STOCKHOLM STUDIES IN POLITICS
The Politics of Legal Challenges to Pornography: Canada, Sweden, and the United States
Max Waltman
The Politics of Legal Challenges to Pornography

Canada, Sweden, and the United States

Max Waltman
For Marlene, Noah, Aron, and Baltazar
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With hope.

Max Waltman
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Introduction

A Polarizing Issue

Pornography produces a marked divergence of opinion within contemporary democracies. Its critics raise concerns of gender inequality, sexual abuse, and exploitation, focusing on harms of discrimination against particular groups. Its defenders raise concerns of expressive and sexual freedom, focusing on the dangers of regulation. Such polarized opinions were reflected in 2006 in an opinion survey in Sweden—a small, relatively homogenous country with about 9.1 million people at the time—where 67% of women among young adults aged 18–21 endorsed a “total ban on pornography,” roughly one half agreeing “completely” and the other half “in part.”

By contrast, among young men, 54% did not agree with the statement, of which 16% did “not agree particularly much” and 38% did “not agree at all”; thus, only 45% of the men endorsed a “ban,” 13% completely, and 32% in part (Johansson and Habul). The survey responses did not follow a left–right ideological continuum (ibid.).

Not surprisingly, a population survey in the United States published in 2008 with “emerging adults” (age 18–26) also found that far more women than men disapproved of pornography consumption, though there was slightly lower disapproval across the sexes than in the Swedish survey on regulation. Surveys with the full range of adults have showed similar trends in opinion differences by sex in both countries.

A more recent American opinion survey reported in the Atlantic asking about respondents’ opinions on pornography in general, as distinguished from law specifically, found that only 29% considered it “morally acceptable” to consume pornography (23% of women, 35% of men), although a larger percentage, 39%, opposed legal restrictions.

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4 The U.S. General Social Survey from 1996 to 2006 shows roughly one in four adult men believe pornography consumption should be “illegal” for all, two in three believe it should be illegal only for minors, and less than 5% believe in total decriminalization; by contrast, just about half of all women believe it should be illegal for everyone, about half believe it should be illegal only for minors, and 5% or less believe in total decriminalization. See Nat’d Data Program for the Sciences, NORC, “General Social Surveys, 1972–2006: ‘Feelings about Pornography Laws’” (Univ. of Chicago, 2014) (table presentation), archived at http://perma.cc/382N-MY3S (select “screen capture”). A general population survey in Sweden in 1996 found similar results: 38% of adult women favored a “ban,” 36% disfavored, with 26% undecided; by contrast, 15% of adult men favored a ban, 66% disfavored, with 19% undecided. Sven-Axel Månsson, “Commercial Sexuality,” in Sex in Sweden: On the Swedish Sexual Life 1996, ed. Bo Lewin, Kerstin Fugl-Meyer, and Folkhälsoinstitutet (Stockholm: Nat’l Institute of Public Health (Folkhälsoinstitutet), 2000), 254 tbl.13:18.
In contrast to opinion surveys, numerous anonymous consumption surveys show a much stronger polarization in terms of usage on the basis of sex (pp. 33–37 below). A majority of young adult men reportedly consume pornography each month, occasionally or every day, typically in solitude (ibid.). Young adult women, although reportedly are likely to have encountered pornography at some point, very seldom use it unless that use is initiated by partners or friends, and then on a much less frequent basis than men (ibid.). Unsurprisingly, studies show that consumption is more strongly associated with physiological sexual arousal among men than among women who, compared with men, exhibit stronger negative mental affect in response to pornography than their relatively lower arousal already suggests. The gendered differences in opinion could potentially be more attenuated if greater knowledge about pornography existed among more women. Such a hypothesis is strengthened when considering that roughly 1 in 5 of the young men in the American sample referred to above did not endorse using pornography as acceptable behavior, despite the fact that they used it themselves; by contrast, roughly 1 in 5 women endorsed it despite the fact that they did not use it. The views expressed, in other words, do not reflect direct experience to some considerable degree.

The same divisions of opinion among the body politic can be seen in political and legal outcomes when institutions in democracies confront the pornography issue. This dissertation will inquire into the political and legal challenges that pornography, as a social practice, consequently poses to modern democracies and how three of them have responded to those challenges. It will scrutinize the consequences, if any, to sex equality. Part I assesses pornography’s harms, including an assessment of the validity and reliability within the large body of social science literature and other evidence produced since the 1970s that principally measures the effects of its consumption. With a variety of methods and measurements, including experiments, social surveys, and qualitative designs, this evidence converges on the conclusion that consumption causes and predicts behavioral sexual aggression as well as attitudes supporting violence against women (e.g., trivialization of sexual abuse), independently from other causal factors or predictors (pp. 98–122 below). As one indication of the potential scope of these effects in social reality, a representative (weighted) self-report survey of almost 3000 American college men found a statistically significant increase of “sexual aggression,” even amidst concern of underreporting, that was positively associated with pornography consumption, including

7 Carroll et al., “Generation XXX,” 17.
8 The first scholarly conceptualization of pornography as a “practice”, as distinguished from “depictions” or “representations,” was made by Andrea Dworkin and Catharine A. MacKinnon when it was described as “a systematic practice of exploitation and subordination based on sex which differentially harms women” in a law proposal drafted for the Minneapolis city council at its request. Proposed Ordinance Sec 1., to add Minneapolis City Code, Minn., § 139.10(a)(1). 1st Reading, Nov. 23, 1983, archived at http://perma.cc/3229-ZN5B.
9 These trends are further supported by positive associations between consumption and crime reports on an aggregated level in some careful studies that control for known alternative factors within a relatively isolated social context (e.g., intra-state comparisons within the same year, as distinguished from longitudinal data or cross-national data). See infra pp. 132–134.
11 Among the parallel survey of college women in the same sample, 53.7% of more than 3000 women reported being subjected to sexual aggression since age 14, with 15.4% reporting rape and 12.1% report-
among men scoring relatively low on other typical risk factors: low risk individuals reporting “never” using pornography admitted having sexually aggressed on average 0.40 times since age 14, while low risk individuals reporting “very frequently” using pornography admitted sexual aggression on average 1.12 times. Among men in the moderate risk group, those never using pornography admitted sexual aggression on average 1.5 times, while those using it very frequently admitted sexual aggression on average 3.03 times; among the high risk group those “never” using pornography reported having sexually aggressed on average 1.09 times, by contrast to those using it “very frequently” who reported having sexually aggressed on average 7.78 times (Malamuth et al., 78, 85).

Other studies have found that pornography consumption amplifies attitudes and beliefs that “only bad girls get raped,” “women ask for it,” or that women who “initiate a sexual encounter will probably have sex with anybody” (pp. 115–122 below). Consistent with such “rape myths,” an individual experiment found that male and female college students exposed to almost five hours of common nonviolent pornography over six weeks recommended significantly lower penalties for hitchhiking rape—on average roughly 5 years imprisonment as opposed to the average 10 years recommended by the control group. Similar causal associations with attitudes supporting or trivializing gender-based violence have been found in other long-term and short-term experiments; self-report surveys corroborate the associations in social context. The dissertation also assesses surveys of specifically targeted groups that find that consumption among domestic batterers is positively associated with more abuse (pp. 122–123). It further analyzes studies of prostitution documenting that consumption is positively associated with buying women for sex, with qualitative accounts indicating that consumption inspires men to coerce prostituted women into more harmful or unwanted acts that are strongly resisted among other women, including unsafe sex, violence, and gang-rape (pp. 123–129). The analysis of studies and evidence on consumption harms is made with an approach that triangulates their different methods, measurements, and findings, addressing criticism and concerns in the literature over the reliability and validity of some of the findings (see 89–98; on methodology). The purpose is to assess the level of challenge pornography poses to democratic societies and legal systems that purport to respond to the needs of their peoples for equal protection from systemic harms and guarantees of personal security and dignity, as well as redress of particular civil rights violations on group grounds.

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14 See, e.g., Dolf Zillmann and James B. Weaver, “Pornography and Men’s Callousness Toward Women,” in Pornography: Research Advances and Policy Considerations, ed. Dolf Zillmann and Jennings Bryant (Hillsdale, NJ: Lawrence Erlbaum, 1989), 118–119 & tbl.4.3 (short-term exposure experiment to nonviolent “female-instigated sex” for both genders significantly reduced their recommended penalty from 846 months to 515 months, slightly larger than for any other common popular category including violent pornography); cf. infra pp. 115–122 (assessing meta-analyses on a larger body of experimental and nonexperimental quantitative studies).
In addition to assessing potential consumption harms, an analysis of studies and evidence of production harms of pornography will also be made in Part I, including addressing critics and arguments claiming no such harm exists. Evidence of the profits and economic structure of the pornography industry is considered, including its cultural origins (pp. 37–41). A large number of studies and other evidence is analyzed that suggest pornographers exploit preexisting and intersectional multiple disadvantages among the persons they use, who are typically drawn from other forms of prostitution (pp. 55–64; cf. 73–75). Such preconditions include extreme poverty, child sexual abuse and neglect, other forms of abuse and violation, homelessness, and sex, race, ethnic, and other discrimination (ibid.). Moreover, the dissertation considers whether these persons’ unequal position in societies and lack of real or acceptable alternatives, as documented, may explain a number of other studies and evidence indicating that pornographers often coerce them into accepting unwanted or physically dangerous acts for higher profits (pp. 64–67). The analysis also considers whether such power imbalance, if found to exist, is a condition associated not only with physical injuries among persons used to produce pornography, but also with mental damage such as posttraumatic stress disorder (PTSD). The extent to which alternative predictors of mental health problems have been reasonably controlled for is also considered (pp. 67–72).

Evidence is assessed that shows that prostituted persons—the population largely used to make pornography—exhibit posttraumatic stress disorder (PTSD) symptoms on a level comparable to Vietnam Veterans seeking treatment, with PTSD reportedly being even higher among persons with experience from prostitution in pornography than among persons with experience from off-camera prostitution exclusively (pp. 67–72). The analysis is made in light of further studies indicating that prolonged exposure desensitizes consumers to nonviolent pornography, making them look for more extreme materials to sustain arousal (pp. 50–51). Consistent with such trends, other researchers have documented a much stronger popular demand for materials that include violent sex, “gang-rape,” “ass-to-mouth sex,” and multiple entries than for nonviolent pornography (pp. 44–50). In light of these converging sources of evidence, the question is raised of the extent to which this apparent demand for abusive materials creates economic incentives for pornographers that are harmful to the population necessary to produce the materials, thus could explain exploitation, traumatic symptoms, and other abusive conditions in pornography production. Opposing views in the scholarly and popular debate are engaged systematically (see esp. 72–86), including assessing methodology, theoretical perspective, conceptual validity and reliability, as well as to what extent results can be generalized to male “performers” as well as females.

Implications for Democracy and Equality

Gender-Based Violence as a Linchpin of Sex Inequality

Given the empirical analysis of pornography as a social practice (chapters 1–3), this dissertation exposes a number of potential implications for democracies in terms of sex equality norms and policies. If a practice like pornography can be shown systematically to exploit vulnerable women and produce sexual aggression and attitudes supporting violence against women (e.g., trivialization of sexual abuse and distrust toward rape victims, see 104–105, 115–122 below), it could be considered as impacting on the social equality of women to men. Indeed, “gender-based violence”—
that is, “violence that is directed against a woman because she is a woman or that affects women disproportionately . . . acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”—is internationally regarded as a human rights abuse against women and a form of sex discrimination, such that states are obliged to provide adequate protections and remedies for them, whether or not states or non-state actors perpetrate these harms. The empirical prevalence of such violence has been found to be substantial cross-culturally as well, which supports the articulation and approach to the problem at the international level. Studies from different countries and samples show high rates of sexual violence and aggression against women in general, including rape, though their numbers and measurements differ (see below).

For instance, in a study published as early as 1982 with 930 randomly selected adult females in San Francisco, Diana Russell found that 44% who completed in-person interviews reported that they had been subjected to rape or attempted rape as defined by California and many other state laws in 1978 at least once in their lives. The average number of incidents for the 44% was 1.92, with half victimized more than once (Russell, 84). A more recent study with different methodology published in 2007 produced lower estimates, finding that 18% of all American adult women have experienced rape, with a breakdown of 16% being subjected to “forcible rape” and 5.0% being subjected to drug and alcohol facilitated rape/incapacitated rape. Nevertheless, this study estimated that the prevalence of “forcible rape” has in-


increased 27.3% per capita since 1991 (Kilpatrick et al., 57, 59). In another study published in 1987 with over 3000 respondents in a representative (weighted) sample of United States female college women, 53.7% reported being subjected to sexual aggression (ranging from brutal rape to accepting unwanted sexual acts due to overwhelming “continual arguments and pressure”), with rape reported by 15.4% and attempted rape by 12.1% of all respondents. A national prevalence study with 10,000 female respondents from Sweden in 2001 also reported a high prevalence of gender-based violence, estimating that 46% had been victimized by a man’s violence since age 15, that 56% had been sexually harassed, and that “nearly” one fourth between age 18 and 24 had been subjected to men’s violence in the preceding 12 months.

The mere numbers of gender-based violence are compelling but do not alone demonstrate the extent to which the violence is a problem of inequality or democracy, (or show its connection with pornography). However, as spelled out perhaps most clearly by the international authorities, the United Nations General Assembly Declaration on the Elimination of Violence Against Women takes the position that “violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.” This interpretation has also been made previously by scholars, who have seen gender-based violence as one of the linchpins in causing, reinforcing, and keeping male dominance intact as a social system of inequality based on gender. For instance, Susan Brownmiller in 1975 stated that the “rapist performs a myrmidon function for all men by keeping all women in a thrall of anxiety and fear. Rape is to women as lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological intimidation.” Some probe further into her analogy by noting the historical associations between rape and lynching in America, that alleged rape or attempted rapes of white women served as pretext for lynching Black men, thus asking where Brownmiller’s analogy “place Black women?” Along those lines, law professor and leading legal theorist Kimberle Crenshaw, highlighting the intersection of racial and gender politics, created the concept of “intersectionality,” illustrating how Black women who wish to voice political concerns about rape may find themselves in the dilemma of having either to unwittingly provide fodder for a racist narrative portraying Black men as quintessential “rapists” that historically supported lynching, or having to refrain largely from publicly articulating politics against gender-based violence.

Apparently the politics that surrounds gender-based violence, and the forms it may take, varies for different groups of women within democracies. Nonetheless, the violence itself can commonly be seen as a source of social dominance, fear, and silence that affects women as such. One study accordingly found that among American women, roughly a third at a minimum worried each month about being raped, many more than once per day, feeling “terrified and somewhat paralyzed” when

19 Koss, Gidycz, and Wisniewski, “Scope of Rape,” 166 & 168 tbl.4.
21 U.N. Declaration on VAW, supra note 16, pmbl., para 6; cf. supra note 16 (citing international law).
thinking about it. Another third indicated that they worried “more occasionally,” but that such fears were nonetheless “always there” as a “part of the background,” and could “grip them very intensely” at certain moments (Gordon and Riger, 21). The last third claimed they never worried, but nonetheless reported taking precautions, “sometimes elaborate ones,” against being raped (p. 21). Other studies and evidence from various countries, quantitative as well as qualitative, support the conclusion that gender-based violence is an asymmetrically gendered source of fear for many women (and to which there is no comparable equivalent for men, apart from their fear for other men). In light of the various prevalence studies cited above, women’s fear of gender-based violence is warranted. The widespread sexual violence that the consumption studies of pornography predict does exist, these studies show.

**Broader Indices of Sex Inequality**

The position taken by the U.N. and others above, that men’s violence against women is a key linchpin that sustains gender inequality (note 16), should be seen in light of the fact that women are systematically unequal to the group men on a number of important social indices in addition to violence. Sexual violence takes place within a larger context of gender inequality enforced by an array of cumulative means. For instance, given that in 2008 women reportedly composed 40% of the world’s labor force in the formal sectors and “more than half the world’s university students,” their inequality to men is still evident when considering that women’s wages represented only between 70% and 90% of men’s wages in a majority of countries that same year. Accordingly, the official “gender pay gap” (average difference between women’s and men’s wages) was estimated in 2006 to be as high as 27.5% in Canada, 22.4% in United States, 22% in Germany, 20% in U.K., 16% in Sweden, 11% in France, and 9% in Ireland. Such economic inequality may be amplified when gender intersects with racial or ethnic disadvantage.

Economic gender inequality may popularly be perceived as diminishing. Yet women are predicted to become notably underrepresented in “green jobs” that “reduce energy consumption and the carbon intensity of the economy, protect and restore ecosystems and biodiversity, and minimize all forms of waste and pollution.” Estimates suggest at a minimum that 80% of such green jobs will come in the “secondary sector,” including construction, manufacturing, and energy production. Women are estimated to compose only 9% of the workforce in

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30 Bureau of Labor Statistics, U.S. Dep’t of Labor, “Usual Weekly Earnings of Wage and Salary Workers First Quarter,” news release, Apr. 17, 2012, p. 6 tbl.2 (reporting Hispanic women earned 10% less than Hispanic men, but 40% less than white men), archived at http://perma.cc/V2SK-SR5G.

construction and 24% in manufacturing (p. 7 tbl.1). Furthermore, although women comprise roughly 20% of the workforce in the energy industry in industrialized countries, they are less than 1% in “top-management,” less than 4% in “decision-making positions,” and less than 6% among “technical staff” (as distinguished, e.g., from administration and public relations) (p. 9). In essence, women risk becoming systematically excluded from the labor sectors of “the future.”

Economic inequality, however powerful, is just one empirical index of gender inequality. A closely related measurement is the proportion of unpaid labor that women do relative to men. On the basis of national time use surveys, OECD reports that in “virtually every country, men are able to fit in valuable extra minutes of leisure each day while women spend more time doing unpaid housework.” For instance, in Canada and the United States daily “care for household members” is performed slightly above 40 minutes for females compared to about 20 minutes for males, and “routine housework” is performed about 130 minutes for females compared to about 80 minutes for males (OECD). Although spending time with “TV or radio at home” is more common in the United States than in Canada, U.S. males allot approximately 20% and in Canada 24% more such time than do females in their respective countries (ibid.). Men in Canada also spend approximately a third more time for sports than do females, while American men spend roughly twice as much time for sports as do women (ibid.).

Another gender equality index is female underrepresentation in government. On January 1, 2014, the Inter-Parliamentary Union reports that females comprised only 21.77% of parliamentarians in the world. In Sweden, although there has never been a female head of state (i.e., prime minister), women comprise a relatively high percentage (45%) of the 349 MPs. In Canada, women constitute 25% of the House of Commons (they have 40% in the Senate) (IUP Parline). In the United States, women comprise 18% of the House of Representatives, and 20% of the Senate. In the Russian Federation, women are just below 14% in the Duma and 8% in the Council. The U.K. has about 23% women in both houses, and Vietnam has just above 24% women in their National Assembly (ibid.). France has 26% women in the National Assembly; Germany has 36% women in the Bundestag and 28% in the Bundesrat (Federal Council). Rwanda seems to score highest in the world, with 64% women in the Chamber of Deputies (38% in the Senate) (IUP Parline).

Many more indices of inequality between men and women exist. An additional one of some potency in democracies is the influence of women relative to men in media. Media shapes the political agenda and popular pressure on politicians; likely, it can affect opinions among those who interpret or apply laws. In the United States, a recent report by the Women’s Media Center found that the industry’s own sources showed that the gender representation in newspaper newsrooms is exactly the same in 2012 as it was in 1999, which is far from satisfying; both then and now, only 36.9% were women and 63.1% were men. The report further found that U.S. women made up just 9% of directors of the “top 250 domestic grossing films” of 2012, that the ratio of male directors to females was 4 to 1 among 3100 prime-time television episodes under review, that the percentage of female news directors had just

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reached 30%, and that women are otherwise systematically underrepresented as well as commonly segregated into stereotypical roles in mainstream media. All these factors of inequality appear to situate women in a vulnerable position both to being used in pornography’s production and in resisting the effects of its consumption by men in their environment.

Research Problem, Questions, and Contribution

As part of a wider literature analyzing women’s inequality to men as a research problem, the triangulation of evidence in industrialized democracies from a number of important economic, social, cultural, and political spheres, including gender-based violence (pp. 4–9 above), compels asking what are the obstacles, and what tools offer potential, to sex equality. Inequality seems to be contrary to democratic ideals to provide equality among citizens who may participate in self-rule, to the extent they wish, without being fettered by discrimination. However, is it likely that women will influence decision-makers equally with men if women as a group are systematically excluded, not only from legislative representation, but also from more gainful employment and the media relative to men? Given that they are relegated to performing more unpaid labor with less leisure time than men? When women live in constant fear of gender-based violence, such as rape or sexual harassment, and have such abuse trivialized by their communities?

Given that gender-based violence contributes to pushing women further into the socially subordinate conditions statistically documented above (pp. 7–9), as numerous legal and scholarly authorities hold it does (pp. 4–7), gender-based violence arguably vitiates women’s possibility of exercising substantively equal influence in democracies, despite being formally equal citizens to men. Moreover, the evidence of pornography’s harms summarized previously also suggests that pornography is one of the linchpins of gender-based violence, which in turn is one of the linchpins of sex inequality more broadly. Perhaps not coincidentally, a recent statistical analysis of panel data from 2006, 2008, and 2010 found that pornography consumption significantly predicted opposition to affirmative action policies for women in hiring or promotion, even after controlling for a range of alternative factors and potential interactions between them. These data on affirmative action are not nearly as systematic as the large body of research on the empirical relationship between sexual aggression, attitudes supporting violence against women, and pornography consumption analyzed in chapters 3. Nevertheless, they corroborate the links between pornography consumption, gender-based violence, and imposition of sex inequality more broadly, indicating that the consumption effects are not limited to gender-based violence, but could possibly directly influence the other social indices of sex inequality, including economic, political, social, and cultural ones. This chain of linked causes for inequality can be viewed as a system of social dominance, in which women are subordinated to men.

36 Ibid., 5–6 (executive summary).
37 Features of this ideal can be seen already in early ancient concepts of democracy, limited as they were, when distinguished from autocracy or rule by inheritance. Democracy embodied the idea of a rough proportional equality of influence over key decision making among the demos or their elected representatives. Cf. infra pp. 144–149.
38 The distinction between “substantive” equality and “formal” equality is explained, infra pp. 243–248.
The research problem and its broader implications, given that the empirical evidence on pornography assessed in chapters 1–3 below sustains the hypotheses here, concern whether or not existing democracies are sufficient to their own ideals if they permit the continuation of the interlocking system of social dominance suggested by the production and consumption of pornography. If democracies do not prevent or redress pornography’s harms to women’s equality in general, and to those exploited and harmed in its production in particular, do they harbor a deficit of equality that needs to be addressed in theory and in practice? If answering in the affirmative, the question of the obstacles and potential under present systems of democracy to address these problems follows. The main research question that guides the strategy, methods, and selection of empirical material (data) thus concerns the conditions that obstruct and enable legal challenges to the production and consumption harms of pornography in democracies, and what alternatives may exist. The dissertation’s broader aim is to shed light on democratic obstacles and potential for successful legal challenges to practices of social dominance, including those analogous to pornography, and to suggest alternatives that can inform approaches to such contemporary problems of inequality and dominance.

Following democratic theorist Ian Shapiro, this dissertation uses a problem-driven approach, starting “with a problem in the world”—here, the problem of the potentially compelling harms of gender inequality produced by pornography that are specifically inquired into in chapters 1–3. Shapiro’s problem-driven approach is distinguished from analyzing a problem that is a “mere artifact[] of the theories and methods that are deployed to study it” (Shapiro, 598). Certainly, most theories were invented to solve a problem, and many empirical descriptions are indirectly theory laden (pp. 601–03). Yet theories may be misapplied to social and political problems where they do not make sense empirically (see, e.g., 599–601), just as analyses of a particular aspect of social reality may become “more theory laden than others” (p. 602) and result in serious bias or simple irrelevance. And a theoretically informed analysis of legal challenges to pornography’s harms insufficiently grounded in empirical study of those harms as actually played out in social reality risks misguided conclusions, however elaborate its theories and methods. The analysis of the empirical evidence of harm in chapters 1–3 therefore forms an indispensable foundation. Without it, further theoretical analysis of democratic obstacles and potential to legally challenge those harms would be ungrounded, limited, if not misguided and potentially deceptive. On the same assumption, a democratic theory that does not properly account for democratic practices as they occur in social reality will be of limited value for future policy, as it is not empirically problem-driven.

