

**THE CIVIL RIGHTS AND EQUALITY DEFICIT:  
Legal Challenges to Pornography and Sex Inequality in  
Canada, Sweden, and the U.S.\***

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Pornography has been found to desensitize societies to violence against women, inspiring rapes and contributing to the sexual subordination of women to men.<sup>1</sup> Making their materials, pornographers exploit existing inequality between the sexes to coerce women and children to perform unwanted or dangerous sexual acts as a form of prostitution. Existing legal regulations in democratic societies have not approached pornography with these realities in mind, but usually rather as a right protected by freedom of expression, or as an “obscene” expression offending the public rather than harming any particular group. In rare but important instances, pornography has legally been seen as a harmful practice violating women’s human or democratic rights to equality.

This analysis exposes tensions and poses questions regarding democracy, equality and the meaning of citizenship. If a practice like pornography systematically reproduces and sustains a group’s domination of another, and one democratic ideal is to provide equality among citizens who may participate in self-rule, existing democracies may be regarded as insufficient to their own ideals when they do not regulate it effectively. In this light, the question becomes what, under present systems of democracy, are the obstacles to democracies addressing these problems, and what alternatives exist? To pursue this inquiry, this paper will compare events in *Canada*, *Sweden*, and the *United States* where laws regulating pornography and prostitution were challenged on the basis that they did not respond to their harms to women’s equality.

In Canada the Supreme Court held that legally prohibiting pornography that is violent, degrading or dehumanizing, seeking “to enhance respect for all members of society, and non-violence and equality in their relations with each other,” promotes equality, a fundamental democratic value “that the restriction on freedom of expression does not outweigh.”<sup>2</sup> In the U.S., on the other hand, federal courts held that giving women a civil right to sue pornographers for the harm to women to which pornography contributes was “viewpoint discrimination” in violation of the First Amendment.<sup>3</sup> Similarly, while in Sweden the *purchase* of sex was prohibited in 1998 and *being* prostituted was not on the legislative rationale that prostitution is a form of sex inequality and violence against women,<sup>4</sup> pornographer’s prostitution of women was

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<sup>1</sup> See *infra*, notes 15-59 and accompanying text for sources, documentation and analysis of these conditions.

<sup>2</sup> *R. v. Butler*, [1992] 1 S.C.R. 452, 509, CarswellMan 100 at paras. 126-27.

<sup>3</sup> *American Booksellers Ass’n, Inc., v. Hudnut*, 771 F.2d 323, 331 (7<sup>th</sup> Cir. 1985), *aff’d mem* 475 U.S. 1001 (1986) (6-3).

<sup>4</sup> See Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill] p. 22 (Swed.).

nevertheless protected as “speech” when legislators lamented that so extending “liability for procuring . . . is in conflict with . . . Freedom of Expression.”<sup>5</sup>

National differences notwithstanding,<sup>6</sup> after subsequent judicial interpretation similar heterosexual pornography once ruled criminal by the Canadian Supreme Court in *Butler*<sup>7</sup> is now legal; e.g., materials presenting women presented as sexually insatiable and constantly looking for sex with strangers,<sup>8</sup> men repeatedly ejaculating into their mouths,<sup>9</sup> and a man verbally abusing a woman, bending her backwards over a toilet while urinating into her mouth, and “punishing” her when it overflows by scrubbing the toilet bowl with her head all the while she is “obviously not consenting” according to the acquitting judge.<sup>10</sup> Not surprisingly, existing obscenity regulation of pornography in the U.S. is also considered arbitrary as well as ineffectual,<sup>11</sup> most forms of pornography making their way to the market in any case.<sup>12</sup> And in Sweden, despite that purchase of sex, if not pornography, was criminalized as a form of sex

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<sup>5</sup> Statens Offentliga Utredningar [SOU] 2001:14 *Sexualbrotten: Ett ökat skydd för den sexuella integriteten och angränsande frågor* [government report series] p. 415 (Swed.), *aff’d* Proposition [Prop.] 2004/5:45 *En ny sexualbrottslagstiftning* [government bill] (Swed.).

<sup>6</sup> For overview of constitutional differences in this area, *see, e.g.*, Samuel V. LaSelva, “I know it when I see it: Pornography and Constitutional Vision in Canada and the United States,” in *Constitutional Politics in Canada and the United States*, ed. Steven L. Newman (New York: State of New York Press, 2004), 133-151; Kathleen E. Mahoney “Freedom of Expression: Hate Propaganda, Pornography and Section 1 of the Charter,” in *Canadian Constitutional Dilemmas Revisited*, ed. Denis N. Magnusson and Daniel A. Soberman (Institute of Intergovernmental Relations, 1997), 81-100.

<sup>7</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 CA: Emond Montgomery, 1996) p. 204 (describing content of seized materials presenting women (some appearing to be children) being raped, performing sex on superiors, and penetrated in “every orifice” by penises and objects, all while themes of racism and sexism in comments such as “bitch” or “hole” were abundant, accompanied by denigrating treatment such as ejaculation in women’s faces.). [hereinafter: Factum of LEAF]

<sup>8</sup> *R. v. Hawkins*, 1992 CarswellOnt 1940 (Gen. Div.) at paras. 5-13, *aff’d* *R. v. Hawkins* (1993), 15 O.R. (3d) 549 (C.A.), *sub nom.* *R. v. Ronish*, 1993 CarswellOnt 133

<sup>9</sup> *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.)

<sup>10</sup> *R. v. Price*, 2004 BCPC 103 ¶ 59, B.C.W.L.D. 666. CarswellBC 895.

<sup>11</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) 30-31; Donald Alexander Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989), 20-21.

<sup>12</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. 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.

inequality and violence against women, which has reduced demand significantly,<sup>13</sup> the judiciary interpreted the law as a victimless public crime implying it being a violation against morals, and ignored prostituted person's damages.<sup>14</sup>

Considering these trajectories of mostly unsuccessful democratic challenges against the harms of pornography and prostitution to sex equality, the question for the political theorist is what is in the way for democracies to address the harms of pornography to gender equality.

### ***Production & Consumption of Pornography***

In order to apprehend the substantial implications for democratic theory and practice, specifically for women's full citizenship and gender inequality, it is necessary to conduct a review of the conditions of production and the consumption of pornography. Pornography has been documented to be under control of organized crime,<sup>15</sup> although legitimate corporations are increasingly involved with distribution.<sup>16</sup> Some of it is made in the context of war, genocide, or by freelancers.<sup>17</sup> In 2006 *reported* revenues of the industry in merely sixteen high-output countries was estimated to be ninety-seven billion dollars.<sup>18</sup> The structure and size of the industry compared to the gender imbalance among its users is telling. Sexual acts performed on real persons in visual materials regularly end up as masturbation materials overwhelmingly for male consumers.<sup>19</sup> Arguably, it is a form of prostitution of sexual services of women for men,<sup>20</sup>

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<sup>13</sup> See National Criminal Investigation Dept. Sweden, *Trafficking in Women: Situation Report no. 5*, elaborated by Kajsa Wahlberg and Camilla Örndahl (Sweden: RKP KUT Report 2003:b), 34 (noting reduced demand after 1999); Kommittédirektiv [dir.] 2008:44 *Utvärdering av förbudet mot köp av sexuell tjänst*. [gov't commission directive], p. 5-6 (Swed.) (citing *National Rapporteur* on trafficking, the Nat'l Crim. Invest. Dept., Sweden).

<sup>14</sup> Nytt Juridiskt Arkiv [NJA] [Supreme Court] 2001-07-09 p. 529 (Swed.) ("the act is not to be viewed primarily as a crime against person but instead as a crime against public order[.] Already the fact that the one who has carried out the sexual service is called as a witness by the prosecutor speaks in favour of that this is the case.").

<sup>15</sup> See Attorney General's Commission on Pornography, *Final Report* (U.S. Dep't of Justice, July 1986), 291-297, 1037-1238. *available at* <http://www.communitydefense.org/lawlibrary/agreport.html>.

<sup>16</sup> Timothy Egan, "Erotica Inc.—A Special Report: Technology Sent Wall Street into Market for Pornography," *N.Y. Times*, Oct. 23, 2000, at A1.

<sup>17</sup> Catharine A. MacKinnon, *Sex Equality*, 2nd ed. (New York: Foundation Press, 2007), 1333n60; MacKinnon, "Turning Rape into Pornography," Ms. 24 (July/August 1993), reprinted in *Are Women Human? And Other International Dialogues* (Cambridge MA: Harvard University Press, 2006), 160-68; MacKinnon, "Rape, Genocide, and Women's Human Rights," *Harv. Women's L. J.* 17 (1994): 5-16.

<sup>18</sup> Jerry Ropelato, "Pornography Statistics 2007," *TopTenREVIEWS*, (accessed Feb. 22, 2008) <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html>. It is important to consider that much economic activity in the sex industry, in part due to its illegal and unofficial nature, goes unreported.

<sup>19</sup> Data show striking gender-differences in usage. In a representative sample of 4343 third year high-school students from Sweden only 6,5 percent of the females used it more than a couple of times a year, usually initiated by a male partner. By contrast, 9,9 percent of the males used it every day, twenty seven percent a couple of times per week, and 27,9 percent used it a couple of times per month. See Carl-Göran Svedin and Ingrid Åkerman, "Ungdom

evident among other places in nine countries where forty-nine percent (n=802) of prostituted persons themselves directly reported, even while being interfered with by pimps, pornography had been made of them.<sup>21</sup>

In an older in-depth study with fifty-five female survivors of prostitution in Portland, Oregon, fifty-three percent reported having been sexually tortured on average fifty-four times a year, often while made to participate in pornography.<sup>22</sup> While some question that pornography is produced under coercive or violent conditions, much evidence shows this study was not an exception. Survivors testify to the systematic threats, rapes, and violence regularly committed against women and children, some being coerced into the industry from the age of three.<sup>23</sup> Women and young girls are documented to have been tortured to increase the market value of the materials, resulting in permanent physical injuries.<sup>24</sup> Male participants confirm that pornographers regularly force women who manifestly resist it to have anal intercourse.<sup>25</sup> Linda Boreman, the performer in the pornography classic “Deep Throat,” 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.<sup>26</sup> The movies she was forced to make are symptomatic of an industry where violence and coercion are hidden behind cameras. Some suggest these survivors are not representative. But, other than when materials are expressly violent, as they often are,<sup>27</sup> they cannot alone reveal if force was

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och pornografi,” [Youth and Pornography] in *Medierådet: Koll på porr*, ed. Ann Katrin Agebäck (Medierådet, 2006), 89-92. (citing data retrieved in Statens offentliga utredningar [SOU] 2004:71 Sexuell exploatering av barn i Sverige. [government report series] (Swed.)) In Lawrence and Herold’s sample of 198 women surveyed at a fitness-center in Ontario, 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 J. of Sex Res.*, 24 (1988): 168.

<sup>20</sup> Andrea Dworkin and Catharine A. MacKinnon pioneered this claim.

<sup>21</sup> Melissa Farley et al., “Prostitution and Trafficking in Nine Countries,” in *Prostitution, Trafficking, and Traumatic Stress* ed. Melissa Farley (New York: Haworth Press, 2003), 46.

<sup>22</sup> Susan Kay Hunter, “Prostitution is Cruelty and Abuse to Women and Children,” *Mich. J. Gender & L.* 1 (1993): 93-94.

<sup>23</sup> *In Harm’s Way: The Pornography Civil Rights Hearings*, ed. Andrea Dworkin and Catharine A. MacKinnon (Cambridge MA: Harvard University Press, 1997), 265-268 (statement of “Ms. P.” at Minn. Press Conference, July 25, 1984).

<sup>24</sup> Att’y General Comm., *Final Report*, 787-88 & n799.

<sup>25</sup> Att’y General Comm., *Final Report*, 773-74 (quoting from Los Angeles Hearings).

<sup>26</sup> Linda Lovelace, *An Autobiography with Mike McGrady*. (Secaucus NJ: Citadel Press, 1980). See also *Harm’s Way*, 60-65 (testimony of Linda Marchiano, lie detector accounted for at 205-213).

<sup>27</sup> Numerous studies have documented violence against women and children shown in pornography. See, e.g., Rimm, “Marketing Pornography.” For a content-study made in 1997 and 1998 of a sample of so called newsgroups on the internet, see Bjørnebekk and Evjen, “Violent Pornography” (finding torture-pornography the most frequent category, *Ibid*, 198).

used to produce them. And since people withhold information when being threatened or dependent on the industry, the possibility exists of more rather than less coercion.

Testimonial evidence on violence and coercion during production in public hearings repeatedly mirror quantitative data on violence and coercion in the lives of prostituted women around the world. Seventy-eight percent of the Portland survivors were also raped an average of forty-nine times a year, and eighty-four percent were victimized through aggravated assault an average of 103 times a year.<sup>28</sup> Converging, other survivors testify to constantly being covered with “welts and bruises.”<sup>29</sup> Independent testimonies in recent procuring cases in Sweden suggest such violence (including welts and bruises) is not an exception.<sup>30</sup> There is no reason to believe circumstances are safer in those forms of prostitution in which a camera is present.<sup>31</sup> 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.

When looking at prostituted women’s histories of child sexual abuse, the coercion necessary for pornographers to exploit them becomes yet more visible. Prevalence rates of women in prostitution abused as children ranges from fifty to ninety percent in various studies.<sup>32</sup> Abused children become runaways and are sexually exploited to survive. In a San Francisco study with 200 prostituted females, ninety-six percent of all participating juveniles reportedly were runaways, and seventy percent explicitly reported sexual abuse as affecting entry while more indicated this strongly.<sup>33</sup> The median age of entry here was thirteen, and several studies

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<sup>28</sup> Hunter, “Prostitution is Cruelty,” 93-94.

<sup>29</sup> Att’y General Comm., *Final Report*, 784.

<sup>30</sup> See, e.g., *Helsingborgs tingsrätt* (TR) [Dist. Ct. of Helsingborg] 2005-09-25, B 1230-05, pp. 58-59. (Swed.) for a testimony by Katarina, forced by violence and/or threats to have intercourse two or three times every day with a procurer in whose house she lived in for almost two months, entrapped in part because procurers took her money. See also *Id.* pp. 48-56 (testimonies by Niculeta), *sentence modified, Hovrätten över Skåne och Blekinge* (HovR) [Scania and Blekinge Ct. App.] 2006-01-11, B 2429-05 (Swed.) (denying Katarina’s damages of approx. \$8,000). See also *Stockholms tingsrätt* (TR) [Dist. Ct. of Stockholm] 2003-03-21, B 4205-02 (Swed.) (testimonies by Nadja, Julia, Renata & Olesia, “welts and bruises” mentioned by independent witnesses, e.g., at pp. 14, 16, 21 (trans. “blåmärken”), *sentence modified, Svea hovrätt* (HovR) [Svea Ct. App.] 2003-06-23, B 2831-03 (Swed.) (additional testimonies).

<sup>31</sup> See Melissa Farley, Jacqueline Lynne, Ann J. Cotton, “Prostitution in Vancouver: Violence and the Colonization of First Nations Women,” *Transcultural Psychiatry* 42 (2005): 250-51, who confirm this prevalence of violence in a sample of 100 women in prostitution.

<sup>32</sup> See, e.g., Farley et al., “Prostitution in Nine Countries,” 35 (citing studies), 43 (original data). See also MacKinnon, *Sex Equality*, 11251-2 (citing studies).

<sup>33</sup> Mimi H. Silbert and Ayala M. Pines, “Sexual Child Abuse as an Antecedent to Prostitution,” *Child Abuse & Neglect* 5 (1981): 410.

conservatively suggest an average of thirteen to fourteen.<sup>34</sup> In Sweden, the number of children being sexually exploited is “significant” according to a government report from 2004.<sup>35</sup>

In a population of 827 active prostituted persons that were interviewed through surveys in the nine countries mentioned, two thirds met criteria for Post Traumatic Stress Disorder, regardless of whether prostitution was legalized or criminalized, and the symptoms were higher or equal to that of treatment-seeking Vietnam veterans and fugitives from other forms of violence against women, as well as from state-organized terror.<sup>36</sup> The Crisis- and Trauma Center in Stockholm that is in contact with prostituted women has, in a statement from June 2005, said the following:

Common with all those [prostituted] women are the severe post traumatic stress reactions that are manifested in the forms of serious mental disorders, such as severe sleep- and concentration disorders, recurrent anxiety and panic attacks, grave depression, severe anorectic reactions, self-destructive behaviors combined with extensive problems of impulse control, and manifest or latent suicidality.<sup>37</sup>

Moreover, the Crisis- and Trauma Center concluded that prostituted persons whom they made contact with have had difficult childhoods, been abused, and, in most cases, been sexually exploited or subjected to abuse.<sup>38</sup> Under such conditions, authentic consent is vitiated. For the same reasons, prostitution should not, as it often is consistent with denying damages for engaging in it, be regarded an acceptable job. In a population of 1,969 prostituted persons in Colorado Springs 1967-1999, the active ones ran a risk of murder 18 times higher than in a comparable non-prostitute population.<sup>39</sup> Workplace homicide rate for prostituted women (204 per 100,000) was “many times higher than that for women and men in the standard occupations that had the highest workplace homicide rates in the United States during the 1980s (4 per

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<sup>34</sup> Farley et al., *Prostitution in Nine Countries*, 35 (citing studies); Dorchon Leidholdt, “Prostitution: A Violation of Women’s Human Rights,” *Cardozo Women’s L.J.* 1 (1993): 133, 136n3 (citing Silbert & Pines, “Occupation Hazards of Street Prostitutes,” *Crim. Just. Beh.* 8 (1981): 397). See also American Psychological Association (APA), *Report of the APA Task Force on the Sexualization of Girls*. ed. Eileen L. Zurbriggen et al. (Washington, DC: American Psych. Ass’n, 2007), 17, available at [www.apa.org/pi/wpo/sexualization.html](http://www.apa.org/pi/wpo/sexualization.html).

<sup>35</sup> Statens offentliga utredningar [SOU] 2004:71, *Sexuell exploatering av barn i Sverige, del.1* [government report series] p. 15-16.

<sup>36</sup> Farley et al., “Prostitution in Nine Countries,” 44-48.

