime," and freedom of expression may "be limited in business activities" or "where particularly important grounds so warrant."<sup>238</sup> U.S. law similarly permits restrictions if there are particularly important grounds ("a compelling state interest"), assuming the regulation sustains strict scrutiny review.<sup>239</sup> The lower "intermediate" standard of scrutiny in the U.S. that requires a proportionality assessment with respect to the government interests at stake, as enunciated in *United States v. O'Brien*, so that "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest"<sup>240</sup> also has a similar codification in the Swedish Instrument: such a restriction "can never go beyond what is necessary with regard to the purpose which occasioned it."<sup>241</sup>

Although *O'Brien* did not concern the production of pornography through the "conduct" of prostitution, it is analogous to the extent that a defendant unsuccessfully argued that the proscribed *conduct* of burning a draft card was a form of protected "symbolic speech"; the Court held that regulations of such conduct, however symbolic or not, may be constitutionally sustained

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<sup>235</sup> Regeringsformen [RF] [Constitution] (Swed.) (as amended 2011).

<sup>236</sup> RF [Const.] 8:14 (Swed.).

<sup>237</sup> RF [Const.] 2:1(1) (Swed.).

<sup>238</sup> RF [Const.] 2:23(1) (Swed.) (emphasis added).

<sup>239</sup> See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010) (5-4) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Roberts, C.J., plurality opinion)); cf. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, 475 U.S. 1, 19 (1986); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-607 (1982); *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978).

<sup>240</sup> *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>241</sup> RF [Const.] 2:21 (Swed.).

if, inter alia, the underlying governmental interest was “unrelated to the suppression of free expression.”<sup>242</sup> Subsequent decisions following *O’Brien* have, along this rationale, attempted to distinguish regulations that are content-based or viewpoint-based from those which are not.<sup>243</sup> *O’Brien* has thus supported sanctions against cross-burning with the “intent to intimidate” as a permissible content restriction,<sup>244</sup> and regulations of adult theatres and strip-clubs on a “secondary effects” doctrine.<sup>245</sup> Correspondingly, the Swedish Instrument of Government provides that “[n]o limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion.”<sup>246</sup> The underlying philosophy behind this provision seems to be the same as in *O’Brien*; the state should not discriminatorily restrict particular views, for instance from the opposition (dissidents), while legally privileging the views of the orthodoxy or the mainstream (ruling class) or vice versa.

Similarly with the U.S. law’s content/viewpoint distinctions, the Swedish Instrument provides that detailed regulations of “a particular manner of disseminating or receiving information, without regard to its content, shall not be deemed a limitation of the freedom of expression or the freedom of information.”<sup>247</sup> This provision raises issues from both American and Canadian jurisprudence regarding the constitutionality and problems related to “secondary effects” doctrines.<sup>248</sup> However, contrary to applying a prostitution law against pornographers, which does not target the dissemination or receiving of resulting materials, the *O’Brien* standard as well as the Instrument permit laws targeting the dissemination of expressive materials, and are not limited to ancillary proscribed conduct (e.g., labor exploitation during media production).

As the Swedish constitutional statutory regulations of expressive activity are not only found in the Instrument, but are further delegated to a couple of very detailed statutory laws on the freedoms and regulations of certain printed, visual, and other media,<sup>249</sup> we must scrutinize whether pornography produced particularly for such enumerated medias are subject to a higher level of protection. These two codes are also *fundamental laws*, hence subject to the same parliamentary procedural regulations for amendments as the Instrument. The Freedom of the Press Act (*Tryckfrihetsförordningen*) thus includes numerous regulations and rules for printed

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<sup>242</sup> *O’Brien*, 391 U.S. at 377.

<sup>243</sup> See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1219-20 (2011); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

<sup>244</sup> *Virginia v. Black* 538 U.S. 343, 361-63 (2003).

<sup>245</sup> See, e.g., *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 296-97 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976).

<sup>246</sup> RF [Const.] 2:21 (Swed.).

<sup>247</sup> RF [Const.] 2:23(3) (Swed.) (emphasis added).

<sup>248</sup> *Irwin Toy Ltd. v. Quebec (Att’n General)*, [1989] CarswellQue 115 ¶ 50, 1 S.C.R. 927 (WL) (“rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning”); see also *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 57 (1986) (Brennan J., dissenting) (“The fact that adult movie theaters may cause harmful ‘secondary’ land-use effects may arguably give Renton a compelling reason to regulate such establishments; it does not mean, however, that such regulations are content neutral.”); *Boos v. Barry*, 485 U.S. 312, 334-38 (1988) (Brennan J., Concurring) (arguing the Renton-analysis risks incorrectly disguising laws as content-/viewpoint neutral); The critique against secondary effects doctrines is not, of course, restricted to pornography. See, e.g., Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 3001 (2010) (5-4) (Alito J., dissenting) (“the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. . . . [T]he Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups”).

<sup>249</sup> RF [Const.] 2:1(2) (Swed.).

media,<sup>250</sup> while the more contemporaneous Freedom of Expression Act (*Yttrandefrihetsgrundlagen*) regulates a number of non-printed media in a corresponding fashion.<sup>251</sup> Certain media are not covered by these two codes, such as theatres, demonstrations, public meetings, and much Internet media (unless certain requirements or actions on behalf of a formally responsible online publisher are fulfilled).<sup>252</sup> As such, these media are only regulated by the Instrument, thus referred to as not being within the “exclusive” domain of the two latter fundamental acts.

### ***Detailed Expressive Regulation & the “Principle of Exclusivity”***

The general assumption is that the two detailed Swedish additional fundamental laws take precedent over general law in regulating activity associated with the rights of expressive freedoms in printed or other specified protected media according to the delegation from the Instrument of Government, unless the fundamental laws themselves or other established doctrines suggest otherwise. In article 3 of Sweden’s Freedom of the Press Act, the most explicit expression of this principle of exclusivity is found: “On account of an abuse of the freedom of the press or complicity therein no person may, other than as prescribed or in other cases than this Act determines, be charged or held criminally liable, or held liable for civil damages, nor may the publication be confiscated or impounded.”<sup>253</sup>

However, legislative history, case law, and other doctrine holds that the two fundamental laws do not subject every imaginable proscribed activity to the exclusive jurisdiction of the fundamental laws simply because the conduct, at some point, made use of protected expressive media. For instance, fraud, blackmailing, unfair competition (e.g., by misleading advertising), forgery of banknotes, dishonest conduct, misleading information, or illicit printing of money, have since long been recognized as not being protected by freedom of expression, even though they are not explicitly enumerated in the fundamental laws.<sup>254</sup> A statutory basis for such exemptions has for instance been to interpret the wording of the Act on the Freedom of the Press’s article 3; when mentioning “an *abuse* of the freedom of the press,”<sup>255</sup> article 3 has *not* been taken to imply an abuse of every use or abuse of the printed word per se—only abuses of “freedom of the press” in the sense of the democratic right to enjoin a free exchange of opinion and information that furthers development of free liberal societies.

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<sup>250</sup> Tryckfrihetsordningen [TF] [Constitution] (Swed.).

<sup>251</sup> Yttrandefrihetsgrundlagen [YGL] [Constitution] (Swed.).

<sup>252</sup> See, e.g., Konstitutionsutskottets betänkande 2001/02:KU21 [Bet.] Yttrandefrihetsgrundlagen och Internet, m.m. [parliamentary committee report/proposal] 22-32 (Swed.) (passed) (distinguishing various levels of expressive protection among different Internet media actors); Statens Offentliga Utredningar [SOU] 2010:68 Ny yttrandefrihetsgrundlag? Yttrandefrihetskommittén presenterar tre modeller [government report series] 50-53 (summarizing existing regulations).

<sup>253</sup> TF [Const.] 1:3 (Swed.). A similar provision exists in the Act on Freedom of Expression, see Yttrandefrihetsgrundlagen [YGL] 1:4 (Swed.).

<sup>254</sup> See, e.g., SOU 2006:96 Ett nytt grundlagsskydd [gov’t report series] 59-65 (Swed.) (summarizing doctrine); SOU 1947:60 Förslag till tryckfrihetsförordning [A Proposal for a Freedom of the Press Act] [government report series] p. 250-51 (Swed.); Gunnar Persson, *Exklusivitetsfrågan: Om förhållandet mellan tryckfrihet, yttrandefrihet och annan rätt* [The Issue of Exclusivity: On the Relationship between Freedom of the Press, Freedom of Expression, and Other Law] (Stockholm: Norstedts Juridik, AB, 2002) (PhD Diss. Law), passim.

<sup>255</sup> TF [Const.] 1:3 (Swed.) (emphasis added).

The doctrine on permissible exemptions from the principle of exclusivity is rooted in legal scholarship from the late 19th century, and was further emphasized in 1900 and 1905 when the Swedish Supreme Court convicted persons for fraud on basis of newspaper advertisements.<sup>256</sup> Because the Supreme Court’s fraud opinions left the Freedom of the Press Act unremarked, their decisions appeared to inspire legal scholar Nils Alexanderson to write an interpretive and influential account in 1907 on what implicit rationales they were based on.