Part I of the dissertation thus contains four chapters, of which the first three are guided by the analytical sub-question that inquires into whether existing empirical evidence and related scholarship show that the prevalence and character of pornography’s production and consumption harms are socially compelling. More precisely, it is asked how these harms, if compelling, affect women’s equality to men. Chapter 4 develops a theoretical framework (summarized pp. 9–16 below) grounded in democratic theory building on the preceding empirical findings. Chapter 4 informs further empirical analysis of the democratic potential and obstacles to legal challenges to pornography to be conducted in Part II and III. The findings in Part I are integrated in the dissertation’s analysis and referred to throughout it, including in relation to specific legal challenges studied.

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Part II, embracing chapters 5–9, aims to analyze the flexibility of existing law in the three countries examined, with the goal of assessing their potential to challenge pornography’s harms as documented. The sub-questions in this part concern to what extent the possibility for change exists within existing legal architectures. It asks which legal frameworks require relatively less political intervention, and which more. The democratic theories addressing social dominance analyzed in chapter 4 are used to interpret and analyze existing legal architecture, asking questions such as to what extent historically disadvantaged and subordinated groups’ perspectives and interests are recognized, represented, and supported by the law, aiming to elucidate the law’s potential to challenge pornography’s harms to them. Part II is to a large extent concerned with concept measurement. That is, it identifies the possible facilitation or obstruction of legal challenges to pornography’s harms, as documented, in the various legal frameworks, in light of the concepts developed in chapter 4.

The sub-questions in Part III, chapters 10–12, inquire into whether the different legal frameworks, identified in Part II as more or less favorable to legal challenges to pornography’s harm, have made a difference in the predicted direction, when one analyzes real attempts to challenge the existing limitations in law (e.g., in legislatures or courts). The democratic theories that address social dominance, analyzed in chapter 4, are here matched with patterns in the empirical evidence. If found valid, this exercise informs conclusions as to why certain countries have been more favorable to challenging the harms of pornography than other countries, and what conditions may further support such challenges in the future. Here, a systematic comparative case study research design is conducted, explained more in detail below (pp. 16–30), in order to explain what conditions that inhibits and what conditions promotes such legal challenges.

In terms of the dissertation’s scholarly contribution, a problem-driven study in political theory of legal challenges to pornography investigates a number of key democratic principles often posited in oppositional terms, including centrally the tension between equality rights and expressive freedoms. The dissertation finds this opposition problematic when compared with other empirical problems of off-camera gender-based violence, including domestic abuse, rape, sexual harassment, sex trafficking/prostitution, even child pornography—social problems that, when challenged, are not defended with reference to freedom of expression, although arguably they are conduct with expressive dimensions. For the same reasons pornography is a particularly complex problem to challenge politically and legally, a scholarly analysis of it might provide theoretical contributions to a broader set of political problems than an analysis of a less complex problem would. An additional contribution includes theory-testing and development. To the extent that the democratic theories on challenges to social dominance analyzed in chapter 4 are tested and found useful, or in need of modification, the dissertation contributes to the cumulative development of democratic theory. To the degree the problem of democracy can be solved by legal challenges in democracies, equality will be promoted considerably. And to the degree it appears to encounter systemic barriers to its solution in democracies on the ground, the egalitarian principles and premises of democracy find themselves challenged on their own grounds.

The generalizable knowledge gained from this dissertation could be useful to inform studies of other complex intractable social problems, for example, political and legal challenges to climate change that face strong “vested interests” or “problematic existing norms” that obstruct efforts stop the increase of so-called greenhouse gases
in the atmosphere.\footnote{Cf. Leigh Raymond et al., “Making Change: Norm-Based Strategies for Institutional Change to Address Intractable Problems,” Political Res. Quart. 67, no.1 (2014): 197–211 (analyzing challenges to climate change and violence against women).} Such obstacles may be short-term profits and environmentally unsustainable consumer behavior, which to some extent are analogous to problems of challenging the pornography industry. Put otherwise, this dissertation analyzes evidence suggesting that the social practice of pornography is sustained by consumers who demand it, who have more power in democracies than its victims do. These consumers thus have a vested interest in the pornography industry in face of potentially overwhelming evidence suggesting that their behavior contributes to harms to people exploited to produce the materials, or other harm to those victimized due to the social effects of pornography consumption (\textit{see} chapters 1–3). The consumer’s behaviors, their “norms” of entitlement to their materials, and their concomitant vested interests in keeping the industry alive contributes to profits for pornographers. A vicious circle is created of demand, profits, and harmful behaviors for those victimized. A qualified analogy with legal challenges to climate change might be made, for instance with regard to how the harms are typically contested and denied.\footnote{See, e.g., Justin Gillis, “Panel’s Warning on Climate Risk: Worst Is to Come,” New York Times, March 31, 2014, A1 (Westlaw) (reporting that “several rich countries,” including the United States, successfully requested the removal of an $100 billion annual estimate by the World Bank that was cited in the 48–pages executive summary of a 2,500-page main report from the U.N. Intergovermental Panel on Climate Change (IPCC) for offsetting the effects from climate change on poor countries who “had virtually nothing to do with causing global warming,” but who “will be high on the list of victims as climatic disruptions intensify,” leaders of their countries feeling they are paying for “decades of profligate Western consumption”).}

This dissertation is restricted to legal challenges, as distinguished from non-legal challenges, such as educational policies. Given what the empirical evidence in chapters 1–3 suggests are the harms of pornography, the history of the women’s antipornography movement, seen through the events analyzed in this dissertation, suggests that, measured against the persistence and expansion of the pornography industry over the same period, efforts to educate the public have failed for over 40 years. Moreover, the evidence of harm suggests both a failure to protect a population and the need for a remedy to be delivered, which is the job of legal systems. Law is also highly educational and typically produces both voluntary compliance and educational change. Finally, state behavior through law, including its response or not to social movements in democracies, is one valid focus of inquiry for the study of politics. This dissertation therefore proceeds on the view that in order to pursue a political science that delivers the most empirically useful knowledge, it is necessary to focus the inquiry first on legal challenges, rather than on the larger range of alternative means of social change.

Considering further the demarcation of this inquiry, it might be suggested that in order to explain what obstructs or enables legal challenges, one could also study the influence of a broader surrounding social and historical context (e.g., the wider political, social, and cultural changes, spatially and over time). To extend the inquiry accordingly may be worthwhile without doubt. However, focusing on legal challenges in context can produce useful insights as to how a more limited set of legal and political elements impinge upon legal challenges to pornography. This dissertation therefore focuses on understanding what political and legal systemic elements obstruct or enable challenges to pornography. It draws from a body of literature developed by established scholars in democratic theory that also relates to a narrower
focus on such systemic dimensions as they affect analogous problems of social dominance based on gender, racial, economic and other grounds (see chapter 4).

A related concern may be that political-legal research, for purposes of analytical parsimony, could be tempted to disregard the influence of history on legal challenges. However, when “history matters,” it will often be reflected in or rejected by law. Although such an association is open to empirical investigation on a case-by-case basis, legal doctrines and jurisprudence can be presumed to reflect broad historical social trends and debates, as they ultimately are influenced by political decisions, even when such decisions are polarized and contentious—a fact evident from the opinion surveys on pornography summarized above (pp. 1-4) as well as from divisions of opinion within case law. Studying variation in legal doctrine over time, one must be sensitive to the fact that there is sometimes “secondary” influence from surrounding social context within which any legal challenges take place, hence draw on a broader range of sources than purely legal materials (e.g., scholarly discourses and media reports), as this dissertation does. Thus, legal changes, and attempts at changing law, offer also a record of social history.

A Summary of Theoretical Framework

The foundation of this dissertation is informed by the examination of the empirical evidence of pornography’s harms in its production and consumption. That analysis finds that pornography is a social practice of inequality that exploits, causes, and reinforces multiple social disadvantages. These disadvantages include gender, class (e.g., poverty and lack of economic alternatives), childhood abuse and neglect, race, ethnicity, and other forms of discrimination. Its dynamic of inequality is seen in how pornography production typically exploits prostituted persons, of whom most are vulnerable and wish to leave the industry (pp. 55–75 below), and how its consumption promotes sexual aggression and attitudes that support and trivialize violence against women (pp. 98–129). Put otherwise, that analysis suggests that pornography is precipitated by social inequality and reinforces it through promoting gender-based violence—one of the linchpins sustaining sex inequality (pp. 4–6 above). Sex inequality is widespread in modern democracies, with women’s systematic subordination to men being visible in a number of socially important and distinct indices (pp. 6–9). Given such conclusions, pornography is instrumental in the social system of inequality and social dominance in those places where it is prevalent. Seen from that vantage point, theories on challenges against social dominance and inequality should be applicable to answering the question: what is in the way of successfully challenging pornography as such in democratic legal systems?

In response to the empirical evidence, to and answering the underlying questions of this dissertation, chapter 4 critically analyzes the larger body of democratic theory that addresses practices of social dominance in general, such as violence against women and other forms of discrimination or exploitation, that may shed light analogously on the limits or potential of legal challenges to pornography in particular. From the more general theory, a specific democratic theory is developed in this dissertation that is hypothesized to answer the question not only why legally challenging pornography is difficult, but also to indicate an alternative approach needed to successfully challenge its identified harms. Specific theoretical applications and concepts are developed on a lower “middle-range” level, especially in Parts II and III, based on the additional empirical evidence analyzed there. These broader democratic theories apply to a greater range of social problems of inequality and dominance than pornography alone. As the dissertation applies these general theories to
legal challenges to pornography, it seeks to refine, thus improve them through the dissertation’s more specific focus.

This is the first time the attempt has been made, to my knowledge, to bridge the gap systematically across levels of abstraction and concretization between (a) democratic theories, (b) legal challenges to pornography in the real world, and (c) empirical social evidence of harm. Chapter 4 identifies democratic obstacles (pp. 142–148 below) and possibilities (pp. 148–168) for legal challenges within democracies on the basis of theoretical analysis. It finds a certain set of elements in a consistent body of theory that implies how to successfully challenge the harms of social dominance that are associated with pornography in general, though also being potentially applicable to a range of other problems. Key critics of this theoretical body in contemporary thought are addressed (pp. 168–175), as is the relevant critique within well-known positions of political theory (pp. 142–148).

The theories and hypotheses advanced to suggest more successful challenges to the status quo derive from a body of theory here referred to as hierarchy theory. The democratic theories holding views contrary to hierarchy theory are analyzed as well, including so-called postmodern approaches. A critical, even hegemonic theoretical approach in some jurisdictions, is the form of liberalism associated with a more restrictive view on democratic intervention, as distinguished from some more interventionist approaches within liberalism. The concepts of negative freedom and positive freedom are useful in describing contrasting approaches within liberalism on promoting individual freedom in a modern complex society with intrinsic social interdependence between individuals, groups, and government institutions. The corresponding “negative rights,” more simply put, favor minimal democratic intervention on the view that society is itself free and equal and there are potential dangers with “big governance,” while “positive rights” favors more affirmative democratic interventions on the view that there are potential benefits from “good governance.”

Hierarchy theory advances two distinct but related main elements that will be entertained throughout the dissertation from chapter 4 an onwards. These are (1) equality (meaning lack of social dominance) and (2) recognition/representation of socially disadvantaged and/or historically subordinated groups’ interests and perspectives, whether through law or through politics in general (cf. 153–168 below). The liberal notion of negative rights and the postmodern approaches, each for what ostensibly appear to be different reasons (cf. 145–150; 171–178), both discourage political and legal recognition and representation of socially subordinated groups according to the terms of hierarchy theory. With regard to equality, hierarchy theory suggests the necessity of democracies recognizing and distinguishing those social groups that are disadvantaged because of systematic structures of oppression from those groups who are not so disadvantaged (see 148–168). This includes identifying discrimination, violence, and exploitation analogous to the documented harms associated with pornography discussed in chapters 1–3. A middle-level theoretical concept consistent with this account that is subsequently identified empirically in various legal approaches to inequalities and social dominance is substantive equality. Substantive equality in law, described more in detail in chapter 8 (e.g., 241–246), calls for pro-

43 What is here called “hierarchy theory” has sometimes been called “dominance theory” by others. Hierarchy is a term implying the opposite of equality. In order to have a useful theory of how to best promote equality, it seems necessary to have a theory how to understand hierarchy: how it works, and how it can be countered.

44 For an explanation of the concept of negative and positive rights, including the related concept of negative and positive freedoms developed from Immanuel Kant to Isaiah Berlin and beyond, with examples from domestic abuse case law on obligations for the public to intervene, see infra notes 542–546 and accompanying text.
moting equality in social, economic, political, legal, and other tangible terms. It is thus to be distinguished from concepts such as formal equality.

The Canadian approach is explicitly referred to as “substantive equality” in case law. By contrast to formal equality, it requires a more searching inquiry into the consequences of a challenged law in its social, political, economic, and historical context. Discriminatory distinctions are not restricted to facial discrimination or de jure discrimination, but also can cover consequences that are substantively disparate even if they occur under facially neutral laws (sometimes termed de facto discrimination or discrimination “in effect”), whether or not intentional. Canada guarantees not only non-discrimination in the formal sense, but equality through the operation of law in the social, political, or cultural sense. As expressed in a leading case: “every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.” Substantive equality is particularly prominent in Canadian constitutional law, where the concept legally originated, though its impetus and insights can be seen operating with varying explicitness in case law, statutory regulations, or legislative history in all countries and jurisdictions studied in this dissertation, including international law (see further Part II and III).

With regard to representation, hierarchy theory further suggests (pp. 148–168) that democracies need to support autonomous organization and representation of historically subordinated groups’ social perspectives and interests in political processes, as well as being sensitive to them in the legal architectures and regulatory frameworks that impinge on their situation—in this case, particularly the frameworks regulating pornography. This position recognizes that oppressed groups (e.g., women subjected to men’s violence or Black people in the U.S.) have needed to organize separately from other broader progressive social movements (e.g., left parties or mainstream women’s organizations) (pp. 155–156). These groups have sought to keep the articulation of their priorities, perspectives, and interests from being controlled or diminished by competing imperatives within broader movements, which may not only have different priorities, but also priorities that directly conflict with theirs at times (ibid.). Although these adversary conditions often lead to an “oppositional consciousness” among disadvantaged minority groups, it is a consciousness

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46 See Andrews v. Law Soc’y of B.C., [1989] 1 S.C.R. 143 at 171, 56 D.L.R. (4th) 1 (Can.) (McIntyre J., dissenting only in the results as to the application of s. 1 of the Canadian Charter) (“s. 15 has a much more specific goal than the mere elimination of distinctions”). Lamer J., concurring (Can.). Justice McIntyre’s interpretation of Section 15(1) was adopted by the majority, represented by the opinion of Justice Wilson. Id. at 151 (Wilson, J., concurring) (Dickson, C.J., L’Heureux-Dubé, J., concurring). Justice McIntyre’s interpretation of Section 15(1) was also adopted by the third written opinion in Andrews. Id. at 193 (La Forest, J., concurring). Hence, Justice McIntyre’s interpretation of Section 15 was cited with approval by each written opinion in the case.

47 Id. at 173 (McIntyre J.) (recognizing “adverse effect” discrimination, and that “intent” is not a required element of it); cf. id. 174 (McIntyre J.) (“discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”) (emphasis added).

48 Id. at 164 (McIntyre, J.).
they will need to keep in order to generate more useful knowledge that can contribute to sustainable political and legal policies that tackle their particular oppression (ibid.). Political and social theorists as well as activists have long developed the version of hierarchy theory on representation and recognition synthesized in this dissertation. The need for this approach and its imperatives is corroborated by empirical data, including quantitative measures.49

By contrast to hierarchy theory, an alternative theoretical viewpoint—postmodern democratic theory—suggests that states should refrain from attempting to recognize and represent vulnerable or subordinated groups’ perspectives and interests in law or policy processes (see 168–175 below). This body of theory submits that such attempts will “discursively renaturalize” the groups’ subordination,50 or otherwise will be “misappropriated by the state” and reinstate the same injuries on the populations that the recognition intended to rectify.51 These postmodern theories instead suggest using generic rights that are void of content as abstract aspirational ideals figuring equality and freedom, encouraging possibility but without “corresponding entitlements” (Brown, 134). From the standpoint of hierarchy theory, this postmodern position suffers from the same problems, alternatively leads to the same inadequate outcomes, as classic liberalism. As explained more in chapters 4, the liberal concept of negative rights suggests that abuse of power by non-state actors (i.e., various forms of social dominance) should be intentionally ignored by democracies on the assumption that granting affirmative mandates to intervene leads to more government abuse of power (pp. 143–148 below). However, from the position of hierarchy theory, particularly in its development within intersectional scholarship,52 there seems to be little possibility to challenge social dominance except through addressing such non-state actors, which these liberal and postmodern theories explicitly refuse (again, for ostensibly different reasons) to do. (cf. 143–168).

Research Design: Comparative Case Studies

The comparative case study method will be deployed to address the question of what obstructs and what enables legal challenges to pornography’s harms. Before explicating the particular comparative research design (pp. 22–30), I will outline how the case study method in political science can be applied as a research design in the context of legal challenges to pornography more generally.

Case Studies

Scholars in the social sciences have, at least since the 1960s, attempted to distinguish detailed “case studies” from other type of studies, achieving little principled

scholarly consensus. The subsequent confusion over the case study’s “virtues and vices” has, in the words of political scientist John Gerring, made “[p]ractitioners continue to ply their trade” but with difficulties in articulating what they do in methodological vocabulary.\(^{53}\) This situation prompted him to comment in 2004 that case studies exist in a methodological “curious limbo” where they are held in “low regard” despite the fact that a “vast number of case studies . . . have entered the pantheon of classic works” (Gerring, APSR, 341). Consistent with those remarks, another scholar who appreciated the seminal contributions of this methodological sub-discipline concluded in 2006, citing philosopher Thomas S. Kuhn, that “a discipline without a large number of thoroughly executed case studies is a discipline without systematic production of exemplars, and . . . a discipline without exemplars is an ineffective one.”\(^{54}\)

**Units of Analysis: Formal, Informal, Direct, Indirect**

Gerring defines “the case study as an intensive study of a single unit for the purpose of understanding a larger class of (similar) units” (APSR, 342). The term *unit* is interchangeable with the term *case*,\(^{55}\) and the “larger class” of such units is referred to as the “population” of relevant units for comparison.\(^{56}\) Each legal challenge studied in this dissertation is therefore conceived as a single unit, defined as a nation, where the objective of the study is to shed light on a “larger class” of legal challenges to pornography. This approach is similar to how one would intensively study one revolution, or one election, in order to understand a larger class of such phenomena (i.e., of such cases/units) (cf. Gerring, APSR, 342). The population that my dissertation relates to is thus comprised of all legal challenges to the production and consumption harms of pornography as identified in chapters 1–3 that may have (or will) occur in the universe of legal challenges to such harms.

The legal challenges in this dissertation usually materialize in one of two forms, though they may oscillate between them over time: (1) challenges via legislative means on a local, state, federal, or international level; or (2) challenges via judicial means, for example, attempts to change the applications of laws via reinterpretation in any of the mentioned jurisdictions. A legislative challenge may end up in the courts, thus be subject to judicial challenges; conversely, a judicial challenge may be countered by legislative action. One may also try to delimit each unit of legal challenges on the basis of its historical trajectory, if the unit is fairly clear from context and not spread out over time indeterminately. However, demarcating the units on a longitudinal basis is ambiguous. Put succinctly, history matters; that is, legal challenges do not erupt in a historical and experiential vacuum, as if there were no precedents before them. Demarcating and properly defining the units of analysis are ad-

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\(^{55}\) In order to avoid further confusion about terms, whenever possible I will use the term “unit” rather than “case” to distinguish its methodological meaning from how the term is otherwise understood empirically in legal challenges.

dressed by Gerring, who observes that “a certain degree of ambiguity is inherent in the enterprise of the case study” (APSR, 345). Here, he introduces a useful distinction between “formal” and “informal units” (p. 344). The “formal” units of legal challenges would be those that are “chosen for intensive analysis,” e.g., within a specified comparative design such as the “most similar systems design” (MSSD) discussed more fully below. By contrast to those formal units, the “informal” units are such legal challenges that are “brought into the analysis in a less structured manner” (ibid.). A certain amount of knowledge about these informal units may be needed in order to choose the particular units for intense study and for identifying “plausible causal hypotheses” (ibid.). As expressed by Gerring, “[c]ase studies are not immaculately conceived; additional units always loom in the background” (ibid.). The distinction between formal and informal units “is always a matter of degrees” (ibid.).

I would further refine Gerring’s distinction between formal and informal units by noting a subspecies under the informal unit that makes sense in comparative political-legal research. Various doctrines in law often interconnect different empirical issues by analogy. Hence, further distinction is called for between informal units that are (1) direct legal challenges to pornography, and (2) indirect legal challenges—for example, impinging by analogy, via doctrinal importance, or by influencing related constitutional frameworks that affect legal challenges to pornography. Indirect units may be legal challenges to doctrinally related problem such as hate-propaganda, sex trafficking, or sexual harassment. Other examples of indirect units in this dissertation are challenges to group libel (on grounds of race, ethnicity, or religion), misleading advertisements, flag-burning, espionage, or sedition, which have all influenced doctrines on freedom of expression that impinge on how challenges to pornography are responded to by the legal system. Similarly, the legal treatment of dishonest conduct and violent resistance that was integral to expressive conduct, rape documented via cell phone cameras, and even counterfeiting have implications for how pornography production might be legally challenged. The distinction between direct and indirect units can also be cast in terms of standard legal research; that is, analyzing applications of various doctrines and how they interconnect on a given subject directly or more analogously. Although this distinction might not be as useful for research in other areas, where it should be empirically validated on a case-by-case basis, it makes a lot of sense for comparative political-legal research, as different issues are associated in law by various doctrinal analogies.

**Logic of Explanatory Inference**

There is no clear scholarly consensus whether qualitative research is primarily concerned with “testing” as opposed to “generating” theory, or with “causal effects” and probabilities as opposed to “causal mechanisms.” Gerring leans toward mechanisms rather than probabilities as a more general statement (APSR, 348). However, an often cited article by Bendt Flyvbjerg in 2006 suggested that case studies are particularly effective in testing theories, for instance if selecting “critical” cases. Gerring similarly admits that there “is a variety of ways in which single-unit studies can credibly claim to provide evidence for causal propositions of broad reach” (APSR, 347), including selecting “crucial” or “especially representative” cases/units. With regard to the selection of theories to test (as distinguished from case selection), political scientists Gary King, Robert Keohane, and Sidney Verba contended in 1994 that one should choose theories “capable of generating as many observable implica-

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57 Flyvbjerg, “Misunderstandings Case-Study Research,” 224–28 (arguing single case studies may put theories to critical tests).
tions as possible” in order to be able to verify, rebut, or revise them. Here, hierarchy theory (outlined in chapter 4, or in summary pp. 9–16 above) generates a number of implications, such as hypothesizing that a greater constitutional recognition of substantive equality concerns would lead to laws that are more sensitive to the harms of pornography. This prediction should be able to be observed in court cases where laws targeting pornography are challenged and through examining legislative history that documents efforts to pass new legislation. With respect to hierarchy theory, several “formal,” “informal,” “direct,” or “indirect” units may be studied in order to attempt to support or reject its hypotheses.