<sup>37</sup> Linda Karlsson, *Målsägandebegreppet vid vissa sexualbrott - köp av sexuella tjänster, människohandel och koppleri*. Examensarbete 20p i processrätt, Stockholms Universitet, VT 2006 (citerar Kris- och Traumacentrum).

<sup>38</sup> Ibid.

<sup>39</sup> John J. Potterat m fl. “Mortality in a Long-term Open Cohort of Prostitute Women.” *Am. J. Epidemiol.* 159 (2004): 782-83.

100,000 for female liquor store workers and 29 per 100,000 for male taxicab drivers).”<sup>40</sup>

Canada's largest federal public inquiry into prostitution in 1985, the so called *Fraser Report*, quoted estimates that mortality for prostituted persons may be 40 times higher than the national average.<sup>41</sup>

In a society where it is virtually impossible for a group of girls and women to escape homelessness and obtain professional skills, the industry will continue preying upon them. Considering clients who define prostitution as “paid rape”<sup>42</sup> raises the question why any women would stay. The reason is they do not have a choice to leave in most instances. In nine countries eighty-nine percent (n=785) explicitly stated they wished to leave but could not, irrespective of whether prostitution was legalized or not.<sup>43</sup> Most are destitute. Despite this reality of this production, pornography conveys that women secretly really want abuse, hence choose it freely.<sup>44</sup> However, if women are unequally situated to men in society, including economically, finding them being sexually exploited, raped, and abused in pornography does not appear to be a free choice. Such practices have been analyzed in the context of a general political and social domination by men over women.<sup>45</sup> In order to make materials, the industry exploits existing subordination and vulnerability of women and children.<sup>46</sup> With all this force needed to make women in pornography perform, will consumers use force on other women to experience what has been used through mediation?

## **PORNOGRAPHY & THE CONSTRUCTION OF SEX INEQUALITY**

Compared to prostitution in the flesh, pornography has a specific circular power that reinforces sexual inequality. Making women perform as sexual puppets (as “acting” objects), it eroticizes

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<sup>40</sup> Ibid (vår översättning).

<sup>41</sup> Canada, *Pornography and Prostitution in Canada. Report of the Special Committee on Pornography and Prostitution in Canada*. vol. 2 (Ottawa: Supply & Services, 1985), p.350.

<sup>42</sup> See Melissa Farley, “Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly,” *Yale J.L. & Feminism* 18 (2006): 131.

<sup>43</sup> Farley et al., “Prostitution in Nine Countries,” 48, 51.

<sup>44</sup> See generally Andrea Dworkin, *Pornography: Men Possessing Women* (London: The Women’s Press, 1981), 129-98, who tracked the theme of presenting women as overtly masochists and/or sadists in all genres of pornography, literary pieces with “the weight of intellectual adulation” included. Ibid, 167 et seq.

<sup>45</sup> See generally MacKinnon, *Sex Equality*, for a large overview of the work of others on the systematic discrimination of women by men in various social settings.

<sup>46</sup> For an analysis of pornography as a social practice that exploits existing inequality between the sexes, see, e.g., Andrea Dworkin, “Pornography and Male Supremacy”, in *Letters From a War Zone* (New York: Lawrence Hill Books 1993) (1981), 226-34; Dworkin, “Pornography Happens,” in *Life and Death* (New York: Free Press, 1997), 126-138; See generally Dworkin, *Pornography*, esp. 200.

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 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>47</sup> And prolonged exposure to common non-violent pornography was found to produce unfounded beliefs in sexual promiscuity as well as acceptance of male dominance and female servitude,<sup>48</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>49</sup> These results converge with actual self-reports among American male college students where correlations between consumption and sexually coercive behavior were significant for all, and dramatically for highly predisposed men.<sup>50</sup> The findings are consistent with reports from prostituted persons of how clients often force them to imitate pornography.

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<sup>47</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. See also Dworkin, *Pornography*, 129-98, who made this analysis of pornography fifteen years earlier.

<sup>48</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>49</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>50</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. Cf. Neil M. Malamuth and Vanessa Vega, “Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors,” *Aggressive Behavior* 33 (2007): 104-117 (finding that pornography “consumption contributed significantly to the prediction of sexual aggression both as a main effect and in interaction with other factors.” *Id.* at 114).

In the San Francisco study (N=200) 193 women had reported rape, of whom twenty-four percent made unsolicited comments that rapists referred directly to pornography and insisted that victims enjoyed the rape and extreme violence.<sup>51</sup> Forty-seven percent in the nine-country study (n=802) reported being upset by attempts at making them imitate pornography.<sup>52</sup> A woman attested for a group of survivors during a public hearing in Minneapolis: “Men witness the abuse of women in pornography constantly, and if they can’t engage in that behavior with their wives, girlfriends, or children, they force a whore to do it.”<sup>53</sup> Women and girls who are not prostituted have also repeatedly testified about similar coercion.<sup>54</sup> An agency for battered women asked clients whether abusers used pornography and conservatively estimated, one half did.<sup>55</sup> In a rape case, six adolescent boys gang-raped a juvenile while reenacting a specific pornography magazine’s outlay.<sup>56</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>57</sup>

Sexual objectification in media and culture is forced on women from birth, accelerated by the influence of pornography steadily trickling down into mainstream culture.<sup>58</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. Although “scientific” evidence of single direct harmful causation is complex and can seldom be absolutely verified, especially not in the *Popperian* sense, when considering the preponderance of evidence and convergence of different methodologies and sources on the single conclusion, in the undisputed context of gender inequality in which women are routinely

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<sup>51</sup> Mimi H. Silbert & Ayala M. Pines, “Pornography and Sexual Abuse of Women,” *Sex Roles* 10 (1984): 863-64.

<sup>52</sup> Farley et al., *Prostitution in Nine Countries*, 44, 46.

<sup>53</sup> *Harm’s Way*, 116 (testimony by T.S.)

<sup>54</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>55</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>56</sup> Att’y General’s Comm., *Final Report*, 777 (citing National Women Judge Conference, Oct. 1986)

<sup>57</sup> *Harm’s Way*, 214-15 (letter from Flora Colao, founder/director of programs for sexual assault survivors).

<sup>58</sup> See generally Am. Psych’l 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)

subjected to sexual violence and objectification in society, not attributing causality from the sexual objectification and violence in pornography is not credible, even though other causes are also present.<sup>59</sup>

## ***Feminist Challenges to Pornography***

### **A HISTORIC RÉSUMÉ**

Existing laws or policies in modern democracies are ineffective in addressing any of the substantial harms from pornography.<sup>60</sup> Analyzing this problem, feminist criticism was articulated in the 1970s while organizations were formed, taking visible actions such as picketing outside pornography stores, organizing marches and rallies.<sup>61</sup> The release of the pornography movie *Snuff* in 1976, which presented murder and dismemberment of a woman *as sex*, ignited feminist opposition to pornography in Canada and the U.S., including picketing, demonstrations, and violent civil disobedience in which among others writer Andrea Dworkin became vociferous.<sup>62</sup> Notable early organizations against pornography in the U.S. were Women Against Violence Against Women (WAVAW), formed in L.A. in 1976,<sup>63</sup> Women Against Violence in Pornography And Media (WAVPAM) in Berkeley, California,<sup>64</sup> and 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.<sup>65</sup> 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

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<sup>59</sup> Cf. Att'y General, *Final Report*, 309-12.

<sup>60</sup> See citations *supra* note 11.

<sup>61</sup> See generally, Susan Brownmiller, *In Our Time* (NY: Random House, 1999), 295-325; *Take Back The Night* ed. Laura Lederer ed. (Toronto: Bantam Books, 1982) (1980) (early critical essays). See also 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). Cf. Downs, *New Politics of Pornography*, 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>62</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

<sup>63</sup> Brownmiller, *In Our Time*, 298; Lederer, *Take Back The Night*, 15.

<sup>64</sup> Brownmiller, *In Our Time*, 299.

<sup>65</sup> *Ibid.*, 303-12.

screening of *Snuff* already in 1977,<sup>66</sup> 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.<sup>67</sup> Nevertheless, the legal challenges were different in Canada. The appointment of the federal governmental Committee on Pornography and Prostitution (the so called “Fraser Committee”) in 1983 marked the “culmination” of extensive and diverse public pressure to change, improve, or abolish existing obscenity laws from the mid 1970s.<sup>68</sup> Despite its thorough preparatory works, the Fraser Committee’s report in 1985 was regarded an inconsistent political compromise of little practical use, in spite of its pretensions of representing “a rational, fair and realistic balancing of the interests involved.”<sup>69</sup> It never gave rise to consistent legislative action.<sup>70</sup> Around this time the site for feminist action in Canada turned to the courthouses where judges recently had begun applying some of the critique of harm in interpretations of obscenity laws.<sup>71</sup> Although the mobilization of feminist Canadian lawyers such as Kathleen Mahoney and Linda A. Taylor, with help from their American counterpart Catharine MacKinnon,<sup>72</sup> did not fundamentally alter pornography’s availability on the ground, continuing its harms of inequality unabated.

The aim of the early women’s movement against pornography was to *raise consciousness* of how pornography destroyed the possibility of equal and mutual sexual relationships and contributed to the exploitation and abuse of women, which partly they succeeded in. Legislatures and judiciaries in America were *not unaware* at the time of this new discourse, stressing how

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<sup>66</sup> Cole, *Sex Crisis*, 72.

<sup>67</sup> Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto: University of Toronto Press, 1994), 78-79.

<sup>68</sup> Kathleen E. Mahoney, “Defining Pornography: An Analysis of Bill C-54,” *McGill Law Journal* 33 (1988): 576. According to Mahoney, crucial groups in civil society engaged in these issues were the Canadian Coalition Against Media Pornography (as well as provincial coalitions); Canadian and provincial Advisory Councils on the Status of Women; Media Watch; National Action Committee on the Status of Women; Canadian Civil Liberties Association (with provincial associations); Canadian Conference of Catholic Bishops; and the United Church of Canada. *Ibid.*

<sup>69</sup> Canada, *Pornography and Prostitution in Canada. Report of the Special Committee on Pornography and Prostitution in Canada*. vol. 1 (Ottawa: Supply & Services, 1985), 260. For a critique of this notion of rational compromise, see Lacombe, *Blue Politics*, 81-92.

<sup>70</sup> See Mahoney, “Defining Pornography, Bill C-54,” 575-99, for a critical review of the last major Parliamentary effort at this time to change the laws regulating pornography.

<sup>71</sup> Johnson, *Undressing Canadian State*, 48; Cole, *Sex Crisis*, 72.

<sup>72</sup> Mahoney and Taylor were, e.g., counsels for the Women’s Legal Education and Action Fund (LEAF) in the *Butler* case. *R. v. Butler*, [1992] 1 S.C.R. 452, 460. MacKinnon is recognized as having “helped prepare the legal brief” of LEAF in this case. Jeff Sallot, “Legal Victory Bittersweet GOOD; BAD NEWS: The Supreme Court’s Pornography Ruling Is Hailed As a Stunning Advance. But a Program That Helped Make It Possible Has Been Cut,” *Globe and Mail* Feb. 29, 1992 (Canada).

pornography reinforced women's unequal status as citizens. Further efforts by the women's movement in the U.S., pioneered by Andrea Dworkin and Catharine A. MacKinnon in 1983, established a new legal paradigm recognizing pornography as a violation of women's equal attainment of rights. These events directly challenged the unresponsiveness by democratic states to the harms of pornography, and will therefore be the subject of further analysis below. While the evidence has grown since then, the whole range of studies supporting their analysis – from experiments to survivor testimony – were present at that time.<sup>73</sup>

### **CHALLENGING THE OBSCENITY APPROACH**

Existing pornography laws in the U.S. are not based on a contextual recognition of inequality but rather on a concept of obscenity.<sup>74</sup> The Canadian obscenity law is more harm-based. In Sweden obscenity laws were formally abolished in 1969,<sup>75</sup> although certain elements of the concept still exist in other provisions such as the prohibition of “unlawful exhibition of pornographic pictures [if] apt to result in public annoyance.”<sup>76</sup> Under a constitutional clause termed “offences against the freedom of the press”,<sup>77</sup> criminal sanctions are also allowed against “unlawful portrayal of violence,” including “sexual violence or coercion,”<sup>78</sup> which contain less of the obscenity elements, but have been less useful in part because of various procedural limitations and other flaws further discussed below.

*Obscenity law* has historically been focusing on morals of appropriate public behavior, countering dissolution of social structures by containing sexuality inside stable (heterosexual)

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<sup>73</sup> For an account of the substantial findings of experimental and correlational studies at the time, *see, e.g., Pornography and Sexual Aggression*. ed. Malamuth & Donnerstein (1984). *See also* Factum of the Intervener Women's Legal Education and Action Fund, in the case of *R. v. Butler*, [1992] 1 S.C.R. 452, *reprinted in* Women's Legal Education and Action Fund (LEAF), *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Montgomery CA: Emond Montgomery, 1996), 201-21 [hereinafter: Factum of LEAF].

<sup>74</sup> Its Latin etymological roots refers to “ill-omened,” “adverse,” “not for stage.” Downs, *New Politics of Pornography*, 9. Obscenity is often understood as “filthy or indecent.” Paul Brest & Ann Vandenberg, “Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis,” *Stan. L. Rev.* 39 (1987): 610. Hence, obscenity is not concerned with exploitation or abuse of women. *Pornography*, on the other hand, refers to writing or sketching about “whores” or “harlots” in Greek. Edward Donnerstein, 2000. “Pornography,” 6 *Encyclopedia of Psychology* 238 ed. Alan Kazdin (Washington DC: Am. Psych. Ass'n, 2000); Dworkin, *Pornography*, 199; Frederick F. Schauer, *The Law of Obscenity* (Washington DC: Bureau of Nat'l Affairs, 1976), 1. While retaining a stigmatizing meaning to prostituted women it nevertheless corresponds with how the contemporary industry works more than the former. *Cf.* Dworkin, *Pornography*, 199-202. The discrepancy between obscenity law and reality is symptomatic rather than a coincident.

<sup>75</sup> Proposition [Prop.] 1970:125 *Kungl. Maj:ts proposition nr. 125 med förslag till ändring i tryckfrihetsförordningen m.m.* [government bill] (Swed.).

<sup>76</sup> Brottsbalk [BrB] [Criminal Code] 16:11 (Swed.).

<sup>77</sup> Tryckfrihetsförordningen [TF] [Constitution] ch. 7 (Swed.).

<sup>78</sup> *Id.* art. 4:13

relationships, purporting a concern for keeping sexual restraint on and commitment by individuals.<sup>79</sup> Criminal obscenity litigation has alternatively been deployed to repress women's reproductive and sexual autonomy by regulating birth control information, abortion, and "dissident" sexual practices.<sup>80</sup> Granted this use, its implicit purpose has been analyzed as male sexual control, restricting only materials the men thought expendable by those in power would desire, such as gay men, or materials promoting viewing men as sexual objects of coercion.<sup>81</sup>

While obscenity in the U.S. has been excluded from First Amendment protection,<sup>82</sup> seeming to make possible the restriction of pornography, the pornography industry did not stop growing, even as obscenity laws were used at times to restrict literary or artistic works, and even those criticizing pornography.<sup>83</sup> Attempting to refine and tighten the law, the decision in *Roth v. the United States* (1957)<sup>84</sup> did not stop these trends, but rather more exceptions protecting pornography followed.<sup>85</sup> The later legally largely intact definition of obscenity in *Miller v. California* (1973) also failed to address the harms of pornography to women as a group.<sup>86</sup> *Miller* defined obscenity as:

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<sup>79</sup> See, e.g., Cole, *Sex Crisis*, 68 et seq; Kathleen E. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique," *Ottawa L. Rev* 17 (1985): 37; Cf. Downs, *New Politics of Pornography*, 102.

<sup>80</sup> See, e.g., Cole, *Sex Crisis*, 70.

<sup>81</sup> Catharine A. MacKinnon, "Not a Moral Issue," in *Feminism Unmodified*, ed. Catharine MacKinnon (Cambridge MA: Harvard University Press, 1987), 153.

<sup>82</sup> See, e.g., *Roth v. United States*, 354 U.S. 476, 481 (1957) (citing "numerous opinions" in support for excluding obscenity from First Amendment protection)

<sup>83</sup> See, e.g., Joel Feinberg, "Pornography and the Criminal Law," *U. Pitt. L. Rev.* 40 (1979): 584; Schauer, *The Law of Obscenity*, 15-16; Cole, *Sex Crisis*, 88-93 (Canada).

<sup>84</sup> 354 U.S. 476 (1957)

<sup>85</sup> See, e.g., *Redrup v. New York*, 386 U.S. 767 (1967) (summarily reversing prior convictions); *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (protecting material having "any other form of social importance" in addition to literary, scientific or artistic protections); *Memoirs v. Massachusetts*, 383 U.S. 413, 419-21 (1966) (strengthening *Jacobellis*), *abrogated in part by Miller v. California*, 413 U.S. 15, 23-25 (1973) ("utterly without redeeming social value" test of *Memoirs* rejected); *Manual Enterprises v. Day*, 370 U.S. 478, 485 (1962) (separate concurring opinion by Harlan and Stewart JJ.) (adding requisite of "patent offensiveness"). Additionally, *all* adult pornographic materials are initially presumed non-obscene. *Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62-63 (1989) (holding that before any materials can be taken out of circulation a judicial determination of obscenity has to be made); *Lo-Ji Sales v. New York*, 442 U.S. 319, 326/n.5 (1979) (holding that "[while] contraband may be seized without a warrant under the 'plain view' doctrine [of the Fourth Amendment] material arguably protected by the First Amendment . . . normally may not be seized on the basis of alleged obscenity without a warrant."); *Marcus v. Search Warrant*, 367 U.S. 717, 730-32 (1961) (Fourteenth Amendment due process clause found to bar police officers from seizing materials as obscene without prior judicial determination); See also *Stanley v. Georgia*, 394 U.S. 557, 564-65 (1969) (invoking right to privacy of home-possession); *But see United States v. Reidel*, 402 U.S. 351, 354-55 (1971) (prohibiting mailing obscenity to consenting adults not unconstitutional); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376-77 (1971) (seizing materials owned by returning foreign traveler not prohibited).