[T]he Freedom of the Press Act’s chapter 1, article 1 by no means entails that every indicted activity, which made use of the printed word to bring about the accomplishment of its intent, would fall under the freedom of the press’s procedural regulations. The error herein is easily found through a justified comparison between freedom of expression and freedom of the press. If an impostor makes use of a printed advertisement in order to accomplish their objective, this is just as little a freedom of the press offense as it would appear to us to describe the verbal fraudulent account as a criminal violation of the boundaries of *freedom of expression*. The criminalization has in both cases apparently been made from an entirely different perspective.<sup>257</sup>

Although Alexanderson also had recognized a more dogmatic textual approach to the statutory wordings,<sup>258</sup> his own account offered an appealing formula how to resolve such conflicts by emphasizing the legislative purpose of the Freedom of the Press Act, as this is explicitly spelled out in the first article. (The Instrument of Government contains similar wordings.<sup>259</sup>) As amended 2011, the Freedom of the Press Act holds that “universal freedom of the press for all” is related to the purpose “of securing a free exchange of opinion and availability of comprehensive information”; hence, the individual’s right to “express his or her thoughts and opinions in print, to publish official documents and to communicate information and intelligence on any subject whatsoever.”<sup>260</sup> Following Alexanderson, terms such as “opinion” or “information” are not self-explanatory. One should therefore consider the political, social, and cultural purposes of freedom of expression, as opposed to doing a mere textual reading. When an act had been criminalized, or otherwise regulated with legislative intentions unrelated to freedom of expression, the freedom of the press would not release the liability simply because the culprit made use of printed or other media during the course of his activity. The provision prohibiting prior restraint found in chapter 1, article 2 of the Freedom of the Press Act also appears to be subject to a similar determination of the principle of exclusivity.<sup>261</sup>

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<sup>256</sup> Persson, *Exklusivitetsfrågan*, 63-64.

<sup>257</sup> Nils Alexanderson, *Föreläsningar öfver den svenska tryckfrihetsprocessen* [*Lectures on the Swedish Freedom of the Press Procedure*] (Uppsala: Almqvist & Wiksells Boktryckeri AB, 1907), 7-8 (emphasis in original).

<sup>258</sup> See Persson, *Exklusivitetsfrågan*, 65-69 (discussing Alexanderson’s work, and the context of his writings).

<sup>259</sup> See *supra* note 237, and accompanying quotations from Regeringsformen [RF] [Const.] 2:1(1) (Swed.).

<sup>260</sup> TF [Const.] 1:1(2). See also Persson, *Exklusivitetsfrågan*, 33, who notes that at the time of Alexanderson’s writings, the phrase “communicate information and intelligence on any subject whatsoever” did not exist in the Freedom of the Press Act.

<sup>261</sup> Persson, *Exklusivitetsfrågan*, 126-27. For instance legal action, including confiscation of private possession, may be taken already during the stages of attempts, preparation, and conspiracy in cases of counterfeit offenses, such as illicit printing of money, and without any explicit rule of delegation in the fundamental laws. *Ibid.*, 309-10. Moreover, copyright law allows similar actions under general law, albeit with the support of an explicit rule of delegation. *Ibid.*, 308-09. One Swedish scholar stated that there are no exceptions to the prohibition against prior restraint, even for materials falling outside the purview of the principle of exclusivity. See Hans Gunnar Axberger, *Tryckfrihetens gränser* [*The Limits of Freedom of the Press*] (Stockholm: Liber Förlag, 1984) (PhD Diss. Law), 77. According to Persson, however, existing law shows this view is incorrect. Persson, *Exklusivitetsfrågan*, 315.

An additional reason why it has been important to carve out exceptions from the written fundamental laws is that whenever an activity thought of as an abuse of freedom of expression is codified in the freedom of expression offenses “catalogue,”<sup>262</sup> a host of procedural restraints and unusual obstacles generally apply. For example, the consent of the Chancellor of Justice, with few exceptions, is needed to bring charges unless it is a purely civil case (e.g., defamation).<sup>263</sup> Further, liability in the catalogue is usually tied to an editor-in-chief or the next responsible person, rather than to the de facto culprit (e.g., the author, informant, or photographer).<sup>264</sup> Moreover, if one party demands a special “Freedom of the Press-Jury,” nine jurors are appointed where six are needed for a successful conviction.<sup>265</sup> The jury’s sentencing can only be mitigated downwards by the court’s judge, and only the defendant can appeal its decision. Higher courts can only affirm, acquit, or reduce previously imposed penalties.<sup>266</sup>

From the vantage point of a negative concept of freedom, where democratic state-intervention is viewed with suspicion, many procedural restraints on freedom of expression offenses appear consistent. However, with regards to prostitution and pornography production, there is evidence suggesting such restraints will effectively make regulations very difficult to apply. Much common prejudice maintains that prostitution is a victimless crime, in spite of well documented facts (see above). Even controlled attitudinal research studies show that pornography consumption itself produces many similar myths and attitudes that would be directly counterproductive to the enforcement of laws against pornography (see above). Such evidence raise doubts whether the procedural restraints on the freedom of expression offences make pornography or prostitution regulations particularly difficult to apply.

#### ***Child- & Adult Materials under the Constitution***

Complicating things, the *dissemination* of child and adult pornography have by Swedish legislatures not been regarded as covered by the exemptions recognized under the Alexanderson doctrine. For instance, the production with intent to disseminate violent (adult) pornography is proscribed as “unlawful depiction of violence”<sup>267</sup> since 1987 by an amendment to the freedom of expression offenses catalogue. In the legislative history, it was stated that the Freedom of the Press Act primarily protects

the free debate and the free flow of information in various social issues. But the protection is not limited to this area. The freedom to express oneself in printed matter holds for ‘any subject whatsoever.’ This means that, e.g., religious, artistic, or scientific presentations are covered by the protection as well as presentations characterized as pure entertainment.<sup>268</sup>

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<sup>262</sup> Such offenses include, inter alia, conduct that traditionally is excluded from expressive protections in many jurisdictions; e.g., instigation of war, unauthorized trafficking in/or recklessness with secret information, sedition, agitation against a population group, defamation, and perversion of the course of justice. TF [Const.] 7:4-5 (Swed.).

<sup>263</sup> TF [Const.] ch. 9, arts. 2 & 4 (Swed.).

<sup>264</sup> These general rules for liability are found in chapter 8 of the Freedom of the Press Act, *see* TF ch. 8, and in chapter 6 of the Freedom of Expression Act, *see* YGL ch. 6.

<sup>265</sup> TF [Const.] 12:2 (Swed.).

<sup>266</sup> *Id.*

<sup>267</sup> TF [Const.] 7:4 ¶ 13 (Swed.).

<sup>268</sup> Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] p. 21 (Swed.).

A similar phrase was expressed in dicta by the Supreme Court in 1979 when it summarized the scope of application for constitutional protection: “The Freedom of the Press Act . . . further protects presentations characterized as pure entertainment and without cultural value, even pornography and depictions of violence.”<sup>269</sup> (The 1987 amendment, however, made disseminating depictions of violence a freedom of expression offences, see above.) Obscenity laws were also regulated in the Freedom of the Press Act as “offences against freedom of expression” before 1970.<sup>270</sup> These explicit regulations in the fundamental laws suggest that the Alexanderson doctrine has not been deemed applicable to the *dissemination* of pornography; however, whether the *production* is covered by prostitution laws pose different questions (more below).

As a matter of comparison with the Canadian law against dehumanizing and degrading pornography that was motivated in part by concerns for sex inequality,<sup>271</sup> the Swedish government bill also rationalized the law against violent pornography in similar terms; it stated that in violent pornography, women are “commonly depicted” in a “grossly offensive and dehumanizing way.”<sup>272</sup> The government bill concluded that it “had to be obvious” that such depictions would negatively affect boys and adult men’s view of women.<sup>273</sup> Furthermore, it stated that “society’s efforts in various ways to promote equality between the sexes are countered by the fact that these materials may be freely disseminated,” and that there was “no reasonable rationale—regarding such products in particular—for retaining the present and significantly generous freedom to publish pornographic images.”<sup>274</sup>

Since producing and disseminating pornography per se were not enumerated as unprotected—only violent materials—an assumption can be made that even such dehumanizing and degrading materials proscribed under Canadian law are still protected in Sweden. Such an interpretation is consistent with later constitutional amendments, where Parliament codified an explicit rule of delegation that put all regulations of child pornography in general law,<sup>275</sup> taking effect on January 1, 1999 after two parliamentary decisions.<sup>276</sup> This parliamentary decision was hotly debated. Newspaper and journalists’ organizations had argued against this complete delegation to general law that removed the procedural regulations generally used for offences against freedom of expression.<sup>277</sup> A contrary view had also been raised in public that the Alexanderson doctrine was an easier route to bypass child pornography regulation from the constitution.<sup>278</sup> The latter suggestion was categorically dismissed by the government in favor of

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<sup>269</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1979-09-28 pp. 602, 608 (Swed.).

<sup>270</sup> See, e.g., Prop. 1970:125 [gov’t bill] p. 17 (summarizing law).

<sup>271</sup> See, e.g., R. v. Butler, [1992] 1 S.C.R. 452 at 509, CarswellMan 100 ¶¶ 126-27 (WL).

<sup>272</sup> Prop. 1986/87:151 [gov’t bill] p. 102 (Swed.).

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> For this rule of delegation in the Freedom of the Press Act, see TF [Const.] 1:10 (Swed.).

<sup>276</sup> Konstitutionsutskottets betänkande [Bet.] 1998/99:KU4 Tryckfrihetsförordningens och yttrandefrihetsgrundlagens tillämpningsområden - barnpornografifrågan m.m. (vilande grundlagsförslag och följdlagstiftning) [The Freedom of the Press and Expression Acts’ Purviews: The Child Pornography Issue, etc. (Pending Constitutional Proposal & Follow-up Legislation)] [parliamentary committee report] p. 3 (Swed.).

<sup>277</sup> Prop. 1997/98:43 Tryckfrihetsförordningens och yttrandefrihetsgrundlagens tillämpningsområden: Barnpornografifrågan m.m. [government bill] p. 71 (Swed.).