King, Keohane, and Verba argued further that qualitative research should “find as many observable implications” of the theories in the empirical materials (e.g., in legislative history and court cases), then “make observations of those implications . . . at different levels of analysis, that are relevant to the theory being evaluated.” Gerring also implies that there may be benefits of making many observations within the units of analysis, finding that a case study “in principle” provides “infinite” opportunities to observe “co-variation” within each unit (APSR, 344). It may seem debatable though whether the quantity of observations is a measurement of validity itself. Certainly the quality of the observations should also count? If not, we would be doing a “quantitative” case study, not a “qualitative” one. In any event, regardless of how many observations are made, one needs a method for observing. More concretely, this dissertation observes “co-variation” by looking for detailed evidence of variation in the responses to legal challenges among legislatures, courts, and other legal actors/entities (e.g., law enforcement, prosecutors, plaintiffs, defendants, or scholars who influenced systemic responses to legal challenges). The legal documents containing these responses harbor thousands of pages of legal reasoning, providing numerous instances of variation on the application of principles and doctrines. These observations provide data from which inferences can be drawn about what obstructs or enables more effective legal challenges to pornography. Each observation may indicate a corroboration, refutation, or revision of the theoretical frameworks of democratic theory outlined in chapters 4 (see summary, pp. 9–16 above). In practical terms, this entails, for example, observing variation in applications of laws in response to legal challenges in one or more units of analysis, or observing variation over time in one unit and analyzing how it relates to the democratic theories outlined in chapter 4 (cf. Gerring, CUP, 28 tbl.2.4). The use of all these strategies simultaneously is what Gerring refers to as “comparative-historical” method (ibid.).

**Within-Case Methods: Legal, Historical, and Pattern Matching**

Matthew Lange’s book *Comparative-Historical Methods* from 2013 provides a clear account of typical methods in comparative case study designs. He notes that within-case methods offers causal insights into particular cases that are largely descriptive and ideographic, but which can add more nomothetic and generalizable insights when applied to more cases (Lange, 40–41). One way to use the analytical leverage of several cases (apart from using large-N samples and statistical methods) is to apply within-case methods in a structured small-N comparison of two or more cases, including for instance Mill’s methods of agreement and difference (cf. Lange, 112–14). Before dealing with the comparative design in detail (pp. 22–30 below), it is

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useful to look at Lange’s distinctions of the analytical stages of within-case methods: “primary” and “secondary within-case methods” (Lange, 42). The “primary methods” generate evidence from various data by using such well-known methods as historical research, statistical methods, so-called network analysis (pp. 55–67), or, as in this dissertation in particular, legal analysis of case law, legislation, and constitutional obstacles and potential for legal challenges to pornography’s harms. In the “secondary methods,” the researcher uses the data and analytical insights gained from the first analytical stage to answer more complex issues regarding what conditions promotes or obstructs legal challenges to pornography’s harms (cf. 42–43).

Here, Lange distinguishes three subtypes that researchers choose from: “causal narrative explores the determinants of social phenomena, process tracing explores mechanisms, and pattern matching tests theories” (p. 43; emphasis added). This dissertation uses pattern matching for within-case analysis.

Pattern matching is a systematic technique “to explore whether or not the pattern of a case matches the pattern predicted by a theory” (p. 53). In this sense, pattern matching may test “the causal implications of a theory”; that is, whether or not a theory support an account of probable causes to the variations in legal challenges to pornography observed within and across the units compared (cf. Gerring, APSR, 348). As noted above with regard to the benefit of providing multiple points of observation, single case studies try to “match” the particular predictions of theories by drawing as many reasonable empirical implications from them as possible, then attempting to observe the implied patterns empirically. Corroboration (or refutation) occurs to the extent that the theoretical implications are matched empirically (or not). A theory that implies a specific cause for variation in the success or failure of legal challenges would thereby be relatively strengthened or refuted by a well-executed case study (cf. Gerring, APSR, 348–49). For instance, hierarchy theory (summarized above pp. 9–16) suggests that democracies and legal systems with a stronger imperative to promote substantive equality (as distinguished from formal equality) would produce more effective challenges to pornography than those with less substantive equality guarantees. Similarly, hierarchy theory suggests that democracies and legal systems that enable more representation of the perspectives and interests of groups who are harmed by pornography would produce more effective challenges against it. These theoretical predictions are possible to test via pattern-matching to their empirical implications in the units of analysis. The empirical analysis in chapters 1–3 of the harms of pornography, together with theoretical insights from democratic theory on representation of socially disadvantaged groups in chapter 4 below, suggest, when further analyzed in Part II and III, which perspectives and interests those harmed might contribute to potential legal challenges.

Accordingly, Part II involves legal analysis and historical methods to show to what extent the imperatives of substantive equality and representation of substantively unequal groups predominate within the regulative frameworks, thus making the selected cases more or less likely to support legal challenges. The analysis makes use of various “ideal types” (more below) informed by previous literature to establish whether or not patterns match. In Part III, the pattern matching also involves an analysis of to what extent the favorable and disfavorable conditions predicted by hierarchy theory were present or not during actual legal challenges to existing regulatory frameworks in the three selected democracies (Canada, Sweden, and the United States). The pattern matching in Part III includes empirical evidence from legislative deliberations, judicial adjudications, and/or other situations relevant to the legal

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61 A number of strategies to increase the number of observations for qualitative single case studies are also suggested in King, Keohane, and Verba, *Inference in Qualitative Research*, 209–12.
challenges. For instance, the analysis asks whether or not the articulation of (or the response to) a particular legal challenge relied on a substantive equality argument rather than conservative or classic liberal arguments on pornography and harm. If the success or failure in the legal challenges were consistent with predictions from hierarchy theory accordingly, there is a pattern matching between theory and empirical observations.

**Concepts and Measurements**

Matching a theory with empirical patterns of variation requires robust conceptualizations that can validly measure causal factors and their outcomes. Regarding concepts and measurements in general, political scientist Arend Lijphart observed in 1971 that there were clear benefits to comparative case study methods relative to statistical ones: “often, given the inevitable scarcity of time, energy, and financial resources, the intensive comparative analysis of a few cases may be more promising than a more superficial statistical analysis of many cases.”

Along similar lines, King, Keohane, and Verba in 1994 noted that case studies enable thick descriptive analysis that provide robust, rather than superficial, validity in measurement and concepts, and as such are “fundamental to social science”:

> If quantification produces precision, it does not necessarily encourage accuracy, since inventing quantitative indexes that do not relate closely to the concepts or events that we purport to measure can lead to serious measurement error and problems for causal inference. Similarly, there are more and less precise ways to describe events that cannot be quantified. Disciplined qualitative researchers carefully analyze constitutions and laws rather than merely report what observers say about them. . . . Case studies are essential for description, and are, therefore, fundamental to social science. It is pointless to seek to explain what we have not described with a reasonable degree of precision.

Rather than relying on reports from secondary sources, as is discouraged by King, Keohane, and Verba (cf. Lange, 144–48), this dissertation contains in Part II an extensive analysis, based on primary sources, of the comparative legal architectures and regulatory frameworks in the units of analysis for pornography consumption, distribution, and production (see chapters 5–9). Part II thus distinguishes three Weberian-style “ideal types” of legal frameworks: (1) obscenity law, (2) liberal regulations, and (3) balancing approaches. The three ideal types are more or less pronounced in each unit of analysis (see summary pp. 24–28 below). Following the well-known comparative approach suggested by sociologist Neil Smelser from 1976, these ideal types are used to guide selection of units/cases in the comparative design (below). They are also used as heuristic devices in the within-case analysis.

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63 King, Keohane, and Verba, *Inference in Qualitative Research*, 44 (internal cross-citations omitted).

64 See Max Weber, *The Methodology of the Social Sciences*, trans. and ed. Edward A. Shils and Henry A. Finch (New York: Free Press, 1949), 90 (stating that an “ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct (Gedankenbild). In its conceptual purity, this mental construct (Gedankenbild) cannot be found empirically anywhere in reality.”).

that includes pattern-matching. Part II finds that the ideal types relate consistently to a number of theoretical assumptions following from the democratic theories accounted for in chapter 4. For instance, Part II analyzes the extent to which existing legal architectures and regulative frameworks of pornography are consistent or not with the notions of substantive equality or group representation within hierarchy theory (cf. 9–16 above), and addresses how the laws would be viewed through postmodern or liberal theories. Certain aspects of these ideal types remain open to further empirical inquiry, such as their more precise potential for enabling or obstructing specific legal challenges. An inquiry into such questions is made more fully in Part III, based predominantly on primary sources such as statutes, case law, and legislative history.

Comparative Design

Most Similar Systems Design (MSSD)
Consistent with political scientists Amy Mazur, Dorothy McBride Stetson, and associates who aimed to find “the combination of political and social factors that appears to produce state structures prone to pursuing effective state feminist action,” this dissertation will also “use the comparative method to yield hypotheses about cross-national variations” that can explain what obstructs as well as what enables legal challenges to pornography. Put otherwise, part of the objective is to find a factor or a combination of them that are probable in producing more (or less) successful challenges. The comparative method can thus highlight favorable and unfavorable conditions for legally challenging pornography in different political systems and democratic contexts. Legal challenges to pornography can hypothetically be observed in

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66 As an alternative method to comparative case studies, a statistical large-N study of legal challenges to pornography might have been considered. However, to generate valid measurements to answer this dissertation’s research question, one would for instance need to analyze legal doctrines in each jurisdiction to distinguish those factors that were decisive from those that were irrelevant in promoting or obstructing legal challenges. Such a strategy entails measuring theoretical concepts such as “substantive equality,” “survivor representation,” and measuring to what extent and how the total units of analysis relate to the three ideal types. The quantitative measurement instruments must relate to these same theoretical constructs and ideal types while these may take different shape in different national doctrines, which necessitates the canvassing a large body of law in each unit of analysis. Similarly, a significant amount of legal analysis in each jurisdiction is needed to control for idiosyncratic factors that might otherwise promote or obstruct legal challenges, so as not to attribute statistical variation to the wrong predictors. If the body of law that impinges on these conditions is made up of thousands of written pages in just one nation, it is easy to imagine that a quantifiable measure runs the risk of lacking concept validity unless performed with in-depth knowledge of every legal system included. The complexity of performing such an ambitious statistical large-N strategy would call for a team of analysts to avoid the problems that political scientist Giovanni Sartori in 1970 termed “conceptual stretching” or misinformed conceptualization. Giovanni Sartori, “Concept Misformation in Comparative Politics,” Am. Pol. Sci. Rev. 65, no. 4 (1970): 1052–53; cf. David Collier and James E. Mahon, Jr., “Conceptual ‘Stretching’ Revisited: Adapting Categories in Comparative Analysis,” Am. Pol. Sci. Rev. 87, no. 4 (1993): 845–55. Put otherwise, it is questionable whether a large-N study on this topic might unconsciously include “oranges” when comparing “apples.” Although such a project is accordingly beyond the scope of this dissertation, some version of a larger-N strategy is informed by it, and if carefully circumscribed could form a subsequent extension of it.


68 Cf. Theda Skocpol and Margaret Somers, “The Uses of Comparative History in Macrosocial Inquiry,” Comp. Stud. Soc’y & Hist. 22, no. 2 (1980): 182 (defining one group of scholars in political science as pursuing “comparative history for macro-causal analysis” where the objective is “to specify ‘configurations favorable and unfavorable’ to particular outcomes they are trying to explain”) (quoting Barrington
many more jurisdictions in the world, thus under a broader diversity of democratic conditions, than would be available in a single unit of analysis where only longitudinal observations would be available. In this light, the comparative method, by making spatial comparisons available as well, invites generation of theoretical implications while strengthening the predominantly ideographic focus of single case studies with more nomothetic insights (Lange, 108–14, 131–38).

When using the comparative case study method, many political scientists relate to one of John Stuart Mill’s classic logics of inquiry: “method of difference” and “method of agreement.” These have subsequently been renamed the most similar systems design (MSSD) or most different systems design (MDSD) in the literature. This dissertation relies on the MSSD. Its crude logic holds that the researcher, on basis of some form of theory, compares two or more units of analysis that are “similar” in many theoretically relevant aspects on the independent measures but differ on the dependent measure sought to be explained (here: legal challenges to pornography). The objective is to identify potentially different conditions in the independent dimensions/variables on basis of cumulative knowledge that indicate explanations for the dependent phenomenon that occurred differently in the units. MSSD can ideally rule out a number of otherwise alternative explanations by holding constant independent variables that are similar among the chosen units of analysis.

It should be noted that, by contrast to large-N comparisons, Mill’s small-N comparative methods by themselves offer little independent insights unless they are combined with other methods, such as within-case analysis that include pattern matching, or alternatively causal narrative or process tracing (Lange, 110–12). In this dissertation, pattern matching is deployed as a within-case method, using data from, for example, legal analysis and historical methods to analyze the extent that independent factors, such as substantive equality in law and representation of perspectives and interests of those harmed by pornography, have contributed to more or less successful legal challenges in Canada, Sweden, and the United States (see 19–21 above). The dissertation then uses the MSSD to test and possibly strengthen the findings from within-case analysis across cases, as the comparative selection of units systematically focuses on the potential effects from the same independent factors studied within cases/units (see 24–28 below). Put otherwise, this strategy “uses Millean comparisons to explore whether any of the causal factors highlighted in multiple within-case analyses help to explain the outcome across cases. If they do,
the comparisons—in combination with the insight provided by within-case methods—offer general insight for a larger set of cases” (Lange, 110).

Selecting Formal Units of Analysis
The “formal units” of legal challenges to pornography selected for study in this dissertation are Canada, Sweden, and the United States. They are “similar” in the sense of all being western liberal democracies that purport to guarantee freedom of expression and gender equality, though their rationales and methods for doing so differ legally. They all also ostensibly condemn gender-based violence, sexual exploitation, and other forms of abuse by non-state actors that nonetheless occur within their jurisdictions, and which the empirical evidence suggests is significantly caused in part by pornography production and consumption (see chapters 1–3). Canada and the United States have been compared in the literature previously with regard to legal challenges to pornography, although not to the systematic extent that they are in this dissertation, and not with a systematic comparison to Sweden. The independent dimensions that differ relevantly between the three countries, for purposes of legal challenges to pornography’s harms, are categorized according to the ideal types of legal frameworks further analyzed in Part II: (1) obscenity law, (2) liberal regulations, and (3) balancing approaches (see Table 1, p. 24 below). These dimensions are also consistently analyzed in relation to democratic theories in the dissertation.

Table 1. Predominance of Legal Frameworks in Canada, Sweden, and United States

<table>
<thead>
<tr>
<th>Dimension / Unit</th>
<th>Canada</th>
<th>United States</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obscenity Law</td>
<td>Medium</td>
<td>High</td>
<td>Low</td>
</tr>
<tr>
<td>Liberal Regulations</td>
<td>Low</td>
<td>High</td>
<td>Medium</td>
</tr>
<tr>
<td>Balancing Approaches</td>
<td>High</td>
<td>Low</td>
<td>Medium</td>
</tr>
</tbody>
</table>

Canada has a strong balancing approach in its constitutional framework since 1982 that not only in principle but also in practice recognizes “substantive equality” to a stronger extent than in the United States (see chapter 8 below). This condition is hypothesized to be favorable to legal challenges to pornography from the viewpoint of hierarchy theory. The United States, by contrast, recognizes substantive equality only sparsely in case law, thus has a low presence of balancing approaches, although balancing does exist at times. Hence, it will be shown how the United States has a more liberal regulation with a stronger “negative” concept of rights that discourages explicit recognition of disadvantaged groups and non-state abuse of power in legal challenges to adult pornography (see chapter 7). Following hierarchy theory, this is a less favorable condition for legal challenges to pornography compared to Canada. However, some important U.S. exceptions exist. For instance, it will be shown that a U.S. group defamation case (pp. 263–269) and sexual harassment law (e.g., 329–331) recognize more substantive equality than U.S. adult pornography regulations do. Hence, the balancing approach is stronger in certain instances than in others under U.S. law. Yet when compared to Canada, these instances of balancing utilizing

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equality are exceptions rather than systematic features of U.S. constitutional law (see chapters 7–8). According to hierarchy theory, Canada is hypothesized to have more favorable systemic conditions for legally challenging pornography (e.g., 269–273), while the United States with its “negative rights” concept that discourages legal recognition of social disadvantaged groups would be more consistent with liberal and postmodern approaches to legal challenges (e.g., 237–241).

Sweden has until recently been regarded as a case sui generis with regard to its criminal prostitution law from 1999. That law has differed significantly from Canadian and American prostitution laws, though other nations have followed Sweden’s approach since 2009, including Canada as late as on November 6, 2014, when a bill passed Parliament that largely mirrors the Swedish prostitution law. Sweden asymmetrically targets those who buy or otherwise exploit persons for sex and decriminalizes and supports those persons who are bought for sex to facilitate their escape from prostitution (pp. 282–286 below; cf. 471–503). The Swedish model prostitution law and its rationale, impact, and potential is so far most well researched where it originated, and where it has been enforced and officially studied. This law is consistent with a substantive equality approach to prostitution by its recognition of disadvantaged populations and its professed objective to support them and targeting their exploiters. Such an approach is favored by hierarchy theory but is inconsistent with a postmodern approach that discourages substantive recognition of disadvantaged groups and remedy of their disadvantage through law (e.g., 294–298).

The question whether its practical impact has been consistent with its intentions is to be further examined in the dissertation. By contrast, Sweden’s adult pornography regulation resembles more that of its U.S. counterpart, with a stronger “negative rights” concept in constitutional structures and legal frameworks than in Canada (compare 225–237 with chapter 8). On this dimension of substantive equality, Sweden takes a middle-position (ibid.). By contrast, their prostitution regulation has recognized substantive equality most among the three units of analysis (compare 237–241 with 294–298). Sweden’s prostitution law is potentially applicable to pornography production, but no successful legal challenge has been made to use it in this way. Attempts that were made in the 1990s and 2000s will be analyzed through pattern matching (see chapters 9 and 12).

Regarding obscenity law, all three countries retain at least some elements of that framework in their regulation of pornography, although Sweden has the least of it (see chapter 6). Obscenity law is shown in chapter 6 as being relatively insensitive to substantive inequality, although whether or not it is effective to challenge pornog-

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74 See Bill C-36, Protection of Communities and Exploited Persons Act, 2nd Sess., 41st Parl., 2014 (Royal Assent, Nov. 6, 2014) (Can.). The exception compared to Sweden’s law is that prostituted persons who solicit sex “in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre,” or obstruct public traffic when soliciting, may obtain criminal sanctions in Canada. Id. cl. 15.
raphy production and consumption remains open for inquiry in this dissertation. Canada takes a middle position on the obscenity dimension, having retained some elements of obscenity law (e.g., the use of criminal law and “the contemporary community standards test”) while still being open for a more balancing interpreting approach that strongly includes sex equality concerns (e.g., the harm test, see chapters 8 and 11). The United States, by contrast, is the most traditional among the three in its obscenity law. The law on its face provides little if any recognition of the goal of promoting gender equality or countering dehumanizing or violent materials, although more recent criminal prosecutions are using the law consistent with such latter concepts, with some success (see 355–363). Alternatives to obscenity law for regulating pornography in the United States are largely governed by doctrines on adult and child pornography that conform to a liberal framework (pp. 210–225). In Sweden, adult pornography regulation has lost most elements of obscenity law, except in some definitional terminology and prohibitions against public display of pornography (pp. 194–196). A gender equality imperative is recognized in the legislative history for a prohibition on production and dissemination of violent pornography, though not as strongly as in Canada where nonviolent dehumanizing materials are also prohibited (ibid.).

The three units of analysis thus appear similar on key democratic aspects, for example, principally recognizing sex equality, non-exploitation, freedom of expression, and some commitment to combat gender-based violence, although still harboring sufficient cross-variation on the independent dimensions (regulative frameworks). This makes them possible to study systematically within a MSSD case selection framework, combined with the technique of “pattern-matching” between democratic theory and legal and historical data, that is, the within-case method of analysis (see 19–21 above).

Considering the many comparative research studies and official evaluations made on the impact and potential of Sweden’s prostitution law, Sweden also provides an opportunity to observe some theoretical implications in terms of policy outcome, as distinguished from policy output. The distinction between policy output and outcome has long been made in the sub-discipline of public policy implementation research. Understanding the causes of change in policy or law is fairly uncomplicated (policy output); measuring and understanding the causes of change in the actual empirical “outcome” of such alteration in policy output is more complex. For instance, although the doctrinal challenges causing legal change of pornography laws is relatively easy to document and measure, to find comparable indices of “outcome” in terms of pornography consumption in each country is not only difficult at pre-

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sent, but such consumption is likely affected by a number of intervening, moderating, and mediating factors apart from legal changes. By contrast, in the case of prostitution laws, a number of social science studies with more precise measurements on the effects of legal change (e.g., the prevalence of prostitution) have been done both before and after 1999, in numerous countries culturally and socially comparable to Sweden but with different legal approaches to prostitution (e.g., Denmark, Norway, the Netherlands, Germany, New Zealand, and Australia (see 471–503 below)).

Regarding measuring policy “output,” the predictions of the hierarchy theory concerning social dominance are analyzed in terms of systemic responses to legal challenges: has there been a legal change in pornography regulation that recognizes substantive equality and represents survivors’ interest, and if so, what conditions made these changes possible? The MSSD in combination with pattern matching as a within-case method of analysis (using legal analysis and historical methods to analyze data) are used for answering such questions.

As to prostitution, it is a parallel situation to pornography in the sense that the people used in prostitution and the people used in pornography are typically the same people (e.g., 55–57), and are used in the same ways while their abuse is profited from by pimps and pornographers alike (see chapters 1–2). Thus, pornography is a branch of the sex industry, of which prostitution is the tree. The objectives of the Swedish prostitution law (see 277–286) to prevent sexual exploitation, support prostituted people who wish to leave the sex industry, and to promote gender equality appear equally relevant in the context of prostitution for pornography as in off-camera prostitution. Yet as such applications of prostitution laws to pornography production are absent and cannot be empirically investigated, it is more imperative to know if the existing “outcome” of the Swedish prostitution laws reduced sexual exploitation, supported prostituted persons, and promoted substantive equality. If hierarchy theory is confirmed with regards to prostitution laws in such respects, it indicates that similar legal challenges to pornography production would be successful given the same objectives.

The countries more similar to Sweden where prostitution has been studied since 1999 could, following Gerring’s approach to case selection, be regarded as “informal units” of analysis in the case study design (Gerring, APSR, 344; cf. 17–18 above). The studies of these informal units have used comparative as well as longitudinal designs, and documented the occurrence of prostitution with fairly similar and standardized measures. They have controlled for numerous hypothesized causes and effects, including asking whether prostitution became more “dangerous” or took

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77 There are a number of anonymous social surveys on consumption in countries such as the United States, Sweden, Denmark, Norway, Hong Kong, and Canada, but they do not use uniform conceptualization and measurements, thus cannot be systematically compared. See infra pp. 33–37. Moreover, although some surveys include adults, most detailed surveys are done on young adults (with few exceptions), and these surveys all define that group according to different criteria (some age 17–20, some age 18–27, some age 18–30, and so on). Ibid.


other “forms” after the Swedish law changed in 1999. Together with the large body of research analyzed in chapter 2 on the similarities and variation in exploitative and abusive conditions within different forms of prostitution and pornography production globally, these studies provide crucial comparative measures of whether or not the law has made a difference in “policy outcome.” Hence, Sweden is a “crucial case” (Gerring, CUP, 115–21) for corroborating, refuting, or revising the predictions and causal implications of hierarchy theory in particular, and its approach to legal challenges against social dominance. As recalled, hierarchy theory predicts that a substantive equality approach in law to prostitution will empower members of disadvantaged groups. Sweden would, under this theory, show some success in empowering those who are exploited in prostitution compared to other countries that do not have a similarly substantive equality approach to prostitution law. The question then is to what extent Sweden’s law successfully contributed to reducing sexual exploitation or not, and to what extent it has empowered disadvantaged populations in prostitution. Hence, this dissertation’s design provides an opportunity to evaluate the “fit” between theories and empirical evidence of policy outcome (Gerring, CUP, 119) between the formal unit (Sweden) and informal units (Denmark, Norway, Germany, the Netherlands, Nevada, Victoria, Australia, New Zealand, etc.) in an area extremely close to, indeed overlapping with, pornography’s harms.