<sup>86</sup> See, e.g., Downs, *New Politics of Pornography*, 22.

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>87</sup>

For both the U.S. and Canada<sup>88</sup> the concept of “contemporary community standards” ignores social structures of sexual domination; i.e., law is insensitive to whether a community tolerates subordination of women through, e.g., pornography.<sup>89</sup> Neither does *Miller’s* notion of “prurient interest” identify what is harmful to the ones victimized by pornography but rather focuses on *observers*, implying that the harm of pornography can be avoided by victims “averting their eyes”.<sup>90</sup> Closing your eyes will not prevent women from being raped, battered, or tortured by intimate partners being inspired and impelled by pornography though. Nor will it help adolescent girls forced out on streets, coerced into imitating pornography upon thousands of client’s requests,<sup>91</sup> to escape the sexual abuse. Defining harm as an offence to observers silences and denies these women their rights.

Consistent with other scholars, writer Susan Cole suggests that a successful law particularly must target the harm women experience, and not be gender neutral.<sup>92</sup> Legal scholar Catharine A. MacKinnon noted how the gender-neutrality of obscenity covers how pornography’s subordination of women as a group is a concrete politics of sex inequality—not an abstract depraved morality of society as a whole.<sup>93</sup> Not surprisingly, defining what appeals to “prurience” has been shown to be extremely difficult and subjective.<sup>94</sup> And if material “taken as a whole” has other value, MacKinnon asked why this *by definition* should outweigh sexual abuse and women’s subordination.<sup>95</sup> The general focus on morality misses what is harmful with

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<sup>87</sup> *Miller v. California* 413 U.S. 15, 24-25 (1973).

<sup>88</sup> In Canada, the concept of community standards was introduced in *Brodie v. The Queen*, [1962] S.C.R. 681, 706 at paras. 76-78. *See also* Cole, *Sex Crisis*, 70.

<sup>89</sup> For an elaborate account of the criticism in this paragraph, *see, e.g.*, MacKinnon, “Not a Moral Issue,” 152-54.

<sup>90</sup> Kathleen E. Mahoney, “Destruction of Women’s Rights through Mass Media. Proliferation of Pornography,” in *Human Rights in the Twenty-First Century. A Global Challenge*, ed. Kathleen E. Mahoney and Paul Mahoney (Dordrecht Neth.: Martinus Nijhoff, 1993) 765.

<sup>91</sup> The average woman is estimated to serve five men per day, entailing an eighteen year old has been used by over 9,000 men if entering at thirteen. Vednita Carter and Evelina Giobbe, “Duet: Prostitution, Racism and Feminist Discourse,” *Hastings Women’s L.J.* 10, (1999): 46.

<sup>92</sup> Cole, *Sex Crisis*, 63-64.

<sup>93</sup> MacKinnon, “Not a Moral Issue”, 147.

<sup>94</sup> *See* James Lindgren, “Defining Pornography,” *U. of Penn. L. Rev.* 141, no.4 (April 1993): 1210, 1213, 1216.

<sup>95</sup> MacKinnon, “Not a Moral Issue,” 153.

pornography, and will not be a sound foundation for review of relevant facts in a democratic context, that is, on the assumption that women are not to be treated as unequals.

In comparison with American and Canadian obscenity-doctrines, the Swedish provisions do not explicitly refer to obscenity, but its legal definition of pornography shares substantial obscenity elements. Instead of referring to prostitution, as in the original greek/latin meaning of the term,<sup>96</sup> or “explicit sexual subordination”—as was originally done in the legal definitions proposed by feminist activists in the U.S.<sup>97</sup>—the criminal code prohibits publicly exhibiting (but not disseminating for private consumption) materials “apt to result in *public annoyance* [as] unlawful exhibition of pornographic pictures.”<sup>98</sup> As with obscenity law generally, regulating what is annoying to the observer misses what is harmful to those documented to be victimized by pornography. And as with the *Miller* definition’s focus on what is offensive to observers, or appealing to their prurient interests, or the materials’ artistic merit, the Swedish legal definition is indeed occupied with *everything but* whom pornography subordinates (even the producer’s intent is given more weight):

A pornographic picture is defined as a picture that, without containing any scientific or artistic values, in an uncovered and provocative way depicts a sexual theme. Crucial . . . is what *purpose* a specific presentation has. If the intent with the presentation in a substantial way is to sexually affect the viewer, it might be considered a pornographic product. But if the picture has been produced with other intent, e.g. artistic, it is not considered as pornographic.<sup>99</sup>

### QUESTIONING THE “VIOLENCE AND COERCION” APPROACH

Additionally, Sweden criminalizes as “unlawful depiction of violence” when “[a]ny person . . . depicts *sexual violence or coercion* with intent to disseminate the picture or pictures or disseminates such depiction.”<sup>100</sup> Social evidence firmly suggests that pornography does indeed present sexual acts “committed on a person under circumstances which are coercive,” meaning that the production of pornography could qualify as *sexual violence* according to the

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<sup>96</sup> See *supra*, note 74.

<sup>97</sup> See *infra*, note 144.

<sup>98</sup> Brottsbalk [BrB] [Criminal Code] 16:11 (Swed.) (*emphasis added*).

<sup>99</sup> Statens Offentliga Utredningar [SOU] 2001:14 *Sexualbrotten: Ett ökat skydd för den sexuella integriteten och angränsande frågor* [government report series] p. 237 (Swed.). Cf. Proposition [Prop.] 1970:125 *Kungl. Maj:ts proposition nr. 125 med förslag till ändring i tryckfrihetsförordningen m.m.* [government bill] p. 79-80 (Swed.).

<sup>100</sup> Brottsbalk [BrB] [Criminal Code] 16:10b (Swed.) (*emphasis added*).

International Criminal Tribunal of Rwanda.<sup>101</sup> But despite these hypothetically far reaching statutes—i.e., virtually all pornography is produced under coercive conditions, hence “depicts” sexual coercion—enforcement is not effective in targeting the supply of coercive or even violent pornography. There are occasional cases brought against distributors, sometimes entailing three months imprisonment or probation with 120 hours of communal service,<sup>102</sup> but the availability of such materials nevertheless exist despite deterrence of criminal penalties.<sup>103</sup>

The judicial procedures applied to most criminal code provision that is part of the so called “Freedom of the Press Act’s Crimes Catalogue”<sup>104</sup> effectively minimizes the scope for successful legal action against such materials. Moreover, *unlawful depiction of violence* does not

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<sup>101</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 688 (Sept. 2, 1998) (“The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive.” *Id.* ¶ 688), *aff’d*, Case No. ICTR-96-4-T, Judgment, ¶¶ 423-424 (June 1, 2001). In the tribunal’s opinion “coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances...” *Id.* ¶ 688. In this context the court suggests that the presence of a hostile armed militia or group of men by itself can create circumstances during which women may find themselves coerced to submit to sexual demands, such as doing gymnastic exercises nude in public. *Id.* Similarly, women in pornography are often forced by circumstances around them at the moment, such as being threatened with violence if refusing to perform specific acts, or they are forced to act by circumstances in their lives generally such as poverty and the need for survival. Many women in similar situations outside the pornography studios may also be coerced to perform unwanted or dangerous acts that actually originate from pornography, being subordinately situated in asymmetric relations of power. The Rwanda Tribunal also held that sexual violence “is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact.” *Id.* ¶ 688. Some pornography presents women being dehumanized as sexual objects for men’s gratification and does as such not necessarily contain physical contact *per se*. Applying the tribunal’s definition then, pornography could be a form of *sexual violence*.

<sup>102</sup> See e.g. Rättsfall Från Hovrätterna [RH] [Selective Ct. App. Rep.] 2000:97 (Dec. 5, 2000) (Swed.) (probation conviction with 120 hours communal service, equivalent to 3 or 4 months imprisonment); Svea hovrätt (HovR) [Svea Court of Appeals], June 12, 1995, No. B 1326/94 (Swed.). (three months imprisonment)

<sup>103</sup> A government report in 1995 officially concluded that a widespread marked existed in Sweden for this type of pornography. See Statens Offentliga Utredningar [SOU] 1995:15 *Sammanfattning: Könshandel. Betänkande av 1993 års prostitutionsutredningen*. [summary of government report series] pp. 3-4 (Swed.). With the increased use of internet since then, availability has generally grown in many countries. See e.g. Rimm, “Marketing Pornography,” (containing sample of internet downloading frequency according to pornography categories); Bjørnebekk and Evjen, “Violent Pornography,” (describing internet availability according to pornography categories). For instance only in the young population, a large survey-study among third year high-school students in Sweden in 2003 showed that 97,6% of the boys and 76,3% of the girls of 4343 respondents reported having looked at pornography (although with vast sex-disparities regarding the *frequency* of use), and of these 11,9 percent of the boys and 3,6 percent of the girls reported seeing/using pornography containing explicit *violence* or coercion. Svedin and Åkerman, “Ungdom och pornografi,” 92 (citing data retrieved in Statens offentliga utredningar [SOU] 2004:71 *Sexuell exploatering av barn i Sverige*. [government report series] (Swed.).)

<sup>104</sup> For instance, the law against “unlawful depiction of violence” has a parallel regulation in the Constitution signalling its special protection under the Freedom of the Press Act, prohibiting “unlawful portrayal of violence, whereby a person portrays sexual violence or coercion in pictorial form with intent to disseminate the image, unless the act is justifiable having regard to the circumstances.” Tryckfrihetsförordningen [TF] [Constitution] ch. 7, art. 4:13 (Swed.) See also Yttrandefrihetsgrundlagen [YGL] [Constitution] 5:1 (Swed.), which cross-refers, holding the former valid to other forms of media as well. For the procedural regulations, see particularly Tryckfrihetsförordningen, ch. 9, 12. (Swed.).

entail civil damages for women as a group, as has not yet the hate-speech provisions in the Freedom of the Press Act nor the provisions criminalizing possession or dissemination of child pornography.<sup>105</sup> The legal rationale in effect concerns the public morality and “offensive speech” rather than harm or reputation to those victimized. In the words of a critical scholar, “[r]eputational harm to those who are allowed to be individuals—mostly white men—is legal harm. Those who are defined by, and most often falsely maligned through, their memberships in groups—namely almost everyone else—have no legal claim.”<sup>106</sup>

Considering the desensitization to coercion and violence against women that pornography evidently produce in its consumers,<sup>107</sup> only allowing the public to report violations while the sole consent of the Chancellor of Justice is needed to charge under this law is not promising. Particularly considering that no woman has yet been appointed Chancellor, and that men are documented to be the overwhelming pool of users (not the least those with economic means).<sup>108</sup> Additionally restraining these proceedings, a majority of six among nine members of a special “Freedom of the Press-Jury” is needed for a successful conviction when a charge has finally been brought by the Chancellor. Finally the Chancellor is not allowed to appeal an acquittal whereas defendants, on the other hand, may appeal. In such cases, an Appeals’ Court may only acquit or lower the penalty. Prior restraint is prohibited except at public broadcasting or cinemas where, as has also been the case in Canada, a quasi judicial film-review board can censor or allow exceptions for certain materials (exceptions will also hold for non-public copies).<sup>109</sup> A sample of Chancellor dismissals of reported violations is telling for the high threshold.

The Chancellor decided to dismiss a case against a magazine presenting “fisting” where two men had sex with one woman while one is inserting a fist into the woman’s vagina.<sup>110</sup> In another case he offered a waiver of prosecution for a cable-broadcasted four minute rape-scene seven minutes into the movie previously censored for cinemas in “Les Grandes Jouisseuses” (*Wild Sex-Plays of the Paris Girls*), holding his decision valid in so far as “no compelling public or private

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<sup>105</sup> See Nytt Juridiskt Arkiv [NJA] [Supreme Court] 1978-01-02 p. 3 (Swed.) (dismissing civil claims for groups under provision criminalizing *agitation against a population group*). See also

<sup>106</sup> Catharine A. MacKinnon, *Only Words* (Cambridge MA: Harvard University Press), 81-82.

<sup>107</sup> See empirical evidence presented *supra*, notes 47-59.

<sup>108</sup> See *supra*, notes 18-19. In the U.S., user demographics on the internet suggest pornography consumption is positively correlated with income. Jerry Ropelato, “Pornography Statistics 2007” <http://internet-filter-review.toptenreviews.com/internet-pornography-statistics.html#anchor11>

<sup>109</sup> Brottsbalk [BrB] [Criminal Code] 16:10b:3-4 (Swed.).

<sup>110</sup> JK-beslut B 1 [1990] *Ifrågasatt tryckfrihetsbrott; olaga våldsskildring* [Chancellor decisions] (March 7).

interest would seem to be set aside, and assuming the crime would not entail more penalty than a fine.”<sup>111</sup> He has also offered waivers of prosecution for nine films that previously, in an opinion delivered in a brief written by the National Board of Film Censors, had been found criminally liable. The film titles were “Lolita Geile Züchtigung, Non Stop Bondage SM, School Dayz 86, Anal-Extreme/Anal Ecstasy, Bizarre Bond Special, Women’s Penitentiary, Bondage Interludes vol 1., Bizarre 2., College Classics part 2.”<sup>112</sup> Finally, in a case where materials were described in detail, the decision entailed that he dismissed charges against an issue of the Swedish Hustler Magazine containing a series of pornography sequences with pictures presenting one woman’s head being cut off, another implying a man using an ax to cut off another woman’s head, while additional pictures showed the man performing surgery to replace their heads/bodies. Despite admitting this sequence was “particularly pornographic in its nature” the Chancellor nonetheless held that “the violence the women are subjected to is not part of a sexual act, and the pictures where the violence is presented or implied do not contain sexual allusions.”<sup>113</sup> Since Hustler’s presentation of violence is an integral part of the sexual context, the Chancellor’s suggestion that the violence do not contain sexual allusions is highly questionable. If anything, such presentations inspire sexual coercion, objectification, and treating women like sexual commodities or things, dead or alive.

Allowing one man the discretion to apply a doctrine of “victim-less crimes” that ignores the effect of linking pornography with violence in a social context where women are sexually subordinated and raped on a daily basis, combined with jury-system of a mandatory two-third majority, how likely will violent pornography ever be stopped? This analysis suggests the judiciary is more or less unable to perceive sexual coercion and violence, in part because pornography sexualizes violence. ”The term violence means negative, exceptional, extreme, not everyday, not positive. The pleasure of sexual arousal is a powerful positive reinforce. . . . Once violence is sexualized, it is less likely to be seen as violence.”<sup>114</sup> The gender power-imbalance seems reinforced in the powers of the state to regulate pornography, and in Sweden particularly

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<sup>111</sup> JK-beslut B 9 [1993] *Anmälan om yttrandefrihetsbrottet olaga våldsskildring* [Chancellor decisions] (May 18).

<sup>112</sup> JK-beslut B 4 [1994] *Justitiekanslern har i visst fall beslutat att inte inleda förundersökning beträffande yttrandefrihetsbrottet olaga våldsskildring* [Chancellor decisions] (May 9).

<sup>113</sup> JK-beslut B 12 [1991] *Ifrågasatt tryckfrihetsbrott, olaga våldsskildring i form av serie av stillbilder* [Chancellor decisions] (Nov. 21).

<sup>114</sup> Catharine A. MacKinnon, “On Sex and Violence: Introducing the Antipornography Civil Rights Law in Sweden,” in *Are Women Human*, 94.

in the office of the Chancellor. In this instance, describing the state as “male” seems highly apt.<sup>115</sup>

### **ADJUDICATING FREEDOM OF EXPRESSION, EQUALITY & HARM**

One of the main obstacles to challenges to pornography as a violation of human rights and equality has been conflicting interpretations of democratic rights. Generally, liberal notions of equality under democracies values rights to individual self-development and communication, which are to be protected by the state. Expressive rights are seen as enabling autonomous and informed value judgments, e.g., by making different views available, and has appeared as a way to prevent tyranny by making dissident political opposition heard.<sup>116</sup> This view implicitly presumes citizens to be *equal* participants and consumers in a “market-place” of ideas,<sup>117</sup> and is less responsive to relationships between *de facto* unequal participants (e.g. prostituted women vs. well-to-do pornography-consumers). Similarly, the analogy between pornographers and political dissidents—the latter generally conceived as raising legitimate political critique—is less consistent with how pornography is documented to condition sexual responses, including violence, coercion and discrimination, and how it is produced; i.e., by exploiting existing inequalities in order to prostitute women *en masse*. Rather than being the guarantor of individual self-development (for whom?) and a vibrant market-place of ideas among equal citizens, pornography is a practice silencing women’s genuine public voices by effectively contributing to, and benefitting from their social, sexual, and political subordination.<sup>118</sup>

The fundamental argument of liberal theories of expression is perhaps most eloquently spelled out in the works of John Stuart Mill, who in his *On Liberty* argued that rights to free

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<sup>115</sup> Legal and political theorist Catharine MacKinnon, while commenting on Max Weber’s conception of the state as the entity with a monopoly on legitimate violence, held that when men’s violence against women (of which pornography is a form) is viewed as legitimate in male-dominated society, Weber’s concept is as consistent with the state being male as the lack of state-accountability is consistent within women’s lives. Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge MA: Harvard University Press, 1989), 169. MacKinnon first articulated the concept of the state as male. *See esp. ibid.*, 157-170. For further discussion of male violence as inherent to the state, *see* Catharine A. MacKinnon, “Women’s Status, Men’s States,” in *Are Women Human? And Other International Dialogues* (Cambridge MA: Harvard University Press, 2005), 1-16.

<sup>116</sup> *See, e.g.*, Ronald Dworkin, “Women and Pornography,” in *Prostitution and Pornography. Philosophical Debate about the Sex Industry*. ed. Jessica Spector (CA: Stanford University Press, 2006), [1993] 307.