<sup>278</sup> *Id.* at 67.

an explicit amendment on the rationale that child pornography had previously been inserted among freedom of expression offences:

The government here wants to ascertain that regardless of what may be claimed to be read into the fundamental law's objectives or derived from their purposes or from legislative history, it is a fact that the child pornography offense is covered by the regulation in the Freedom of the Press Act since 1980 . . . . Child pornography, thus, are presentations that are considered as abuses of the freedom of expression in the same way as, e.g., unlawful depiction of violence, or agitation against a population group. There is, hence, no doubt at all about what is the existing law on the subject.<sup>279</sup>

Nonetheless, Alexanderson's formula makes sense if considering that proscribing presentations promoting child sexual abuse was not proscribed on a rationale intending to restrict freedom of expression and information per se. For instance, the government in part rationalized the legislation on the grounds that child pornography images "may be shown for a child in order to induce the child to participate in such acts that are depicted on the image."<sup>280</sup> Similarly, the government held that "every . . . child pornography image entails a violation of the depicted child, but also of children in general, worth sanctioning. Even a possession of such an image entails a recurring violation of integrity."<sup>281</sup> The legislative intent was thus rather to protect against "violations of integrity," not to infringe a free discussion about child sexuality or other dissident or deviant speech. Whatever merit the Alexanderson legacy had, the conventional assumption nonetheless held the contrary; without more, dissemination or possession of pornography merited protection by the fundamental laws.

#### ***Toward Non-Intervention (Negative Freedom) in Expressive Law***

The more "absolutist" view of freedom of expression shown in the government's approach to child- and adult pornography in the 1980s and 1990s had likely been influenced by a general change toward emphasizing a more *negative freedom concept* in the doctrine since the end of 1940s, when the Alexanderson's approach still dominated the conventional wisdom.<sup>282</sup> Democratic intervention in the area of expression was apparently viewed more negatively than it was directly after World War II. Constitutional amendments that require two parliamentary decisions are a form of procedural check consistent with early liberal ideals, such as those of Locke, Madison, or Mill. In order to understand the obstacles to pornography regulation, this general development will be briefly surmised.

Whereas Alexanderson originally emphasized the legislative intent of a general law in order to sustain it under constitutional challenges, since the 1960s it became more common in the doctrine to ask whether the "activity by itself" had less to do with the purposes of the fundamental laws.<sup>283</sup> According to this line of thought, the intent of the fundamental laws of expression appears to matter more than the intent of a potentially conflicting general law. A

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<sup>279</sup> *Id.* at 67.

<sup>280</sup> *Id.* at 65.

<sup>281</sup> *Id.* at 65.

<sup>282</sup> See, e.g., SOU 1947:60 Förslag till tryckfrihetsförordning [A Proposal for a Freedom of the Press Act] [government report series] pp. 119-20 (Swed.) (summarizing, with an approving reference to Alexanderson, the doctrine on permissible exceptions to the principle of exclusivity).

<sup>283</sup> See, e.g., Persson, *Exklusivetsfrågan*, 116-17.

development along such lines could be seen, e.g., in a 1979 case where a newspaper editor was convicted for procuring according to the criminal code because he had approved the publication of advertisements which contained contact information to prostituted women.<sup>284</sup> The court of appeals found that the editor contributed to “that prostitution has developed faster and in a larger extent than otherwise possible,”<sup>285</sup> thus the legislative interest underlying the prohibition against promoting prostitution was applicable on him. This was consistent with the original Alexanderson doctrine. On appeal the Supreme Court affirmed the outcome, but qualified their opinion with a discussion why the Freedom of the Press Act was not applicable to printed advertisements for prostitution. Language was “borrowed” from marketing doctrine, and the prostitution advertisements were thus found to be “of completely commercial nature, and have not been able to be perceived as statements in the debate on prostitution or otherwise as molding opinion.”<sup>286</sup> This shifted the emphasis from the procuring law’s intent to the intent of the Freedom of the Press Act.

The new approach to the fundamental laws seen in the 1979 procuring case may have originated in a governmental bill on marketing in 1970,<sup>287</sup> where the government expressed concern that the Marketing Act’s general provision could be used against “advertising in printed matters aiming to get the public to understand certain values, or influencing their general behavior in a certain direction.”<sup>288</sup> An impermissible application of this kind was envisaged as, for instance, where “information” about a business person’s “race, religion, political viewpoint, or personal relationship”<sup>289</sup> would be unprotected by freedom of expression. Such an application was to be avoided, even in cases where the advertising “in fact had been disseminated with a purely *commercial purpose*.”<sup>290</sup> The occasions when the Freedom of the Press Act was not to be applied to marketing law were, thus, to be limited to “such presentations which have purely *commercial relationships* to things.”<sup>291</sup>

Symptomatically for liberal democracies, a doctrine that makes sense in one area (especially when factions of powerful men are involved) can be applied for other areas even where it makes less sense. Accordingly, doctrines derived from marketing law may be applied to pornography, prostitution, and in extension to gender-based violence with results that are insensitive to the inequalities of power which characterizes these latter contexts. Following Crenshaw (see above), laws developed for groups that are singularly burdened (e.g., leftist dissident men, or middle class professional women) don’t work as well for groups burdened by multiple and intersectional disadvantages, which prostituted persons tend to be. The liberal expressive framework often assumes that all groups are similarly situated to the means of expressive power, and that reason

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<sup>284</sup> All three courts’s opinions are reported in NJA 1979-09-28 p. 602 et seq (Swed.).

<sup>285</sup> NJA [Scania & Blekinge Ct. App.] 1979-09-28 p. at 606.

<sup>286</sup> NJA [Supreme Court] 1979-09-28 p. 609.

<sup>287</sup> This is suggested by the accounts of Persson, *Exklusivetsfrågan*, 176-77.

<sup>288</sup> Prop. 1970 nr. 57 Förslag till lag om otillbörlig marknadsföring m.m. [Proposal for an Act on Undue Competition] [government bill] p. 67 (Swed.).

<sup>289</sup> *Id.* at 66.

<sup>290</sup> *Id.* at 67 (emphasis added).

<sup>291</sup> *Id.* at 67 (emphasis added).

will prevail in a marketplace of ideas.<sup>292</sup> Following this logic, freedom is best preserved with very few limits on freedom of expression. This might work sufficiently well for marketing law, but not necessarily with respect to intersectional sexual exploitation. Political scientists should thus account for what extent general laws have influenced areas of law related to gender-based violence, prostitution, and pornography, and whether such influence have made law insensitive to multiple and intersectional disadvantage. It is clear that the legal approach to pornography in Sweden (nor elsewhere) has not developed in a vacuum; rather, it has been molded according to social needs very different from those victimized by the sex industry. From the perspective of the latter groups, laws framed according to the imperatives of preventing gender-based violence or social discrimination probably had provided a better framework.

Considering that pornography laws can be influenced by marketing law, it is perhaps not too surprising that lottery regulation also had an influence. Whereas lottery offences were previously removed from the Freedom of the Press Act in 1949 on the Alexanderson rationale that such offenses could be regulated *entirely* by general law,<sup>293</sup> in 1974 the Parliament effectively reversed this doctrine by amending the Freedom of the Press Act with an explicit rule of delegation that sweepingly set aside the principle of exclusivity with respect to marketing associated with “alcoholic beverages or tobacco products.”<sup>294</sup> Doubts were expressed that the new marketing laws, including the requirement of “purely commercial relationship to things” that had been quoted in the 1979 Swedish Supreme Court procuring decision, could not sustain comprehensive regulation without constitutional amendment, even if a particular product was deemed harmful for “social or similar reasons.”<sup>295</sup>

The implication that exceptions for *social harm* would not sustain constitutional muster appears troublesome in light of the compelling need to address the harms of prostitution in pornography. It is therefore unfortunate that a few similar remarks were made in conjunction with other new amendments being passed to the Freedom of the Press Act in 1987,<sup>296</sup> which effectively might raise the procedural thresholds for the Swedish democratic legislature to pass effective legislation against pornography. The increase of new amendments has now generally been interpreted as entailing a narrower reading of the principle of exclusivity for cases where there is no explicit exemption in the fundamental laws. For instance, in 2010 the Supreme Administrative Court argued that Parliament most likely would require a further constitutional amendment if they intended a total prohibition against advertising for services such as lotteries and gambling.<sup>297</sup> Notably though, the Court did *not* exclude restrictions even without such an

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<sup>292</sup> The seminal statement to this view was expressed in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting) (“... the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”).

<sup>293</sup> SOU 1947:60 [gov’t report series] p. 250.

<sup>294</sup> Tryckfrihetsförordningen [TF] [Constitution: Freedom of the Press Act] 1:9 (Swed.).

<sup>295</sup> Prop. 1973 nr. 123 Förslag till ändring i Tryckfrihetsförordningen [government bill] p. 42 (Swed.).

<sup>296</sup> Prop. 1986/87:151 om ändringar i tryckfrihetsförordningen [government bill] p. 53 (Swed.).

<sup>297</sup> Regeringsrättens årsbok [RÅ] [Supreme Administrative Court] 2010-11-30 ref. 115 Mål 2208-09, slip op. at 8 (Swed.) (“*Expressen Case*”).

amendment as long as restrictions were made on basis of the *particular circumstances* of each case.<sup>298</sup> Thus a window of opportunity for narrowly tailored interpretation exists.

Perhaps the most contentious case decided on this case-by-case logic has been the so-called *Aftonbladet/Nazi* case, where a tabloid newspaper journalist in January 1998 showed three publicly known persons threatening photographs of Nazis that had been taken outside their respective homes.<sup>299</sup> The photos were published a few days later, with headlines such as “Death Threat against Chief of Police,” and showed armed persons covering their faces with balaclavas, and in one case a tear gas gun was pointed against an apartment door’s mailbox.<sup>300</sup> The five Nazis that had made the photographs, but not the journalist, were convicted in lower courts for having committed gross *unlawful threat*<sup>301</sup> and gross *threat to public servant*,<sup>302</sup> even though these offences were not explicitly mentioned in the fundamental laws. The Supreme Court reversed four of five judgments on the rationale that the Nazis were protected as “informants”<sup>303</sup> under the Freedom of the Press Act. The court found that the journalist wanted an illustration that provided a visual impression of the defendant’s Neo-Nazi organization, which he wrote an article about; thus, the publication of the photographs were integral to the journalist’s “journalistic activity,” and therefore the informants were seen as constitutionally protected.<sup>304</sup>

Legal scholars have criticized this novel concept—“journalistic activity”—for “leading very far when tying the informant’s liability to the issue of whether someone else has a journalistic purpose.”<sup>305</sup> Perhaps not surprisingly then, the Supreme Court dismissed the fifth Nazi who had sought relief for a substantive defect, or a petition for a new trial, after the other cases had been decided. The Supreme Court, however, took the position that the lower courts’ judgments “could not be regarded as *manifestly* in conflict with law.”<sup>306</sup> Hence, the case-by-case logic of individual assessments was emphasized anew.