“Diverse” Cases, Selection Issues, and Mill’s Methods

The MSSD strategy makes sense when considering similarities between Canada, Sweden, and the United States concerning their approaches to gender equality, gender-based violence, and pornography regulation. However, the differences accounted for in Part II suggest these three units may not be very “similar” after all. To the extent one regards them as more “diverse” than “similar” in the relevant aspects for comparison, it is legitimate to ask whether the selection strategy should alternatively cast them as diverse cases. In a “diverse case” strategy the objective—following Gerring, who seems to have coined this usage—is often to approximate a larger sample of units representing the diversity or variety among typical legal challenges. That is, rather than “most similar” or “most different” units, one aims to study a representative selection (cf. Gerring, CUP, 97–101). Certainly, a sample of three formal units may not be representative of the distribution of typical categories of units within the full sample of legal challenges to pornography in the universe. Nonetheless, selecting “diverse cases” will likely produce a more representative selection “than any other small-N sample (including the typical case).” Casting the dissertation’s selection of Canada, Sweden, and the United States as a “diverse cases” strategy does not, however, violate the basic logic of inquiry of the most “similar” systems design; the objective is still to understand variation on the dependent “variable.” By contrast, the logic of inquiry underlying a most different systems design (MDSD) would be to understand non-variance on the dependent measurement—an objective not reflected in the design used in this dissertation, as the dependent measures do harbor co-variation. Hence, this dissertation does not, as in a hypothetical example by Gerring and Seawright, present “a mixture of most similar and most different analysis.” Nevertheless, considering the diverse qualities of the chosen formal units of analysis (Canada, Sweden, and United States) appears to imply a more complex research strategy, when isolating the conditions responsible for the variation in

81 Ibid., 307 n.3.
the dependent measure. The term “diversity” entails diverse conditions—not similarities, as might ideally be the case in a MSSD strategy.

Albeit case selection should be made with caution, it does not include artifacts of sampling error or selection bias; those concepts do not apply in the same sense to within-case analysis as they do to large-N studies (Lange, 155–58). In this dissertation, the predominant findings are built on what happened in particular cases; ideographic insights drawn from testing theory on multiple empirical observations in selected units of analysis (pattern matching). Certainly, the MSSD use “pseudo-statistical analyses” that by themselves would be affected by sampling error, as understood in statistics (p. 157). Yet the MSSD is not used independently to estimate causal effects. It is either applied in combination to “frame subsequent analysis” with the more ideographic within-case methods, and/or to “make Millian comparisons at the end of the analysis” that can qualify potential nomothetic implications from the within-case analysis (p. 157). In such a research design, sampling error poses much less of a problem than in statistics (cf. 157). Regarding selection bias, the reader may of course ask whether or not other countries could have been considered in addition or instead of Canada, Sweden, and the United States. However, legal challenges of comparable magnitude in other countries that addressed the documented empirical harms, while systematically relating those harms to the problem of gender-based violence and men’s social dominance over women, have been scarce.

To illustrate, a civil rights model to challenge pornography’s harms was proposed by influential lawyers in Germany in the late 1980s, but was never subject to such legislative and judicial action as this approach was in Canada and the United States. Similarly, although there were recurring reports in 2013 about consideration in Iceland’s government to create new laws against consumption of abusive pornography online—apparently sparked by concerns about gender-based violence—no such laws have yet been reportedly proposed or passed. Likewise with regard to prostitution laws, more countries have surely moved in Sweden’s direction. Yet Sweden was first to adopt a clear substantive equality approach to this problem in its laws (pp. 282–286 below), and the law’s rationale, impact, and potential are subsequently most well-documented there. All in all, although Canada, Sweden, and the United States do not provide the entire universe of cases/units where systematic legal challenges to adult pornography, sexual exploitation, and their harms to women’s equality have taken place in democracies, they are among the more prominent instances. An alternative case selection does not appear warranted considering the “diverse selection” rationale used, as such a selection does not mandate absolute repre-


83 See Alexandra Topping, “Battle to Block Online Porn in Iceland: Gender Equality Activists Press New Government to be First in Europe to Ban Access,” Guardian, May 27, 2013, p. 17 (Lexis); Tracy McVeigh, “Can Iceland Lead the Way Towards a Ban on Violent Online Pornography?,” Observer, Feb. 17, 2013, p. 31 (Lexis). One may also encounter sensationalist news reports with some regularity in western tabloid press, alleging there are draconian pornography laws in some foreign jurisdiction—though typically these reports come without citations or credible sources on the laws’ effectiveness and political rationales.

84 See supra notes 73–74.
sentativeness. Rather, the selection aims for a representation of the diversity of regulatory frameworks (see above) within similar structural frameworks, that is, democracies.

Other more general criticism has been voiced toward Mill’s logic of inquiry for comparison. For example, sociologist Stanley Lieberson in 1994 argued that these methods could not rule out alternative factors of explanation even assuming a probability standard, nor can it rule out multiple causes and interaction effects. He thus contended “that the methods of agreement and difference are both outdated and inappropriate” (Lieberson, 1230). Albeit his critique is useful to highlight the method’s weaknesses and inherent limitations (and should be read by students of comparative method for that precise reason), it disregards the fact that few small-N comparisons use Mill’s methods without combining them with other within-case methods, such as pattern matching, causal narrative, or process tracing (cf. Lange, 110–12). Indeed, without methodological combinations, Mill’s methods by themselves offer little independent insights and are vulnerable to Lieberson’s criticism. Yet their function is often (as in this dissertation) to contribute to “methodological synergy” with other methods, rather than offering independent insights (cf. Lange, 127).

Lieberson’s critique also appears to assume that comparativists proceed without cumulative knowledge, as if producing theory from a tabula rasa. The application of the MSSD or MDSD generally builds upon an extensive body of literature on the topic, which subsequently guides case selection, selection of variables, and comparative design. For instance, this dissertation relies on numerous well-known authorities in democratic theory (chapter 4 below) and other authorities in comparative legal studies (Part II). Considering the cumulative knowledge of comparative politics and theories as well as how Mill’s methods are typically combined with other methods, including Ian Shapiro’s “problem-driven” approach, their validity and robustness are raised in ways that Mill and other contemporaries, for example, Emile Durkheim, could not have anticipated when they criticized these methods’ application in social sciences. Even granted the relevant points in Lieberson’s critique, its absolute rejection of Mill’s methods resembles the analogy that political scientist Giovanni Sartori in 1970 referred to as “the man who refuses to discuss heat unless he is given a thermometer,” by contrast to “the man who realizes the limitations of not having a thermometer and still manages to say a great deal simply by saying hot and cold, warmer and cooler.”

Data/Material and Legal Research

The dissertation’s selection of data—or materials, should one prefer it—warrants explanation. The data in Parts II and III come mainly from primary sources such as constitutions, legislation (including existing, proposed, invalidated, or superseded), case law, legislative history, government reports, international law, or public statements from key authorities during legal challenges. The analysis of those sources is also to some lesser extent complemented by data from contemporary media reports, various scholarly commentaries and analysis, or from other sources that can provide additional insights or contrasts to the analysis of primary sources. Such information may include accounts from interviews with relevant legislators, government officials, organizations, or individuals, or other information (e.g., background infor-

86 Cf. Lijphart, “Comparative Politics & Comparative Method,” 688 (remarking that Mill’s and Durkheim’s “objections are founded on a too exacting scientific standard”).
87 Sartori, “Concept Misformation in Comparative Politics,” 1033.
mation about various parties in a litigation or in a campaign to lobby legislatures). These sources may also encompass various contemporaneous research that was conducted at the time of the particular legal challenges under study, thus may have affected or could shed light on conditions not clearly discernible from legal sources. Depending on what specific questions are sought to be answered when drawing on these complementing sources, they may be regarded as either secondary or primary.

The dissertation makes use of a number of standard legal research techniques, including analyzing case law doctrines and other jurisprudence. The techniques make the selection of data and material less problematic from the perspective of representativeness or validity, especially when contrasted to other political topics. For instance, when researching gender equality in intraparty politics, executive action in international conflicts, or labor–employer negotiations, similar official record-keeping may be unavailable. Scholars working with such topics are often dependent on the selective interest of media or previous scholars to highlight potentially important cases. In cases where no written records exist, researchers may even be dependent on first-hand experiential accounts to accurately approximate the relevant population of cases. By contrast, legislation, case opinions, legislative history, and secondary sources within legal research databases such as Westlaw or Lexis are digitalized to a considerable extent, facilitating electronic search. In addition, as legal practitioners and scholars alike need quick access to the current state of the law (not least when working for clients), such databases typically offer highly efficient methods for tracking doctrinal changes or updates in response to attempted challenges of existing laws. These techniques make it unlikely that important legal developments will be overlooked.

For instance, Lexis’ Shepard’s citation service, Westlaw’s Key Cite, and their respective headnotes functions—as well as other techniques such as “terms and connectors search”—make many significant legal developments easy to track. Certainly, these techniques do not preclude the necessity for creativity or analytical skills in working with legal areas that are ambiguous (which they commonly are), or making novel arguments and challenges that have not previously been articulated. Indeed, when legally challenging social practices of domination, existing doctrines rarely offer sufficient explicit answers to the problem. Modern techniques of legal research makes it a comparably reliable field for accessing relevant comparative data across countries, as well as for pinpointing where the law is less clear, thus more open for challenging interpretations.

The next chapter forms the beginning of Part I that deals with evidence and theories relevant to legal challenges to pornography in democracies. Chapter 1 begins by analyzing empirical conditions related to the prevalence and character of pornography consumption, particularly its gendered dimensions in western democratic systems. It also includes an overview of the social, financial, and organizational aspects of its production, and clarifies research definitions of pornography materials, research on popular categories of consumption, and misinformation in the scholarly debates. Chapter 1 thus focuses on the broader social organization and practices of pornography consumption and production, while chapters 2 and 3 deals specifically

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88 For instance, if an account of media or scholarly responses to a legal challenge is sought, news reports or scholarly articles are primary source, but if accounts are sought of organized lobbying strategies and responses by politicians, news media and scholars are secondary sources.

89 Although these techniques are not commonly taught at political science departments, they are frequently learned and mastered by judicial politics scholars, especially in North America. I have had the fortune to receive training at the University of Michigan Law School (Ann Arbor) as a visiting scholar twice, and have since continued using the techniques while improving my skills.
with the *harms* related to those conditions that informs the “problem-driven” approach to the study of legal challenges in democracies.

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90 Shapiro, “Problems in Study of Politics,” 598 (stating that the “nub” of the problem-driven approach is to pay “more attention to the problem” and less attention on “vindicating” some favored theory or method that “contribute little to the advancement of knowledge.”)
Part I: Evidence and Theory for Change

1. Pornography: Empirical Conditions

Pornography has been argued to be a social practice that feeds on and fuels inequality. The challenges to pornography and its harms have entailed claims of abuse, exploitation, and dominance by some, usually men, and of discrimination, victimization, and subordination by others, usually women and children. As with other political claims of structural dominance—such as stating that global capitalism is inherently exploitative of the working class, particularly in “developing” countries—this one is also highly contested by those it indicts, including their apologists. To those caught in between, for instance politicians and the judiciary, having to face the exigency of the issue may be compelling or exhaustively onerous. In responding to the rage expressed by those engaged in stopping pornography’s harms, the amount of legal accountability demanded, and their sometimes far-reaching political implications, questions are raised on how to judge the existing evidence against pornography. Such questions are at the center of this and the following two chapters.

Pornography as a Social Practice

Consumption and Gender

As will be further inquired into in the next two chapters, the harms of pornography come in mainly two forms; either primarily associated with its production, or pri...
arily with its consumption. Before looking directly at research on such consumption and production harms, it is necessary to understand to what extent men and women generally differ in consuming pornography. This information will assist in situating pornography in a relevant context for accurately assessing its impact on inequality, gender-based violence, and also on sexual exploitation. There are significant gender differences in level of arousal and emotional responses to pornography exposure documented in the social science literature. A recent meta-analysis from 2007 of this body of research found that women exhibited significantly “greater levels of negative affect in response to sexual materials than men,” and were significantly less physiologically aroused by the materials than men were. When pornography was more physiologically arousing to men than women in these studies, the positive psychological labeling also increased more among men than among women (Allen et al., 551). However, the relationship between physiological arousal and positive emotional responses was not linear when comparing the genders, as women’s reported level of negative affect was stronger than their relative lack of physiologically arousal would suggest—a finding suggesting that women interpret their arousal differently than men (p. 553).

Several detailed survey studies summarized below from such different industrialized regions as the United States, Sweden, Denmark, Norway, Hong Kong, and Canada, show dramatic gender disparities in the level of exposure to pornography. Accordingly, a study of American population data from the General Social Survey (U.S.) in 1973, 1994, and 2000–2002, respectively, concluded that “regardless of technological context, pornography use is . . . predominantly male [and] young males are the predominant users.” However, the General Social Survey collected data on pornography consumption with relatively crude variables. For instance, it measured whether respondents had “seen an x-rated film in the past year,” and used relatively few other variables, such as distinguishing between movie theatres or VCRs, or whether respondents had “used a pornographic website in the last 30 days” (Buzzell, 117). These measurements are not good for distinguishing accidental from systematic use. By contrast, a study on young U.S. adults published in 2008 provides more information. Jason Carroll and associates surveyed a “nonclinical” population of “emerging adults” (age 18–26) based on 813 university students (500 females, 313 males) across the United States. Although 21.3% of these males reported using pornography either “everyday or almost every day,” alternatively “3 to 5 days a week,” only 1% of the women reported so (Carroll et al., 18 tbl.1). Furthermore, 27.1% of young men reported using pornography 1 or 2 days a week, while only 2.2% of the women reported so (tbl.1) Moreover, 21% of the men reporting using it 2 or 3 days a month, while only 7.1% of women reporting so, and 16.8% of men reporting using it once a month or less, with 20.7% of women reporting so (tbl.1). Finally, in a strong reversed pattern, only 13.9% of the men reported no pornography use while a dramatic 69% of all women reported the same (tbl.1).

Studies from other countries confirm the patterns found by Carroll and associates on fairly similar samples of youths, young adults, or sometimes within general adult population samples. Accordingly, among a large representative sample in Sweden of

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93 For more explanation of meta-analysis methodology in this research area, see infra pp. 92–93.
96 Carroll et al., ”Generation XXX,” supra p. 1 n.3, at 6–30. Students were recruited from six diverse college sites distinguished on such dimensions as size, religiosity/non-religiosity, East-Mid-West Coast, etc. Ibid., 12–13. Further citations in text.
4,343 third-year high school students, only 6.5% of the girls used pornography more than a couple of times a year (5% once in a month or so, 1.3% once a week or so, 0.2% more or less every day); their use was usually initiated by male partners.\textsuperscript{97} By contrast, 9.9% of the boys in Sweden used it every day, 27.0% a couple of times per week, and 27.9% a couple of times per month (Svedin and Åkerman, 91 tbl.2). Boys used pornography significantly more often when alone, while females encountered it in company, or when a male used it together with her (p. 92). Similar striking gender disparities in initiating consumption, or simply in consuming pornography itself, have been repeatedly documented in other Swedish studies of young populations.\textsuperscript{98}

Among general adult population samples in Sweden, these trends seem also to be present. Surveying a national population sample of 2810 persons,\textsuperscript{99} Swedish researchers commented in 1996 on their findings by remarking that “[p]ornography is made mainly by men, for men...and there is much to indicate that women can, above all, be regarded as passive recipients rather than active consumers.”\textsuperscript{100} The adult sample provided indications that females may even over-report their exposure to pornography when the survey does not clearly define “pornography”; for example, more women than men had perceived “ordinary TV” (i.e., public service TV, as distinguished from cable or satellite) as a source for exposure, despite that explicit sexual media generally deemed to be pornography (i.e., with genital organs exposed in sexual situations) was “almost never shown on the ordinary TV channels” (Månsson, 257).

In Denmark, a neighboring country to Sweden, similar gendered consumption trends prevailed among a representative sample of 688 heterosexual Danish adults aged 18–30 who were slightly above education average.\textsuperscript{101} Their pornography consumption seemed to be slightly higher in quantitative terms for both genders compared to the Swedish surveys above. Hence, 97.8% of men and 79.5% of women had ever watched pornography, and of those who consumed it 3 times a week or more,


\textsuperscript{98} In a sample of 924 third-year high school students where 98% of the men and 72% of the women had “ever” consumed pornography, 75% of the men and 19% of the women reported taking the initiative to consume it, and while 30% men were “high consumers” less than 2% of the women were; i.e., reporting consumption every week or every day in contrast to “never,” “a few times a month,” or “once in a while” (n = 718). E. Häggsström-Nordin, U. Hanson, and T. Tydén, “Associations between Pornography Consumption and Sexual Practices among Adolescents in Sweden,” Int’l J. STD & AIDS 16, no. 2 (Feb. 1, 2005): 102–03. The authors state that these results “with some caution, can be generalized to other in-school third year high school students in Sweden.” Ibid, 106. Another study with 1000 young female respondents surveyed while visiting a family planning clinic in Stockholm, found that among the 84.4% whom had “seen pornography”, 78% had seen it “rarely”, 20% “occasionally”, and only 1.9% reported “frequent” encounters (n = 841). Christina Rogala and Tanja Tydén, “Does Pornography Influence Young Women’s Sexual Behavior?,” Women’s Health Issues 13 (2003): 41 (median age 22, range 14–24, ibid., 40). The authors declared that their findings “with some cautions, can be generalized” to sexually experienced young women in rural areas as well. Ibid., 42. Additionally, in a female sample of 345 drawn from a University Clinic, only one woman had “consumed pornography often”, 8.4% “sometimes”, and 91.1% “rarely”. Tanja Tydén, Sven-Eric Olsson, and Elisabeth Häggsström-Nordin, “Improved Use of Contraceptives, Attitudes Toward Pornography, and Sexual Harassment Among Female University Students,” Women’s Health Issues 11, no. 2 (2001): 90. Based on previous studies the authors believe these findings can be generalized to “sexually experienced female university students in Sweden.” Ibid., 91.


\textsuperscript{100} Sven-Axel Månsson, “Commercial Sexuality,” supra p. 1 n.4, at 263. Further citations in text.

\textsuperscript{101} Gert Martin Hal, “Gender Differences in Pornography Consumption among Young Heterosexual Danish Adults,” Arch. Sex. Behav. 35 (2006): 577–85. Further citations in text. The survey instructions had emphasized that “materials containing men and women posing or acting naked such as seen in Playboy/Playgirl did not contain clear and explicit sexual acts,” thus were to be disregarded as pornography when completing the questionnaire. Ibid, 579.
38.8% were men and 6.9% were women; of those consuming it 1–2 times per week, 28.8% were men and 11.4% were women (Hald, 582). The men also consumed pornography significantly more alone than did women (48.2% vs. 8.7%), for instance during masturbation; correspondingly, men had been exposed at significantly younger age than had women (age 13.2 vs. 14.9), and those who consumed it were spending significantly more time per week doing this than women did (on average 80.8 minutes vs. 21.9 minutes) (p. 582).

In Norway, another neighboring country to Sweden, a national adult population survey from 2002 (age 15 to 91, mean 43.6) found that among those who reported being “weekly” pornography users, the men/female ratio was 9.1% vs. 0.6% for magazines, 4.0% vs. 0.1% for films, and 4.5% vs. 0.2% for “Internet pornography”; among “monthly” users the comparable ratios were 11.8% vs. 1.5% (magazines), 14.8% vs. 2.3% (films), and 5.3% vs. 0.3% (Internet). In Hong Kong, a study of the consumption patterns among young adults age 18–27 found gendered consumption patterns along previous lines, with males consuming the overwhelming part, though consumption on the whole was reportedly lower for both genders compared to the countries above. The consumption patterns and the conclusions drawn from the enumerated countries above also confer with a Canadian sample of 198 adult women surveyed at a fitness center in Ontario, where those who had consumed pornography mostly did it after a male partner had initiated it.

For readers less familiar with survey methodology, there is no reason to believe these self-reports on pornography consumption would be less reliable than other self-reported behaviors that are actually legally sanctioned (as opposed to cultural disapproval). The anonymous self-reported methodology has time and again been shown reliable in a number of criminology studies, in spite of the sensitive nature of what respondents report. Though it is necessary to review how questions have been worded along with considering other relevant issues pertaining to validity, this method per se does not appear to have any significant problems of reliability.

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103 Mohsen Janghorbani, Tai Hing Lam, and The Youth Sexuality Study Task Force, “Sexual Media Use by Young Adults in Hong Kong: Prevalence and Associated Factors,” Arch. Sex. Behav. 32, no. 6 (2003): 548 tbl.3. The study defined pornography as “any sexually explicit materials primarily developed or produced to arouse sexual interest or provide erotic pleasure.” Ibid. 546.
105 See, e.g., David Huizinga and Delbert S. Elliot, “Reassessing the Reliability and Validity of Self-Report Delinquency Measures,” J. Quantitative Crim. 2, no. 4 (1986): 294, 323–24 (stating that “these measures have acceptable levels of reliability and validity as judged by conventional social–science standards,” ibid., 294 (multiple citations omitted), and that, after discussing “instances” of lower validities among Black respondents in the United States, “self-report measures are among the most promising of our measures of criminal behavior and are, perhaps, the only measures capable of meeting the needs of both descriptive and etiological research”, ibid., 323–24); Josine Junger-Tas and Ineke Hean Marshall, “The Self-Report Methodology in Crime Research,” 25 Crime & Just. 291, 354 (1999) (stating that “[t]he self-report method has outgrown its childhood diseases; it is now a true-and-tried method of research.”); Terence P. Thornberry and Marvin D. Krohn, “The Self-Report Method for Measuring Delinquency and Crime,” in Measurement and Analysis of Crime and Justice, Criminal Justice 2000, vol. 4, ed. David Duffee (Washington, DC: Nat’l Inst. of Justice, 2000), 72 (“There are no fundamental challenges to the reliability of these data. . . . [S]elf-reported measures of delinquency are as reliable as, if not more reliable than, most social science measures.”).


**Cultural Legacy**

It is not surprising to find markedly different consumption patterns among male and females. Pornography has even by the pornographers themselves (i.e., those who produce and disseminate the materials, usually for gain) been emphasized as being a product geared for men, not women. As said about his publication *Playboy*, the now world-famous pornographer Hugh Hefner in the 1950s tellingly opined that “[i]f you are somebody’s sister, wife, or mother-in-law and picked us up by mistake, please pass us along to the man in your life and get back to the Ladies’ Home Companion.”

Such an explicit gender-asymmetry can also be seen in the ancient Greek etymological roots of the word pornography, where its connection to prostitution is further indicated: pornography, accordingly, is derived from the two words *graphos* (“writing, etching, or drawing”) and *pornē* (“whores” or “harlots”) respectively. In Ancient Greece, the *porneia* appears thus to have been a female slave kept inside institutionalized brothels that would not be let out, received no education, and was generally treated as dirt. Young boys were also held as sexual slaves to older men, and on Crete and other places in Greece systematic kidnapping of boys for this end appears to have been regularly occurring. However, the female *porneia* was distinguished from prostituted boys, who were released and granted access to the female brothels when having grown up; and the *porneia* were distinguished from married women, who were merely held in confinement (i.e., not in brothels proper) and kept uneducated; additionally, the *porneia* was distinguished from those prostituted women who were afforded freedom of movement and education; thus, the *porneia* was regarded as the lowest in social standing of them all. The socially assigned function of the *porneia* was apparently that of the quintessential sexual object.