<sup>117</sup> The concept of a market-place of ideas was introduced in First Amendment doctrine in a famous dissent by Justice Holmes. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes J., dissenting) (“the best test of truth is the power of the thought to get itself accepted in the competition of the market”)

<sup>118</sup> For an analysis of how pornography silence women in society, *see* Catharine A. MacKinnon, “Francis Biddle’s Sister,” in *Feminism Unmodified*, 163, 192-97.

expression are important for the development of societies among other things, and that restrictions were only legitimate insofar as one's rights would harm another one's:

The object of this essay is to assert one very simple principle . . . that . . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>119</sup>

Mill's writings can be seen through the lens of his private life considering, e.g., the perceived disapproval by his friends and family over his affair with Harriet Taylor, an intellectually sophisticated wife of an older man, and their subsequent marriage after her husband's death. While such circumstances might have inspired Mill's "animus against society"<sup>120</sup> and the pressure of conformity, his "principle of harm" has nevertheless retained high acclaim long since then. It has been suggested its reductivism, i.e., the "attempt to subsume a large and complicated set of problems under 'one very simple principle'"<sup>121</sup> is what made *On Liberty* politically attractive.<sup>122</sup> When confronting the empirical complications arising from his harm principle, Mill chose a hypothetical fear of excessive regulations (the "slippery slope hazard"<sup>123</sup>) over real harm. For instance he admitted that uninhibited access to alcohol entails tangible costs, damages, and *harm* to society, but nonetheless opposed restricting the rights of others to enjoin intoxicants on a harm-rationale, arguing it could legitimize a "monstrous a principle" possible to extend to freedom of expression and other rights.<sup>124</sup>

Attempting to remedy Mill's own disqualification of the principle of harm in social settings where regulations seem justified, a distinction between so called direct and indirect harm is sometimes entertained. The law of speech in the U.S., accordingly, holds there is a distinction between "mere advocacy and incitement to imminent lawless action," protecting televised Klan-speech advocating lynching and other acts against specific groups while discussing the

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<sup>119</sup> John Stuart Mill, *On Liberty*, ed. introd. by Gertrude Himmelfarb (Harmondsworth: Penguin, 1986), 68.

<sup>120</sup> Gertrude Himmelfarb, introduction to *On Liberty*, by John Stuart Mill (Harmondsworth: Penguin 1986), 20.

<sup>121</sup> Himmelfarb, introduction to *On Liberty*, by Mill, 46.

<sup>122</sup> "There is a boldness about [Mill's] simplicity, even over-simplicity, that is morally attractive, as if to defy reality, to deny complexity, is an assertion of moral superiority, of the power of mind over matter, of will over all the mundane and ignoble circumstances governing our lives." Himmelfarb, introduction to *On Liberty*, by Mill, 46-47.

<sup>123</sup> For a critical review of this concept *see, e.g.*, Frederick Schauer, "Slippery Slopes," *Harv. L. Rev.* 99 (1985): 361-383; For a critique of it in the context of pornography and freedom of expression-law, *see* MacKinnon, *Only Words*, 71-110, esp. 75-78.

<sup>124</sup> Mill, *On Liberty*, 158

organization of a “four hundred thousand strong” member-march accompanied by statements such as “this is what we are going to do to the niggers,” “bury the niggers,” “send the Jews back to Israel,” and “we intend to do our part.”<sup>125</sup> But this view often excludes the form of harm to groups that practices such as pornography creates, changing attitudes and behaviors in large populations with the consequence that members of already disadvantaged groups become exceedingly discriminated against, and indeed subjected to *direct* violence.<sup>126</sup> The evidence of pornography’s consumption and production suggests that the line between direct and indirect harm is a fiction, at least in this instance, perhaps others.<sup>127</sup> Genocides, e.g., are usually not possible without a prolonged change of attitudes, beliefs, and behaviors among key populations – often a result of, *inter alia*, simple as well as sophisticated propaganda, politics, and, at times, pornography.<sup>128</sup>

In other areas U.S. law makes exception to the “clear and present danger”<sup>129</sup> doctrine for speech that does not pose such a danger—e.g., “low value” speech such as obscenity, libel, and “fighting words”—if, after strict scrutiny review, there exist enough compelling state interests to protect society against it.<sup>130</sup> But this law is unstable and not easily applied.<sup>131</sup> For instance, cross-burning at Ku Klux Klan rallies or on the lawn of black families by white neighbors have been successfully prohibited as long as laws are framed in a “content-neutral” fashion, using

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<sup>125</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 446, 449 (1969).

<sup>126</sup> A similar but not identical argument could be made regarding racist hate propaganda, but with important modifications. For example, a necessary precondition for making pornography is coercion in one form or another, which is not necessarily the case with racist hate-propaganda. *See, e.g.*, *Factum of LEAF*, 210 at para. 30. Since racism isn’t explicitly sexual, an accurate analysis of its dynamic must also be made on its own terms.

<sup>127</sup> *Cf. Mahoney*, “Destruction of Women’s Rights,” 765-66.

<sup>128</sup> *See, e.g.*, MacKinnon, “Turning Rape into Pornography,”; “Rape, Genocide, and Women’s Human Rights,” 5-16.

<sup>129</sup> *Compare Schenck v. United States*, 249 U.S. 47, 52 (1919) (articulating clear and present danger doctrine), and *Whitney v. California*, 274 U.S. 357, 374-80 (1927) (Brandeis J., concurring) (using clear and present doctrine to uphold a syndicalism conviction of a member of the Communist Labor Party of California), with *Brandenburg v. Ohio*, 395 U.S. at 449 (overruling *Whitney* and holding Klan-Speech not a clear and present danger).

<sup>130</sup> *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942) (noting that “certain well-defined and narrowly limited classes of speech . . . are of such slight social value . . . clearly outweighed by the social interest in order and morality”); *See also Jerome A. Barron & C. Thomas Dienes, First Amendment in a Nut Shell*, 2nd ed. (St. Paul, Minnesota: West Group, 2000), 27.

<sup>131</sup> *See, e.g.*, Kathleen M. Sullivan & Gerald Gunther, *First Amendment Law*, 3rd ed. (New York: Foundation Press, 2007), 53-54. *But see, Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952) (holding that “we are precluded from saying that speech concededly punishable when immediately directed at individuals cannot be outlawed if directed at groups with whose position and esteem in society the affiliated individual may be inextricably involved.”); *Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) (holding that statute is not “viewpoint based” for First Amendment purposes simply because its enactment was motivated by conduct of partisans on one side of debate)

race-neutral terms such as “intimidating,”<sup>132</sup> while statutes prohibiting cross burning because it “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”<sup>133</sup> are seen as legislation against political “viewpoints” or “disfavored topics.”<sup>134</sup> According to dominant interpretations of the content neutrality doctrine of the First Amendment, the latter are protected in analogy with political critique of the government, the economy, or foreign policy.

But cross-burning and pornography are connected to a specific context of social dominance, and are not just “intimidating” or “offending” *per se*. Facially neutral laws have less surface plausibility in reaching such harms, and are easily questioned (outside its racial context, is there anything “intimidating” about lighting a piece of wood?). Feminists have persuasively argued that the analogy between dissident political speech and these acts is misplaced, and that pornography is a social act based on and inspiring sexual coercion. In this sense MacKinnon takes the view that women are not the state and pornographers not an oppressed minority, but that observably the state protects pornographers, who are part of a dominant rather than dissident culture of male supremacy.<sup>135</sup>

### ***Feminist Democratic Challenges to Pornography: Civil Rights***

During the 1980s, the legal foundation for regulating and protecting pornography was challenged by feminist critiques in both the U.S. and Canada, in democratic challenges to a practice of inequality. In the U.S., a major effort was the antipornography ordinances originally passed by the Minneapolis city council in 1983 and 1984, vetoed by its Mayor two times but eventually adopted in Indianapolis in 1984 in slightly different form but invalidated in the 7<sup>th</sup> Circuit Court of Appeals. In Cambridge, Massachusetts, where political scientist Amy Elman (then a graduate student), Barbara Findlen, and others in 1985 almost succeeded by placing the ordinance on referendum,<sup>136</sup> they first had to sue the city to get access to the ballots.<sup>137</sup> A similar referendum tactic succeeded in 1988 with 62 percent support in Bellingham, Washington, although after

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<sup>132</sup> *Virginia v. Black* 538 U.S. 343, 362-63 (2003) (“intent to intimidate” permissible ground for restriction).

<sup>133</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992) (citing municipal Bias-Motivated Crime Ordinance).

<sup>134</sup> *R.A.V.*, 505 U.S. at 391. *Cf. Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill., 1978), *aff’d* 578 F.2d 1197 (7<sup>th</sup> Cir. 1978), *cert. denied* 439 U.S. 916 (1978) (7-2) (invalidating city ordinance prohibiting Nazi-March in Skokie).

<sup>135</sup> MacKinnon, *Only Words*, 39-40.

<sup>136</sup> Brownmiller, *In Our Time*, 323-25. The ordinance lost 42% to 58%.

<sup>137</sup> Andrea Dworkin, “Beaver Talks,” in *Life and Death* (New York: Free Press, 1997), 92.

being challenged by the ACLU the ordinance, which was never used, got invalidated in a federal district court, citing the Seventh Circuit opinion.<sup>138</sup> In other jurisdictions, such as Los Angeles (1985) and the state of Massachusetts (1991), the ordinance did not pass.<sup>139</sup>

The Minneapolis ordinance was directly grounded on the experiences of those victimized and hurt by pornography, in contrast with the legal obsession with dominant heterosexual morality and appropriate public behavior. Residents in Central and Powderhorn Park—poor, working class, neighborhoods largely of people of color in the city of Minneapolis—were the initiators, disproportionately exposed to “adult establishments” such as pornography-theatres and stores. Patrons were drawn from the greater city-area, and were sexually harassing women and children on a daily basis, including raping or soliciting pedestrians for prostitution, making neighborhood unsafe, dangerous, and declining. Neighborhood activists noted how elites vigorously supported civil liberties, but fought so pornography businesses were not present in their own areas.<sup>140</sup>

The ordinances were also supported by city politicians engaged in their issue, legal scholar Catharine MacKinnon and writer Andrea Dworkin (who together drafted it) and a group of antipornography activists, some of who had attended a University of Minnesota course on pornography held by the two during the fall of 1983. Additionally, during the legislative process calls went out to the Minneapolis network of community organizations, including women’s shelters, rape crisis centers, other neighborhood groups, social workers and other authorities, and individual survivors of pornography and sexual abuse who came to testify in support of the ordinances during public hearings.<sup>141</sup> Opposition was also heard.

This democratic process of creating the ordinances converges with the feminist practice and theory of *consciousness raising*.<sup>142</sup> It took the lived realities of women seriously and the imperative of ending sex inequality as a prime mover for constructing knowledge. Documenting

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<sup>138</sup> Ibid; See also Village Books et al. v. City of Bellingham, C88-1470D (W.D. Wash, 1989) (unreported).

<sup>139</sup> Catharine A. MacKinnon, “The Roar on the Other Side of Silence,” in *Harm’s Way*, 11-18.

<sup>140</sup> Brief of the Neighborhood Pornography Task Force, *Amicus Curiae*, in Support of Appellant Hudnut v. American Booksellers Ass’n Inc., 771 F.2d 323 (7th Cir. 1985), reprinted in *Harm’s Way*, 321-33.

<sup>141</sup> Brest & Vandenberg, “Politics, Feminism, and the Constitution,” 620. The complete Minneapolis hearings are reprinted along with ordinance-hearings from other jurisdictions. See *Harm’s Way*.

<sup>142</sup> For this paragraph, see MacKinnon, Catharine A. MacKinnon, “Points Against Postmodernism,” *Chi.-Kent L. Rev.* 75 (2000): 690. Cf. the concept of consciousness raising with so called standpoint theory in Patricia Hill Collins, “Comment on Hekman’s ‘Truth and Method: Feminist Standpoint Theory Revisited’: Where’s The Power?,” *Signs* 22 (Winter, 1997): 375-81; Dorothy E. Smith, “Comment on Hekman’s ‘Truth and Method: Feminist Standpoint Theory Revisited,’” *Signs*, supra, at 392-98; Nancy C. M. Hartsock, “The Feminist Standpoint,” in *Feminism & Methodology*, ed. Sandra Harding (Bloomington: Indiana University Press, 1987) [1983], 157-80; Dorothy E. Smith, “Women’s Perspective as a Radical Critique of Sociology,” *Sociological Inquiry* 44 (1974): 7-13.

empirical conditions previously silenced in academia, showing that what had been passing as “objective” reality for centuries was rather a “point of view” from those with power, built upon the continuing trivialization of/or invisibility of those with less social power. In contrast with liberal theories of freedom of speech, built on the political practices among different groups of historically privileged and relatively equal men, the ordinance was concretely connected to women’s experiences, the Minneapolis city council finding pornography to be “central in creating and maintaining the civil inequality of the sexes [and] a systematic practice of exploitation and subordination based on sex” differentially harming women and “restricting women from full exercise of citizenship.”<sup>143</sup> Pornography was defined as

the sexually explicit subordination of women, graphically depicted, whether in pictures or in words, that also includes one or more of the following: (i) women are presented dehumanized as sexual objects, things or commodities; or (ii) women are presented as sexual objects who enjoy pain or humiliation; or (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or (v) women are presented in postures of sexual submission; or (vi) women's body parts - including but not limited to vaginas, breasts, and buttocks - are exhibited, such that women are reduced to those parts; or (vii) women are presented as whores by nature; or (viii) women are presented being penetrated by objects or animals; or (ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual.<sup>144</sup>

This definition, also in contrast to the morality of obscenity laws, was built on the experiences of those victimized by pornography had of it, revealed during hearings<sup>145</sup> or in consultation with the drafters. The definition of actionable materials centers on sexual subordination, having been identified and documented as problematic rather than what is arousing to the observer.<sup>146</sup>

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<sup>143</sup> Proposed Ordinance Sec 1., to add Minneapolis City Code, Minn., Sec. 139.10(a)(1). 1st Reading, Nov. 23, 1983. *reprinted in Harm’s Way*, 427 [hereinafter: Minneapolis Ordinance].

<sup>144</sup> Minneapolis Ordinance, Sec. 139.10(a)(1). *reprinted in Harm’s Way*, 428-29. Men, children, or transsexuals would be included in place of women in the definition.

<sup>145</sup> For accounts of hearings, see generally *Harm’s Way*; See also *Att’y General’s Final Report*, 767-900.

<sup>146</sup> The U.N. Rapporteur on Violence Against Women referred to this definition as a “major breakthrough”. U.N. Econ. & Soc. Council [ECOSOC], *Preliminary Report of the Special Rapporteur on Violence Against Women*, ¶ 240 U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994) (*submitted by Radhika Coomaraswamy*)

## TOWARD A DEMOCRATIC THEORY OF CIVIL RIGHTS

Political scientist Iris Marion Young writes that for a theory of justice to be useful, it must consider some substantial social issues and not be too general, abstract or detached.<sup>147</sup> The antipornography ordinance converges with this theory since, in a democratic sense, in the process of creating the ordinance legislators explicitly took the standpoint of subordinated groups, identifying their troubles rather than deploying abstract neutrality. Young has also, for analytical purposes, distinguished between the concepts of deliberative democracy and political activism. According to this account, a typical political activist eschews existent forms of “deliberation” as biased in favor of existing power relationships, rather relying on actions outside established decision-making procedures.<sup>148</sup> Although with the process of creating the antipornography ordinances the legislative conduct of deliberations was transformed when politicians affirmed a democratic ideal of substantial equality, where previously silenced citizen groups were listened to, believed, and defended. Legislatures did not accept formal equality under gender-neutral laws of obscenity and speech, but identified social practices that had to be changed in order to make citizenship more inclusionary and equal, so democracy would deliver the values it purports to adhere to. By taking such a proactive stance, existing forms of deliberation were fused with the conscious activist ideal, hence creating *new* forms and ideals of democracy, and democratic practices.

Consistent with Young, democratic theorist Ian Shapiro—while discussing Foucault, Weber and Plato—writes that hierarchies sometimes are a legitimate part of democracies, and power indeed can be ubiquitous, but that one may still reject that “domination” must be legitimate (as, e.g., when a teacher sexually harasses a student rather than “requiring her to do homework”).<sup>149</sup> Studying inequalities caused by social domination in democracies, e.g., economic distribution, racial and ethnic hatred, and sex equality issues in rape- and abortion laws, Shapiro analyzes how domination can be countered by institutional mechanisms. Consensus sought by deliberative politics is seen as insufficient on its own, although if previously excluded groups are represented, it may further some goals in this direction.<sup>150</sup> While he does not mention pornography, this

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<sup>147</sup> Iris Marion Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990), 4.

<sup>148</sup> Iris Marion Young, “Activist Challenges to Deliberative Democracy,” *Political Theory* 29, no. 5 (Oct. 2001): 673-84.

<sup>149</sup> Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), 4, *cf.* 36-39.

<sup>150</sup> Shapiro, *Democratic Theory*, 35-49.

would be a good example where domination and desensitization of the consumers work against a rational deliberate dialogue in a “functionally similar” way as the concept of community standards does.<sup>151</sup> As principles of making judgments or decisions, these two do not counter systematic social domination of one group over another but may rather tend to accept status quo, e.g., in the case of deliberation by invoking a “common good” in order to reach consensus.<sup>152</sup> In contrast, Young suggests a veto-power for women in issues immediately affecting them as a group.<sup>153</sup> This would counter unequal standards, set by communities as a whole or by necessities of a political consensus. Similarly, Shapiro suggests various 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>

In recognizing the partiality behind the façade of gender-neutrality, and that those with less power in a male dominated society would have less access to state power in enforcing criminal “victimless” obscenity laws—i.e., using Shapiro’s terminology, they are currently more “vulnerable” to powers of others—the ordinance was constructed as a *civil rights law* giving legal initiative particularly to the ones victimized.<sup>155</sup> The drafters’ intentions were that this be an empowering right, making pornographers and perpetrators directly accountable to the survivors, rather than to the state, hence redistributing power more democratically. The drafters’ intentions also encompassed the recognition that with compensation in reach, there exist tangible incentives to shed light on pornography’s harm in court as well as real possibilities for women in the industry to escape it. Bypassing criminal sanctions also entails a lower burden of proof, reducing obstacles to legal action. Until these rights exist, there are no reasons why the widespread public silence of experiences from survivors would not continue.