As opposed to an analogous challenge against pornography production under procuring provisions, even the district court above readily admitted that making threatening photographs outside people’s homes is not an offense by itself.<sup>307</sup> What constituted the crime was the defendants’ intent, or at least their “complete disregard” of whether the images would come to the plaintiffs’ knowledge.<sup>308</sup> In the case of a legal challenge to pornography production, it is the other way: if production of images is done by procuring or purchasing sex from real persons it may be criminal as an *act* of prostitution, but the possession and publication may be constitutionally protected according to Sweden’s view on non-violent adult pornography (see

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<sup>298</sup> See *Id.* at 6 (noting that the “primary rule in criminal law settings” now appears to be “that an assessment shall be made in the particular case whether a presentation is covered by the Freedom of the Press Act or not.”).

<sup>299</sup> See NJA [All Instances of Court] 1999-05-19 pp. 275 et seq. B4575-98 (Swed.). Cf. *Pascalidou et al. v. Sweden*, App. no. 53970/00, Eur. Ct. H.R. (Feb. 11, 2003) (striking case off list due to parties’ settlement), <http://www.echr.coe.int> (follow “Case-Law; Decisions and judgments; HUDOC database.” Click HUDOC, mark “Decisions,” search for “Pascalidou” in “Introduction Zone”).

<sup>300</sup> *Id.*

<sup>301</sup> BrB [Criminal Code] 4:5 (Swed.).

<sup>302</sup> BrB [Criminal Code] 17:1 (Swed.).

<sup>303</sup> Tryckfrihetsförordningen [TF] [Constitution] 1:3 (Swed.).

<sup>304</sup> NJA [Supreme Court] 1999-05-19 p. 281.

<sup>305</sup> Persson, *Exklusivetsfrågan*, 374.

<sup>306</sup> NJA [Supreme Court] 2001-01-01 (notiser) C38 p. 32 Ö2710-99 (Swed.) (emphasis added).

<sup>307</sup> NJA [Stockholm Dist. Ct.] 1999-05-19 p. 277.

<sup>308</sup> NJA [Svea Ct. App.] 1999-05-19 p. 278.

above). Such a challenge to pornographers does *not* target the resulting material or expressive activity per se, as the government attempted to do in the *Aftonbladet/Nazi* case. Despite the move from a more permissive position to a more absolutist position in Swedish freedom of expression law since the 1940s, the doctrine is apparently still open for case-by-case exceptions under the fundamental laws—even against actual expressive materials. From this perspective, it appears puzzling how the Swedish 1998 Sexual Offenses Committee could categorically dismiss applying prostitution laws that do not target expressive sexual activity per se, only the economic or otherwise compensatory means of engaging in it.

### **Legislative Dismissals: the 1998 Sexual Crimes Committee’s Analysis**

In the 1998 Committee’s final report<sup>309</sup> it was admitted that one “could argue” that the fundamental laws do not prevent that “production and the dissemination of printed matter and other media . . . are subject to the same legal rules as other similar activity, e.g., comparable business activity.”<sup>310</sup> Hence, “[g]eneral restrictions that have nothing to do with the expected content are not regarded as violating the basic laws.”<sup>311</sup> The Committee exemplified with the Working Environment Act, which criminalized the use of children at work, and recognized that this Act also covers production and dissemination of pictures and movies.<sup>312</sup> From this vantage point it was said that the legislation on sexual offenses, including the procuring provision, holds generally, and “actual limitations that follows from them do not violate the basic laws.”<sup>313</sup> In this sense it is not a direct restriction of the freedom to produce or disseminate pornography—only an indirect one (and only when using money to buy real persons).

However, the Committee objected to the indirect line of reasoning and emphasized a more absolute reading of the statutory “right of every Swedish citizen to publish written matter [or other protected media], *without prior hindrance* by a public authority or other public body”<sup>314</sup> contained in the fundamental laws. To support this view they attempted to invoke a discussion of “indirect” media restrictions that had been made in the legislative history of media antitrust and bankruptcy law, albeit their citations may actually be interpreted as support for a different conclusion (more below). Nonetheless, the Committee took this discussion as implying that applying the procuring provision to pornographers would make their “right” to publish or disseminate these allegedly protected materials “illusory.”<sup>315</sup>

Assuming, *arguendo*, the assumption that dissemination of non-violent pornography is protected (see above), the Committee’s reasoning about “indirect” restrictions nonetheless has substantial bias, even without considering the moot analogy (they equated preventing prostitution with preventing insolvency or media monopolies, which have no relation to sex inequality or gender-based violence as the former). First, the Committee claimed that two previous government committee reports on antitrust law had taken the view that “case law” as well as “legislative history” suggested that indirect restrictions were permissible as long as they did not “in practice” make the freedoms to print,

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<sup>309</sup> SOU 2001:14 *Sexualbrotten: Ett ökat skydd för den sexuella integriteten och angränsande frågor* [government report series] p. 403-15(Swed.).

<sup>310</sup> *Id.* at 411.

<sup>311</sup> *Id.* at 411.

<sup>312</sup> *Id.* at 411-12.

<sup>313</sup> *Id.* at 412.

<sup>314</sup> Tryckfrihetsordningen [TF] [Constitution] 1:1 (Swed.) (emphasis added); *cf.* TF 4:1, 6:1.

<sup>315</sup> SOU 2001:14 [gov’t report series] p. 412-13.

publicize, and disseminate “illusory.”<sup>316</sup> As will be show below, the cited reports were more nuanced than the Committee revealed and did not view the issue in such dichotomous terms, as being about either more or less restrictions. Furthermore, nowhere did the reports invoke “case law” in support for any particular view.<sup>317</sup>

The reports actually made lengthy discussions about two different ideological perspectives among legal scholars. According to one perspective there is a danger that media monopolies rather than democratic intervention will restrict freedom of expression, so that the opportunities for individuals to express themselves or make informed and objective judgments become “illusory”; hence, restricting monopolization would promote freedom of expression on a balance.<sup>318</sup> This view is consistent with “positive freedom,” as opposed to the concept of “negative freedom” that grounds the view that freedom of expression is best preserved by not intervening against media monopolies. The older report agreed that the negative freedom approach had some merits from the point of view of statutory interpretation; thus, suggested a constitutional amendment to restrict its reach, although the amendment was never passed.<sup>319</sup> By contrast, the later report remarked that a negative freedom interpretation in defense of media monopolies was “irreconcilable” with statements made by Parliament, albeit in non-binding settings; nonetheless, this report concluded that “no one can with certainty know” which one interpretation will prevail.<sup>320</sup>

In the pornography context, the positive freedom approach suggests that because pornography generally promotes sexism and gender-based violence (see above), it actually silences women’s voices in public relative men’s. So although proscribing prostitution in pornography would “indirectly” restrict some individual’s expression just as proscribing monopolies might restrict some individuals’ rights, applying procuring laws would also promote more equal enjoyment of freedom of expression for women. Sources of international human rights law support this interpretation in defense of more effective pornography laws.<sup>321</sup> If the Committee had considered more fully the content of the reports it choosed to cite, the different conclusion might have been reached that proscribing pimping in pornography is more consistent with the purpose of freedom of expression than a release of liability. With the analogy to antitrust law the Committee attempted erroneously to

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<sup>316</sup> *Id.* at 412 (citing SOU 1999:30 Yttrandefrihet och konkurrensen [government report series] pp. 150-51, 208-09 (Swed.); SOU 1980:28 Massmediekoncentration [government report series] pp. 64-65, 92-93 (Swed.)).

<sup>317</sup> Quite the contrary, the more recent report says that except for one precedential case concerning the right to refuse to publish an advertisement, there is no consistent antitrust doctrine on such constitutional conflicts. The report even encouraged the Swedish Competition Authority to continue with antitrust litigation, despite criticism, in order to make the law more predictable. SOU 1999:30 p. 219 (Swed.).

<sup>318</sup> See generally SOU 1999:30 pp. 206-22; see also SOU 1980:28 p. 93.

<sup>319</sup> SOU 1980:28 pp. 92-94.

<sup>320</sup> SOU 1999:30 p. 218.

<sup>321</sup> See, e.g., Human Rights Comm., 68th Sess., 1834th Mtg., *General Comment No. 28*, ¶ 22, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), which compelled states parties under the under the International Covenant on Civil and Political Rights (ICCPR) (Dec. 16, 1966, 999 U.N.T.S. 171) to inform the United Nation of laws *or* factors potentially impeding “women from exercising the rights protected under . . . [article 19 on expressive rights] on an equal basis,” and in this context mentioned that “publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls.” The Commission concluded that states parties under the Covenant “should provide information about legal measures to restrict the publication or dissemination of such material.” *Id.* ¶ 22; see also Catharine A. MacKinnon, “Francis Biddle’s Sister,” in *Feminism Unmodified: Discourses on Life and Law* (Cambridge, MA: Harvard Univ. Press, 1987), 192-97 (discussing pornography as a practice silencing women in society).

show that an absolute conflict of interests between equality and speech was inevitable, where it was clearly not.