Taken together then, the Greek root words in pornography suggest a graphic portrayal of the lives of the most subordinated class of prostituted women. Looking at current conditions of production in the next chapter suggests that pornography still corresponds with the ancient meaning of its root terms, including the connotations to prostitution. Given these etymologic meanings it is not surprising that even in the contemporary context of male dominance, where women are still typically in a socially secondary position vis-à-vis men (see 6–9 above), consumption of graphic sexual materials derived from a practice of sexual exploitation and dominance of so-

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111 In this dissertation, the terms “prostituted person” or “prostituted woman/man” are preferred, since they indicate that persons who are in prostitution are substantially placed there and kept there by acts of others, which the evidence indicates in the following chapter. (This definition was made first by Catharine A. MacKinnon.) As will be discussed further, most people in prostitution appear to be either pimped, or coerced by social forces that include poverty, racism, and sex inequality. While “prostituted person” is used roughly synonymously with “person in prostitution,” the former convey more clearly the said reality. By contrast, terms such as “sex workers” implies prostitution is a chosen form of work; and terms such as “prostitute” conveys that being in prostitution is a characteristic inherent to the person, rather than inherent in the coercive circumstances of her/his social situation as indicated by the term “prostituted person.”
cially subordinated women has not appealed to women at large. Moreover, taking into account that sexual acts performed on real persons in visual materials end up as masturbation materials overwhelmingly for male consumers, as shown above, available evidence supports a characterization of this industry as a form of mass prostitution through media.\textsuperscript{112} Indeed, studies of tricks (clients) of women in prostitution\textsuperscript{113} indicate that half, or more, admittedly see pornography as just another form of prostitution.\textsuperscript{114} Highlighting this association, 49% of a sample of 802 prostituted persons in nine countries, found across five continents, reported being used in pornography as well, confirming numbers from previous studies.\textsuperscript{115}

\textit{The Industry Perspective}

Unlike during the age of eighteenth century libertines such as Marquis de Sade, pornography is not marginalized today, nor is it solely an elite phenomenon anymore. Thus, the conditions of production discussed in this dissertation are not exceptional circumstances in our societies, but part and parcel of a huge industry related to a very large consumer base. For instance, an estimation in 2006 approximated that merely those incomplete revenues that were reported in a sample of sixteen countries totaled $97.06 billion—a sum larger than the combined revenues of top technology companies Microsoft, Google, Amazon, eBay, Yahoo!, Apple, Netflix and EarthLink.\textsuperscript{116} Not surprisingly, the American organization Adult Video News (AVN) mentions an annual increase of revenue from $75 million in 1985 (the period of the so-called porn wars) to $12 billion in 2005—a 160-fold increase.\textsuperscript{117} \textit{Time Magazine}'s movie critic and writer Richard Corliss estimated a lower number in 2005, suggesting that annual revenues from videos alone in the United States would be somewhere near $4 million.\textsuperscript{118} Previously in 2001, \textit{New York Times Magazine}'s Frank Rich had estimated that Americans spend “between $10 billion and $14 billion annually” when also considering “porn networks and pay-per-view movies on cable and satellite, Internet Web sites, in-room hotel movies, phone sex, sex toys and . . .

\textsuperscript{112}Dworkin and MacKinnon also pioneered conceptualizing pornography as a form of prostitution.

\textsuperscript{113}The word \textit{trick} is used to denote a purchaser of sex in this article. Other such commonly used words are johns, punters, buyers, clients, or sex predators. Trick is a word frequently used by prostituted women themselves for men who buy them. It also refers to the many ways these men “trick” them into performing more acts than what the men paid for, or cheating them by, e.g., refusing to pay after having sexually exploited them. See Melissa Farley, “‘Renting an Organ for ten Minutes’: What Tricks Tell Us about Prostitution, Pornography, and Trafficking,” in \textit{Pornography: Driving the Demand}, ed. Guinn and DiCaro, supra p. 27 n.78, at 147.


\textsuperscript{116}Jerry Ropelato, “Pornography Statistics 2007,” \textit{Top Ten Reviews} (2007), accessed June 26, 2014, archived at http://perma.cc/LSZF-D2M8. Among the 16 countries included in this estimation, 9 countries reportedly provided more accessible data. Among them were South Korea, Japan, United States, Australia, U.K., Italy, Canada, Philippines, and the Netherlands. In addition, 7 countries with incomplete data were also included: China, Taiwan, Germany, Finland, Czech Republic, Russia, and Brazil. Ibid.

\textsuperscript{117}Sun et al., “Male and Female Directors,” 312 (citing AVN).

magazines.”119 *Forbes*’s Dan Ackman alleged that Rich’s numbers were overinflated,120 although Ackman appears to conflate what people actually spend on pornography with what only the producers earn, not including distributors and rental stores, which would make his numbers a considerable underestimate.121

Although the availability of “free” pornography on the Internet has grown steadily in the new millennium, that situation has seemingly not undermined profits generally. According to *New York Magazine* journalist Benjamin Wallace, some entrepreneurs actually became richer by using “free” Internet materials to stimulate the demand and propensity to pay among an increasing pool of consumers, while others saw their business models becoming increasingly unprofitable in part because of the Internet.122 Similarly, researcher Gail Dines concluded in 2012 how this “fierce competition” led to weeding out laggards, ultimately consolidating the industry into a new leading group of “a few large firms” that were managed more professionally, harboring the ability to operate in multimarket segments.123 Thus is the familiar dynamic of global capitalism.124

Yet the pornography industry is not like many other legitimate capitalist businesses. In 1985 it was thoroughly documented by the U.S. Attorney General’s Commission on Pornography that pornography production and distribution in the United States were under control of organized crime.125 The commission found that organized crime in the pornography context was not necessarily the equivalent of “La Cosa Nostra,” though there were strong connections between them (see, e.g., Att’y General’s Comm., 295–96). The commission preferred rather to define organized crime here as “a large and organized enterprise engaged in criminal activity, with a continuity, a structure, and a defined membership, and that is likely to use other crimes and methods of corruption, such as extortion, assault, murder, or bribery, in the service of its primary criminal enterprise” (p. 293).126 Moreover, while

121 For instance, Ackman’s lower estimations were based on a revenue of $20 per sold movie, ibid., which does not seem to account for that one video unit in 2001 would have been rented out several times; his approximation appears thus being based on the number that producers charge distributors and rental operators rather than what the consumers actually spend on pornography. Cf. Corliss, “That Old Feeling” (suggesting Ackman was “mistaking grosses for what Hollywood used to call ‘rentals,’ the studios’ share of the gross ticket sales, which it splits with exhibitors”).
123 Gail Dines and Dana Bialer, “Comment: The Porn Industry Isn’t Dying; It’s in Rude Health,” *Guardian*, June 8, 2012, p. 36 (Lexis); But see Louis Theroux, “G2: Why Sex Isn’t Selling,” *Guardian*, June 6, 2012, p. 6 (Lexis), who focuses on those who have lost ground during the more competitive environment following the development of Internet, thus missing to note players who reaped benefits from these same conditions.
124 Cf. Wallerstein, “Class Conflict in World-Economy,” 119, who describes three subdivisions of bourgeoisie, where one consists of the new innovative entrepreneurs, another one still doing business adequately, and a third one who is “coasting” on previous accomplishments but “no longer performs” sufficiently. Thus, in moments of “economic contraction” under capitalism, the new entrepreneurs as well as those performing inadequately increase relatively to the middle category, Wallerstein’s account of economic contractions appears similar to the above accounts, supra notes 122–123 and accompanying text, of Internet’s effect on the bourgeoisie of pornography.
much pornography is made by organized criminal enterprises, some amount is also made in the context of war, or during genocide by soldiers for the purpose of propaganda, or to be kept as trophies.\textsuperscript{127} Additionally, there are numerous individual men such as “amateurs,” freelancers, boyfriends or other intimates, rapists, sex murderers, common pimps\textsuperscript{128} or tricks who make materials, often involving regularly prostituted women.\textsuperscript{129} Legitimate corporations have also become increasingly involved with pornography, particularly on the distribution end since the 1980s.\textsuperscript{130} Considering that much activity is illegal and unofficial, hence goes unreported, even the numbers indicating the size of the pornography industry above are likely to be understatements.

\begin{footnotesize}

\textsuperscript{128} See Harvey Schwartz, Jody Williams, and Melissa Farley, “Pimp Subjugation of Women by Mind Control,” in \textit{Prostitution and Trafficking in Nevada: Making the Connections}, ed. M. Farley (San Francisco: Prostitution Research & Education, 2007), 49–84, for an illuminating account of what pimping may be, based on three different cases where men pimped women into prostitution with various amounts and forms of coercion along a continuum—overt force on one end, ibid., 75–80, exploitation of people’s inequality and lack of equal alternatives due to racism, sexism, or social class on the other end. Ibid., 70–75.


\textsuperscript{130} See, e.g., Timothy Egan, “Erotica Inc.—A Special Report: Technology Sent Wall Street into Market for Pornography,” \textit{New York Times}, Oct. 23, 2000, A1 (discussing and documenting distribution); Gail Dines, \textit{Pornland: How Porn Has Hijacked Our Sexuality} (Boston: Beacon Press, 2010), 50 et seq. (discussing financial involvement from legitimate corporations); Cf. Richard C Morais, “Porn Goes Public: High Technology and High Finance are making the Smut Business Look Legitimate; How did this Happen?,” \textit{Forbes}, June 14, 1999 (concluding that “as pornography becomes more appallingly graphic, it is becoming more mainstream. Phone companies, cable companies, hotel chains and now investment bankers are all part of the act.”).
\end{footnotesize}
Materials, Definitions, Demand, and Supply

Key Definitions

In order to fully understand the evidence on the relationship between pornography, sex inequality, sexual exploitation and gender-based violence, a few of the most typical examples of how pornography is usually defined in social science research are first discussed. Typically, such definitions in research on consumption effects tend to proceed from the concept of “sexually explicit media.” An encyclopedia entry for social and behavioral sciences from 2001 thus defined pornography as “sexually explicit media that are primarily intended to sexually arouse the audience.”

A group of researchers in 2009 similarly defined pornography, with slight modification, as materials that are “primarily intended to sexually arouse the consumer and predominantly contains explicit sexual content.” While such definitions cast a wide though sufficiently well-defined net, the body of research includes an increased use of various sub-definitions to account for different exposure effects, and potentially moderating or mediating variables (e.g., 99–109, 115–118 below).

Canadian psychologist James V.P. Check advanced an influential three-pronged pornography definition in the 1980s that was adopted in Canadian law, in addition to influencing researchers and the policy community in the United States and elsewhere. In R. v. Wagner (1985), pornography (or, rather, “obscenity”) was thus legally defined according to Check’s three categories: “(a) sexually explicit with violence; (b) sexually explicit without violence, but dehumanizing or degrading; and (c) explicit erotica.” Only categories (a) and (b) were defined as “obscene”; thus, Canada’s obscenity law does “not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing.” (Note that this law is not consistent with how obscenity laws have traditionally been conceptualized.) Accordingly, sexually explicit dehumanizing and degrading materials have been conceived as such presentations that verbally abuse women (and/or abuse men) and present them as having animal characteristics were “[w]omen, particularly, are deprived of unique human character or identity and are depicted as sexual playthings, hysterically and instantly responsive to male sexual demands.” In short, “dehumanization” entails making humans more into objects, erasing their individual qualities in favor of them being perceived as sexual things that primarily exist for the pleasures of others.

Check tested his three-pronged definition with Ted Guloien in an exposure experiment over a couple of weeks, in part to see whether it could be applied as a classifi-
cation reference.\textsuperscript{138} Male subjects were sampled in Toronto, Ontario, of which 319 were nonstudents and 117 were college students—a total of 436, of which 115 were controls. (The purpose was in part to test various attitudinal changes after exposure that will be discussed elsewhere in this dissertation.) The experiment found that when the subjects made an evaluation and rating of the content of pornography videos, it “generally conformed quite well” to Check’s three-pronged definition (Check and Guloien, 168). The violent materials were consistently rated as least “educational, realistic, and affectionate,” and as most obscene, offensive, aggressive and degrading; accordingly, nonviolent but dehumanizing materials were rated in between the violent and the “erotica” category, while the latter was rated as most educational, least obscene, etc. (p. 169). While neither violent nor dehumanizing commercial materials have seemed to be difficult to identify or define for various groups of researchers, non-dehumanizing sexually explicit materials have at other times been more elusive than the above experiment might suggest. For instance, when Check, Guloien, and their associates attempted to find sexually explicit videos that did not belong to the first two categories in order to design that same exposure experiment, they eventually had to make edited excerpts because there were no feature-length videos that exclusively contained nonviolent sexually explicit materials that were not also dehumanizing (p. 163); that is, there was a lack of more “prosocially orient-ed forms of sexually explicit materials” (p. 161), or, in Wagner terms, a “positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality.”\textsuperscript{139}

However, as discussed extensively further on in chapter 2 on production harms, few women seem to participate in sexually explicit materials by genuine willingness—that is, without being influenced by coercive circumstances, or in the presence of other reasonable or acceptable alternatives. The distinction between dehumanizing materials and sexually explicit erotica has nonetheless been seen as important by some scholars and commentators, if only for hypothetical purposes. For instance in an early influential magazine article before Canada’s judicial adoption of Check’s typology, Gloria Steinem defined erotica as “a mutually pleasurable, sexual expression between people who have enough power to be there by positive choice.”\textsuperscript{140} Diana Russell similarly defined such hypothetical materials as “sexually suggestive or arousing material that is free of sexism, racism, and homophobia, and respectful of all the human beings and animals portrayed.”\textsuperscript{141} It seems symptomatic to the conditions of production, as well as those for whom the materials appear to be produced, that even though Russell referred to research that had controlled for the effects of erotica (as distinct from other pornography), she did not provide concrete examples of it more than mentioning a short “erotic movie depicting the peeling of an orange,” noting also that flowers or hills can “appear erotic,” and that “many people” regard Georgia O’Keeffe’s paintings “erotic” (Russell, 4). These materials do not seem to

\textsuperscript{138} See James V.P. Check and Ted H. Guloien, “Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica,” in Pornography: Research Advances, ed. Zillmann and Bryant, supra p. 3 n.14, at 159–84, for the entire series of studies. Further citations in text.

\textsuperscript{139} Wagner, [1985] CarswellAlta 35 ¶ 63. The U.S. Attorney General’s Commission in 1986 also thought that the category of materials “in which the participants appear to be fully willing participants occupying substantially equal roles in a setting devoid of actual or apparent violence or pain” was “quite small in terms of currently available materials,” but that there allegedly was “some, to be sure.” Final Report Att’y General’s Comm., ed. McManus, 43.


contain predominantly “explicit sexual content” intended to “arouse”—at least not in the same sense as the definitions of materials studied in more social science oriented paradigms. Additionally, Steinem mentioned films or photos were people were “really making love,” but did not provide examples here either (Steinem, 37). The fact that the erotica category has been particularly elusive should caution the reader against making unwarranted assumptions, especially in light of the documented realities of the conditions of pornography production and who consume it. Persons who initiate consumption of pornography are still predominantly male, not women (see 33–37 above), and sexual exploitation and sex inequality appear to be necessary preconditions to produce it (see chapter 2 on production harms). One should not necessarily rule out that there may exist such erotic materials that Russell and Steinem allude to above. Although even if so, there is little evidence that there exists either a supply or a demand for such materials. Certainly there is no multi-billion dollar worldwide industry in it.

Some American legislative attempts to define pornography more concretely as a violation of the civil rights to sex equality that are briefly outlined below, and analyzed further in chapter 10, share the basic conceptualization of Check’s three-pronged distinction though they include more particularities with regards to various aspects of dehumanization and violence. In 1985, Indianapolis, IL, among other local and state legislatures, advanced a definition originally drafted by legal scholar Catharine MacKinnon and writer Andrea Dworkin that defined pornography as a practice of sex discrimination (subordination based on sex), with requirements for certain additional elements and acts in order to be actionable apart from the four different civil causes of actions (criminal penalties were not included) necessary to use the law: (1) coercion into pornographic performance, (2) forcing pornography on someone in any place of employment, in education, in a home, or in any public place, (3) assault or physical attack directly caused by specific pornography, and (4) trafficking in pornography (production, sale, exhibition, or distribution of pornography, with certain exceptions for libraries). The definition of actionable materials itself read:

Pornography shall mean the graphic sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following: (1) Women are presented as sexual objects who enjoy pain or humiliation; or (2) women are presented as sexual objects who experience sexual pleasure in being raped; or (3) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or (4) women are presented being penetrated by objects or animals; or (5) women are presented in scenarios of degradation, injury, abuse, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; [or] (6) women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display. The use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section.

The Indianapolis definition was unusually specific when compared with definitions used in the social science literature. One important reason was that it intended

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142 See infra pp. 44–50 and accompanying text on the popularity of different categories of pornography (violent, aggressive, dehumanizing, or “erotic”).
144 Indianapolis, Ind. Code Ch. 16 § 16-3(q) (1984).
to only reach materials argued to be harmful according to existing evidence, hence averting legal charges of over-breath or vagueness. At least one experiment measuring its applicability has been made, in which law students were asked to apply it on pornography materials.\(^{145}\) In this experiment, the Indianapolis definition performed better than the existing U.S. legal definition of obscenity (the “Miller test”), as well as when compared to an alternative definition drafted by law professor Cass R. Sunstein.\(^{146}\) The Indianapolis definition was particularly easy to apply when its definition was qualified as covering materials “whose dissemination in context would tend to subordinate women.”\(^{147}\) That the definition requires such a finding was made clear in the legislative history when the law was passed.\(^{148}\)

The Indianapolis definition centered on subordination—a concept with similarities to Check’s dehumanization and degradation respectively. Presumably, subordination is a form of dehumanization or degradation. However, the processes of degradation or dehumanization are not always understood as the opposite to social equality, which the concept of subordination seems to do more clearly, particularly as part of an anti-discrimination law.\(^{149}\) Yet Check’s definition of non-dehumanizing materials as interpreted by the Wagner court assumed “equality” as a standard when defining it as “positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality.”\(^{150}\) In any event, conceptualizing the definition as part of a sex equality law, limited to the four specific concrete acts as causes of action (see above), was considered by Indianapolis to improve its likelihood of survival against constitutional challenges. The law would regulate materials that were argued to contribute to sex discrimination in the form of negative outcomes that “differentially” harmed women,\(^{151}\) such as gender-based violence, sexual harassment, stereotyping, and unequal treatment on basis of sex in a range of social contexts. As interpreted under the Fourteenth Amendment and other U.S. legal authorities, sex discrimination by definition violates equality rights.\(^{152}\) As we look more into the research on exposure effects from pornography, this dissertation will relate those findings to the various definitions above, including the broader as well as the narrower ones.

**Popular Categories**

The most comprehensive content analysis of what is generally popular among pornography consumers appears to have been done by Ana J. Bridges at the Department

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\(^{146}\) Id. at 1214–16. For more details, see also id. at 1208–13.

\(^{147}\) Id. at 1210.

\(^{148}\) Cf. *infra* pp. 301–308 (discussing the legislative history of the proposed Ordinance in Minneapolis that found that pornography was a key factor in maintaining women’s subordinate status, thus a social practice of sex discrimination).

\(^{149}\) Non-degradation or non-dehumanization would not necessarily be inconsistent with inequality. For instance, traditional gender-roles (e.g., unpaid home-making and child care) that substantively entail unequal economic opportunities for women relative to men would rarely be characterized as “dehumanizing” or “degrading,” although certainly referred to as “unequal” among non-traditionals. By contrast, the concept of anti-subordination by default implies that substantive equality is the preferred standard. Subordination can hence be regarded as implying a stronger standard of equality than dehumanization and degradation. (The distinction between “substantive” equality and “formal” equality is explained in detail, *infra* pp. 243–248.)


\(^{151}\) Indianapolis, Ind. Code Ch. 16 § 16-1(a) (2) (1984), invalidated in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

\(^{152}\) For further discussion of the history of this legislative attempt, see *infra* pp. 300–348.
of Psychology at University of Arkansas with associates at other universities, and published in *Violence Against Women* in 2010.\(^{153}\) Their study analyzed the best-selling and most rented sexually explicit videos in the United States by using a randomly sampled collection of 50 movies among a list of 275 titles from the top 30 monthly list published by the Adult Video News (AVN) (Bridges et al., 1070–71). The list was retrieved December 2004 to June 2005 (p. 1070). Due to the proven popularity of the materials, which consisted of 304 scenes in total, their analysis is most likely representative of what a substantial segment of consumers prefer. Ninety percent (89.8%) of all scenes in Bridges et al.'s sample contained aggression (pp. 1075, 1077). By contrast, kissing, laughing, embracing, caressing, or verbal compliments were only present in 9.9% of all scenes (p. 1077). The latter are termed “positive behaviors” by the authors, as they’re supposedly mutually pleasurable (p. 1077). Such scenes would be consistent with Check’s “erotica” category.\(^{154}\) The fact that the 9.9% scenes with “positive behaviors” also contained on average 4 aggressive behaviors entails that the aggression is further amplified in the materials though (p. 1077).

Physical aggression, as distinguished from verbal aggression, was present in 88.2% of all scenes, most commonly spanking, gagging, open hand slapping, hair pulling, and choking (p. 1075). Verbal aggression was present in 48.7% of all scenes, most commonly degrading and dehumanizing name calling such as “bitch” and “slut” (p. 1075). When aggressed against, 95.1% of targets responded with ostensibly pleasure or indifference (p. 1077; \(n = 3,206\)). Moreover, women responded significantly more so than men; conversely, compared with women the men were four times likelier to exhibit “displeasure” when aggressed against (p. 1077; 16% (men; \(n = 147\)) vs. 4.1% (women; \(n = 3,049\))). Individual experiments have shown how violent pornography that portrays the target as not having a negative reaction will produce more laboratory aggression against women and stronger attitudes supporting violence against women than violent materials that present victims as having a negative reaction.\(^{155}\) Attitudes supporting violence against women have been shown to significantly predict behavioral sexual aggression against women, including violence, in a number of studies, with a triangulation across different measurements and methodologies (e.g., self-reports, crime records, and controlled experiments).\(^{156}\) In this light, Bridges et al.’s content analysis indicates how damaging popular pornography may be in social reality. What appears most popular seems to be materials that produce the worse effects for women compared to less popular materials.

Among other notable acts that occurred with a high frequency in the highly popular movies in Bridges et al.’s sample were so-called ass-to-mouth (ATM) sequences where a woman was performing oral sex on a man directly after having been penetrated anally by the same man. The ATM-scenes occurred in as much as 41% (\(n =


\[^{154}\) For Check’s typology, see supra, notes 134–142 and accompanying text.


\[^{156}\) See studies and research discussed infra pp. 93–98. For a definition of triangulation, see infra notes 352–353, and accompanying text.
125) of all scenes (Bridges et al., 1074). As a vivid contrast, only one scene (0.3%) presented characters discussing risks of sexually transmitted diseases or pregnancy, and only 11% of all scenes presented sex with condoms (p. 1074). The fact that scenes presenting ATM sequences were eight times more likely to include physical aggression, and more than three times as likely to include verbal aggression than the average (pp. 1077–78) strengthens assumptions that ATM is an “inherently degrading practice” (p. 1080) in contemporary pornography. Not surprisingly, studies have accounted how “fans” in various online discussion forums expressed particular excitement about the elements of ATM in what apparently provides little additional sexual gratification to the men, apart from degradation and humiliation of their partner; for instance, feces ending up in, and around, women’s mouths during the act. 157 Many of these consumers’ pleasure appear to lie in the fact that they, as one researcher expressed it, can see “the real looks of disbelief, disgust, and distaste flash on the women’s faces when they realize just what they are going to have to put in their mouths.”158 In other words, pleasure is derived from the graphic presentation of someone else’s dehumanization, degradation, and humiliation.

Similarly attesting to the harmful nature of ATM scenes, together with verbal aggression ATM constituted the only two predictors out of nine controlled for whose predictions of physical aggression reached the level of statistical significance in all scenes of Bridges et al.’s popular sample (pp. 1078 & 1079 tbl.4). By contrast to these two, five of the nine predictors of verbal aggression controlled for reached statistical significance; the three strongest predictors among these five were ATM (p < .01), female-to-male oral sex (p < .05), and physical aggression (p < .05); when anyone of these three were present, the likelihood that scenes contained verbal aggression increased over three times compared to the average (pp. 1077–78 & tbl.3). By contrast, scenes with male-to-female oral sex where half as likely to contain verbal aggression, and scenes with vaginal penetration with penis were only one fifth as likely to contain verbal aggression compared to the average (pp. 1077 & 1078 tbl.3; p < .05).