Where the ordinances were proposed—except for minor differences—the following acts were defined as sex discrimination, grounding civil claims for damages and injunctive relief: (1) *coercion* into pornographic performance, (2) *forcing* pornography on someone, (3) *assault*

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<sup>151</sup> The concept of *functional similarity* is used in comparative sociology, also called “functional equivalence”. See, e.g., Mattei Dogan, “Strategies in Comparative Sociology,” *Comparative Sociology* 1 (2002): 74.

<sup>152</sup> See, e.g., Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 40-44.

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

<sup>154</sup> Shapiro, *Democratic Theory*, 5 (original *emphasis*).

<sup>155</sup> For the ideas referred to in this paragraph, see, e.g., Andrea Dworkin and Catharine A. MacKinnon, *Pornography and Civil Rights: A New day for Women’s Equality* (Minneapolis: Organizing Against Pornography, 1988) available at <http://www.nostatusquo.com/ACLU/dworkin/other/ordinance/newday/TOC.htm>

caused by specific pornography, and (4) *trafficking* in pornography (e.g. distribution).<sup>156</sup> Proofs in correspondence with the legislative findings, and with the definition of pornography, would support plaintiffs. Since any woman could sue as being sexually discriminated by circulation of specific materials, on basis of the *trafficking* provision, pornographers would have to pay the costs of the harm the materials exploits as well as engenders.

If not a veto power as suggested by Shapiro and Young, the antipornography ordinance would nonetheless have created an opportunity for women (or anyone similarly subordinated) to effectively stop the circulation of materials documented to be harmful. The ones victimized by pornography have never been adequately represented in the process of creating obscenity laws, which the ordinance additionally would have changed. In the same way Shapiro have suggested that judicial review in democracies, while not being a better remedy against domination than legislative deliberation *per se*, could nonetheless be constructed to counter many procedural threats against groups that are not adequately represented in the democratic processes as exemplified, *inter alia*, by the decisions on race by the Earl Warren Court during the civil-rights era.<sup>157</sup> Similarly, in Canada civil rights have also been seen as making democracy more inclusionary, realizing the ideals of equal citizenship. Political Scientist Robert Vipond argues that the new *Charter of Rights and Freedoms* of 1982 was influenced by the American 1968-71 Civil-Rights movement's underlying ideals "of equality and participation."<sup>158</sup> In contrast to contemporary Canadian critics of "judicial activism", it is argued that the ideal of civil rights to equality should be seen as one of the legislative purposes of the *Charter*.

The advantage of civil rights against pornography's harms, as a complement to legislative problems with consensus and subordination of the interests of those victimized, becomes more evident in light of democratic theories on descriptive (group) representation. Political scientist Jane Mansbridge has suggested that political representation of women would promote equality particularly in contexts of conflicting interests and "mistrust" between the genders, and where women's interest historically have been unarticulated.<sup>159</sup> Pornography poses such a conflict of interests and mistrust between the sexes, and the politics of obscenity that regulates it has indeed

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<sup>156</sup> See, e.g., Indianapolis, Ind. Code Ch. 16 § 16-3(g) (4-7) (1984), reprinted in *Harm's Way*, 444.

<sup>157</sup> Shapiro, *Democratic Theory*, 20, 64-65, 75-76.

<sup>158</sup> Robert Vipond "The Civil Rights Movement Comes to Winnipeg: American Influence on 'Rights Talk' in Canada, 1968-71," in *Constitutional Politics*, ed. Newman, 103.

<sup>159</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.

ignored women's voices and interest throughout history. However, as Mansbridge recognizes, the *relevant* descriptive representation may be contingent with issue and context.<sup>160</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 represent those *victimized* by pornography.

As is evident from the research on pornography, prostituted women are most likely subjected to the worst negative effects of consumption, along with battered women. In addition, certain intersectional factors such as race and class may increase the exposure for some women more than others to the harm of pornography considering, *inter alia*, how race is often associated with particular forms of subjugating sexual exploitation and abuse.<sup>161</sup> Research also indicates that many of those victimized by sexual harassment tend to share a common history of sexual abuse during childhood. The harassers seem to identify some common trait that signals vulnerability. Since pornography inspires sexist behaviour generally, a relationship to sexual harassment can be assumed, hence a common interest exist among those victimized by sexual harassment as well as pornography.

On the other hand women in legislatures—i.e., politically active women—may share different commonalities than the former groups with respect to their exposure of the harms of pornography. Moreover, research on political mobilization in male dominated contexts, particularly in party-politics and political organizations, suggests the existence of certain parameters, or “group dynamics,” that tend to exclude women critical of male dominance over “tokens,” or those less critical.<sup>162</sup> Hence, any effective democratic strategy to empower those victimized by pornography must account for the fact that their interest might not be articulated adequately by a general descriptive representation of politically active women in legislatures. In certain contexts it could even be counterproductive, offering pro-pornographers false legitimacy

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<sup>160</sup> Mansbridge, “Should Blacks/Women Represent,” 638.

<sup>161</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>162</sup> See, e.g., Ottar Hellevik and Torild Skard, *Norske kommunestyrelser: Plass for kvinner?* (Oslo: Universitetsforlaget, 1985), 95; Ingrid Pincus, *The Politics of Gender Equality Policy: a Study of Implementation and Non-Implementation in Three Swedish Municipalities* (PhD Diss., Örebro University, 2002); Gunnilla Björk, *Att förhandla sitt medborgarskap: kvinnor som kollektiva politiska aktörer i Örebro 1900-1950* (PhD Diss., Stockholm University, 2000); Drude Dahlerup, *Blomster & Spark: Samtaler med kvindelige politikere i Norden* (Stockholm: Nordiska Ministerrådet, 1985).

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

Several theorists generally recognize civil rights as a democratic practice to counter social domination, although this inquiry also suggests that such rights need to identify what is particularly harmful in pornography. There already exist constitutional equality guarantees and civil codes that could hypothetically be used. So why have they not been? While distinguishing between *procedural* and *substantive* theories of democracy, Shapiro recognize a prerequisite of “just legislation” based on a “qualitative fairness” in order for the remedy of judicial review to work, simultaneously as he circumscribe such review to a “middle ground” preventing “courts or other second-guessing agencies” to impose solutions on, e.g., deliberative legislative majorities.<sup>163</sup> But as Young suggests, there is no way around identifying the actual *substance* of how political subordination works in social reality if democracies shall deliver their equality commitments,<sup>164</sup> whether decisions are effectively made in legislatures or by judicial interpretation. Such a substantive approach to equality has already been recognized in international human rights law in the case of men’s violence against women, now regarded as a concrete violation of women’s *rights* to equality in several democracies.<sup>165</sup>

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<sup>163</sup> Shapiro, *Democratic Theory*, 64-67, 75-77.

<sup>164</sup> Young, *Politics of Difference*, 4.

<sup>165</sup> See, e.g., Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, pmb. 9, arts. 3(4), 4(2), July 11, 2003, available at <http://www.africa-union.org> (last visited April 14, 2005) (entry into force Nov. 26, 2005) [hereinafter: African Protocol] (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.”); Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, pmb. para 6, U.N. doc. A/RES/48/104 (Dec. 20, 1993) (recognizing that implementation of the Convention on the Elimination of All Forms of Discrimination Against

The paradigmatic shift with which international law has moved beyond the false neutrality and abstraction of Milltonian individual-centered thinking can be seen when comparing it to the Fraser Report's view from 1985, which did consider but not recommend the antipornography ordinances for Canada. Instead the committee suggested the use of general gender equality clauses under existing Human and Civil Rights Codes.<sup>166</sup> Although the committee referred to the “great interest” surrounding the ordinances in Canada at the time, particularly so its trafficking provision, it reflexively commented in a slightly paternalistic tone that initiation of civil class-actions had traditionally been conferred to the Attorney General.<sup>167</sup> While suggesting the public interest derived from a legitimate dissatisfaction with the administration of criminal laws under various censor boards and courts, the committee nevertheless preferred “to address directly the deficiencies in the criminal law rather than create a new form of civil action . . . .”<sup>168</sup>

However, the Fraser Committee did not address the underlying recognition behind the antipornography ordinance that in a context of male dominance there exists an inherent male bias—in criminal as well as civil justice systems—making it imperative for pornography to be *explicitly defined* as a violation of human rights and the right to gender equality, if law is to work in the interest of women and retain its surface plausibility. In contrast, under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) its monitoring body in 1992 *identified* “pornography” as a practice that “contributes to gender-based violence,” and states parties were obliged to “take all legal and other measures . . . including . . . civil remedies and compensatory provisions”<sup>169</sup> to stop it. Where the Fraser Report halted, the CEDAW-Committee expressed an explicit support for a civil rights-based antipornography remedy.

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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 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.”); For a contextualization of violence against women as an issue of sex inequality in the European Union, and a discussion of a series of (mostly ineffective) efforts taken by the Union to confront it, *see* Amy R. Elman, *Sexual Equality in an Integrated Europe: Virtual Equality*. (New York: Palgrave Macmillan, 2007). Cf. with Laurel S. Weldon, *Protest, Policy and the Problem of Violence Against Women: A Cross-National Comparison* (Pittsburgh: University of Pittsburgh Press, 2002), who places both Canada and the U.S. in a larger comparative and international context.

<sup>166</sup> *See* Canada, *Pornography and Prostitution*, 309-15.

<sup>167</sup> *Ibid*, 309.

<sup>168</sup> *Ibid*.

<sup>169</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).

Moreover, under the International Covenant of Civil and Political Rights (ICCPR), the U.N. Human Rights Commission in 2000 similarly held that since “pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.”<sup>170</sup> Similarly, already in the 1995 Beijing Convention States parties agreed that “[i]mages in the media of violence against women... including pornography, are factors contributing to the continued prevalence of such violence[.]”<sup>171</sup> The more recent 2005 African Union’s Protocol on women’s human rights in Africa also urged states to “take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.”<sup>172</sup> These instances of international law suggest that democratic ideals of equality of citizenship will not be realized without concretely engaging with the reality of all citizens, identifying means and expressions of political subordination even if, contrary to Shapiro’s middle-ground theories, this would entail “imposing” commitments on national legislatures.

### ***Engagement or Detachment: Government Responses***

In contrast to the persuasive imperative of international human rights law, legislative challenges to pornography and sex inequality in the 1980s suggest, consistent with Shapiro, Young, and other similar democratic theorists, that existing forms of democratic deliberations are insufficient and need firmer institutional mechanisms representing the interest of those victimized by pornography. For instance, the Canadian Fraser Committee on Pornography and Prostitution deliberately consulted a wide variety of views from the Canadian society. The diverse public opinions repeatedly resurfaced during the committees public hearings and closed interview sessions held across 22 centers and towns where hundreds of organizations and individuals (e.g., some prostituted women) presented their views in writing, or orally.<sup>173</sup> Those in favor of regulations were women’s organizations, churches and church groups, community organizations, educational associations, representatives from the police, different sorts of elected government

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<sup>170</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>171</sup> *Beijing Declaration*, *supra* note 165, ¶ 118.

<sup>172</sup> African Protocol, *supra* note 165, art. 13(m). While exploitation and abuse have been documented preconditions for pornographers to be supplied by human capital (see above) these terms, while illuminating, are rather superfluous in a legal setting.

<sup>173</sup> Canada, *Pornography and Prostitution*, 10, 63.

representatives etc., while those opposing them were civil liberties groups, some professional associations (e.g., librarians), publishing and media industry and related associations, as well as gay rights organizations in major cities.<sup>174</sup> However, it is one thing to stay detached and allow a variety of views during deliberations, and another to *engage* with them seriously.

### **THE INTERESTS OF PROSTITUTED PERSONS**

The Fraser Committee collected many testimonies and documentations suggesting women and children were harmed in production of pornography and subjected to harm caused by its consumption. Recent sociological research were presented to the committee suggesting a majority of prostituted persons had been subjected to incest and sexual abuse already as children, entered prostitution during early or middle adolescence, and had generally been runaways.<sup>175</sup> Many groups and individuals stressed the correlation between women's subordination and low status in society with the phenomenon of prostitution, the fact that women were poorer than men, and some cited pornography as a "cause and contributor" to prostitution since it "reinforces the view that women are sexual objects for men's pleasure [or] the prostitute is the most available person to engage in the sexual acts portrayed in pornography. One promises, the other delivers."<sup>176</sup> These very same views were expressed in the Minneapolis and Indianapolis hearings at the time, and have also been extensively documented in research.<sup>177</sup>

Regarding preconditions for entry into prostitution the committee observed that while women's groups offered many theories for the causes of prostitution, other interest groups such as community associations, the police, and civic leaders, who did not want prostituted women on the streets in their cities, "said very little when it came to a discussion of the root causes of . . . prostitution."<sup>178</sup> Interestingly, while the committee took notice of these disinterested groups and contrasted them with the more engaged ones, it ignored the latter's apparent conclusions when remarking that an adult prostituted person cannot be seen as victimized, but . . .

. . . must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as

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<sup>174</sup> Ibid, 63-64.

<sup>175</sup> Ibid, 351-54.

<sup>176</sup> Ibid, 351-54, quote at 354.

<sup>177</sup> See, e.g., quote from testimony by T.S., *supra* note 53; For research, see generally at *supra* notes 32-59 and accompanying text.

<sup>178</sup> Ibid, 351.

victims, whether the economy or patriarchal social structure, or of abuse directed at them during early years. We have sympathy with this point of view . . . . However, we do not accept it as a principle upon which to structure criminal law. In contrast, it is our view that children should be regarded as vulnerable . . . . thus be seen as victims[.]<sup>179</sup>

It is simply inconclusive and erroneous to suggest that after having been subjected to sexual abuse and incest, then forced to run away from home during childhood or adolescence—with all the attendant problems of staying alive in prostitution, on the street, and still managing school and obtain professional skills—these women should be regarded as responsible for their situation and not victimized. Distinguishing between child- and adulthood makes no sense here, although as an *illusion* it offered Canadian legislators an opportunity to reject prostituted women’s damages and civil rights as injured persons. This, the Minneapolis-style ordinances proposed to the committee by several individuals and organizations in Canada, would have granted them.

In contrast, the U.S. federal Commission on Pornography appointed in 1985 by then Attorney General *William French Smith* implicitly understood that a democratic imperative of equality among citizens must entail that any lawmakers investigate the conditions of those used to produce pornography. A hostile press later dubbed it the “Meese Commission”, trying to delegitimize it by associating it with an “almost universally despised man”<sup>180</sup> who announced its formation but was unresponsive to its further needs, ignored its recommendations, and ridiculed it by publicly receiving it under a semi-nude statue of the “Spirit of Justice.”<sup>181</sup> Nonetheless, in the report the former Nixon-initiated 1970 U.S. federal report on the subject was openly denounced, the 1979 Williams Report in the U.K. and the 1985 Fraser Report were similarly criticized for completely having failed to consider the interests of those abused in the industry.<sup>182</sup> It noted that while the Fraser Committee had “declared” that producers of violent pornography have “little or no respect for the rights and physical welfare of [the performers],”<sup>183</sup> they had not discussed any evidence of these practices or how to distinguish between simulation and

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<sup>179</sup> Ibid, 25.

<sup>180</sup> MacKinnon, “The Roar,” 14.

<sup>181</sup> See, e.g., Michael J. McManus, introduction to *Final Report*, by the Attorney General’s Commission on Pornography (Nashville, TN: Rutledge Hill Press, 1986), xvii-xviii, xxiii.

<sup>182</sup> Att’y General Comm., *Final Report*, 842-46.

<sup>183</sup> Ibid, 845 (citing Canada, *Pornography and Prostitution*, 265).

actual harm, and “did not devote even a paragraph to consideration of harms to performers other than those resulting from outright violence on the set.”<sup>184</sup>

The U.S. Attorney General’s Commission, on the other hand, devoted a whole chapter on “performers” where numerous interviews and readings on the subject from such varying quarters as the industry’s own publications, producers’-, performers’-, law enforcement personnel’ testimonies, along with published interviews in pornography- or popular magazines were presented and analyzed. Regarding the personal backgrounds in the population of pornography performers, the commission noted their similarity with the backgrounds of those studied by other researchers in other forms of prostitution.<sup>185</sup> It was also noted, e.g., how one performer who two years earlier had “declared” before a Senate subcommittee the “myth” of “unhappy childhoods,”<sup>186</sup> then testified to the commission of early sexual abuse along with “many other models.”<sup>187</sup> The report concluded that even while evidence was limited, it was “generally true of commercial pornography’s use of performers:

(1) that they are normally young, previously abused, and financially strapped; (2) that on the job they find exploitative economic arrangements, extremely poor working conditions, serious health hazards, strong temptations to drug use, and little chance of career advancement; and (3) that in their personal lives they will often suffer substantial injuries to relationships, reputation, and self-image.<sup>188</sup>

The Commission particularly noted that while hypothetically there could be exceptions to all their findings which “an extremely thorough investigation” might reveal, tellingly “the industry itself, which of course knows the full truth of the matter, has shown little interest in sharing that knowledge with us.”<sup>189</sup>

### **THE INTERESTS OF THOSE VICTIMIZED BY CONSUMPTION**

Moreover, contrary to the Canadian Fraser Report which heard testimonies of victimization in the production of pornography but did not pursue an inquiry of it nor propose a civil remedy for

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<sup>184</sup> Att’y General Comm., *Final Report*, 846.

<sup>185</sup> *Ibid*, 859/n.983.

<sup>186</sup> *Ibid*, 857 (citing *Effect of Pornography on Women, Children: Hearings before the Subcomm. on juvenile justice, Comm. on the judiciary, U.S. Senate, 98th Cong., 2d Sess., p. 315 (1984) (Statement of Veronica Vera).*

<sup>187</sup> *Ibid*, 857.

<sup>188</sup> *Ibid*, 888.