Moreover, the Committee misrepresented an older government bill that prohibited insolvent persons from conducting private businesses, where the parliamentary Council on Legislation<sup>322</sup> had argued that if such persons for instance were authors, free-lance journalists, troubadours, or photographers—thus made use of constitutional rights in their daily profession—the law could “indirectly” infringe on their constitutional rights.<sup>323</sup> Although the government subsequently added a waiver to protect expressive rights for such persons,<sup>324</sup> its legislative history was much more cautionary than it was purported by the Committee. For instance, the government had actually “doubted” whether the first proposal would “really” entail any indirect infringements as it targeted businesspersons whom were “liable to *grossly unlawful conduct*—often in the area of *white collar crime*.”<sup>325</sup> The government’s implication seems to be that it was unlikely that any such aggravated criminals would also conduct serious literary, journalistic, or other expressive activity that merited constitutional protection. Furthermore, the government assumed that the waiver would “not be of such great practical importance,” since it only protected individual persons, not individuals acting on behalf of legal entities.<sup>326</sup> However, it was added that “there would be reasons to discuss” the waivers “again” if they would “cause practical troubles.”<sup>327</sup>

None of the cautionary remarks above were mentioned by the 1998 Sexual Offenses Committee. Considering that the government believed the “constitutional waiver” under the Bankruptcy Code only to be applied in exceptional cases (see above), the analogous application to pornographers is grossly disproportionate; it provides exploitative and abusive businesses the freedom of liability for procuring offenses that otherwise can entail several years in prison.<sup>328</sup> Moreover, the government promised that if the bankruptcy applications would “cause practical troubles,” e.g., providing the latitude to conduct business patently in violation of serious criminal statutes, the waivers would have to be discussed anew (see above). The Committee’s dismissal of using procuring laws against pornographers rests to a very significant degree on this analogy between the bankruptcy waiver and prostitution laws. What if this disproportionate analogy was transferred to other areas such as rape, sexual coercion, or other criminal conduct? Would they be protected as well? If the Committee’s reasoning is grounded in law, one should find a case law corroborating their position accordingly. However, when looking at Swedish cases where persons were convicted for other criminal offences conducted as integral means to expressive activity, even much lesser offences, it has been impossible to find any defendant whom successfully invoked (if invoking at all) freedom of expression to acquire freedom from liability.

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<sup>322</sup> The Council on Legislation (*Lagrådet*) is an advisory non-binding body composed of Supreme Court judges.

<sup>323</sup> SOU 2001:14 [gov’t report series] p. 412 (citing Prop. 1979/80:83 om ändring i konkurslagen [on Amendments to the Bankruptcy Act] [government bill] p. 184-86 (reprinting statement by Council on Legislation).

<sup>324</sup> Konkurslagen [KonkL] [Bankruptcy Code] 6:1 (Swed.).

<sup>325</sup> Prop. 1979/80:83 [government bill] p. 191 (emphasis added).

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> For penalties under the procuring provisions, see *supra* note 224.

**Counterfactual Doctrine: Violent Resistance & Dishonest Conduct; The Anna Odell Case**

In the *Anna Odell* case, widely known in Sweden since 2009, criminally proscribed acts were undertaken in order to *produce* otherwise lawful expressive materials, contrary to the *Aftonbladet/Nazi* case (see above) where photographing threatening images was not alleged to be an offense until an intent to disseminate them existed. On January 21, 2009, Anna Odell, a student at Stockholm University College of Fine Arts, staged a psychosis and suicide attempt on a public bridge. Her conduct led to intervention from police and mental care providers, who apprehended and restrained her with straps, to which she admittedly violently resisted by, inter alia, kicking her legs, pulling her arms, and shouting.<sup>329</sup> The conduct was filmed by another person for Odell's art movie production. Stockholm District Court in 2009 convicted her under the Criminal Code for *violent resistance* (against public servant) and *dishonest conduct*.<sup>330</sup> The *Odell* case has been reported, discussed, and debated extensively in Swedish mainstream media, which suggests that if the constitutional issues had been disposed in error it would have been appealed.

Odell's defense unsuccessfully invoked the "journalistic activity" concept from the *Aftonbladet* case (see above) with regards to the violent resistance charge because "that part of the conduct is depicted in film."<sup>331</sup> Nevertheless, the court dismissed her appeals to be protected as being involved in journalistic activity. On one hand, it noted that Anna Odell was the author and could therefore not enjoin an informant's protection, and on the other hand it generally stated that the fact that Odell intended to show the video for the public "does not entail that the Freedom of Expression Act is an obstacle in the way for a regular criminal law trial of the [proscribed] act."<sup>332</sup> Contrary to the reasoning of the 1998 Sexual Offenses Committee (above), the *Odell* court seems not to have considered any impermissible "indirect" constitutional restrictions by enforcing the violent resistance and dishonest conduct provisions. The court explicitly recognized Odell's purpose to raise public awareness regarding compulsory care of persons with psychiatric disorders, which mitigated her sentence only to the extent of lowering the amount of fines that would otherwise have been sentenced.<sup>333</sup> Anna Odell's penalty of 50 daily fines is in the exact range for a typical purchase of sex, which in over 85% of the cases during the first ten years of the Sex Purchase Law's application entailed 50 daily fines.<sup>334</sup>

Expression that contributes to the discourse on public policy on mental disorders appears to merit no less constitutional protection than the illustrated journalistic report on Neo-Nazis in the

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<sup>329</sup> Stockholms tingsrätt [Dist. Ct.] 2009-08-31 B3870-09 slip op. at 3, 7-8 (Swed.).

<sup>330</sup> Stockholms tingsrätt, B3870-09, at 1. The offenses *violent resistance* and *dishonest conduct* are found in the criminal code. See BrB [Criminal Code] 17:4, 9:8 (Swed.).

<sup>331</sup> Stockholms tingsrätt, B3870-09, at 5. It may also be noted that Odell's legal counsel represented two of the three parties seeking damages from the defendants in the *Aftonbladet* case in 1999. See NJA [Supreme Court] 1999-05-19 pp. 275, 278 (Swed.) (noting that Claes Borgström was legal counsel). Her selection of a counsel that had taken an opposing position in another somewhat similar constitutional case might therefore have made her position appear more legitimate.

<sup>332</sup> *Id.*

<sup>333</sup> Stockholms tingsrätt, B3870-09, at 9.

<sup>334</sup> See, e.g., SOU 2010:49 Förbud mot köp, *supra* note 178, at 40 (English summary part).

*Aftonbladet* case; not surprisingly, such an argument was not suggested.<sup>335</sup> Furthermore, violent resistance and dishonest conduct are not listed in the fundamental laws as exempted from protection. Such lack of explicit recognition is generally perceived as an obstacle to exceptions, even if a case-by-case assessment might constitutionally be sustained (see above). Although contrary to such exception, Odell's movie and public exhibitions (i.e., her expressive materials) were never charged for violating any laws, as opposed to the *Aftonbladet* case or other non-listed exempted offenses, such as misleading advertisements,<sup>336</sup> counterfeit, and fraud (see above). In this light, the *Odell* case resembles production of pornography, which appears unlawful when sex is either procured or purchased, even though the resulting materials may be lawful.

### **Filmed Sexual Offenses in Swedish Case Law**

There are more analogous cases of filmed offenses in Sweden lending support to the proposition that the Sexual Offenses Committee were legally wrong when dismissing the use of procuring laws against pornographers. For instance, Scania and Blekinge Court of Appeals in 2009 convicted a man for countless acts of gender-based violence committed against two women during the period 2002 to 2008 (the "2009 *Malmö case*").<sup>337</sup> The case included charges of *gross rape* and *gross violation of a woman's integrity* (the latter is an umbrella offense covering other offenses that form a pattern of repeated violations).<sup>338</sup> The defendant had repeatedly filmed his sex with the two women and according to him, there were "many hours of film,"<sup>339</sup> which was explicitly confirmed in the opinion by at least one of the women.<sup>340</sup> The court basically found that the conditions surrounding these films entailed *coercive circumstances*,<sup>341</sup> so even if purporting to present consensual sex his acts were charged under the criminal code.

The man had artistic ambitions regarding the content of his movies and photographs which becomes evident when considering, e.g., how he erased his first version of a group sex movie because one of the women "cried all the time" while the other one "sat on the bedside and looked sad," and when considering how otherwise he consistently tried to eliminate violence and sadness from being shown in any movie he made.<sup>342</sup> Thus, whatever one thinks of the criminal offenses the man committed when producing his materials, by themselves the movies could possibly be disseminated with constitutional protection according to existing doctrine: i.e., "presentations characterized as pure entertainment and without cultural value, even

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<sup>335</sup> Furthermore, in the more contemporaneous Freedom of Expression Act from 1991 that protects non-print media, "artistic creation" is explicitly enumerated alongside other protected interest such as "opinion" and "information." *Yttrandefrihetsgrundlagen* [YGL] [Constitution] 1:1(2) (Swed.).

<sup>336</sup> In 1995 the Swedish Supreme Court for instance upheld an injunction against using the misleading expression "guaranteed interest rate" even in public sponsored information. *NJA* [Market Court] 1995-11-21 pp. 677, 681 Ö5258-95, *aff'd id.* p. 684 [Supreme Court] (Swed.).

<sup>337</sup> *Hovrätten över Skåne och Blekinge* [Ct. App.] 2009-05-18 B452-09, slip op. (Swed.).

<sup>338</sup> *Rape* is found in the same chapter as procuring and purchase of sex. *BrB* [Criminal Code] 6:1 (Swed.). *Gross violation of a woman's integrity* is found among "Crimes Against Liberty and Peace," *BrB* 4:4a.

<sup>339</sup> *Malmö tingsrätt* [Dist. Ct.] 2009-02-03 B6656-08, slip op. at 10 (Swed.).

<sup>340</sup> *Id.* at 18 (testifying "much film has been recorded and many photographs have been taken of their sex life").

<sup>341</sup> *Hovrätten över Skåne och Blekinge*, B452-09, at 26-27, 34-35 (Swed.).