The correlations of verbal aggression show that acts that are often interpreted as presenting female subordination and male supremacy (female-to-male oral sex), and female degradation (ATM) or physical aggression tend to be associated with thematically similar derogatory verbal aggression. As previously mentioned, the most common verbal aggression was gender-stereotypical name calling such as “bitch” or “slut” (p. 1075). By contrast, ambiguous or possibly counter-normative sexual practices with regards to female subordination, for example, male-to-female oral sex and vaginal penetration by penis, did significantly predict less verbal aggression than the former. Bridges et al.’s results also corroborate the validity of the Indianapolis and Check pornography definitions respectively (i.e., graphic sexually explicit subordination or violent and dehumanizing/degrading presentations, cf. 41–44 above), as the presentations that these two definitions defined as particularly harmful significantly predicted aggression against women or behaviors that otherwise endorsed it (e.g., verbal aggression) in their sample of popular pornography movies. If consumption can be found to cause or predict similar individual attitudes and behaviors—a question further to be analyzed in the chapter on consumption harms (pp. 89–138 below)—it would constitute a triangulation of different sources and measurements that


158 Dines, Pornland, 69.
further support the validity of both Check’s and the Indianapolis typologies/definitions as well as the associations between various gendered practices on the level of content analysis as found by Bridges et al.

If Bridges et al.’s findings of a high demand for degrading and abusive materials appear counterintuitive, one should consider that similar evidence have been found earlier, for instance in a 1994 study of the pornography categories consumed over the Internet among a very large worldwide sample of Internet users.\(^{159}\) The 1994 study, tellingly entitled “Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces, and Territories,” had downloaded images, animations, and text files from a number of popular Internet sites over four month, with researchers then tracking the activity of the use of these materials in a smaller representative subsample (Rimm, 1853–84). As the study was made before the systematic use of thumbnail pre-images (p. 1908), all files contained short marketing descriptions that were found to have reliability and validity as such by a panel of research assessors (see 1883–90). Users were therefore most likely fully aware of what type of pornography they would see when they downloaded particular items. The textual descriptions also facilitated automated computerized filters that classified hundreds of thousand files.

Among the total descriptive listings whose contents were surveyed in the Internet study, the smaller but representative sample of the larger pool consisted of 292,114 carefully categorized files that were tracked in terms of their download frequency among Internet users (p. 1854). It was found that among 48.4% of those files that were downloaded, as much as one-third contained child-pornography and two thirds contained “paraphilic” presentations (pp. 1891–92), the latter two thirds including ”sadomasochism (B&D/S&M), fisting, urophilia, coprophilia, foreign objects… bestiality, and incest.”\(^{160}\) The other 51.6% contained either so-called “hard-core” (37.9%) or “soft-core” (13.7%) presentations (p. 1892). The former category included “explicit sexual contact or penetration between two or more individuals, such as fellatio, vaginal intercourse, or anal penetration,” while the latter included “nude and semi-nude portraits emphasizing large breasts, genitalia, or famous models, but with no penetration or erect penis visible” (p. 1885). The study’s definition of hard-core materials is unclear as to whether it could include male aggression, though it reportedly included “women fighting with one another” (p. 1916). Nonetheless, the study corroborates Bridges et al.’s content analysis discussed above in the sense of showing how a very large proportion of the surveyed consumers actively seek abusive or degrading images, as opposed to nonviolent and non-dehumanizing materials, despite that the former’s prevalence was substantially smaller than the latter’s (p. 1891 tbl.5).

The substantial demand for abusive pornography found in the Internet study is also mirrored by the extensive availability of categories such as “torture pornography”

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\(^{160}\) Ibid., 1885. This definition of “paraphilia” was cited to American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 4th ed. (Wash., DC: Am. Psychiatric Assoc., 1994), 522–32. The survey study noted that “voyeurism”—also included in paraphilia, but omitted in the above quote—“did not account for a significant number of downloads and thus could be discarded without any notable effect.” Rimm, “Marketing Pornography,” 1885 n.68.
on the Internet found by other researchers, or the less frequent though still freely available “snuff” materials that present murder in a sexualized context. Another expression of this consumer-driven demand for more abusive materials was provided during the Los Angeles hearings of the 1985 U.S. Attorney General’s Commission on Pornography, where a man who professed to have participated in over one hundred pornography movies testified that producers, directors, and photographers, in order to provide the type of materials they had in mind, regularly forced women to have anal intercourse despite manifest resistance. Corroborating his account, another witness described how pornographers tortured women and young girls so they got permanent physical injuries, at the specific request of publishers for sadomasochistic materials with high commercial value (Att’y General’s Comm., 205–06). The photographs were sold in magazines nationally, and one such was purchased by the Commission in Washington D.C. (p. 206 & n799).

Another general content study to date builds on a sample from best seller lists of the two largest Australian pornography mail-order companies, and was authored by Alan McKee from Queensland University of Technology, School of Media, Entertainment, and Creative Arts. The article was published in The Journal of Sex Research in 2005, and made contrary conclusions to those made by Bridges et al.; McKee only defined 1.9% of the scenes in his sample as “violent” (McKee, 285). However, a number of restrictive criteria for defining pornography as violent or “aggressive” were made, one of them being that the aggression had to include acts that were met by a visibly negative reaction from the target (pp. 282–83). Indeed, Bridges et al. noted that their findings would indicate much less aggression in pornography would they have restricted their definition according to McKee’s criteria, with only 12.2% of the scenes as opposed to 89.8% then defined as aggressive (pp. 1079–80). McKee recognized that previous experimental research had found exposure effects from “positive-outcome rape” pornography (where the target initially resists and later expresses pleasure) being particularly notorious in causing more aggressive behavior among subjects when compared to “negative-outcome” materials (p. 282). Nevertheless, he adopted his restrictive definition of aggression as requiring a negative target reaction on the argument that practices such as “consensual sadomasochist or bondage and domination/discipline acts” are categorically different from “positive-outcome” rape pornography; according to McKee, the target in the former category never expresses displeasure about the violence before eventually being aroused by it (p. 282).

McKee seems to assume that because the target is usually presented as enjoying the sexual violence in sadomasochism, it would cause less aggression in consumers or cause less attitudes supporting violence compared to materials where the target initially resists. He does not assume that sadomasochism might rather desensitize viewers and inspire more aggression—a potentially more plausible assumption. Nu-

161 See 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), 197–98 (finding to torture-pornography the most frequent category in a sample of violent pornography among so-called news- groups on the Internet, noting further that “[i]t seems almost as though there are no limits to the acts of tyranny that can be presented in pictures belonging to this category”).

162 When searching for snuff pornography that presents authentically looking murders in a sexual context on the file-sharing network eMule in March 2007, four such movies were unfortunately easily found.


Numerous experimental studies have already shown how both expressly nonviolent and violent pornography significantly causes laboratory aggression and attitudes supporting violence against women—results that have proved reliable in meta-analyses that also included contradictory and otherwise relevant studies. In other words, not just “positive-outcome” rape pornography produce negative effects, but so does explicitly nonviolent pornography. The fact that sadomasochism may be no better in these respects is neglected by McKee in his attempt to legitimize his restrictive definition of aggression. The two most prominent meta-analysis of the experimental evidence from violent (and nonviolent) pornography show significant increases in laboratory aggression and attitudes supporting violence against women after exposure with homogenous averages. Homogenous averages in a statistical association suggest that there are no moderating categories that differ from the average statistical relationship, such as sadomasochism (cf. 92–93 below).

Another matter complicating the picture painted by McKee is that performers in pornography may be coerced behind the camera by threats or social circumstances to act as if the aggression against them is pleasurable or otherwise harmless, even when it objectively isn’t (cf. p. 55 et seq., on production harms). Studies with a more restrictive definition of aggression as McKee’s minimize this kind of aggression, and contribute to mask asymmetries of power by their neglect of off-camera coercion (cf. Bridges et al., p. 1079). Furthermore, McKee’s limited concept of aggression included several other restrictive qualifications that seem counterintuitive, considering how sexual violence have been documented and analyzed in the research literature. For instance, he regarded practices of sadomasochism as “obviously generic and consensual,” not to be counted as violent “even though they may include isolated [certain] moments which are, in the strictest sense, violent—for example, isolated slaps, shoves, poking, etc.” (McKee, 283). The only exception he offered to these acts were “if a sadomasochistic scene involves an act which is more violent than one would expect, to the point where it conceivably caused lasting injury—for example, a punch in the face or a cut that leads to bleeding” (p. 283). Not even popular perceptions of stranger rapes tend necessarily to include such brutal violence as punching against the head, or cutting someone so it causes “lasting injury.” No wonder the level of violence he found was exceptionally low.

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165 See infra pp. 99–109, 115–122, for complete citations to the experimental research studies and a discussion of their results. For an introduction to the experimental methodology in pornography research, including meta-analysis, see infra pp. 89–93.

166 One reasons for McKee’s assumption about exposure effects related to sadomasochism seems to be that he erroneously believe there “is general agreement among researchers that exposure to non-violent pornography, whether degrading or non-degrading, has no negative effects on consumers.” McKee, “Objectification in Videos in Australia,” 278. In support of this claim he only cites three sources of which none were published after 1993, and only one was published by a well-known scholar in the field (Donnerstein 1987). Ibid. By contrast, McKee presents other equally well-known scholars as the dissenting minority to his view (“but see Zillmann & Weaver, 1989, for an argument against this position,” ibid.) despite that most research to date suggests they represent the majority’s view. For instance, later influential meta-analyses made by Mike Allen and associates from 1995 and by Neil Malamuth and associates from 2010, as well as numerous other authorities on the subject, have persuasively shown that both nonviolent and violent pornography cause increased violence against women. See infra chapter 3 on consumption harms for citations and discussion of these sources.

Desensitization

The high popularity of aggression and degrading acts researchers such as Bridges et al. have found may appear surprising in comparison with McKee’s study, but not when considering other experimental research on pornography consumption. For example, Dolf Zillman and Jennings Bryant’s groundbreaking study on prolonged consumption published in 1986 is instructive: an experiment was made with two groups, together comprised of 80 students (mean age 22) and 80 nonstudents (mean age 35), of which one half were exposed to common nonviolent pornography for one hour each week over six weeks and the other half were exposed to control materials.\textsuperscript{168} Two weeks after the exposure period ended, both groups were given 15 minutes of privacy at a follow-up session where they, under the pretense of an alleged “equipment problem,” were encouraged to select and view any of six different videotapes said to belong to a “vintage collection” (Zillman and Bryant, 567–68). The six movies contained clear and accurate content descriptions on their spine and covers, informing subjects what they would show (p. 569). Unknown to the subjects, the videocassettes also transmitted a unique signal to an event recorder located in an adjacent room whenever it was played, thus unobtrusively tracking the time each movie was played (p. 568). When grouping pornography with violence (e.g., bondage, whipping, paddling and pinching) or bestiality as one category, common nonviolent pornography as a second category, and a “sexually innocent musical” or partial nudity and vulgar language as a third category (G-rated or R-rated), the main effects of six weeks exposure on subjects’ later viewing selection were in the expected direction statistically and “extremely strong” as such (p. 572; p < .001; pp. 568–69; on content).

More specifically, male nonstudents that were pre-exposed to common nonviolent pornography spend on average 13 minutes and 14 seconds compared to 1 minute and 42 seconds for their controls to view pornography with violence or bestiality, a mere 9 seconds compared to 3 minutes and 13 seconds for their controls to view common nonviolent pornography, and no more than 13 seconds compared to 3 minutes and 13 seconds for their controls to view G-rated or R-rated materials (p. 575 tbl.2; fractions converted to seconds). Furthermore, male students pre-exposed to common nonviolent pornography similarly spend on average 10 minutes and 28 seconds compared to 1 minute and 44 seconds for their controls to view violent or bestiality pornography, 9 seconds compared to 2 minutes and 30 seconds for their controls to view common nonviolent pornography, and 1 minute and 17 seconds compared to 5 minutes and 14 seconds for their controls to view G-rated or R-rated materials (p. 575 tbl.2). Female students and nonstudents that were pre-exposed to common nonviolent pornography also exhibited considerable interest to violent and bestiality materials compared to their controls in the experiment’s self-selection phase, as well as showing virtually no interest in common nonviolent materials (p. 575 tbl.2). However, their total viewing distribution was less polarized than the males’ distribution (pp. 573, 575 tbl.2). Zillman and Bryant’s findings were also corroborated by a naturalistic measure in the sense that managers of adult book and video stores had been interviewed about the consumption behaviors of their patrons (p. 576), reporting that many so-called repeat customers changed their preferences from “common sexual activities” to “uncommon and unusual sexual practices” (pp. 576–77). Repeated consumption of nonviolent sexually explicit materials thus appears to significantly increase demand for more violent and abusive materials, which

to a substantial extent may explain the high demand for and popularity of such materials found by Bridges et al. and others (see 44–50 above).

Though the proportion of violent materials on the market is of particular concern with the performers’ health in mind, one should not unduly overemphasize the harms of violent pornography over non-violent materials. Nonviolent materials have also been shown in a large number of experimental studies to cause significant negative consumption effects—in many cases similar levels of laboratory aggression against women and attitudes supporting violence against women as the violent materials causes (see 99–109, 115–122 below). Experiments have further corroborated similar negative effects caused by non-pornographic materials that presents sexist advertising, sexually suggestive R-rated movie scenes, and to a less extent nudity or semi-nudity (see 106–109). Other experiments further show that the category of materials producing the strongest of such effects are the dehumanizing and degrading sexually explicit materials rather than violent pornography per se, and in particular those materials presenting women as promiscuously and indiscriminately initiating sex with men (see 102–106). One experiment that measured the effects from different typical genres of pornography on attitudes supporting violence against women accordingly found that sexually explicit presentations of “nymphomania,” even in “the total absence of coercive or violent action,” caused one of “the strongest trivialization of rape overall” among research subjects. Such materials appeared to incite a psychological “target devaluation process” where men come to perceive women generally in stereotypically more negative terms, for example, as less worthy, “sluts,” or “bad women,” thus dehumanize women as legitimate targets for aggression. Similar effects have been found in laboratory aggression research, where male subjects exposed to pornography aggressed more against a female confederate who made promiscuous remarks than they did against a female confederate who made sexually inhibitory remarks.

“Objectification,” “Agency,” and Gay Male Materials

Detailed studies of consumption effect such as those mentioned briefly above suggest that violent pornography per se may not generally be the strongest cause of aggression compared to other more specific categories, popular perceptions notwithstanding. McKee’s study might seem to address some of these problems, as its title ostensibly communicates a concern with “objectification of women” (as distinguished from “aggression”) in Australian “mainstream pornographic videos.” His analysis, as will be shown below, is nonetheless fraught with a number of simplified assumptions directly in contradiction with a large body of research studies in psychology on pornography consumption effects. Accordingly, in McKee’s study one measurement of “objectification” is to count the number of times that men or women “initiated” sex in the movie, which is then “interpreted as an important marker of agency” (McKee, 280). Underlying this measurement is the theory that “[s]exual objects would not initiate sexual acts for their own pleasure” (p. 280). By this logic, any “character who first communicates desire to have sex . . . is the initiator” (p. 280). However, research in psychology has shown how pornography that presents women in promiscuous roles cause men to adopt attitudes supporting violence

169 Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 120.
170 Ibid., 112–121; see also infra pp. 102–106 for a discussion of these experiments.
against women, for instance branding women as more deserving of aggression, which in turn is documented to lead to increased aggressive behavior against women.\(^{173}\) McKee’s assumption that women who are presented as “initiating sex” by itself would counter the negative aggressive effects from sexual objectification therefore contradicts established findings. Sexual “agency” in pornography as defined by McKee (p. 280) does not counter objectification; rather, it produces more sexual aggression.

In another similar instance, McKee argues that “[c]ounting orgasms provides a rough estimate of whose pleasure was presented most important in each scene. If a character were presented as a sexual object, his sexual pleasure would not be important” (p. 280). Pornography movies that present women as insatiable nymphomaniacs are likely also to present several instances of female orgasms which, consistent with previous studies, suggest that women are promiscuous sexual objects constantly available for sex with men because they enjoy it. Such orgasmic presentations feed on stereotypical “whore” vs. “madonna” schemata that consumers have been found to relate to when trivializing sexual aggression against women, and when increasing their aggression in laboratory experiments.\(^{174}\) Moreover, McKee previously disregarded sadomasochism as a violent category, but here he implies it can be counter-objectifying when including female orgasms. By contrast under the Indianapolis definition, female orgasms in such a context suggest “explicit subordination” of women because “women are presented as sexual objects who enjoy pain or humiliation.”\(^{175}\) Other ways that McKee uses to measure objectification is to count the number of times a performer were “given names or remained as nameless bodies having sex in these videos” (p. 281). However, the fact that a woman is given a name per se does not mean she is less objectified. The research made on various types of pornography discussed above suggested that particular names are likely to strengthen the “target devaluation process” that dehumanizes women and legitimize sexual aggression; indeed, Bridges et al. (p. 1078) found that naming someone “slut” or “bitch,” which they defined as a form of verbal aggression, constituted the only type of predictor together with ass-to-mouth (ATM) sequences that significantly predicted more physical aggression in the movies’ themselves.

Other ways that McKee measures objectification with is to note what particular character’s “point of view the video was presented” from (McKee, 281). However, if the sexually explicit movie is made from the perspective of a nymphomaniac, as in excerpts from the movie *Lady on the Bus* that were found to cause among the strongest trivialization of rape compared to other pornography categories,\(^ {176}\) it likely causes just as negative effects or worse than movies that presents sexual encounters from a man’s perspective. Likewise, McKee recognizes that measuring the time spent “talking to other characters,” “looking” and “talking at the camera” respectively, are measurements that “ignores . . . all of the details that mediate the ways in which viewers interpret audiovisual images in the real world” (McKee, 281). Precisely because of such reasons, it appears incomprehensible why he chooses them as instances that are supposed to indicate counter-objectification. A presentation of an exaggeratedly sexualized woman who says straight into the camera “look at me, I’m

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173 See Zillmann and Weaver, “Pornography & Men’s Callousness,” 112–121; Leonard and Taylor, “Pornography, Permissive and Nonpermissive Cues,” 291–93, 297–99; see also infra pp. 102–106 for citations to these experiments and others and discussion of their results.

174 See supra note 173.

175 Indianapolis, Ind. Code Ch. 16 § 16-3(q) (1984), invalidated in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

176 See Zillmann and Weaver, “Pornography & Men’s Callousness,” 115.
horny!” will most likely be objectifying, unless the context obviously suggests otherwise. McKee’s argument that time talking and looking are two measures with high reliability, because they “can be quantified, even at the expense of accuracy in understanding how images might actually be interpreted” (p. 281), provides little comfort.

In the case of gay male pornography, there exist less systematic quantitative content studies. However, recent studies have analyzed the prevalence of unsafe sex practices in it. For instance, a study published in 2014 surveyed 302 Internet videos that were randomly sampled at five large free websites regarded as fairly representative due to their hub-function for other sites, high traffic, and broad diversity of materials. Potentially high-risk sexual behaviors was found to be frequent; unprotected anal intercourse was presented in 36% of videos, “rimming” (oral-anal contact) in 17%, ejaculation into mouth in 8%, “ejaculation in/on or rubbed into the anus” in 7%, and literally all (99.5%) oral sex was unprotected (Downing Jr. et al., 814–15). Consistent with previous research, “no evidence” of attempts to communicate a promotion of safe sex or warn against unsafe conduct was found (p. 819). Although violence was reportedly not particularly prevalent by the measurements deployed in this study, for example, bondage and sadomasochism (BDSM) only occurring in 10% of videos (p. 815 & n.1), other scholars have provided qualitative accounts suggesting a high popularity of violence and domination in gay male pornography, including sexual torture, BDSM, sexualization of racial hierarchies with white men as dominant and other ethnicities as subordinated, and systematic references to subordinate males in feminized terms. Such gay materials support a social constructivist view of sexuality that recognizes how gender stereotypes are not necessarily attached to biological genders.

The documented demand for abusive and/or unsafe heterosexual and gay pornography above suggests serious concerns about production-related harms. There may be a significant market incentive to coerce women, children, and also adult men who are vulnerable to sexual exploitation in order to produce such materials. If some populations can be made to accept sexual violence and other dangerous and unwanted acts, it would increase the profits and popularity of the pornographers. Thus, when studying the conditions of production in the chapter 2 (pp. 55–89) it will also be of importance to see whether there is corroboration (triangulation) between the findings on the production harms and the findings above from contemporary content analysis.

Conclusions

This chapter has shown that in industrialized countries, pornography is predominantly consumed by men in solitude, of whom a majority of young adults seem to regularly use it each month to varying degrees (some occasionally, others more or less every day). By contrast, women seem rarely to use it, but when they do it is mostly on the initiative of, and in company of others, such as male partners or friends. The cultural legacy of pornography also suggests that it has largely been a male preroga-

179 Kendall, Gay Male Pornography, 56–68.
tive, which according to the empirical evidence has not changed since its democrati-

cation through modern mass media. The pornography industry has previously been
documented to be under the control of organized crime, though legitimate corpo-

tions are increasingly involved since the 1980s, primarily in its distribution. Report-
ed revenues have been large compared to other significant business sectors, though
exact figures are disputed. More recent evidence also suggests that the Internet has
increased profits by making advertising easier, thus attracting new customers that
were previously unavailable or less inclined to spend money on pornography. While
some business actors benefitted substantially from these new conditions, others were
taken by surprise and did not adapt effectively, thus saw declining profits.

In the consumption effects research and in legal challenges to gender-based vio-
lence, pornography materials have been largely categorized according to violent, de-
humanizing, and erotic (non-dehumanizing) dimensions. The empirical evidence
shows virtually no popular demand for “erotic” non-dehumanizing materials, by
contrast to violent and dehumanizing presentations. Research also shows that con-
sumers typically become desensitized after consuming common nonviolent materi-
als, hence look for more extreme materials to sustain arousal, which partly explains
the high demand relatively for presentations such as “gang-rape,” ass-to-mouth sex,
multiple entries, and verbal aggression against women, as well as child pornography.
Some misconceptions exist in media content research about presentations of female
arousal and “agency” that have not accounted for experimental psychological re-
search on gender-based violence. The latter shows, contrary to some popular percep-
tions, that pornography presentations and other cues implying female promiscuity,
including purposive female initiation of sex without aggressive elements, cause
some of the strongest attitudes supporting violence against women and increase male
laboratory aggression against females. Less research of gay male pornography ex-
ists. Some sources nonetheless show a substantial proportion of high-risk unsafe sex,
while others imply violent, dehumanizing, and degrading materials that mimic het-
erosexual materials’ dynamics of dominance and subordination.
Inquiring into the conditions of production should assist an assessment of whether or not the practice of pornography has departed from its place in a gender-based system of social dominance, as implied by its etymological roots discussed in the previous chapter. The forms of pornography production have changed over time, as have prostitution generally. However, as far as the research questions concern preconditions for entering the sex industry, the power-imbalance while there, and the treatment of prostituted persons, more recent social evidence discussed below does not suggest any significant difference from the situation observed in the 1980s or earlier. Rather, they provide it with depth and validation. Thus, many early studies are still highly relevant, particularly when considering the quality, resources, commitment, and meticulous methods used then when compared to many more recent studies. In light of further detailed accounts below, which commonly describe abusive conditions in the sex industry and a huge power imbalance between those who are prostituted for pornography and the pornographers who procure them, a prior question is how persons exactly end up being prostituted for pornography. Simply the fact that there exists a demand for pornography does not necessarily mean that the conditions of production must be abusive. As indicated previously though, pornography seems to be related to social, cultural, economic, and political inequality. Hence, looking first at the preconditions for entering the pornography industry should shed more light on why there seem to be a so many problems of abuse related to its production.