<sup>189</sup> *Ibid*, 889.

those victimized, the U.S. Attorney General's Commission called into question the 7<sup>th</sup> Circuit Court of Appeal's decision to invalidate the Indianapolis Antipornography Civil Rights-Ordinance. The commission pointed to that the U.S. Supreme Court in decisions such as *Brown v. Board of Education*<sup>190</sup> regarding racial segregation of schools, and *Muller v. Oregon*<sup>191</sup> regarding excessive working hours, had relied on precisely the kind of social evidence and findings that the Indianapolis legislature had accepted to construe their ordinance (the so-called "Brandeis Brief" method of legal argument).<sup>192</sup> But where the Supreme Court had relied on such findings to change the established judicial doctrines of the time, Judge Easterbrook in the 7<sup>th</sup> Circuit Court of Appeals, who even accepted the legislative findings in his opinion, erroneously described the ordinance as imposing restrictions based on a "preferred viewpoint"<sup>193</sup> when, on its face, it explicitly regulates pornography as "sexually explicit subordination." Pornography as sexual explicit subordination is simply not a viewpoint, but a social practice of producing and sexually consuming inequality, which Judge Easterbrook first recognized when approvingly citing the legislative premises (see below). Nonetheless, by later construing pornography as just one "viewpoint" among others such as socialism, conservatism, or pacifism, the court invalidated the ordinance since so described, it would indeed move beyond established obscenity doctrines of the First Amendment:

[W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.[note] In the language of the legislature, 'pornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. . . .' Indianapolis Code § 16-1(a)(2). Yet this simply demonstrates the power of pornography as speech. . . . If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. . . . Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.<sup>194</sup>

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<sup>190</sup> 347 U.S. 483 (1954).

<sup>191</sup> 208 U.S. 412 (1908).

<sup>192</sup> See generally, Att'y General Comm., *Final Report*, 747-54.

<sup>193</sup> *American Booksellers Ass'n, Inc., v. Hudnut*, 771 F.2d 323, 325 (7<sup>th</sup> Cir. 1985) ("The ordinance discriminates on the ground of the content of the speech. . . . The state may not ordain preferred viewpoints in this way.")

<sup>194</sup> *Hudnut*, 771 F.2d at 328-30, *aff'd mem* 475 U.S. 1001 (1986) (6-3), *reh'g denied*, 475 U.S. 1132 (1986).

But even if accepting the content neutrality principle as referred to by Judge Easterbrook—despite that obscenity, which is unprotected by the First Amendment, if anything expresses a conservative heterosexual “viewpoint” of morality—that principle has nonetheless never been a constitutional absolute, especially when the content of the speech is found to cause criminal behavior or violate other compelling state interests, as Easterbrook conceded pornography did. Regarding child-pornography the *Miller* exception for artistic, political or social value was unambiguously rejected by the Supreme Court in *New York v. Ferber* (1982) on a reversed principle compared to the reasoning of the Seventh Circuit, entailing the more harmful the effects of the “content,” the less protected the materials.<sup>195</sup> Hence, there was a compelling state interest in prohibiting the “content” of speech. Not surprisingly then, the Attorney General’s Commission who did *engage* themselves with the interest of those victimized by pornography, recommended “[t]he civil rights approach [since it] is the only legal tool suggested to the Commission which is specifically designed to provide direct relief to the victims of the injuries[.] . . . At a minimum, claims could be provided against trafficking, coercion, forced viewing, defamation, and assault.”<sup>196</sup>

The Canadian Fraser Report also, when discussing the Minneapolis Ordinance’s *Assault Provision* that would enable plaintiffs to sue producers when having suffered harm caused by *specific* pornography, cited women’s shelters reporting how clients told about male partners requiring them to participate or be subjected to acts which these men had seen in pornography, as well as cases of violent sex crimes where the perpetrator had been found with “a supply of violent pornography.”<sup>197</sup> In addition, in each city the Fraser Committee was presented with extensive content samples of contemporary pornography abundant with misogyny, coercion and violence against women.<sup>198</sup> Moreover, detailed descriptions of the *social effects* of pornography were provided in “many briefs” of which, according to the Fraser Committee, “most” were

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<sup>195</sup> *New York v. Ferber*, 458 U.S. 747, 761, 763-64 (1982) (holding that “it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests . . . .” *Id.* at 763-64)

<sup>196</sup> Att’y General Comm., *Final Report*, 749, 756.

<sup>197</sup> *Ibid.*, 308. Such testimonies are in fact corroborated by large-N surveys as well as qualitative interviews among populations of abused and prostituted women, and other public inquiries on the subject, which many were known already at the time. See previously cited sources and accompanying text *supra*, notes 51-57.

<sup>198</sup> Canada, *Pornography and Prostitution*, 64-67.

concerned with “that pornography degrades women, robs them of their dignity as . . . equal partners within a relationship and treats them as objects or possessions to be used by men [and] that male violence against women is treated as socially acceptable and viewers are desensitized to the suffering of others . . . .”<sup>199</sup> The Committee finally declared that “our approach represents a rational, fair and realistic balancing of the interests involved, and a significant advance of the present state of the law,”<sup>200</sup> while simultaneously writing that “we are of the view that [representations and depictions of sexual violence] lower the status of women and thus contravene their right to equality.”<sup>201</sup>

In this context the equality guarantees in section 15 of the *Canadian Charter* were specifically mentioned,<sup>202</sup> as well as the possibilities of limiting freedom of expression under section 2(b) on basis of section 1 of the *Charter*, which “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>203</sup> But their proposed legal definition of pornography did not define it in terms of lowering of the status of women, as had Minneapolis and Indianapolis, nor lowering of anyone else. Rather, pornography was gender-neutrally defined in terms of depictions of sexual explicitness, the degree of violence depicted, or depictions of certain body-parts or sexual practices (the “body-parts approach”), or whether “lewd” acts or “lewd exhibition of the genitals” were presented.<sup>204</sup> Such definitions, while not expressly referring to obscenity, are nonetheless similarly insensitive to how pornography reinforces hierarchy in sexual relationships and seem more concerned with regulating violence, nudity, or sexual explicitness per se, as do obscenity laws.

In Canada, since the mid 1950s federal law had already prohibited the production and distribution of *obscenity* defined as “any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and *violence*.”<sup>205</sup> Hence it is unclear how come, at least in their definition

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<sup>199</sup> *Ibid*, 67. These effects of exposure mentioned have also been extensively documented in research, literature, and public inquiries. See citations and accompanying text *supra*, notes 47-59.

<sup>200</sup> *Ibid*, 260.

<sup>201</sup> Canada, *Pornography and Prostitution*, 268.

<sup>202</sup> *Ibid*, 266-68

<sup>203</sup> Canadian Charter of Rights and Freedoms, s.1, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11 (U.K.) [hereinafter: *Canadian Charter*].

<sup>204</sup> *Ibid*, 276-79.

<sup>205</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, s. 163(8) (*emphasis added*).

of pornography, the Fraser Committee thought they presented a “significant advance” of the present law with regards to the purpose of contravening pornography’s subordination of women or anyone similarly situated. Consequently, it is also unclear for whom their approach represented a “rational” and “fair” balancing of interest except for those in favor of status quo. Rather, it seems as if the committee ignored the interest of those victimized and subordinated by pornography, which suggests the hypothesizes drawn from Shapiro, Young, and Mansbridge’s work are accurate; i.e, that there exists a democratic deficit in terms of women’s representation, and particularly the articulation of the interest of those victimized *as* women. It is, as have already been mention, one thing to allow for a variety of views to be expressed during deliberations, and another to *engage* with them seriously and not in a detached manner. Here, the Fraser Approach to democracy fails.

### **A DEMOCRACY THAT CHALLENGES OR REINFORCES DOMINATION?**

Political Scientist Donald Alexander Downs, who criticized Minneapolis’ and Indianapolis’ approach to democracy in adopting the antipornography ordinances said, among other things, the legislatures engagement with antipornography activists—many of whom had been raped and tortured<sup>206</sup>—threatened the “perspective and civility required by healthy public life.”<sup>207</sup> He preferred a model of “democratic elitism” where elites “protect civil liberties” from infringement by mass politics.<sup>208</sup> His ideas are reminiscent of various liberal ideals of Montesquieu, Madison as well as Mill, emphasizing checks and balances, the supremacy of certain rights over others, and a restriction of politics by limiting the sphere for democratic intervention.<sup>209</sup> As with the ideal of a deliberative consensus though, restraining public discourse and privileging abstract liberal rights of freedom of speech will eventually also silence those with least access to established decision-making, while amplifying the speech of the pornographers and the privileged in democracies. These models do not contain mechanisms countering existing systematic domination as those suggested by Shapiro, Young, and to certain extent Mansbridge, or more concretely by the ordinance itself. Moreover, following Shapiro’s critique, the Fraser Committee’s ambition to present a “rational compromise” rather than siding with those

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<sup>206</sup> See testimonies from witnesses in *Harm’s Way*.

<sup>207</sup> Downs, *New Politics of Pornography*, 68.

<sup>208</sup> Downs, *New Politics of Pornography*, 89, 142.

<sup>209</sup> See generally David Held, *Models of Democracy*, 3<sup>rd</sup> ed. (CA: Stanford University Press, 2006); Robert A. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

victimized by pornography in line with the U.S. Commission, would necessarily be biased in favor of the status quo; i.e., as if the white minority in South Africa, merely because they had an “interest” at stake in the democratic transition, legitimately could have expected a compromise that preserved the principle of apartheid along that of racial equality.<sup>210</sup>

A similar critique as Down’s was expressed by Canadian scholar Dany Lacombe, alleging that the “rigidity” of anti-pornography feminists “cannot allow for the plurality of subject positions that women occupy,” nor recognize “differences” and the “fluidity of political identities.”<sup>211</sup> Scholarly comments on opposition to apartheid, racism, or capitalism, would usually not regard such critique as one-sided or lacking subtle accounts of difference, but rather as legitimate political views. Lacombe shows an unwillingness to situate herself in the position of the ones victimized. Pornography could be seen as precisely what circumscribes the possibilities of social and cultural fluidity, and “difference” among women, ascribing their role as sexual objects for men’s use. Both Lacombe and Downs have avoided the substantive issue of which social group is situated in a power-relationship over whom—that is, the inequality that democracy purports to oppose. While not denying gender as a systematic structure subordinating women to men, the forms of democratic decision-making implicitly favored in their critique contains no institutional mechanisms to counter this dominance. What Downs rejects would be precisely those democratic values that Young, Shapiro, Vipond, international human rights law, the approach taken by the U.S. Attorney General’s Commission on Pornography, and especially the civil rights ordinance itself, took: i.e., that politicians may listen to activists and the ones actually being hurt by pornography, taking a standpoint in support of those constituents not yet adequately represented to challenge male dominance, making democracy more equal by crafting rights responsive to these imperatives.

In this regard, Sweden’s 1998 Sexual Crimes Committee (*Sexualbrottsutredningen*) is perhaps the worst example of ignorance, detachment, and an elitist approach to democracy that governments have taken since the 1970s regarding pornography and its harms. In 1998, the Swedish government instigated a total review of the sexual crimes in the penal code, finalized in a bill and passed in parliament 2005.<sup>212</sup> In this context questions were raised whether the criminal prohibitions on procuring should be extended to pornography. This idea had initially

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<sup>210</sup> Cf. Shapiro, *Democratic Theory*, 44.

<sup>211</sup> Lacombe, *Blue Politics*, 152-53.

<sup>212</sup> Proposition [Prop.] 2004/5:45 *En ny sexualbrottslagstiftning* [government bill] (Swed.).

been raised by a 1993 Committee on Prostitution.<sup>213</sup> The latter's suggestions were dismissed in 1997 by the government as having not considered enough the consequences to the fundamental laws on freedom of expression and the press.<sup>214</sup> The older Prostitution Committee's idea of extending procuring prohibitions makes sense though, if pornography is seen as an arm of prostitution, in which the law already penalizes procurers, among other things to prevent prostitution itself.

In addition, Sweden had already in 1998 passed a law prohibiting the purchase of sex in prostitution, while decriminalizing the prostituted persons, on the legislative rationale that prostitution is a form of sex inequality and violence against women exploiting and harming the prostituted person. In the 1998 *Women's Sanctuary Bill* that was passed it is said that

. . . both the Commission on Violence Against Women and the Prostitution Investigation bring up issues that in essential parts concern relationships between men and women, relationships that have significance for sex equality, in the particular case as well as in society at large. By this way, the issues may be said to be related with each other. Men's violence against women is not consistent with the aspirations toward a gender equal society, and has to be fought against with all means. In such a society, it is also undignified and unacceptable that men obtain casual sex with women against remuneration.<sup>215</sup>

The evidence available to the legislators in 1998 indicated that "the prostituted persons mostly are women that in various ways were provided a bad beginning in life, were early on deprived of their self-respect, and were given a negative self-image. In recent times, the link between prostitution and sexual abuse in childhood has become all the more apparent."<sup>216</sup> The condition that the purchaser exploits the prostituted person's situation was also observed: "Even the government makes the assessment that . . . it is not reasonable also to criminalize the one who, at least in most cases, is the weaker part whom is used by others who want to satisfy their own sexual drive."<sup>217</sup> The legislature recognized the destructiveness of prostitution in the Women's

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<sup>213</sup> See summary of Statens Offentliga Utredningar [SOU] 1995:15 *Sammanfattning: Könshandel. Betänkande av 1993 års prostitutionsutredningen*. [summary of government report series] p. 8 (Swed.)

<sup>214</sup> Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill] p. 106 (Swed.).

<sup>215</sup> *Id.* p. 22.

<sup>216</sup> *Id.* p. 102-03.

<sup>217</sup> *Id.* p. 104. (noting as well that decriminalizing the prostituted person while penalizing the purchaser "is also important in order to encourage the prostituted persons to seek assistance to get away from prostitution, that they do not feel they risk any form of sanction because they have been active as prostituted persons.")

Sanctuary bill, in which a statement from the government official report published prior to the bill was quoted wherein the investigators rhetorically asked themselves “how it is that ‘ordinary men’ who are often married or cohabiting, are involved in an activity that they should be aware of is destructive . . . especially for the women they are buying sexual services from?”<sup>218</sup>

In light of these, from an international comparative perspective remarkable recognitions of *prostitution*, as a form of violence against women and an unequal sexual exploitation, it is striking how different the government’s new directive to the 1998 Sexual Crimes Committee regarding *pornography*, which is also a form of prostitution. Here, it was already initially declared that any considerations to extend the procuring provision “should [take as] a starting point that the proposals should not lead to infringements of the fundamental laws of freedom of press and expression, and [that] it is not the committee’s assignment to propose a general prohibition against pornography.”<sup>219</sup> While the legal rationale behind the prior 1993 Committee on Prostitution’s suggestions was said to be similar with what others successfully had argued when criminalizing child-pornography,<sup>220</sup> the committee did not find these rationales transposable to adult pornography:

An extension of the [criminal] liability for procuring is intended to protect those who participate in pornographic pictures and movies and does *admittedly* have another purpose than to infringe the rights of production and dissemination as such. The actual restrictions would be so significant though that in the eyes of the committee, it is in conflict with [freedom of expression].<sup>221</sup>

Nor did the committee explain *why* restrictions would be more significant with respect to adult pornography than with child materials. One is therefore left with a feeling that in contrast to children, harm to women was simply viewed *insignificant* for legislative concern. In contrast to the Canadian Fraser Committee as well as the U.S. Attorney General’s Commission on Pornography, the evidence of pornography’s harm nor the conditions of production was ever reviewed by the government. During the Committee’s term of inquiry an attempt was also made in Parliament by several MP’s (one in the committee herself) to extend the government’s directive to include a comprehensive review “from a gender-political perspective [to] analyze

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<sup>218</sup> Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill] p. 22.

<sup>219</sup> Statens Offentliga Utredningar [SOU] 2001:14 *Sexualbrotten: Ett ökat skydd för den sexuella integriteten och angränsande frågor* [government report series] p. 285 (or) p. 403 (Swed.).

<sup>220</sup> SOU 2001:14 p. 413.

<sup>221</sup> SOU 2001:14 p. 415.

pornography, and from this analysis propose further measures with special emphasis on preventing harmful effects on young people.”<sup>222</sup> In Parliament texts on the back of convolutes from “some regular Swedish pornography movies” where read out loud on the floor, assumingly in order to *raise consciousness* among other MPs.

“How much should a petite 18-year-old have to go through? Five sixty year old men, four Africa Negros [sic], six iron-hard villains. Anal! Sodomasochisms! Mouth Cascades! Mini-Girl Sandy is Back!” “Teenage Bambi Taken Aback by Eight Nasty, Mad Anabolic Monsters.” “Deborah and 14 Men. A Bachelor Party Degenerating and the Poor Stripper has to Tackle the Entire Gang of Drunkards. ALL Empties in Her Mouth.” “Assembly Band Sex. Four Strangers Line Up to Empty Themselves in the Teen Mouth!” “The Lolita Gets Two Dicks in the Ass at the Same Time! Little Tammi is Merely 18 Years and Make the Hardest Scene in History!” “Peter North’s 25 Best Shots. Mouth After Mouth is Sprayed Full! The Girls Get Drowned! Fabulously Grotesque! Do NOT Miss This Unique Cavalcade!”<sup>223</sup>

Having been made conscious what materials and what practices were produced and consumed under constitutional protection, nonetheless Swedish legislators dismissed even appointing a modest inquiry into the (young) lives of those harmed by pornography by 251 votes against 49.

### ***The Aftermath: Legislative & Judicial Responses***

The U.S. Attorney General’s report resulted in an outcry of media attention, substantially orchestrated by pro-pornographers. For example the “Media Coalition,” an interest group consisting primarily of publishers and distributors (some of pornography) a month prior to the release of the report paid Gray & Company, then Washington’s largest PR-firm, “up to \$900’000 for a ‘strategy designed to further discredit the Commission’.”<sup>224</sup> Gray & Company’s budget was more than twice that of the Commission’s \$400’000. Gray’s instructions were to persuade the Attorney General himself, the White House, and leaders of both political parties that the final report was “so flawed, so controversial, so contested and so biased, that they should shy away

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<sup>222</sup> Motion till Riksdagen [Mot.] 1999/2000:Ju710 *Pornografi* [parliamentary bill] (Ulla Hoffmann (v) et al.) (Swed.). (dismissed 49-251).

<sup>223</sup> Mot. 1999/2000:Ju710 (citing pornography material)

<sup>224</sup> McManus, introduction to *Final Report*, xlvi (quoting letter from Steve Johnsson, Senior VP. of Gray & Co, to John M. Harrington, Exec. VP. of the Counsel for Periodical Dist. Ass., June 5, 1986).

from publicly endorsing the document.”<sup>225</sup> Nonetheless the ideas from the report lingered on in the U.S. Congress for several years, and specifically the civil rights ordinance approach itself, which was introduced in part in the form of two law proposals between 1984 and 1991.