<sup>342</sup> *Malmö tingsrätt*, B6656-08, at 17-18, 41. Regarding the first film, he managed to get the women to make a new one where they acted happily, despite that they hated it. However, they submitted because they were afraid of him. *Id.* at 17-18, 41. Their fears are understandable as he handed out violent punishments when, e.g., bruises were not covered up with makeup, or when they showed pain during sex since "he then thought that he appeared as a bad person [sic]." *Id.* at 16.

pornography.”<sup>343</sup> Nonetheless, contrary to the *Anna Odell* case (above) the defendant did not perceive a constitutional freedom of expression defense *even* in order to mitigate his sentence, though other minor details successfully mitigated the opinion and sentencing. Defendant’s rape of women “more or less daily” was mitigated to “several times a week,” some were considered “normal rape” whereas previously all had been considered “gross,” and all charges of rapes (but not gross violation of integrity) of one woman during 2004 were dropped in part since defendant had more sex with the other woman because the former was pregnant that year.<sup>344</sup> If such details could influence the opinion and sentencing, had it appeared reasonable to invoke an “indirect restriction” of constitutional rights along the 1998 Sexual Offenses Committee (see above) his counsel is likely to have stressed the point. This was not done.

In another similar appealed case (the “2009 *Western Sweden*” case), a man had filmed a number of coercive sexual acts with his wife, alleging they were engaging in consensual role-play. The court found differently and convicted him for rape in the acts caught on camera.<sup>345</sup> In his computer the police had seized “saved images of sexual violence in order to substantiate [his] interest in such matters.”<sup>346</sup> They also found he owned typical pornography apparel indicating such interest, e.g., handcuffs, blindfolds, and dildos.<sup>347</sup> Additionally indicating his familiarity and artistic ambition in pornography production, he voluntarily submitted other films he had made to the court to support the contention that the coercive acts on film were simulated role-play.<sup>348</sup> As in the former 2009 *Malmö* case, undeniably this defendant also produced sexual media with some regularity and had artistic ambitions. However, contrary to the *Anna Odell* case (above), he never raised a freedom of expression issue in any court.<sup>349</sup> The 2009 *Western Sweden* case is therefore notable when assessing applicability of prostitution laws to pornography production; had it appeared as a reasonable defense, even if only for mitigating the penalty, defendant’s counsel would have emphasized that his client was engaged in producing expressive material potentially under constitutional protection.

Moreover, in several other cases in Swedish courts of appeals during the period of 2008 to 2011, with cell-phone cameras people had filmed sexual acts that were later subject to criminal charges. Just as in the two cases from 2009 mentioned above, no defendants raised freedom of expression concerns in support of an acquittal or a mitigation of the sentence, nor did they object the forfeiture of their cell-phones (not even a defendant who was acquitted for the sexual offense charge).<sup>350</sup> The reasons for seizing their cell-phones, which the courts subsequently forfeited, was

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<sup>343</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1979-09-28 pp. 602, 608 (Swed.); cf. Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] p. 21 (Swed.) (“pure entertainment”).

<sup>344</sup> Hovrätten över Skåne och Bleking, B452-09, at 14-15, *mitigating sentence of Malmö tingsrätt*, B6656-08, at 40, 65.

<sup>345</sup> Hovrätten för Västra Sverige [Ct. App.] 2009-05-15 B3766-08, slip op. at 5-6 (Swed.), *modifying sentence Varbergs tingsrätt* [Dist. Ct.] 2008-07-22 B2771-07, slip op. (Swed.).

<sup>346</sup> Varbergs tingsrätt, B2771-07, Appendix no. 1 containing prosecutor’s summons application, at 3.

<sup>347</sup> See, e.g., Varbergs tingsrätt, B2771-07, at 3 (list of confiscated items); Hovrätten för Västra Sverige, B3766-08, at 5 (mentioning handcuffs).

<sup>348</sup> Hovrätten för Västra Sverige, B3766-08, at 6. The court of appeals found that the activity in his other films were too different to support the claim that the materials under charge were not showing criminal conduct.

<sup>349</sup> For the district court’s opinion, see Varbergs tingsrätt [Dist. Ct.] 2008-07-22 B2771-07, slip op. (Swed.).

<sup>350</sup> See, e.g., Hovrätten för Västra Sverige [Ct. App.] 2011-04-15 B1607-11, slip op. at 8 (Swed.) (forfeiting cell-phone for inability to permanently erase rape movies); Svea hovrätt [Ct. App.] 2010-04-23 B5077-09, slip op. (Swed.), *aff’g Södertälje tingsrätt* [Dist. Ct.] 2009-05-19 B366-06, slip op. at 11, 15, & Appendix (file no. 140),

said to be the risk for further criminal abuse—e.g., slander and libel of the women depicted in the movies. The defendants objected unsuccessfully to these allegations, if at all.<sup>351</sup> One objection was that they would not use the materials in criminal ways,<sup>352</sup> another one that the films could be permanently erased with certainty (something the courts did not believe),<sup>353</sup> and a third one (when acquitted for rape) that their movies were “non-criminal and of private character.”<sup>354</sup> If any constitutional interest can be said to have been invoked at all, though in vain, it was a privacy interest rather than a freedom of expression. The Swedish case law on filmed sexual offenses shows that courts have never perceived any legal conflict in enforcing sanctions against criminal activity conducted as an integral means to produce otherwise constitutionally protected expressive materials.

Moreover, as suggested by legal scholars when discussing illicit printing of money and other cases,<sup>355</sup> confiscation was not only permissible regarding the cell-phones, but also regarding movies stored on other medias.<sup>356</sup> Such forfeiture was apparently not regarded as a de facto prior restraint on future potentially lawful uses of expressive media, nor regarded as making the defendant’s constitutional rights “illusory.” Arguably, in part these materials contained such non-violent pornography that is constitutionally protected according to the doctrine (see above). Perhaps most importantly though, and consistent with the judgment in the *Anna Odell* case, the courts have not found any bar against charging perpetrators for sexual offenses simply because the conduct was also documented on film. If offenses such as violent resistance and dishonest conduct can be enforced during artistic productions, even when only entailing low penalties, and sexual coercion, which is part of the same sexual offenses chapter in the criminal code as the prostitution laws, may too, one has to question why prostitution laws cannot.

The reasons why sexual coercion intuitively appears reprehensible are precisely the same reasons why Sweden choose to pass the Sex Purchase Law: The abuse of power, sometimes including violence, or the subsequent sexual exploitation of a person who’s been deprived of their power. Procuring, or purchasing a person for sex for money, in many ways are just other forms of sexual coercion. The purchased person typically has less power already than her/his trick or procurer—often a result of years of childhood sexual abuse and other plights (see above);

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containing prosecutor’s summons application, at 5 (convicting for gross sexual coercion and forfeiting cell-phone containing movie thereof); Svea hovrätt [Ct. App.] 2009-08-11 B5284-09, slip op. at 2 (upholding cell-phone forfeiture, but dismissing rape charge), *rev’g in part* Södertörns tingsrätt [Dist. Ct.] 2009-06-05 B6371-09, slip op. (Swed.); *see also* Svea hovrätt [Ct. App.] 2009-09-07 B6354-09, slip op. at 4-5 (Swed.) (forfeiting cell-phone that contained copy of a movie seized in another cell-phone in previous rape case which involved the same defendant, *see supra*, Svea hovrätt, B5284-09, at 2).

<sup>351</sup> *See* Svea hovrätt, B5077-09, *aff’g* Södertälje tingsrätt, B366-06 (no objections to cell-phone forfeiture).

<sup>352</sup> Södertörns tingsrätt [Dist. Ct.] 2009-06-05 B6371-09, slip op. (Swed.) (defendant unsuccessfully objecting cell-phone forfeiture, no particular grounds raised), *rev’d in part* Svea hovrätt [Ct. App.] B5284-09, at 2 (dismissing rape charge, but affirming cell-phone forfeiture).

<sup>353</sup> Hovrätten för Västra Sverige, B1607-11, at 8 (defendant objecting unsuccessfully that movies could be erased permanently).

<sup>354</sup> Svea hovrätt, B6354-09, at 4 (unsuccessfully arguing that his acquittal for a rape depicted in movie effectively makes the content “non-criminal and of private character”).

<sup>355</sup> Persson, *Exklusivitetsfrågan*, 309-10; *see also id.* at 315 (discussing erroneous claims in scholarly literature).

<sup>356</sup> *See* Hovrätten för Västra Sverige [Ct. App.] 2009-05-15 B3766-08, slip op. at 2 (Swed.) (“2009 *Western Sweden case*”) (forfeiting movies stored on hard drives); *see also* Hovrätten över Skåne och Bleking [Ct. App.] 2009-05-18 B452-09, slip op. at 41 (Swed.) (“2009 *Malmö case*”), but note that it is unclear from the wording of the opinion whether the films and photographs were permanently or temporarily forfeited.

hence, a trick or procurer do not need to “coerce” in the traditional sense to obtain or sell their sex. The money contains the sufficient power. Indeed, Sweden criminalized the trick and decriminalized the prostituted person on the rationale that the former abuses his/her relative power while exploiting the latter, who typically do not want to stay in prostitution.<sup>357</sup>

***Concluding Legal Note on Application of Existing Procuring Law***

It might be objected that the prostitution laws legislative history did not explicitly mention the pornography setting. Notably though, similar objections against extending the procuring provisions to areas never mentioned in legislative history, such as newspaper prostitution advertisements, were effectively dismissed by the Supreme Court in their 1979 decision (see above),<sup>358</sup> and has not been overruled since. The defendant unsuccessfully had reportedly submitted to the Supreme Court that it was “offensive to the public sense of justice to interpret something from an old legislation that was not anticipated, namely advertisements in the daily press.”<sup>359</sup> In the court of appeals, the defendant had also unsuccessfully argued that the “procuring provision was introduced in 1918 and intended to counter completely different activities than those subject to the present case, primarily brothel- and souteneur activity,” and that no legislative inquiry had dealt “with the newspapers’ role.”<sup>360</sup> This position was rejected, and the government was found to have made a permissible application according to original legislative intent, with the court noting, e.g., that supplying prostituted people’s addresses to potential tricks was mentioned in the legislative history as an example of promoting prostitution; the courts thus concluded that advertising was “well comparable” to such promotion.<sup>361</sup> This rationale appears just as valid for applying the provision to pornography production. Empirical evidence of the harmful conditions of exploitation during pornography production suggests that it is made under similar conditions as prostitution generally, if not even worse (see above).