Production and its Preconditions

As mentioned briefly in the previous chapter, probably half or more among populations of tricks seem to regard pornography as an arm of prostitution. As a corroborating mirror, 49% of a sample of 854 prostituted persons in nine countries also reported having been used in pornography (a proportion similar to previous studies). In the previously most thorough public investigation of the production conditions in the pornography industry—an investigation also subject to orchestrated media campaigns to discredit its findings (see 349–351 below)—the U.S. Attorney General’s Commission and its 1985 Final Report devoted a whole chapter on the use of commercial “performers.” Numerous interviews were conducted, as well as systematic readings on the subject from such varying quarters as the industry’s own publica-

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180 See supra notes 107–115 and accompanying text describing the etymology of the word pornography.
181 See, e.g., Farley, Bindel and Golding, Men Who Buy Sex, supra chap. 1, n. 114, at 21 (among 103 tricks that were interviewed, 60% reported that “to some extent they classified the women in pornography as a prostitute”); Durchslag and Goswami, Interviews With Chicago Men, supra chap. 1, n. 114, at 14 (among 113 tricks that were interviewed, 49% reportedly “thought of women in pornography as prostitutes”).
tions along with interviews with performers and others in pornography or popular magazines. Similarly, numerous testimonies in public hearings by producers, performers, and law enforcement personnel were systematically collected. Conflicting statements about the industry were noted, such as when one performer who two years earlier had “declared” before a Senate subcommittee the “myth” of “unhappy childhoods” later reported to the Commission of early sexual abuse along with “many other models.” The different sources at hand were analyzed, including the contradictory accounts; yet on the whole the commission concluded that the personal backgrounds among pornography performers were similar with those in other forms of prostitution, who had been studied by other researchers (e.g., Att’y General’s Comm., 859n983). This particular conclusion is consistent with the associations between pornography and prostitution alluded to by tricks and the fact that many prostituted persons report having participated in pornography. Accordingly, the Attorney General’s report found that it was “generally true” of people used as “performers” in pornography (as is generally true in prostitution as well, more below):

(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. (Att’y General’s Comm., 888)

The Commission further noted that while hypothetically there could be exceptions to all their findings that “an extremely thorough investigation” might reveal, tellingly “the industry itself, which of course knows the full truth of the matter,” had exhibited “little interest in sharing that knowledge” with the Commission (p. 889).

Considering the evidence of violence and abuse in the industry (pp. 63–72 below), women do not seem to have a genuine “choice” of subjecting themselves to these realities. That is not to say that some of them do not intentionally decide to enter the sex industry. Yet other real or acceptable alternatives may be severely lacking or limited. As the general preconditions and circumstances found in the larger population of prostituted persons discussed below mirror those of pornography performers found by this Commission, there might be further reasons why “extremely thorough” inquiries showing otherwise were absent. Not surprisingly, a more recent online survey published in 2011 that compared female “adult film performers” with a demographically matched female control group from California corroborates the Commission’s conclusions (performers were contacted via American industry-related databases or Internet websites for those seeking “adult film jobs”): during childhood, 21% of performers reported legal removal to foster care compared to 4% among controls, 37% reported “forced sex” compared to 13% among controls, and 24% reported living in a household on welfare compared to 12% among controls—conditions also mirrored the previous year, where 50% of the adult performers reported failing to meet basic living needs compared with 36% among controls (p. < .01).  

186 See supra notes 181–182 and accompanying text.
187 Corita R. Grudzen et al., “Comparison of the Mental Health of Female Adult Film Performers and Other Young Women in California,” Psychiatric Services 62, no. 6 (2011): 641 tbl.1 & 642 (p < .01). The authors suggest potential underreporting of difficult conditions due to the format of the online survey,
Poverty
The evidence on prostitution in general shows that it is often characterized by excessive inequalities, which is one reason it may be said to be intrinsically exploitative. This inference is evident when looking at the typical reasons among prostituted persons for entry into the sex trade. Extreme poverty is the most frequently cited reason generally in a diversity of global economic regions, from North American to Scandinavian welfare states to industrializing or rural developing regions. The same reasons are cited among persons prostituted in pornography; accordingly, the U.S. Attorney General’s Commission (p. 859) found that what “chiefly” motivated entry among performers into the pornography industry was “financial need.” A survivor in the 1970s tellingly described the economic desperation or misery that made some women enter pornography model agencies; for example, having a kid in a hospital, being an illegal alien lacking green cards, or simply not earning enough at regular (low-status) jobs. Without other realistic means for income, similar economic hardships seem to force many people to stay in prostitution, including in the pornography industry.

Even in Sweden, generally regarded as a social democratic welfare state, strapped economic conditions and other bureaucratic obstacles nonetheless existed in prostitution that made it difficult for people to escape it in 1995. Perhaps not surprisingly, a forty-five-year-old prostituted woman interviewed by a Swedish government inquiry, who even claimed she was in a better position than other prostituted people by
being able to choose her customers carefully, nonetheless concluded that most of all she wanted to leave prostitution but could not.\textsuperscript{190} Symptomatically, she also had a prior history of childhood neglect, institutional foster care at age 16, and other kinds of problems in adolescence common among prostituted persons (\textit{see} 59–63 below). Apart from a couple of years of regular work or homemaking, she had been prostituted for 25 years, primarily on the streets (SOU 1995:15 pp. 73–75). She explained her situation and feelings further, shedding some light on the difficulties of leaving prostitution despite her strong wish to leave the “life”:

The problem is that I cannot enter schools, courses, or work-places. I have no papers and I cannot account for what I have done during all these years. . . . It is too late for me now to change my life. Nonetheless, I am afraid to get stuck in prostitution. I cannot imagine going around here until age 50–60. For me, it is now burdensome and difficult to walk the streets. . . . Everyone watches me. They know what I am doing and what I am good for. I all the more seldom walk around during daylight. (pp. 73–75)

This government inquiry also revealed many voids in the social safety net in Sweden that might otherwise have supported some prostituted persons. For example, prostituted women with mental disorders were frequently encountered by outreach workers. At such times the inquiry had found that it was “very difficult to get these women taken care of. This holds especially if the women are drug abusers. Neither the psychiatric care, nor drug addiction programs, seems then to want to take responsibility for them” (p. 109).

Most persons who try to leave prostitution are not only poor, but often lack “rudimentary” job skills that could help them support themselves, as well as frequently lacking social skills required outside the world of prostitution.\textsuperscript{191} Such a situation makes it even more difficult for prostituted persons to escape prostitution and be re-integrated into society. In effect, they get stuck in coercive circumstances from which they cannot escape. Numerous bureaucratic obstacles and barriers similar to those mentioned by the Swedish woman above further contributes to coercing prostituted people to accept physical acts they do not want, and accept a situation that they cannot leave. Just to mention one instance of this problem in Nevada, where prostitution is legal in several counties,\textsuperscript{192} women’s shelters do not admit women with children, pets, HIV, communicable diseases, or criminal records; women who have not been drug-free for a specified time; or women recently released from prison, in effect creating barriers to escape for many prostituted women.\textsuperscript{193} These are precisely the kinds of situations that afflict many women in prostitution. Various policies and situations create other insurmountable barriers. Just to get a job as a housekeeper in Las Vegas, Nevada, at a large hotel and casino, starting at $9 per hour, can require an

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\textsuperscript{192} Under a Nevada statute, \textit{Nev. Rev. Stat.} § 244.345 (2011), counties with populations under 700,000 can enable third parties, through a county licensing board process, to profit from businesses that use “natural persons” (as long as they are not minors) for the purpose of prostitution, though unlicensed prostitution is still regarded as a misdemeanor. According to information published in 2007, third parties in prostitution would be able to operate consistent with this law in ten counties in Nevada. \textit{See} Melissa Farley, “Legal Appendix A: Legal Status of Prostitution by Each of Nevada’s 17 Counties in 2007,” in \textit{Prostitution in Nevada}, ed. Farley, \textit{supra} chap. 1, n. 128, at 213.

immense amount of documentation, payment for required personal expenses, and other things difficult for people who just escaped, or are escaping, prostitution to provide in advance. The coercive circumstances of prostitution are reflected in survey responses in nine countries with prostituted persons where 89% of 785 respondents explicitly stated they wanted to escape prostitution. Other studies have found similar percentages who want to escape prostitution. Such results document sexual slavery rather than a “job,” and might likely be recognized as such under the international Slavery Convention. That is, when considering that tricks and pimps who buy or sell persons for sex in these nine countries where 89% of the prostituted persons explicitly say they want to leave but apparently cannot, those prostituted persons seem to be in a “status or condition . . . over whom any or all of the powers attaching to the right of ownership are exercised” according to that Convention.

Preconditions of Entry into the Sex Industry

Apart from the economic misery and desperation that propels many into prostitution, hence into the sex industry more generally, the majority of prostituted people, who become the performers in pornography, have been subjected to sexual (and physical) child abuse; according to numerous international studies, roughly 60–90% (depending on the study) were subjected to such treatment. As a general population com-

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194 Ibid., 163–66.
196 See, e.g., MacKinnon, Sex Equality, supra p. 6 n.23, at 1250 (citing Elizabeth Fry Society of Toronto, Streetwork Outreach with Adult Female Prostitutes: Final Report (1987), 12–13) (finding approximately 90% of women drawn from street prostitution indicated they wanted to escape); cf. Melissa Farley, "Legal Brothel Prostitution in Nevada," in Prostitution in Nevada, ed. Farley, 23–24, 29 (81% of the 45 respondents in legal brothels said they wished to leave prostitution during interviews, while many were subject to surveillance by listening devices and responded in whispers as they were under strong pressures not to reveal information that “reflected badly” on the brothels to outsiders).
198 See, e.g., Farley et al., "Nine Countries," 43 (finding that 59% of 854 prostituted persons affirmed that she or he “[a]s a child, was hit or beaten by caregiver until injured or bruised,” and 63% affirmed they were “sexually abused as a child.”); Chris Bagley and Loretta Young, “Juvenile Prostitution and Child Sexual Abuse: A Controlled Study,” Canadian J. Community Mental Health 6 (1987): 12–14 tbl.2 (finding 73% of 45 female prostitution survivors were subjected to child sexual abuse, compared to 28% of 36 women among a community control group of similar age, and that 100% of the prostituted survivors had been subjected to either sexual or physical abuse, compared to only 35% of the controls); Silbert and Pines, "Entrance Into Prostitution," 479 (finding 60% of 200 current and former prostituted juvenile or adult women reported childhood sexual abuse from ages three to sixteen of which 70% involved repeated abuse by the same persons, and 62% of the 200 persons reported physical abuse); Jennifer James and Jane Meyerding, “Early Sexual Experience as a Factor in Prostitution,” Arch. Sexual Behavior 7 (1977): 33 & 35 (asking a sample of 136 prostituted women in a “large Western city” in the United States whether “prior to your first intercourse, did any older person (more than ten years older) attempt sexual play or intercourse with you?”) and finding 52% responded affirmatively). In-depth studies of survivors show higher frequencies of abuse. See, e.g., Evelina Giobbe, "Confronting the Liberal Lies About Prostitution," in Living With Contradictions, ed. Alison M. Jaggar (Boulder, CO; Westview Press, 1994), 123 (referring to organization WHISPER’s survivor interviews in Minneapolis, where 90% reported battery and 74% reported sexual abuse between age 3 to 14); Hunter, “Prostitution Is Abuse,” supra chap. 1, n. 129, at 98–99 (finding 85% of 123 prostitution survivors reported child incest, 90% physical abuse, and 98% emotional abuse). Likewise, the Mary Magdalene Project in Reseda, California, reported in 1985 that 80% of the prostituted women it worked with were “sexually abused” during childhood, and Genesis House in Chicago reported “abuse” for 94%. Giobbe, “Liberal Lies,” 126 n.10; cf. Ines Vanwesenbeeck, Prostitutes' Well-being and Risk (Amsterdam Neth.: VU Uitgeverij, 1994), 21–24 (summarizing early studies on childhood victimization as a predictor for entry into prostitution, with
parison, the prevalence of child sexual abuse among females in the United States is reportedly three times lower than it is among prostituted populations (roughly between 20% to 30%, depending on the study). As a further comparison, a Canadian study surveying thirty-three female prostitution survivors and thirty-six women in a community control group of similar age found that the childhood sexual abuse experienced by the prostitution survivors began at a significantly earlier age, occurred much more frequently, occurred over much longer periods, involved many more abusers, and included a “dramatic” difference that entailed a greater range of and more serious assaults for the prostituted persons than the abuse experienced by the community control group.200

Prostituted persons encompass the population from which those who are used in pornography are typically drawn (see, e.g., 55–57 above). As expected, the recent online survey among female pornography performers also found about a three-time higher frequency (37% to 13%) of “forced sex” during childhood than among female controls from California, but since it restricted childhood sexual abuse to “forced sex,” their data is not comparable to other studies on prostituted populations.201 Moreover, many prostituted persons have been runaways during their childhood or adolescence.202 Not surprisingly then, homelessness was reported either currently or in the past among 75% of 761 prostituted persons (including adults) in nine countries.203 Similarly, 21% of the pornography performers surveyed online reported legal removal to foster care during childhood compared to only 4% among controls (Grudzen et al., 642), which is consistent with the evidence showing that many prostituted persons have been runaways and a majority have experienced homelessness. As was evident among 200 juvenile and adult prostituted women in San Francisco who were sampled through informal recruitment and advertising in order to avoid “arrestable” or “service oriented” respondents,204 they reported an “almost total lack of positive social supports, and . . . an extremely negative self-concept and a depressed emotional state” at the time of entering prostitution (Silbert and Pines, 486).

some studies indicating lower percentages than the above). Vanwesenbeeck’s summary is partly superseded by more recent studies and a refined general survey-methodology in areas of sexual abuse that has developed to avoid underreporting. See, e.g., Kilpatrick, et al., Drug-facilitated, Incapacitated, & Forcible Rape, supra p. 5 n.18, at 24–25 (stressing the importance of using “behaviorally specific terms . . . [that] do not require women to label an event as ‘rape’ in order to qualify an event as a rape incident,” at 25); Lundgren et al., Captured Queen, supra p. 6 n.20, at 15–16 (“The questions about violence put to women by the researcher must penetrate behind any possible reinterpretations or minimizing of the violence if we are to attain knowledge of women’s experiences”).


200 Bagley and Young, “Juvenile Prostitution & Child Abuse,” 14–16 & tbl.3.

201 Grudzen et al., “Female Adult Film Performers,” 641 tbl.1 & 642 (p < .01). Further citations in text.

202 See, e.g., Silbert and Pines, “Entrance into Prostitution,” 485 (reporting over half of 200 juvenile and adult, current and former, prostituted women in San Francisco were runaways when entering prostitution; over two-thirds of the current prostituted women were runaways, and 96% of prostituted juveniles were runaways); Bagley and Young, “Juvenile Prostitution & Child Abuse,” 14 (three-quarters of 45 prostitution survivors left homes “iven by strife, drunkenness, and abuse” by age 16, compared to none of 36 community control women of similar age; sexual abuse was the most frequent reason given for leaving home among prostitution survivors).

203 Farley et al., “Nine Countries,” 43.

The “primary picture” among them was thus one of vulnerable runaway juveniles being “solicited for prostitution” and exploited by pimps “because they have no other means of support due to their young age, lack of education, and lack of the necessary street sense to survive alone” (pp. 488–89). Child abuse and neglect thus affect spirits and life chances negatively; consequently, without education, job training, and resources to survive, they are easy prey for being sexually exploited by pimps and tricks.

Those who were abused as children also habitually report that sexual abuse affected their entry into prostitution. In the San Francisco sample of 200 prostituted juvenile and adult women, 70% of those whom were sexually abused as children explicitly reported that it affected their entry into prostitution, while a greater number strongly indicated so in open-ended responses. These findings are similar with findings from other populations of prostituted persons. Hence, in most situations of prostitution, which includes prostitution for pornography, coercive circumstances exist that push women into the sex industry, such as subjection to sexual abuse as children, poverty, and homelessness. Not unexpectedly, a low age of entry in prostitution is generally corroborated internationally. For instance, 47% in the sample of 854 prostituted persons from nine countries found across five continents had reported that they entered under age 18 (n = 751). In the San Francisco sample, 78% of 200 entered under 18, and although “average” entry age for the whole sample was 16, a majority of 62% had started before 16, and “a number were under 9, 10, 11 and 12 when they started prostitution.” Subsequently, in Sweden the number of children being sexually exploited still remains “significant” according to a 2004 government report and more recent research findings in Sweden among youth over 18 who have been prostituted in and around Gothenburg also confirm high correlations to prior childhood (sexual) abuse, neglect, and homelessness. Such findings were also corroborated in other recent nationally representative youth-surveys in

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206 For instance, the Swedish government inquiry in 1995 specifically mentioned that the San Francisco-study’s high frequency of sexual abuse in childhood and its subsequent influence in the girls’/women’s entry into prostitution were similar to findings from interviews made by clinical- and outreach workers in Gothenburg, the second largest city in Sweden. SOU 1995:15, supra note 190, at 104. In Des Moines, Iowa, researchers alike found that in a sample of 40 adolescent runaways and 95 adult homeless women, “early sexual abuse increases the probability of involvement in prostitution irrespective of any influence exerted through other variables.” Ronald L. Simons and Les B. Whitbeck, “Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women,” *J. Fam. Issues* 12 (1991): 361. Likewise, among the mentioned sample of 45 female prostitution survivors in Canada, a majority also reported that child sexual abuse significantly influenced their entry into prostitution. See Bagley and Young, “Juvenile Prostitution & Child Abuse,” 17 tbl.4 (reporting that among forty-five female prostitution survivors, 40% reported that child sexual abuse “definitely” influenced their entry into prostitution, 6.7% reported it “probably” did, and 15.5% reported it “perhaps” did or, “not sure”).

207 Farley et al., “Nine Countries,” 40. For countries included and related information, see infra note 249.

208 Silbert and Pines, “Child Abuse as Antecedent,” 410. Consistently, 70% of respondents were under age 21 at the interview, almost 60% were 16 or below, and many were age 10, 11, 12, and 13. Mimi H. Silbert and Ayala M. Pines, “Occupational Hazards of Street Prostitutes,” *Crim. Just. Behav.* 8, no. 4 (1981): 396; Silbert and Pines, “Child Abuse as Antecedent,” 408. The oldest respondent in the sample was 46, the youngest 10 (mean 22). Ibid.

209 SOU 2004:71 Sexuell exploatering av barn i Sverige, del 1 [Sexual Exploitation of Children in Sweden, part 1] [government report series] pp. 15–16 (Swed.).

Sweden, including particular surveys on LGBT-populations and adding socioeconomic factors and foreign nationality as predictors to prostitution.\footnote{211 Gisela Priebe and Carl-Göran Svedin, “Unga, sex och internet” [Youth, Sex, and Internet], in Se mig: Unga om sex och internet, ed. Ungdomsstyrelsen [Nat'l Board for Youth Affairs] (Stockholm: Ungdomsstyrelsen, 2009), 74–75, 110, 112, 135, archived at http://perma.cc/Y37H-VFVJ; Ungdomsstyrelsen, ”Erfarenheter av sexuell exponering och sex mot ersättning ” [Experience of Sexual Exposure and Sex for Remuneration], in Ungdomsstyrelsen, Se mig, 156, 158, 161–69.}

Furthermore, social discrimination in the form of sexism and racism is linked to entrance into prostitution. For instance, the Swedish National Council for Crime Prevention (BRÅ) found that poverty and discrimination are two key structural factors for “recruitment” into sex trafficking to Sweden, Finland, and Estonia, with many women and girls belonging to minority groups such as the Baltic Russian-speaking minority and the Roma people in Eastern Europe, and the “majority” coming from “the lowest social strata.”\footnote{212 Brotnsförebyggande rådet (BRÅ) [Swedish Nat'l Council for Crime Prevention], The Organisation of Human Trafficking: A Study of Criminal Involvement in Sexual Exploitation in Sweden, Finland, and Estonia (Stockholm: BRÅ, 2008), 8 (second quote), 36–43, archived at http://perma.cc/6TPL-RCFS.} Similarly in the United States regarding race discrimination, African American women and girls are highly overrepresented in prostitution.\footnote{213 Likewise, in Canada First Nation Aboriginal women are overrepresented.\footnote{214 An overrepresentation was also seen of female Black respondents in the online survey of pornography performers relative their proportion within the California control group (18% versus 7%), though this difference is not statistically significant (possibly a Type II error due to low sample size). \footnote{215 A content analysis in the} An overrepresentation was also seen of female Black respondents in the online survey of pornography performers relative their proportion within the California control group (18% versus 7%), though this difference is not statistically significant (possibly a Type II error due to low sample size).\footnote{215 A content analysis in the}} Likewise, in Canada First Nation Aboriginal women are overrepresented.\footnote{214 An overrepresentation was also seen of female Black respondents in the online survey of pornography performers relative their proportion within the California control group (18% versus 7%), though this difference is not statistically significant (possibly a Type II error due to low sample size).\footnote{215 A content analysis in the}}

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212 Brotnsförebyggande rådet (BRÅ) [Swedish Nat'l Council for Crime Prevention], The Organisation of Human Trafficking: A Study of Criminal Involvement in Sexual Exploitation in Sweden, Finland, and Estonia (Stockholm: BRÅ, 2008), 8 (second quote), 36–43, archived at http://perma.cc/6TPL-RCFS. Although the study had found a few “exceptions” of educated women from “better circumstances,” it is notable that the reason stated for their prostitution was a need for money (e.g., financing their studies). Ibid., 39. Furthermore, no information is provided to account for whether these persons had not also been subjected to childhood abuse or neglect, or were otherwise vulnerable. Ibid., 36–43.

213 See, e.g., Jennifer James, Entrance into Juvenile Prostitution: Final Report (Washington, DC: National Institute of Mental Health, 1980), 17, 19 (finding African American girls were 25% of sample (n = 136) of prostituted girls interviewed in Seattle area, although only 4.2% of the entire population in the area were Black). Interviews conducted with over 3000 “streetwalking prostitutes” for an outreach project in New York City found approximately half were African American, a quarter Hispanic, and the remaining quarter white. Barbara Goldsmith, “Women on the Edge,” New Yorker, Apr. 26, 1993, at 65. See also Vednita Nelson, “Prostitution: Where Racism and Sexism Intersect,” 1 Mich. J. Gender & L. 81, 83 (1993) (concluding that “[r]acism makes Black women and girls especially vulnerable to sexual exploitation and keeps them trapped in the sex industry.”).


215 Grudzen et al., “Female Adult Film Performers,” 641 tbl.1 (n = 134).}
United States of fifty-four X-rated Black/White interracial videos published 1994
found that racial inequalities were also mirrored in the sense that “Black women
were subordinated, relative to White women, by performing fellatio while clearly in
a supplicant position—on their knees—and being shown as initially resisting but
eventually submitting.”\(^216\) Similarly, Black women were subjected to more physical
and nonphysical aggression than White women were (Cowan and Campbell, 335).
However, White women were more “subordinated, or perhaps, depersonalized, by
being subjected more frequently to semen in their faces” (p. 335).

Different prostitution researchers have long since recognized that tricks tend to
be aware of the coercive facts of prostitution, although they simultaneously show a
tendency to neutralize or deny their own abusive contributions.\(^217\) Accordingly, sev-
eral recent and roughly random samples of tricks that were interviewed anonymously
in different cities in Europe and United States show a strikingly similar awareness
of prostitution: Among 110 tricks in Scotland, 50% acknowledged that prostituted
persons “are victimized by pimps,” 73% noted that persons are prostituted “strictly
out of economic necessity,” and 85% recognized that prostituted women do not en-
joy sex in prostitution.\(^218\) Similar interview responses came from 113 tricks in Chi-
go, IL, including 57% believing the majority had “experienced some type of
childhood sexual abuse.”\(^219\) Among 103 tricks in London, U.K., 55% believed that “a
majority” of prostituted women are “lured, tricked or trafficked,” and 35% believed
that 50–90% of all prostituted women had been abused as children, while 34%
thought that only between 30–40% were.\(^220\) In Boston, Massachusetts, where 101
men who buy sex from prostituted persons were also compared with 100 men who
did not buy sex from prostituted persons (both groups being matched by age, eth-
nicity, and education level), two-thirds (66%) of both groups “observed that a majority
of women are lured, tricked or trafficked into prostitution,” and as many as 96%
of buyers and 97% of non-buyers acknowledged that “minor children are almost al-
ways available for prostitution in bars, massage parlors, escort and other prostitution
in Boston.”\(^221\)

The shared knowledge among tricks who regularly buy persons in prostitution
above suggests doubts about the common disbelief exhibited about these conditions

\(^{216}\) Gloria Cowan and Robin R. Campbell, “Racism and Sexism in Interracial

\(^{217}\) See, e.g., Andrea Di Nicola and Paolo Ruspini, “Learning from Clients,” in *Prostitution and Human
‘No, you don’t know. Of course I don’t ask for the residence permit. . . . I have nothing to do with it.’
(Dutch Client) ‘If I could differentiate [between forced and voluntary, DZ/RS], it would probably not
influence my choice. . . . It is totally wrong of course.’ (Dutch Client)”) (brackets in original); Martin A.
Monto, “Female Prostitution, Customers, and Violence,” *Violence Against Women* 10, no. 2 (2004): 177
(stating about tricks that “though they may not acknowledge their part in the system, many are aware that
prostitutes are victimized in the course of their activities.”).