### **LEGISLATIVE DELIBERATIONS DITCHED**

The *Pornography Victims Protection Act* was introduced the first time in 1984 by Senator Arleen Specter, R-Pa. and later in the House as well, containing a civil ground for adult and child victims who had been coerced into making pornography to recover damages from producers.<sup>226</sup> The bill defined actionable materials as “visual depiction” of “sexually explicit conduct,”<sup>227</sup> and offered shields against typical judicial gender bias that could *not* negate a finding of coercion; i.e., such as whether the plaintiff *previously* had been prostituted, had had sex with defendant, had posed for pornography, had consented, had signed a contract, was paid, etcetera.<sup>228</sup> While not offering a subordination-based pornography definition as the antipornography ordinances did, nevertheless it was not limited to obscenity per se. However, despite being reintroduced through 1987 in similar forms it never passed.<sup>229</sup>

In 1989 another attempt was made by Senator Mitch McConnell, R-Ky, who introduced the *Pornography Victims’ Compensation Act*. This bill centered on consumption harms and offered civil remedies to its victims from producers, distributors, or sellers of specific materials, assuming plaintiffs could prove, with a preponderance of evidence—as under the Minneapolis/Indianapolis ordinances’ assault provision—that specific materials caused an assault or a murder.<sup>230</sup> The first versions explicitly referred to the findings of the Attorney General’s Commission as well as to other federal investigations and research on the subject.<sup>231</sup>

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<sup>225</sup> Ibid, xlvi. Gray & Company’s strategy comprised five “key components” that successfully became “conventional wisdom” of most media reports on the Commission, simply parroting lies such as that (1) “there is no factual or scientific basis’ for the assertion that ‘sexually-oriented’ material cause criminal sexual or violent behavior ‘in any way,’” (2) that “[i]t is a waste of the nation’s time, energy, and financial resources to try to contain these materials because ‘it diverts our attention from real economic and social problems,’” (3) that “[t]his campaign to infringe on all our rights’ is the work of ‘religious extremists,’” that (4) “[i]f the effort to stop pornography succeeds, its leaders will be encouraged to force their ‘narrow and social agenda on the majority,’” and that (5) “[o]ne does not have to approve of certain publications to support the right of others to read them.” Ibid, xlvi.

<sup>226</sup> S. 3063, 98th Cong. (1984), H.R. 5509, 99th Cong. (1986).

<sup>227</sup> S. 3063, Sec. 2(3), p.2; H.R. 5509, Sec. 2(3), p.2.

<sup>228</sup> S. 3063, 98th Cong. Sec. 2(3)(c)(2) (1984), p. 3; H.R. 5509, Sec. 2(3)(c)(2) (1986), pp. 3-4.

<sup>229</sup> S. 3063, 98th Cong. (1984), S. 1187, 99th Cong. (1985), H.R. 5509, 99th Cong. (1986), S. 703, 100th Cong. (1987), H.R. 1213, 100th Cong. (1987).

<sup>230</sup> S.1226, 101st Cong. (1989), S.983, 102d Cong., (1991).

<sup>231</sup> S. 226, Sec. 2(2-7), S.983, Sec. 2(3-8).

However, as deliberations moved on in the Senate Judiciary Committee and in conjunction with media being filled by the common outrage from pro-pornography quarters,<sup>232</sup> the challenging approach of the bill became increasingly watered down. In conjunction with striking out the references to research on pornography and replacing it with a preamble instead referring to the imperatives of “Anglo-American jurisprudence” and “American tort law,”<sup>233</sup> as well as striking out any testimonies from the offender as admissible evidence (the “Ted Bundy Provision”),<sup>234</sup> so many additional requisites were added that the bill became a dead letter law.

Senator *Howell Heflin*, D-Ala., successfully added an amendment requiring a criminal conviction of the offender before a civil suit could be filed against producers, distributors or sellers.<sup>235</sup> Senator *Specter* also added an amendment requiring that defendants must first be convicted under criminal *obscenity laws*,<sup>236</sup> whereas pornography in the initial versions had been defined as that which is “sexually explicit,” and in various sub-definitions further specified through a “body-parts” approach *as well as* an antipornography subordination approach centered on explicitly violent and coercive materials.<sup>237</sup> However, Specter’s and Heflin’s restrictive modifications did apparently not please First Amendment considerations among Committee members enough. An additional amendment provided by the chair of the Judiciary Committee *Joseph R. Biden*, D-Del (now Vice-President of the United States), went even further, but was narrowly rejected (7-7). The Biden amendment would have required proof that defendants knowingly had provided the public with obscene materials by the time of the assault or murder.<sup>238</sup> This meant that defendants first be convicted in a criminal obscenity proceeding

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<sup>232</sup> See e.g. Christopher M. Finan, *From the Palmer Raids to the Patriot Act*, (Boston: Beacon Press, 2007), 260-64;

<sup>233</sup> S. 1521, 102d Cong., Sec. 2(a)(1-2) (1991).

<sup>234</sup> S. 1521, Sec. 3(c).

<sup>235</sup> Kitty Dumas, “Backers of Porn-Victims Bill Fight for Panel Approval,” *CQ Weekly Report* 50, no. 24 (June 13, 1992): 1711; See also “Pornography Victims’ Compensation Act,” *CQ Almanac* XLVIII (1992): 331.

<sup>236</sup> Dumas, “Porn-Victims Bill,” 1711; “Pornography Victims’ Compensation Act,” *CQ Almanac*, 331.

<sup>237</sup> S. 983, Sec. 4. (subparts defining “(1) sexually explicit” as “graphically” depicting or describing “(A) sexual intercourse, including but not limited to genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (B) bestiality; (C) stimulation or penetration of the genitals by inanimate objects; (D) masturbation; (E) lascivious exhibition of the genitals of any person; or (F) sadistic or masochistic abuse, including but not limited to torture, dismemberment, confinement, bondage, beatings, or bruises or other evidence of physical abuse, which are presented in a sexual context or which appear to stimulate sexual pleasure in the abuser or the recipient of such abuse; however . . . not . . . an isolated passage; (2) “violent” describes any acts or behavior, or any material that depicts or describes such acts or behavior, in which women, children, or men are- (A) victims of sexual crimes such as rape, sexual homicide, or child sexual abuse; (B) penetrated by animals or inanimate objects; or (C) tortured, dismembered, confined, bound, beaten, or injured, in a context that makes these experiences sexual or indicates that the victims derive sexual pleasure from such experiences.)

<sup>238</sup> Dumas, “Porn-Victims Bill,” 1711; “Pornography Victims’ Compensation Act,” *CQ Almanac*, 331.

before the assault or murder had even taken place, entailing only those being (in the words of Senator *Strom Thurmond*, R-Sc) “foolish enough to commit the identical criminal act twice”<sup>239</sup> to be civilly liable under the law.

As a result of these legislative deliberations, aggressively lobbied from inside as well as outside, as is common, American democracy failed to adequately represent and articulate the interest of those victimized by pornography. The Congress had missed an exceptional opportunity to rectify the blatant First Amendment fundamentalism that had become the unofficial doctrinal legacy—though technically binding only for the 7th Circuit—after the Supreme Court in 1986 *summarily* affirmed (6-3), without offering their own opinion, Judge Easterbrook’s decision to invalidate the Indianapolis ordinance.<sup>240</sup> In Congress, the victims were once again silenced. Since then, adult pornography in the U.S. is generally unchallenged outside the small confines of *sexual harassment doctrine* at work, where display is seen as contributing to a hostile working environment, hence entailing grounds for civil remedy.<sup>241</sup> As a comparison, in Sweden such a doctrine has not yield ground,<sup>242</sup> despite their more radical prostitution law. And while this prostitution law initially looked promising it has not yet delivered the full potential of its democratic imperatives.

## JUDICIAL RESISTANCE

Since the Swedish law against purchase of sex was passed in 1998, street prostitution was dramatically reduced in incidence.<sup>243</sup> Trafficking in Sweden is regarded the lowest in Europe. Other countries are beginning to adopt aspects of the Swedish model (e.g., Norway, Iceland, and South Korea). In Stockholm, social workers encounter only 15 to 20 prostituted persons per

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<sup>239</sup> Kitty Dumas, “Future Unclear For Pornography Bill,” *CQ* “Pornography Victims’ Compensation Act,” *CQ Weekly Report* 50, no. 24 (June 27, 1992): 1887; “Pornography Victims’ Compensation Act,” *CQ Almanac*, 332.

<sup>240</sup> *Hudnut v. American Booksellers Ass’n Inc.*, 771 F.2d 323 (7th Cir. 1985), *aff’d mem* 475 U.S. 1001 (1986) (6-3), *reh’g denied*, 475 U.S. 1132 (1986).

<sup>241</sup> See *Robinson v. Jacksonville Shipyards, Inc.* 760 F. Supp. 1486 (M.D. Fla. 1991) (settled before appeal), for a prejudicial case against sexual harassment and pornography at work.

<sup>242</sup> See *Arbetsdomstolen (AD) [Labor Court] 2005-06-08, Dom nr 63/05, Mål nr A 64/04 (Swed.)*, for an almost similar Swedish case of sexual harassment and pornography at work. The court noted that “inside the camp, several elements featuring half-pornographic or at least sexual content [where on display],” *id.* at 14., in shared spaces were both genders had to stay. The National Armed Forces were here, as an employer, *not* being held liable for civil damages despite a preponderance of observations indicating extensive sexual harassment and bullying against plaintiff, even by the employer’s internal investigators.

<sup>243</sup> National Criminal Investigation Dept. Sweden, *Trafficking in Women: Situation Report no. 5*. elaborated by Kajsa Wahlberg and Camilla Örndahl (Sweden: RKP KUT Report 2003:b), 34 (noting reduced demand after 1999); Cf. *Kommittédirektiv [dir.] 2008:44 Utvärdering av förbudet mot köp av sexuell tjänst*. [gov’t commission directive], pp. 5-6 (Swed.) (citing *National Rapporteur* on trafficking, the Nat’l Crim. Invest. Dept., Sweden).

night, whereas prior to the law they encountered up to 60.<sup>244</sup> In Malmö, social workers encountered 200 women a year prior to the law, one year after the law they were only 130, and in 2006 they were 66.<sup>245</sup> In Gothenburg, data indicate street prostitution declined from 100 to 30 persons a year between 2003 and 2006.<sup>246</sup> Moreover, the Nat'l Criminal Investigation Dept. has found traffickers and pimps do not regard Sweden as a good market anymore.<sup>247</sup> Procurers are now forced to operate through complex indoor arrangements to satisfy customer's fears of getting caught, using several apartments and avoid staying too long at one place. This "necessity [for] several premises" has been corroborated in telephone interception (wiretapping), testimonies from prostituted women, police in the Baltic States, and in almost all preliminary investigations.<sup>248</sup>

However, the rates of convictions are comparatively low. There were 10 clients convicted in 1999, 29 in 2000, 38 in 2001, 37 in 2002, 72 in 2003, 48 in 2004, 94 in 2005, 108 in 2006, and 85 in 2007.<sup>249</sup> The main reason for the low conviction rate lies in a Supreme Court 2001 decision where it had to interpret the level of penalty, and in so doing accepted a ruling by a lower court holding that when a man makes use of a prostituted person with her so-called "consent," this entails the offense is committed against the "public order" and not against her as a "person."<sup>250</sup> Hence, her right to civil damages was not recognized, and the penalty was lower than it could have been otherwise. This decision also meant that the purchase of sex is now technically regarded as a "low priority" crime, despite that at least two judges, one in the Supreme Court, were convicted and fined the approximate equivalent of US\$ 5,300<sup>251</sup> and US\$ 5,800<sup>252</sup> respectively.

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<sup>244</sup> Socialstyrelsen, *Prostitution in Sweden 2007* (National Board of Health and Welfare, 2008), p. 33.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid, p. 34.

<sup>247</sup> National Criminal Investigation Dept. Sweden, *Trafficking in Women*, p. 34.

<sup>248</sup> Ibid.

<sup>249</sup> Swedish National Crime Statistics, available at [www.bra.se](http://www.bra.se)

<sup>250</sup> Nytt Juridiskt Arkiv [NJA] [S. Ct.] 2001-07-09 s. 529 (accepting lower ruling holding that "[i]n the act prohibiting the purchase of sexual services the consent is a requirement if there is to be any crime. It is not stated, as is the case with the act mentioned above prohibiting genital mutilation, that consent does not give release from liability. The way the prohibition is articulated therefore leads one's thoughts into the direction that the act is not to be viewed primarily as a crime against person but instead as a crime against public order, which is a crime where consent as discussed above will have no significance. Already the fact that the one who has carried out the sexual service is called as a witness by the prosecutor speaks in favor of that this is the case. With respect to this it will, in deciding the level of penalty for the act, initially be of significance that the act is to be viewed as a crime against public order . . .").

<sup>251</sup> "Domare som köpte sex riskerar avsked," [Judge Who Purchased Sex Risks Being Fired] *DN*, Sept. 20, 2004.

However, none of the conditions or observations of prostitution made by the legislature, or in contemporary research, document a condition of freedom required for the “consent” on which the Supreme Court relied on above to be meaningful. In light of such observations the Parliament had, by criminalizing the purchaser but not the prostituted person, established that purchasers are legally assumed to knowingly exploit another person's dire situation. This is not a situation to which a person can legitimately consent.

In another ruling from 2007, the Administrative Court of Appeal taxed a prostituted person based on a discretionary assessment.<sup>253</sup> As the complainant pointed to, that decision leads to “that prostituted persons, in order to be able to pay taxes, are coerced to continue[.]”<sup>254</sup> Even jurisdictions such as the state of Nevada that have legalized prostitution in certain counties, with all the attendant harm, refuse to make it worse by taxing the abuse.<sup>255</sup> In this context, it is noted that the statutory wordings of the Swedish law defining prostitution as “purchase of sexual service” is highly inconsistent with reality. Prostitution is an abuse and exploitation of women, and not an acceptable job or “service”. Instead, prostitution could have been defined as “purchase of a sexual act of a person” which would make it much more difficult to interpret it as a regular business service for taxation purposes, or as a crime against public order, and not against a “person”. The wordings “sexual activity” were even proposed, unsuccessfully, to substitute “sexual service” by at least three considerate parties in response to the government’s referral of the 1998 Sexual Crimes Committee’s final report for public consideration; Hence, the *Scania and Blekinge Court of Appeal* and the *Judicial Authority* objected, inter alia, whether it would not be more consistent to let the prohibition relate to the concept “sexual activity,” and the *Stockholm University Law School* suggested replacing “sexual service” with something that did not imply prostitution to be part of regular commercial business services.<sup>256</sup>

In practice though, despite current deficiencies, the law’s effect of lowering the demand leads to that less women are abused in prostitution. However, Swedish law could be even more *strengthened*, consistent with its intent. Until the victims are compensated and helped further, enabled to leave the sex industry, the situation will not be fully addressed. Consistent with the

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<sup>252</sup> Lasse Wierup, ”HD-ordförande skämtar om domarens sexköp,” [Supreme Court Chief Justice Jokes about Justice’s Sex Purchase] *DN*, May 26, 2005.

<sup>253</sup> Kamrarrätten i Stockholm (KR) [Admin. Ct. App.] Mål 2231-06, 2007-03-19 (Swed.).

<sup>254</sup> *Ibid*, s. 1.

<sup>255</sup> Brendan Riley, “Prostitution Tax Dies,” *Casper Star-Tribune* (Wyoming), Apr. 9, 2009, [www.trib.com/articles/2009/04/09/news/breaking/doc49de76207e5ba596445857.txt](http://www.trib.com/articles/2009/04/09/news/breaking/doc49de76207e5ba596445857.txt)

<sup>256</sup> Proposition [Prop.] 2004/5:45 *En ny sexualbrottslagstiftning* [government bill] pp. 103, 107 (Swed.).

democratic imperative of identifying which groups are subordinated and victimized, as has been suggested particularly by Young, there should be *three parts* to any adequate scheme: (1) decriminalize *and support* the prostituted people, preferably with civil rights, (2) criminalize the buyers strongly, and (3) criminalize third party-profiteers. Despite lately having switched direction and begun to recognize some circumstances in prostitution as coercive, hence justifying a higher level of penalty for purchasers in those cases, courts have not yet awarded damages merited by such victimization consistently, or at all.<sup>257</sup> The purchaser of sex has money. Civil damages put the accountability where it belongs. The one who, by using her abused situation, violates the prostituted person by forcing her to perform sex harms her and should therefore compensate her. Thereby, an economic opportunity to change prostituted persons' situation is created that the state does not have to pay for, while offering a substantial incentive to testify which is currently lacking.

The almost relentless disinterest of prostituted person's situation among Swedish legislators and the judiciary, particularly regarding pornography, is only moderated when considering the passing of the act decriminalizing the prostituted person while criminalizing the purchaser, which codified the observation whom is subordinated and who is the predatory exploiter.<sup>258</sup> Similarly, in Canada most hopes were dashed after the Fraser Committee handed down their report, with the attendant legislative vacuum. Likewise, after an initially highly promising Supreme Court decision on pornography in *R. v. Butler*<sup>259</sup> the continuing interpretation of that decision has been highly disappointing.<sup>260</sup>

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<sup>257</sup> *See, e.g.*, Svea Hovrätt (HovR) [Ct. App.] mål B 3065-07, 2007-12-18, p. 9-10 (holding that the prostituted person had "been in such a subordinate position against the two men that it must have been considered a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited."). The prostituted person was from the Court of Appeal's view in effect understood to be in a situation in which genuine consent was not possible. In prostitution, this is usual.

<sup>258</sup> "[I]t is not reasonable also to criminalize the one who, at least in most cases, is the weaker part whom is used by others who want to satisfy their own sexual drive." Proposition [Prop.] 1997/98:55 *Kvinnofrid* [government bill] p. 104 (Swed.).

<sup>259</sup> [1992] 1 S.C.R. 452, CarswellMan 100.