Interestingly, one may object that legislators had actually intended *not* to include newspaper advertisements by not mentioning it, perhaps due to freedom of expression concerns? However, this position did not strike the courts as plausible at all. Rather, it was held that “with consideration to that [newspaper] advertising has a much stronger effect than such conduct which the legislative history directly aimed at, it is generally important as a means in the fight against prostitution to counter such advertising.”<sup>362</sup> The same could be said about pornography production. Evidence suggests that consumers are inspired by the materials to “try out” new activity with people in prostitution, whom sometimes are also forced to imitate pornography conduct.<sup>363</sup> Thus, pornography acts as a form of advertising for prostitution. The harms to prostituted people appear also to be enhanced by circulation of the materials, them being sold and distributed forever publicly as and for sex, reportedly creating more stigma that may obstruct

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<sup>357</sup> See *supra* pp. 32-34, on the Sex Purchase Law’s legislative history; cf. Waltman, “Sweden’s Prohibition,” 450-58; Waltman, “Ending Trafficking” *supra* note 171, at 137-46.

<sup>358</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1979-09-28 p. 602 (Swed.).

<sup>359</sup> *Id.* p. 606.

<sup>360</sup> NJA [Scania & Blekinge Ct. App.] 1979-09-28 p. 605 (Swed.).

<sup>361</sup> *Id.* p. 606.

<sup>362</sup> *Id.* p. 606.

<sup>363</sup> See *supra* notes 102-107, and accompanying text.

escape.<sup>364</sup> Moreover, pornography production is just as unequal with respect to gender as is prostitution; thus, the additional legislative purposes of the Sex Purchase Law as a means to counter gender inequality (see above) would be similarly furthered by countering prostitution in front of the camera as prostitution without a camera.

Considering the 1979 decision on prostitution advertisements in light of the *Anna Odell case* and decisions on filmed sexual offenses, the lack of enforcement of Swedish procuring (or trafficking) laws on pornography production does not seem to have much to do with constitutional freedoms or rule of law. Rather, the haphazard comments and cursory dismissals by the 1998 Sexual Offenses Committee seem purely *ideological*. No absolute constitutional obstacle prevents the Swedish judiciary, or the Parliament, to take legal action against sexual exploitation in the pornography industry by using existing procuring or trafficking laws.

### ***AN ALTERNATIVE DEMOCRATIC THEORY***

The failed attempts to apply prostitution laws to pornography production in Sweden suggest that one obstacle might be the liberal negative concept of freedom. As previously mentioned, this view assumes that granting the democratic state a power to intervene in social business entails walking a “slippery-slope” that eventually leads to abuse of state power. According to this logic, John Stuart Mill feared an “unlimited right in the public not only to prohibit by law everything which it thinks wrong, but in order to get at what it thinks wrong, to prohibit any number of things which it admits to be innocent.”<sup>365</sup> In the introduction it was discussed how the view of early liberals may be related to their particular social context were privileged men feared (and often rightly so) that other men would abuse state power against them. However, this perspective has since been criticized as far too limited a view of power to be applied to problems such as gender-based violence.<sup>366</sup> For instance, domestic violence is perpetrated by private actors who abuse the position of vulnerability of others, and this abuse has historically been protected by the same state doctrine of non-intervention derived from the concept of negative freedom.

However, there is now an increasing recognition of the need for “positive freedoms” in international law; e.g., disparate impact flowing from similar treatment (formal equality) is seen as a form of discrimination that states need to enact proactive measures to fight, such as affirmative action.<sup>367</sup> A similar approach has influenced case law on gender-based violence in domestic law, where states who fail to intervene may be civilly liable to victims of domestic violence in some countries (albeit not everywhere).<sup>368</sup> This positive freedom approach also underlies Sweden’s approach to prostitution; Sweden does not treat the prostituted person

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<sup>364</sup> For instance, women in Nevada brothels reported that pornography made there with them made them feel stigmatized and defined by it, making escape from prostitution more difficult. Farley, *Prostitution in Nevada*, 37.

<sup>365</sup> Mill, *On Liberty*, 156.

<sup>366</sup> See *supra* p. 19 et seq.

<sup>367</sup> See, e.g., Comm. on the Elimination of Discrimination Against Women, 30<sup>th</sup> Sess., *General Recommendation No. 25*, ¶¶ 8 & 18, U.N. Doc. HRI/GEN/1/Rev.7 (May. 12, 2004); Human Rights Comm., 37<sup>th</sup> Sess., *General Comment No. 18: Non-Discrimination*, ¶¶ 8-10, U.N. Doc HRI/GEN/1/Rev.7 at 146 (Nov. 10, 1989).

<sup>368</sup> Compare *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009), and *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC) (S. Afr.) (state liable for failure to intervene), with *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005), and *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989) (state not liable for failure to intervene).

“similarly” as those who buy and procure them, but views prostitution as a form of inequality that merits state intervention (see above).

By contrast, legal rationales derived from such remote areas as marketing and lottery laws to antitrust and bankruptcy laws have, even when applied incorrectly, made an influence that strengthened the principle of non-intervention with respect to Swedish pornographers. Most of these analogous rationales derive from social contexts of power very far from gender-based violence or sexual exploitation. Judging from the empirical evidence on the harms of the sex industry surmised above, it would appear unlikely that monopolization, insolvency, marketing and gambling by itself would affect the life, liberty, dignity and equality of persons to the same degree as prostitution. From this perspective, it is remarkable that prostitution in pornography was not even judged correctly according to the standards of the former doctrines on free expression; e.g., the case-by-case constitutional approach was patently ignored by the 1998 Sexual Offenses Committee (see above). This disengagement with the substantive social conditions of power stands out in contrast to the Sweden’s emphasis on gender-equality when passing the Sex Purchase Law (see above). Considering these different approaches, a tacit logic underlying the dismissals to apply prostitution laws to pornographers appears to be the “slippery-slope” concept of negative freedom, even though arguably wrong from a legal standpoint. The question is why pornographers have been granted such a special absolute freedom compared to the many other activities that are patently criminalized, even when being integral to expression (see, e.g., the decision above on violent resistance, dishonest conduct, and filmed sexual offenses)? Some answers are suggested by democratic theories discussed in the introductory part.

### **Intersectionality: The Problem of Multiple Disadvantages**

Crenshaw argued (above) that many laws and political approaches that attempt to address inequality fail to recognize the burden of multiple disadvantages—i.e., problems of intersectionality. Prostituted people, as mentioned above, are usually burdened by numerous historical, social, political, and legal disadvantages such as having been victimized by child sexual abuse, neglect, poverty, homelessness, sexism, and racial discrimination. However, the outcome of the ideological approach taken by legislators with regard to the pornography industry only addressed one source of disadvantage: subjection to abuse of state power. This rationale erroneously assumes that power do not operate in the intersection of multiple disadvantages—only according to the singular logic of allegedly weak individuals versus a powerful state. Evidence suggests that persons prostituted in the pornography industry share the same group disadvantages as prostituted people generally (see above). State non-intervention is inadequate to provide them with freedom from abuse of power, just as non-intervention is an inadequate response to the exigencies of domestic abuse. However, what distinguishes domestic abuse from the pornography industry is that the former may be *presented* as a problem of singular disadvantage, even when being more complex. Following Crenshaw, an assumption can be made that women would “but for” gender inequality be equally situated to men in the private sphere. A singular conflict is thus presented between the constitutional interest of privacy and equality.

Compared to domestic violence, pornography production not only adds the additional constitutional interest of free expression, which already entail three conflicting perspectives:

equality, speech, and privacy (“private business”). Furthermore, prostituted peoples’ multiple disadvantages constitute such coercive circumstances that usually make them having to accept, for lack of “real and acceptable alternatives,”<sup>369</sup> to be exploited sexually in ways that many non-prostituted persons would simply define as “rape.”<sup>370</sup> These conditions thus add another disadvantage which law and public opinion tend to attribute negatively to the prostituted person: *money*. Being paid to be raped should be viewed as evidence of an additional disadvantage, but for prostituted persons it often tarnishes their legal status. Following Crenshaw, all these factors make the pornography industry far too complex to be accurately addressed legally and politically on a singular logic. Perhaps this is also one reason why the filmed sexual offenses, violent resistance, and dishonest conduct could be proscribed in Sweden without anyone successfully raising the freedom of expression flag (see above). These offenses did not necessitate an intersectional analysis; e.g., rape is easily comprehended as illegitimate abuse, as are violent resistance and dishonest conduct.

Sweden’s legal approach to prostitution in 1998 was the first in the world to navigate through prostitution’s multiple forms of disadvantages sufficiently to recognize that being paid money for sex is not an expression of genuine freedom, but rather a form of exploitation and inequality (see above). Regarding the pornography industry a similar recognition of multiple disadvantages has failed to be delivered, and would have required an accurate interpretation of more conflicting constitutional interests than with regards to prostitution. Because there would also be more conflicting interests involved, more social forces would likely attempt to influence democratic decision-making in matters pertaining to pornography. For instance, data on number of tricks compared to number of pornography consumers suggest that the pornography consumption is an issue affecting far more men, at least in Sweden, than is prostitution per se.<sup>371</sup>

### **Representation & Democratic Decision-Making**

As argued by Young (see above), one reason why underprivileged groups who organize politically are usually found outside formal legislative arenas are that the perspectives of more privileged groups tend to dominate the latter arenas. There may also be “adversary” logics in legislative and judicial deliberative processes which tend to silence the perspectives of social groups who are less powerful such as prostituted persons. One non-governmental organization which was important in making Swedish parliamentarians interested in the Sex Purchase Act was the national women’s shelter umbrella movement (ROKS).<sup>372</sup> Although the initial interest for the Sex Purchase Act appears to have been linked to the antipornography women’s movement in

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<sup>369</sup> *Travaux Préparatoires* to the Palermo Protocol, *supra* note 170, ¶ 63 (clarifying that the reference to third parties who “abuse” someone’s “position of vulnerability” is a form of trafficking that should be “understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”).

<sup>370</sup> See, e.g., *supra* notes 108-111, and accompanying text.

<sup>371</sup> For an estimation of the percentages of tricks in Sweden, see Sven-Axel Månsson, “Commercial Sexuality,” in *Sex in Sweden: On the Swedish Sexual Life 1996*, ed. Bo Lewin, (Nat’l Institute of Pub. Health, Swed.; Stockholm, 2000), 238 (year 1996); Jari Kuosmanen, *Tio år med lagen [Ten Years with the Law]*, in *Prostitution i Norden*, ed. Charlotta Holmström and May-Len Skilbrei (Copenhagen: Nordiska ministerrådet [Nordic Council of Ministers], 2008), 368, 372-73 (years 1999-2008). For some alternative analysis of these data, see Waltman, “Sweden’s Prohibition,” 460. For estimations of pornography consumers, see *supra* notes 12-18, esp. n.14.

<sup>372</sup> See *supra* notes 186-189, and accompanying text.

Sweden,<sup>373</sup> it is not entirely clear why the antipornography movement lost momentum later on. Possibly, there was a strategic decision made by ROKS and others to focus only on the Sex Purchase Act, as experiences from other countries showed that pornography was extremely difficult to challenge politically and legally. Either way, the support for proactive measures or inquiries of the situation in pornography around the time of the 1998 Sexual Offenses Committee's work could not muster a majority in Parliament.<sup>374</sup> Considering that a historically unprecedented representation of 42,7% women in Sweden's Parliament<sup>375</sup> existed simultaneously with the 1998 Committee's and Parliament's dismissal of attempts to address pornography's harms, women's representation in legislatures are clearly not enough to address a gender equality issue such as pornography. As Weldon and Htun's research from over 70 countries shows, autonomous women's movements have been shown more crucial for change than female representation in government (see above).

But few women's antipornography movements have survived, or attained enough influence over the legislatures or the judiciaries. What can be done in such cases? In this context, Mansbridge's recognition that the relevant descriptive representation may be contingent with issue and context is important.<sup>376</sup> The fact that the harms of pornography typically affect women differently depending on social status may also be a cause why legislatures and courts have been disinterested to address them. Research has shown how prostituted women are particularly vulnerable to consumption effects, such as demand for dangerous acts by tricks who seek to imitate pornography they've seen (see above). Even though research also suggest that the effects from pornography consumption affects general attitudes toward women in society, such attitudes may be more difficult to relate to pornography for women who are not in prostitution or are not particularly vulnerable to similar abuse. The mainstreaming of pornography in society, which influences everything from music videos to fictional literature,<sup>377</sup> also makes it difficult for the general public to distinguish various causes to sexism and pornography's role in that.

Young, and to some extent Shapiro, have proposed several institutional mechanisms that may provide better guarantees that the perspectives of historically, socially, politically, and legally subordinated groups will be heard (see above). Some of these measures may appear controversial from a conventional liberal democratic view, such as a veto-power for issues immediately affecting them as a group.<sup>378</sup> However, the failure to address pornography's harms shows why such measures may be necessary in order to make democracy more inclusionary and equal. The basis for these measures are the same as for Crenshaw, who stated that if we "began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would

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<sup>373</sup> See, e.g., Russell, "Swedish Feminism & Pornotopia"; see also *supra* notes 186-189, and accompanying text.

<sup>374</sup> See *supra* notes 231-232, and accompanying text.

<sup>375</sup> "Riksdagsval 1922-2010. Valda efter kön" [Parliamentary Elections 1922-2010: MPs According to Gender], Statistiska Centralbyrån (SCB), accessed Apr. 8, 2012, [www.scb.se/Pages/TableAndChart\\_\\_\\_\\_160728.aspx](http://www.scb.se/Pages/TableAndChart____160728.aspx).

<sup>376</sup> Mansbridge, "Should Blacks/Women Represent," 638.

<sup>377</sup> See, e.g., American Psychological Ass'n, *Task Force Report* (reviewing research); Catharine A. MacKinnon, "X Underrated," *The Times Higher Education Supplement*, May 20, 2005, 18 et seq. (analyzing the role of pornography and how it increasingly influences mainstream culture).

<sup>378</sup> Shapiro, *Democratic Theory*, 5; Young, *Justice & Politics of Difference*, 184.

also benefit.”<sup>379</sup> Such an approach necessitates a more critical perspective toward the conceptual merits of the negative freedom of liberalism. Albeit having merit in certain areas, negative freedom is not a catch-all approach that works for every issue. It has already been replaced in the area of domestic violence in many countries (see above). Moreover, the concept of a social welfare state, as generally envisioned by political theorists such as John Rawls as well as in human rights law,<sup>380</sup> also questions the general validity of negative freedom (an issue relevant also for the present discussion on health care reform in the United States).

However, emphasizing positive freedoms per se is a general approach that is too abstract to provide guidance for concrete issues; hence, it needs further specification. With respect to prostitution in the pornography industry, Young’s suggestions for considerations might, apart from the mentioned veto-proposal, also include (1) public support for “self-organization” of groups, e.g., survivors or persons who are used in the sex industry, or more generally women’s shelter movements, in order “that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of the society”; (2) institutional mechanisms that oblige decision-makers to account for the perspectives voiced by such groups, e.g., special consideration to their briefs or submissions, or government obligations to inquire into problems related to groups that are particularly disadvantaged, which evidently prostituted persons in the pornography industry are.<sup>381</sup>

The first of Young’s proposals is consistent with the findings from Weldon and Htun in the sense that it is very likely that equality will be promoted if democracies promote such autonomous groups (“self-organization”).<sup>382</sup> It can therefore be assumed that people who’ve been exploited in the sex industry would influence public policies so they become more effective, if government have promoted their autonomous organizations. A government obligation to promote such organizations can be laid down in law, or even made a constitutional obligation rather than being an open political imperative subject to the whims of democratic majorities. Of course, it is imperative that legitimate organizations are supported, as opposed to organizations manipulated by pornographers or other sex industry interests. However, this is not a problem particular to the sex industry, but concerns numerous of social interest organizations that receive public support or legal recognition, and could be addressed similarly.

Young has also suggested quotas,<sup>383</sup> which is less difficult for special commissions, public hearings, courts, and similar bodies. However, it is not certain that quotas intending to reflect the perspective pornography survivors would be effective at the highest government level, unless in very large and unlikely percentages. According to Weldon and Htun (above), female representation in government was a weaker cause for effective policies against gender-based violence than autonomous organizations. Although quotation as strategy has its limits and should be used at an appropriate level of government, quotas make it more difficult for privileged

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<sup>379</sup> Crenshaw, “Demarginalizing the Intersection,” *supra* note 159, at 167.

<sup>380</sup> International Covenant on Economic, Social, and Cultural Rights (ICESCR), Dec. 16, 1966, 993 U.N.T.S. 3 (entry into force Jan. 3, 1976); John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard Univ. Press, 2005).

<sup>381</sup> These modifications of Young’s proposals draws from Young, “Polity & Group Difference,” 124, and Young, *Justice & Politics of Difference*, 184.

<sup>382</sup> Cf. Weldon & Htun, “Civic Origins.”

<sup>383</sup> Young, *Inclusion & Democracy*, 141-53.

groups to dismiss applying prostitution laws to pornographers by referring to the “common good” of non-intervention. Quotas make privileged groups having to confront social experiences and circumstances from the sex industry that they may be unaware of.<sup>384</sup>

Moreover, empowering historically subordinated groups would also need a stronger emphasis on *civil* remedies that could give prostituted people or other people who were harmed by the social practice of pornography the initiative to use the law—as opposed to *criminal* law, which is dependent on prosecutorial discretion and public priorities.<sup>385</sup>

### **A Concluding Note**

The issue of applying prostitution laws to pornographers will, from my account in this paper, hopefully be seen as quite straightforward; applying existing prostitution laws do not need any legislative intervention—at least not in Sweden, and not elsewhere either, at least when assuming that prostitution is legally recognized as a form of inequality, where tricks and pimps typically exploit and harm prostituted persons. Having inquired into the legal inconsistencies and ideological bias that legislators approached the issue in Sweden, it appears as the political theories that address group disadvantages accounted for above are highly relevant. Some of the less conventional proposals, such as quotas and group vetoes, may look rather reasonable responses to address empirical problems such as prostitution and the sex industry. The problem of social dominance, and how to make democracies more equal, is obviously not restricted to the sex industry, nor to gender-based violence. A theory that address the problems for groups who are multiply disadvantaged and situated in a complex intersection between conflicting democratic imperatives, as people who are prostituted in pornography evidently are, is more likely to be useful for other groups that are singularly disadvantaged in less complex situations. In the metaphor of Crenshaw: “When they enter, we all enter.”<sup>386</sup>

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<sup>384</sup> Cf. Young, *Justice & Politics of Difference*, 185-86.

<sup>385</sup> See, e.g., Catharine A. MacKinnon and Andrea Dworkin, eds., *In Harm's Way: The Pornography Civil Rights Hearings* (Cambridge, MA: Harvard Univ. Press, 1997); Waltman, “Rethinking Democracy”; see also Waltman, “Sweden’s Prohibition,” 463-68 (arguing for a stronger civil rights approach under the existing Swedish prostitution laws).

<sup>386</sup> Crenshaw, “Demarginalizing the Intersection,” *supra* note 159, at 167 (internal quotation marks omitted).