<sup>260</sup> The further analysis of these Canadian judicial decisions is more fully elaborated in Max Waltman, "Rethinking Democracy: Legal Challenges to Pornography and Sex Inequality in Canada and the U.S.," *Political Research Quarterly* (forthcoming). In a slightly different version, this piece is available at [http://www.statsvet.su.se/publikationer/waltman/Waltman\\_WPSA\\_rethinking\\_democracy\\_pornography\\_and\\_sex\\_in\\_equality\\_april\\_08.pdf](http://www.statsvet.su.se/publikationer/waltman/Waltman_WPSA_rethinking_democracy_pornography_and_sex_in_equality_april_08.pdf)

## LEGISLATIVE DISTRESS

Around the time of the Fraser Commission's appointment, there was a consensus that the obscenity provisions in the *Criminal Code* were "too broad and too vague."<sup>261</sup> Feminists criticized that section 159 (now 163)<sup>262</sup> in the Criminal Code not only often let through "violent" and "degrading" pornography, but "non-degrading sexual material" was (and is) also found obscene from time to time.<sup>263</sup> The code's requisite that obscenity be a matter of "undue exploitation of sex" also implies an acceptable "due exploitation" of sex.<sup>264</sup> The Fraser Report did not lead to immediate legislation after its submission in February 1985, although the conservative government introduced bill C-114<sup>265</sup> in 1986 in an attempt to reform pornography law. C-114 did not stick to the recommendations in the Fraser committee only to criminalize violent materials, but included an extensive body-parts definition of pornography—denounced by Canadian feminists such as Susan Cole as the "laundry list." Such definitions do not consider pornography as sexual subordination, or inequality, instead defining pornography gender-neutrally in opposition to the contemporary critique from the women's movement.

Moreover, while "treating . . . another as . . . object" or "attempts to degrade . . . another"<sup>266</sup> could hypothetically cover Playboy, terms such as "object" or "degradation" are not equivalent to "subordination" per se. The Indianapolis definition had "servile display" and other more apt definitions for materials that graphically subordinate others. Moreover, C-114 offered no civil rights (i.e., it was a "victim-less crime") and lacked a connection to equality guarantees in the *Charter* to motivate its surface plausibility why "degrading," or treating "another" as an object, would be contrary to democratic imperatives and be a compelling state interest for criminal sanctions. Not surprisingly, the bill died and was never debated in Parliament after the government sponsor, John Crosbie, was sent to the department of transportation, replaced by Ramon Hnatyshyn.

Based on interviews and other sources (press and public statements),<sup>267</sup> Dany Lacombe claims the conservative government (Tory) "lost track of feminists' concerns about the harm

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<sup>261</sup> Mahoney, "Defining Pornography," 578.

<sup>262</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, s. 163 (1985),

<sup>263</sup> Mahoney, "Defining Pornography," 579.

<sup>264</sup> Ibid.

<sup>265</sup> Bill C-114, *An Act to amend the Criminal Code and the Customs Tariff*, 1st Sess., 33d Parl., 1984-85-86.

<sup>266</sup> Bill C-114 ¶1, s. 138, (p.2) [all section citations are to numbers as they would appear in an amended *Criminal Code* following passage of the Bill in 1986].

<sup>267</sup> This paragraph is, where not noted, based on the analysis in Lacombe, *Blue Politics*, 99-116.

pornography causes to women's rights to equality,"<sup>268</sup> and neglected the interests of women's groups.<sup>269</sup> The crafting of the bill was dominated by conservative caucus negotiations. A focus on child sexual abuse began to dominate throughout. The bill was a target for massive criticism from all quarters, except conservatives and churches according to Lacombe. Some feminists even argued that had a lack of clarity which made a greater scope for judicial interpretation, hence would allow for materials portraying "physical harm and violence toward woman."<sup>270</sup> According to Lacombe Hnatyshyn seriously considered the public discontent over Bill C-114 and intended to make another attempt.<sup>271</sup>

However the next bill, C-54,<sup>272</sup> had similar flaws as did C-114. For example, the National Action Committee on the Status of Women (NAC) submitted a brief to the House of Commons Justice Committee where, inter alia, they suggested that the government should not limit itself to criminal, but also explore civil remedies and other positive measures.<sup>273</sup> These requests were not met. Rather, under the proposed law, after the judicial order for forfeiture any further proceedings would need the consent of the Attorney General similarly with how, under Swedish law, any proceedings against unlawful depiction of sexual coercion or violence needs the consent of the Chancellor to be instigated (see above). Bill C-54's definition of pornography was similar in many respects to bill C-114. Rather than sexual subordination or inequality, it was occupied with "depictions"; e.g., "the exhibition, for a sexual purpose, of a human sexual organ, a female breast or the human anal region of, or in the presence of, a person who is, or is depicted as being or appears to be, under the age of eighteen years . . . ."<sup>274</sup>

Minister of Justice, Hnatyshyn, was quoted at a press conference saying bill C-54 was a result of consultations with various groups that represented a "broad consensus in Canadian public that there is no place for portrayals of child pornography, sexual violence and degradation in a sexual context."<sup>275</sup> However, this consensus was questioned by highly pitched voices, not

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<sup>268</sup> Ibid, 112.

<sup>269</sup> Ibid, 111.

<sup>270</sup> Ibid, 115.

<sup>271</sup> Lacombe, *Blue Politics*, 116.

<sup>272</sup> Bill C-54, *An Act to amend the Criminal Code and other Acts in consequence thereof*, 2d sess., 33d Parl., 1986-87.

<sup>273</sup> Kirsten Johnson, *Undressing the Canadian State: The Politics of Pornography from Hicklin to Butler* (Halifax: Fernwood, 1995), 52-53 (citing NAC brief to the House of Commons Justice Committee on Bill C-54, prepared by Kate Andrew and Debra J. Lewis, Toronto (Feb.))

<sup>274</sup> Bill C-54, ¶ 1, Sec. 138, 1(a)(i). (p. 2.)

<sup>275</sup> Lacombe, *Blue Politics*, 118 (citing Hnatyshyn in Toronto Star, 23 May 1987).

only from the women's movement. For instance, some writers and artists protested in 1987 by exhibiting art by Matisse covered in brown paper.<sup>276</sup> Chair of Toronto Public Library Board, Sheryl Taylor-Munro, decided to close 28 of 32 public libraries in Toronto on Dec. 10, 1987, and was quoted saying "This bill is a clear threat to a first-class library system . . . . The Government is saying we are no different than child pornographers. This bill goes against everything we believe in—things like open access to information and freedom of speech."<sup>277</sup> Apparently Edward L. Greenspan, a "prominent" criminal lawyer had been consulted by the Canadian Civil Liberties Association (CCLA) and had "warned" librarians about the consequences of the proposed legislation.<sup>278</sup>

According to Lacombe, the implications of Bill C-54 was that "many important artistic and educational works could be censored" such as "Petronius's *Satyricon*, Boccaccio's *Decameron*, Nabokov's *Lolita*, and Plato's *Symposium*" since they all "'encourage'" sexual intercourse between children or between an adult and a child.<sup>279</sup> Lots of other educational or artistic materials were also cited by the criminal lawyer, as potentially threatened by the bill.<sup>280</sup> Lacombe quotes Greenspan writing that "anyone distributing such material [as defined by the bill] would be liable to 10 years in jail."<sup>281</sup> Regardless of Lacombe and Greenspan's exaggerations, one may still ask why artistry and educational matters should be more important than discrimination, harm, and sexual violence against women per se? And why is it reasonable to believe that the Supreme Court of Canada, on basis of the *Charter*, could possibly support charging librarians 10 years in prison on behalf of distributing books by Plato?

Hnatyshyn tried but failed to assure librarian that they were not the target of legislation, but rather hard-core pornography. Other conservative MP's had, e.g., defended the bill in ways that did imply that some "reorganization" of libraries might be necessary in order to keep certain materials away from young Canadians.<sup>282</sup> But it is simplified to assume only this opposition made the bill fall. The government had a majority in the House and could easily have pushed the

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<sup>276</sup> Ibid, 118-120.

<sup>277</sup> Kirk Makin, "Join battle against anti-porn bill, librarians urged," *Globe and Mail*, Nov. 21, 1987.

<sup>278</sup> Lacombe, *Blue Politics*, 124 et seq.

<sup>279</sup> Lacombe, *Bue Politics*, 126.

<sup>280</sup> Ibid, 124-25.

<sup>281</sup> Ibid, 126.

<sup>282</sup> Lacombe at 128 (quoting from MP Richard Grisé, parliamentary secretary to the deputy prime minister and president of the Privy Council).

bill through, but it did not.<sup>283</sup> Additionally, religious and conservatives who supported the bill were said to withdraw their support when, among other things, another lawyer hired by the Inter Church Committee on Pornography (ICCP) had found “numerous loopholes that could drastically liberalize an apparently conservative law,”<sup>284</sup> much to the contrary of the teachings of Mr. Greenspan and Prof. Lacombe.

When those subordinated and harmed are not adequately represented, no democracy has yet been able to address their harms. This legislative example is telling; i.e., despite the assumed “broad consensus” that existing obscenity laws were unsound, could be misused, did not touch harmful materials, among other things, the interest of those victimized were not addressed. The obsession in the 1980s with pornography seemed to have additional roots, and while the harms were addressed by some of those engaged in the struggle, their voices were nevertheless drowned. Similarly, the judicial trajectory after this defeat was analogous.<sup>285</sup>

## **JUDICIAL DETACHMENT**

In Canada, Federal law still prohibits the production and distribution of *obscenity*, defining it as “any publication a dominant characteristic of which is the *undue* exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.”<sup>286</sup> In a series of decisions during the 1980s, ending with *R. v. Butler* in 1992, Canadian courts reinterpreted the obscenity laws by incorporating some of the challenges of feminist notions of pornography’s harm and inequality, and rejected challenges appealing to the supremacy of freedom of expression over prohibiting certain pornography.<sup>287</sup> In *Butler* it was held that legally prohibiting pornography that is violent, degrading or dehumanizing, seeking “to enhance respect for all members of society, and non-violence and equality in their relations with each other,” promotes equality, which is a fundamental democratic value “that the restriction on freedom of

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<sup>283</sup> *Ibid*, 128-29.

<sup>284</sup> *Ibid*, 130.

<sup>285</sup> This development is more fully elaborated on in Waltman, “Rethinking Democracy,” *Political Research Quarterly* (forthcoming). I’m indebted to feminist scholars who have analyzed the development during the 1980s, such as Janine Benedet, Susan Cole, Kirsten Johnson, Christopher Kendall, Catharine MacKinnon, Kathleen Mahoney, and others.

<sup>286</sup> Canada Criminal Code, R.S.C. 1985, c. C-46, s. 163(8) (*emphasis added*).

<sup>287</sup> Some of the cases were *R. v. Doug Rankine and Act III Video* (1983) 9 C.C.C. (3d) 53; *R. v. Ramsingh*, (1984) 14 C.C.C. (3d) 230 (Man. Q.B.); *R. v. Wagner*, 36 Alta L.R. (2d) 301 (Q.B.) *aff’d*, 50 C.R. (3d) 175 (Alta. C.A., 1986), *leave to appeal refused*, (1986) 26 C.C.C. (3d) 242n (S.C.C.); *Towne Cinema Theatres Ltd. v. The Queen*, [1985] 1 S.C.R. 494.

expression does not outweigh.”<sup>288</sup> At this point, a series of three tests had developed in Canadian courts to interpret “undue” according to the obscenity statute (mere “exploitation” of sex not being enough): (1) The community standards test, (2) the degradation and dehumanization test, and (3) the “internal necessities” test, providing an “artistic defense” if a serious literary or political treatment was advanced.<sup>289</sup> Hence, obscenity law had departed from its usual occupations with morals by recognizing harm and sexual abuse, rather than “prurient interest” or “patent offensiveness” as is the focus of the U.S. standard in *Miller*. While this development initially looked more promising than, e.g., the *Miller*-standard, general problems of criminal obscenity laws returned once again post-Butler.

Similar heterosexual pornography once ruled criminal by the Canadian Supreme Court in *Butler*<sup>290</sup> is now legal; e.g., materials presenting women presented as sexually insatiable and constantly looking for sex with strangers,<sup>291</sup> men repeatedly ejaculating into their mouths,<sup>292</sup> and a man verbally abusing a woman, bending her backwards over a toilet while urinating into her mouth, and “punishing” her when it overflows by scrubbing the toilet bowl with her head all the while she is “obviously not consenting” according to the acquitting judge.<sup>293</sup> The obscenity statute has also been interpreted as requiring a mens rea which acquits pornography stores—but not so called “distributors”—assuming the former do not have adequate knowledge of the content they’re trafficking even when materials combine sex with violence.<sup>294</sup>

The failure of the implementation of the Butler law eventually comes down to that the foundation for Butler never substantially departed from the obscenity approach, hence it kept the loopholes made possible under criminal law’s standard of proof, the biases of contemporary

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<sup>288</sup> R. v. Butler, [1992] 1 S.C.R. 452, 509, CarswellMan 100 at paras. 126-27.

<sup>289</sup> See, e.g., R. v. Butler, [1992] 1 S.C.R. 452, 474 et seq., CarswellMan 100 at paras. 40ff.

<sup>290</sup> Factum of LEAF, p. 204 (describing content of seized materials presenting women (some appearing to be children) being raped, performing sex on superiors, and penetrated in “every orifice” by penises and objects, all while themes of racism and sexism in comments such as “bitch” or “hole” were abundant, accompanied by denigrating treatment such as ejaculation in women’s faces.).

<sup>291</sup> R. v. Hawkins, 1992 CarswellOnt 1940 (Gen. Div.) at paras. 5-13, *aff’d* R. v. Hawkins (1993), 15 O.R. (3d) 549 (C.A.), *sub nom.* R. v. Ronish, 1993 CarswellOnt 133

<sup>292</sup> 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.)

<sup>293</sup> R. v. Price, 2004 BCPC 103 ¶ 59, B.C.W.L.D. 666. CarswellBC 895.

<sup>294</sup> See Canada Criminal Code, R.S.C. 1985, c. C-46, s. 163(2) (1985), where “knowingly” is an added requisite for sellers, but not distributors, which may be a more ambivalent distinction in empirical settings though. For applications, see, e.g., Jorgensen v. R, [1995] 4 S.C.R. 55, 105, CarswellOnt 985 at para. 94 (acquitting store selling material presenting forced anal intercourse, inter alia, where non-consenting woman grimaces in pain); R. v. Erotica Video Exchange Ltd. (1994), 163 A.R. 181 (Prov. Ct.), CarswellAlta 820 (acquitting two of three retail stores on mens rea ground).

community standards, the supremacy of the artistic defense, and a lack of explicit constitutional reference to equality provisions 15 or 28 in the *Charter*, including the silence of those victimized in court and non-existence of civil remedies to complement the criminal sanctions.<sup>295</sup> Cases since *Butler* confirm that judicial review in existing democracies are inadequate in representing interests of those victimized by pornography. Rather than moving towards more engagement with these constituents, Canadian courts have reverted to *disengagement*.<sup>296</sup>

## **Conclusions**

The U.S. Attorney General's Commission, compared to the equivalent challenges in Canada and Sweden, is the most far-reaching and substantially challenging effort against pornography on a federal government level. Despite its "radicalism" the appointees represented a broad spectrum of political views; there were four conservatives, three liberals, and four "middle of the roaders."<sup>297</sup> Nonetheless their composition did not result in a watered down and ineffective compromise, as did the Fraser Report. Nor did it result in detached non-engagement, as in the Swedish 1998 Sexual Crimes Committee. Rather, the realities investigated into were *engaged* with utmost concern for those victimized. Their situation and interests were identified as crucial, in contrast to the more detached deliberative approach of the other two commissions.

This commission's members had the courage to change their views significantly during the course of investigation. Dr. Park Elliot Dietz, for instance, initially held a liberal position, but later wrote a personal statement in the final report that pornography "is used as an instrument of sexual abuse and sexual harassment,"<sup>298</sup> adding that he cried during Andrea Dworkin's testimony, and compelled the nation to act:

I ask you, America, to strike the chains from America's women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of

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<sup>295</sup> This analysis is more fully presented in Waltman, "Rethinking Democracy," *Political Research Quarterly* (forthcoming).

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<sup>297</sup> McManus, introduction to *Final Report*, xxxvi.

<sup>298</sup> Attorney General's Comm., *Final Report*, 47 (Personal statement by commissioner Elliot Dietz. Commissioner Cusack *Concurring*)

sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.<sup>299</sup>

In light of the comparison between the differing outcomes of the Canadian, Swedish, and U.S. government commissions on pornography (and prostitution), the problem for democracy, as suggested by Shapiro, Young, and Mansbridge, has been that there exist no institutional mechanisms or democratic representation that *guarantees* an adequately articulated interest of those victimized in or by pornography, pretensions of a “fair and realistic” balance of interest notwithstanding. There exists a *civil rights and equality deficit* regarding policies regulating pornography. For instance, female representation alone seemed elusive in the Swedish case, as was previously suggested when analyzing Mansbridge’s discussion on descriptive representation. Considering that the dismissal of inquiring into the harms of pornography was made at a historically unprecedented representation of 42,7% women in parliament,<sup>300</sup> compared to descriptive representation a civil human rights-based remedy would more clearly have represented the interest of those actually harmed by pornography—harms these MPs might have very little experience of. It would give victimized women (and similarly situated men) a legal right to represent as well as articulate their interests themselves or/and through a qualified counsel in a democratic judicial deliberation. Adherence to principles of human rights law, as developed through engaged deliberation in international bodies with particular input from those being harmed and subordinated by pornography, should offer a more efficient track to further substantial democratic equality, including accountability to those victimized. This model entails a more engaged democracy.

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<sup>299</sup> Ibid, 51 (Personal statement by commissioner Elliot Dietz. Chairman Hudson, Commissioners Dobson, Lazar, Garcia and Cusack *Concurring*)

<sup>300</sup> Statistiska Centralbyrån, *Riksdagsledamöter efter kön och tid. Valår 1922-2006* (Stockholm: Statistics Sweden), [www.scb.se/Pages/TableAndChart\\_\\_\\_\\_160728.aspx](http://www.scb.se/Pages/TableAndChart____160728.aspx)