\(^{219}\) Durchslag and Goswami, *Interviews With Chicago Men*, supra chap. 1, n. 114, at 20–23. Moreover,
this study found that 27% of the tricks believed the majority of prostituted persons are “homeless.” 32%
believed the majority enter under age eighteen, 49% said “prostitution exploits a woman’s sexuality,”
41% “said” they tried to “help or rescue a woman in prostitution when she was being harmed,” and 42%
believed that “prostitution causes both psychological and physical damage.” Ibid.


\(^{221}\) Melissa Farley et al., “Comparing Sex Buyers with Men Who Don’t Buy Sex” (paper presented at the
Annual Conference of Psychologists for Social Responsibility, Boston, MA, July 15, 2011), 22–23, ar-
among many persons who do not buy persons in prostitution. Cultural myths about consensual and non-coercive prostitution may, to the extent they sustain inadequate present political and legal responses, reinforce a tolerance for the sexual exploitation that exist under the contemporary conditions of de facto slavery. The early deprivation of the “self-respect” and concomitant “negative self-image” among prostituted persons, recognized more recently by some legislatures as being caused by childhood abuse, neglect, and the other problems discussed above, probably also contributes in limiting these persons’ vision of themselves and their future. From a point of view where these persons have sometimes literally been seasoned into prostitution during their whole lives, anything other than being in prostitution would seem remote even in cases where technically they might escape from prostitution. Furthermore, in any society that effectively, and regardless of its political system, makes it near impossible for a particular class of people to obtain real job skills, support for emergencies, or give them no other options than doing the lowest paid jobs that no one else wants—whether by force, or by lack of effective intervention—the pimps, tricks and pornographers alike will continue to prey on and exploit people for sex. As said by Andrea Dworkin, “[s]ocieties can be organized in different ways and still create a population of women who are prostituted,” concluding that this was also one of the means for societies to reproduce male dominance. In this sense pornography and prostitution are also practices of sex inequality, where the persons whom are exploited because of their sex are supplied in part because society is already unequal.

Abuse in the Sex Industry

Below, there are accounts by many former pornography performers of systematic threats, rapes, and violence regularly committed against women and children in the course of pornography production. Already the 1985 U.S. Attorney General’s Commission heard testimony corroborated by other evidence on how women and young girls had been tortured to increase the market value of the materials, resulting in permanent physical injuries. The Commission also heard testimony confirming such accounts from a man who reportedly had participated in over one hundred pornography movies, saying that producers, directors, and photographers, in order to provide materials high in demand by consumers, regularly force women who manifestly resist it to have anal intercourse. In other public hearings a person testified that she had been coerced into pornography films already at age eight, and recalled scenes produced with numerous children. Others have ended up in pornography at

222 See, e.g., supra note 197 and accompanying text for a definition of prostitution as “slavery” under international law.

223 See, e.g., Proposition [Prop.] 1997/98:55 Kvinnofrid [government bill], 102–03 (Swed.) (passed) (recognizing that “[t]he research that exists about prostitution shows . . . that the prostituted persons often are women who, in different ways, received a bad start in their lives and who early on where deprived of their self-respect and received a negative self-image”).

224 See, e.g., Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 58–59 (noting that pimps sometimes deliberately impregnate women to increase the supply of prostituted persons or to increase their control over the adult through her child).


227 Ibid., 773–74 (quoting from Los Angeles Hearings).

a later age. An example of the latter, as well as an expression of the coercion needed to make women perform in pornography, is found in Linda Boreman’s situation. She was the performer in the pornography classic “Deep Throat,” initially cajoled at age twenty-one into a relationship with a man who turned out to be a pimp that lasted two and a half years, in which she found herself constantly threatened, battered, and raped, sometimes on a daily basis, literally held in captivity.\(^{229}\) In light of her experiences, it is not surprising that an in-depth study with fifty-five female survivors of prostitution in Portland, Oregon reported that 53% were sexually tortured on average fifty-four times a year, often while made to participate in pornography.\(^{230}\) Although some question that pornography is produced under such coercive or violent conditions as those documented in this sample, a substantial body of evidence discussed below unfortunately show that the findings in this study are not an exception.

In order to make her movies, in one of them Boreman had to be hypnotized in order to suppress the gag reflex so a man could push his way down to the bottom of her throat; in another she was forced to have sex with a dog.\(^{231}\) Judging from studies of general populations of prostituted women (more below), movies such as those Boreman was forced to make seem symptomatic of an industry in which violence and coercion are hidden behind cameras rather than coincidental. Other than when materials are expressly violent, as they often are,\(^{232}\) pornography materials cannot alone reveal if force was used to produce them. Moreover, because people often withhold information when threatened or while dependent on the sex industry, the possibility exists of more coercion.\(^{233}\) Testimonial evidence on violence, coercion, and trauma during pornography production revealed in public hearings repeatedly


\(^{230}\) Hunter, “Prostitution Is Abuse,” supra chap. 1, n. 129, at 93–94.

\(^{231}\) The Minneapolis Hearings Dec. 12, 1983, 1:30 P.M., supra note 229, at 65 (testimony of Linda Marchiano).

\(^{232}\) Numerous studies have documented violence against women and children shown in pornography. See supra pp. 44–50. Apart from the sources discussed there, see also Sun et al., “Male & Female Directors,” supra chap. 1, n.106, at 312–25; Dines, *Pornland*, supra chap. 1, n. 130, at 63–75 (discussing violent content in mainstream materials, particularly the “gonzo” genre). A Swedish government report in 1995 also concluded, not surprisingly, that an international market existed in Sweden for “pornographic movies with a lot, and gross, violence.” SOU 1995:15, supra note 190, at 12.

\(^{233}\) Third parties in the sex industry, whether operating legally or not, are frequently coercive against prostituted persons and may exercise such threats that impacts on the latter’s propensity to report abuse to authorities or to researchers. In Nevada, Farley noted various incidents and conditions during interviews suggesting that prostituted women in legal brothels were under strong pressures not to reveal information to outsiders that could cast the brothels in negative light. See Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 23–24; cf. Lenore Kuo, *Prostitution Policy: Revolutionizing Practice Through a Gendered Perspective* (New York: NY Univ. Press, 2002), PDF e-book, 84 (noting that all prostituted persons in Nevada legal brothels Kuo interviewed seemed “more concerned with possible assault or abuse” from management than abuse from tricks). In Canada, their Supreme Court in 1992 recognized that pimps’ threats make prostituted persons unlikely to testify about mistreatment. R. v. Downey [1992] 2 S.C.R. 10, 36–39, 90 D.L.R. (4th) 449 (Can.); cf. Royal Canadian Mounted Police, *Human Trafficking in Canada* (Ottawa: RCMP, 2010), 38–39, archived at http://perma.cc/JJM7-XJN5 (discussing witness intimidation and difficulties to get prostituted persons to speak on record against their traffickers); see also ibid., 22 (noting that “numerous” domestic trafficking victims, of which most were forced to prostitution in “exotic dance clubs,” and others in “massage parlours” or “escort services” were “subjected to death threats, physical abuse and brutal assault while under the control of their trafficker”).
mirror both quantitative and qualitative data on these subjects in the lives of prostituted women around the world, and cannot therefore simply be discarded as unrepresentative or “anecdotal.”\(^{234}\) Rather, they are consistent with the asymmetric power relations characterizing the industry, where abuse is commonplace and difficult to prevent.

For example, among a sample of 222 prostituted women surveyed in Chicago, Illinois, approximately 21% explicitly acknowledged having been raped over 10 times in escort services \((n = 28),\) in street prostitution \((n = 101),\) and when being prostituted in their private homes \((n = 24).^{235}\) In the sample of 200 prostituted adult and juvenile females in San Francisco discussed above, 70% reported that tricks raped or similarly victimized them “beyond the prostitution contract” on average 31.3 times.\(^{236}\) Among the fifty-five Portland survivors also previously mentioned, 78% reported being raped an average of forty-nine times a year, and 84% were victimized through aggravated assault an average of 103 times a year.\(^{237}\)

The figures on abuse above are all notable, particularly considering that rape is commonly and sometimes grossly underreported by prostituted persons themselves.\(^{238}\) Converging with such data, other survivors from the pornography industry testify to constantly being covered with “welts and bruises.”\(^{239}\) Some of Linda Boreman’s are visible in Deep Throat to the attentive viewer.\(^{240}\) Independent testimonies in fairly recent procuring and trafficking cases in Sweden suggest such violence (including welts and bruises) is not an exception.\(^{241}\) Studies conducted in other countries, for instance Canada, are indicative of similar levels of violence against prostituted persons where, for example, the use of weapons such baseball bats, crowbars, or where the offender jerks the prostitutes woman’s head against a car’s dashboard or a wall, occur regularly.\(^{242}\) Not surprisingly, a Swedish government report that was part of the legislative history to the 1999 Sex Purchase Law concluded in 1995:


\(^{236}\) Silbert and Pines, “Occupational Hazards of Prostitutes,” 397. It is notable that the respondents had been sampled informally and by advertising to avoid “arrestable” or “service oriented” respondents. Silbert and Pines, “Entrance Into Prostitution,” 474. This fact indicates they did not belong to the most abused cohort.

\(^{237}\) Hunter, “Prostitution Is Abuse,” supra chap. 1. n. 129, at 93–94.

\(^{238}\) See, e.g., Farley et al., “Nine Countries,” supra chap. 1. n. 115, at 56–57, 66 n.4; cf. SOU 1995:15, supra note 190, at 144.


\(^{240}\) The Minneapolis Hearings Dec. 12, 1983, 1:30 P.M., supra note 229, at 62 (testimony of Linda Marchiano).


It is common that women in the sex trade are subjected to various forms of violations such as assault and rape. Some purchasers conceive the situation such as that they, since they’re paying, have a right to treat the woman as they wish. The purchaser thinks that he has not only paid for particular sexual services, but also paid for the woman’s right to a human and dignified treatment.\footnote{SOU 1995:15, supra note 190, at 142. Further citations in text.}

Consistent with these remarks, tricks in more recent studies themselves often admit that they feel entitled to demand any act they pay for,\footnote{See Farley et al., “Men Who Buy Sex in Scotland,” 375 (reporting that 22% of 110 Scotland purchasers said that the paying customer is “entitled to do whatever he wants to the woman”); Durchslag and Goswami, Interviews With Chicago Men, supra chap. 1, n. 114, at 7, 18 (finding 43% of 113 male tricks in Chicago, IL, whom stated the woman “should do anything he asks” when paid); Farley, Bindel, and Golding, Men Who Buy Sex [in London], supra chap. 1, n. 114, at 4, 13 (2009) (finding that 27% of 103 male tricks interviewed in London, U.K., openly explained that once having paid “the customer is entitled to engage in any act he chooses,” and that 47% openly expressed to a greater or lesser degree that “women did not always have certain rights during prostitution.”); Farley, “‘Renting an Organ,’” supra chap. 1, n. 113, at 149–51 (quoting from interviews with tricks).} which the documented harm and trauma in commercial sex also evidences to. This treatment seems possible because prostitution usually entails a massive power-imbalance against the prostituted person, often simply because of the desperate conditions mentioned above causing her or his entry into prostitution. Exemplifying this dynamic, the Swedish government report described a typical case where a “club” selling pornographic movies also produced their own materials, where \textit{any} paying male guest could have sex with the women supplied (SOU 1995:15, p. 96). One woman aged 20, and in great need of money, found herself at the same session having to serve over 10 men from a large crowd with vaginal and oral intercourse, and a completely unprepared anal intercourse (pp. 96–97). Other girls had told about similar experiences at other sex clubs while the police investigated several reports of this kind at the time (p. 97). The event was precipitated by two ”seasoning” sessions where the pimps gradually increased the number of men from 1 up to 4, drawn from a crowd of 30–40 who did not pay much more than $10 each (p. 97). For their sex with her, she was remunerated with less than $100 (p. 97), but because she was still in great financial stress, she accepted another even more horrendous session despite the pornographers having already pushed her limits (p. 97). Her case and similar ones are symptomatic for the imbalance in power that propels women into these dangerous and unwanted situations (more below).

\textit{Mental Sequelae}

There are reasons to believe that circumstances are more psychologically harmful in those forms of prostitution in which a camera is present. Among active prostituted persons surveyed in the nine-country study previously mentioned, out of 802 responding women 49% reported they had been used by pimps or tricks to make pornography, and they were diagnosed with statistically “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography.\footnote{Farley, “‘Renting an Organ,’” 146, 422 n.298 (Pearson $r = 126$, $p = .001$, $n = 749$).} Pornography production did thus differentiate those with higher symptoms in the sample. This effect stands out in particular contrast to alternative factors such as childhood sexual and physical abuse, rape, and physical assault in prostitution, which were associated with a “statistical ceiling effect” in the sample that made it impossible to “differentiate how much each” of.
those particular types of violence “contributed to their overall distress.” The association found in the nine country study between being used in pornography and increased trauma was also seen in a sample of 43 prostituted women interviewed in legal brothels in Nevada.

According to the American Psychiatric Association, PTSD may, inter alia, result from the following:

- Exposure to actual or threatened death, serious injury, or sexual violence in one (or more) of the following ways: (1) directly experiencing the traumatic event(s); (2) witnessing, in person, the event(s) as it occurred to others; (3) learning that the traumatic event(s) occurred to a close family member or close friend [if violent or accidental]; (4) experiencing repeated or extreme exposure to aversive details of the traumatic event(s) . . . [media exposure does not count, unless work related].

Two thirds (68%) of the 854 prostituted persons in the nine countries, including those not reporting being used in pornography, met clinical criteria for PTSD, and this population was not sampled among persons explicitly seeking help. The symptoms in all countries were in the same range as that of treatment-seeking Vietnam veterans—a range similar as for battered women seeking shelter, survivors of

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246 Ibid., 146.

247 Comparing those who had with those who did not have pornography made of them, when events in their lives triggered reminders of past trauma the former group reported statistically significant higher levels of emotional distress. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 37 ($r = .392, p = .009, n = 43$). The 2011 online survey of female commercial pornography “performers” in the United States also found that performers suffered from significantly more mental health problems than the female control group of similar age did, but did not measure PTSD. It used the Behavioral Risk Factor Surveillance Survey (BRFSS) (also called Patient Health Questionnaire-8) and also measured depression. See Grudzen et al., “Female Adult Film Performers,” 641–42. However, depression is not directly related to traumatic abuse, such as PTSD. Nonetheless, “performers” had 7.2 days of “poor mental health” past month compared to 4.8 days for controls ($p<.01$), and 33% of performers met criteria for current depression compared to 13% among controls. Ibid., 642 ($p<.01$). When the 2011 online survey made a multivariate analysis to control for demographic characteristics and health risks and behaviors, only some factors remained significantly correlated with mental health past month though, and then only at a low ($p<.05$) level (general medical health, poverty, domestic violence, forced sex as an adult, and living in a household receiving welfare during childhood). Ibid., 643. Hence, commercial pornography performer status, experiencing foster care during childhood, and forced sex before age 18 did not reach a statistically significant correlation to mental health in the multivariate model. Similarly, performer status did not reach statistical significance at $p<.05$ in the multivariate analysis with regards to depression as outcome variable, whereas a number of other factors did. Ibid. However, there are many reasons to suspect a “Type II Error,” in which the 2011 online survey has falsely confirmed the null hypothesis. One reason is that the sample size is relative small ($n = 134$); another that the factors that reached statistical significance in the multivariate model only did so at a low level ($p<.05$); a third reason is that the study did not measure PTSD but other mental health concepts less associated with traumatic abuse, which may explain differences relative the larger nine-country study and the smaller Nevada study above.


249 Farley et al., “Nine Countries,” supra chap. 1, n. 115, at 47–48, 56. The researchers sampled prostituted persons (1) on the streets in Canada; (2) in brothels, strip clubs, streets, or at massage parlors in Mexico; (3) at clinics for STD controls in Turkey (respondents not “seeking assistance/treatment”); (4) by local newspaper advertisement, drop-in shelter for drug addicted women, and peer-referred (snowball sampling) in Germany; (5) randomly, in four different areas on San Francisco streets; (6) at a beauty parlor in Thailand and at a job training/nonjudgmental support agency in northern Thailand; (7) at brothels, streets, and drop-in centers for prostituted persons in Johannesburg and Cape town, South Africa; (8) at a nongovernmental organization (NGO) supporting approximately 600 women a week in Lusaka, Zambia; and (9) at support agencies in Bogota, Colombia. Male and/or transgendered persons were included among the Thai, South African, and U.S. samples. For more information on the samples and methods, see Farley et al., “Nine Countries,” 37–39.
rape, and refugees from state-organized torture. Although similar data currently do not exist on PTSD in Sweden among prostituted women as there now are in Canada and the United States, professional practitioners working with trauma and recovery of women prostituted in Sweden testify that all the women they encounter exhibit “severe posttraumatic stress reactions manifested in the forms of serious mental disorders such as severe sleep and concentration disorders, recurrent anxiety and panic attacks, grave depressions, severe anorectic reactions, self-destructive behaviors combined with extensive dissociation, problems with impulse control, and manifest or latent suicidality.”

In Mexico, the nine-country study controlled specifically for venue and obtained sufficiently large groups for intra-national comparison among 123 prostituted women; no statistically significant differences were found among prostitution in brothels, massage parlors, strip clubs, or on the street with respect to PTSD severity, nor with respect to length of time in prostitution, childhood abuse, rape in prostitution, number of types of lifetime violence experienced, or percentages who wanted to escape prostitution. At least a similar level (if not a higher) might be expected of women in pornography, who are a subset of this population.

In Zurich, Switzerland, where adult prostitution is legal if prostituted persons are registered and no illegal conditions exist (e.g., underage prostitution or coercion), researchers who studied violence and mental disorders among 193 prostituted persons concluded that, compared to street prostitution, indoor prostitution was “not generally associated with more safety” (Rössler et al., 150). Moreover, the Swiss study measured the “burden of sex work” in terms of such conditions as “income, expenditures, number of working days and of customers per week” and “motivation” for “sex work,” among others (p. 145). Their data suggested that “the burden of sex work” over the course of one year “impacts on the women’s mental health to an extent comparable to the rates developed during their whole previous lives” (p. 150).

In South Korea (not included among the nine countries), a more recent study with 46 formerly indoor (as opposed to outdoor/street) prostituted women revealed significantly stronger symptoms of PTSD and disorders of extreme stress not otherwise specified (DESNOS) compared to a control group even though the mean number of

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250 Farley et al., “Nine Countries,” 48, 56. One may wonder why the nine-country study shows slightly lower numbers of rapes and assault in comparison with some of the in-depth studies cited above. See ibid., 43 (frequency of violence). However, the authors note that asking about rape in prostitution is like asking a person in a combat zone if that person is being under fire. Ibid., 66. The nine country study is also likely to have underreported the frequency of rape (or other assaults) when considering that other large screening surveys usually employ “behaviorally specific terms . . . [that] do not require women to label an event as ‘rape’ in order to qualify an event as a rape incident,” or otherwise might invite respondents to minimize their experiences of gender-based violence. Kilpatrick et al., Drug-facilitated, Incapacitated, & Forcible Rape, supra p. 5 n.18, at 16; cf. Koss, Gidycz, and Wisniewski, “Scope of Rape,” supra p. 2 n.10, at 165, 167 & tbl.3; Lundgren et al., Captured Queen, supra p. 6 n.20, at 15–16 & appendix at 99–102.

251 Samples from the United States (n = 130) and Canada (n = 100) are included in the nine-country study. Farley et al., “Nine Countries,” 37–38.


253 Farley et al., “Nine Countries,” 49.

254 Cf. supra notes 245–247 and accompanying text.

days since leaving prostitution was as high as 573.12 (range: 16 to 2,190), and despite controlling for prior childhood sexual abuse.\textsuperscript{256}

In Alberta, Canada, the number of months in prostitution predicted positively, and with statistical significance, poorer mental health among forty-five prostitution survivors even after controlling for, inter alia, the severity of child sexual abuse before age sixteen and separation from a biological parent for five or more years before age twelve; unsurprisingly, these associations persisted with statistical significance when forty-five community controls were added to the analysis.\textsuperscript{257}

The above studies from Mexico, Switzerland, Korea, and Canada measured and controlled for abuse prior to entering prostitution, as well as numerous other relevant factors, but still found widespread PTSD and other mental disorders strongly being predicted by prostitution with statistical significance. These results suggest that the position taken in an Ontario court that PTSD among prostituted persons “could be caused by events unrelated to prostitution,”\textsuperscript{258} as opposed to being caused by prostitution, is implausible. Simply put, prostitution in itself can usually be intrinsically harmful in producing the serious mental consequences of PTSD.

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The associations found above between being used in pornography and increased trauma was also paralleled in responses to abuse by tricks in a sample of over 44 prostituted women interviewed in legal brothels in Nevada; those women whose tricks demanded imitation of pornography (as opposed to making pornography) also experienced statistically significant more traumatic flashbacks than those whose tricks did not make such requirement.\textsuperscript{259} Women in the Nevada brothels also reported that the documentation of their prostitution via pornography made them feel stigmatized and defined by it, making escape from prostitution more difficult.\textsuperscript{260} A number of pornography survivors in testimony made similar reports to the 1985 U.S. Attorney General’s Commission on Pornography.\textsuperscript{261} The degrading and violent content that is plain to see in much mainstream materials suggest additional reasons why PTSD is higher for prostitution in pornography than prostitution generally: it is common with deep-throat gagging, oral urination, physical violence, multiple men entering women in two or more orifices while the women vomit, ejaculation in faces, that performers have uncontrollable tears from pain and even mental blackouts in some situations.\textsuperscript{262} To the sad and disturbing statistics of trauma and stress among prostituted women should thus be considered that those women having pornography made of them are even more hurt.\textsuperscript{263} Such conditions suggest that pornography production, as a specific branch of prostitution, is particularly vicious and cruel and, hence, damaging.

A look at the scholarly literature investigating the health consequences of prostitution, where most women used in pornography appear to be drawn (e.g., pp. 55–57

\textsuperscript{257} Bagley and Young, “Juvenile Prostitution & Child Abuse,” 21–23; tbls.7. In the comparison with the control group, as distinguished from the analysis of exclusively prostitution survivors, the variable “practiced prostitution” was used instead of “months in prostitution.”
\textsuperscript{259} Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 37; \(r = .328, p = .030, n = 44\).
\textsuperscript{260} Ibid., 37.
\textsuperscript{261} Att’y General’s Comm., Final Report, supra chap. 1, n. 125, at 808–10.
\textsuperscript{262} See supra pp. 44–50, for content studies of common pornography materials that are consumed, and additional sources listed supra note 232, particularly Dines, Pornland, supra chap. 1, n. 130, at 63–75.
\textsuperscript{263} See supra notes 245–247, 260–262 and accompanying text.
above), corroborates that prostitution in general is conducted under the coercive and harmful circumstances indicated above. For instance, the high levels of PTSD are mirrored in a number of severe physical symptoms: in a sample of 700 prostituted persons from seven of the nine countries mentioned previously, 24% reported symptoms such as sexually transmitted diseases (STDs) (e.g., syphilis, HIV, uterine infections, ovarian pain, menstrual problems, and abortion complications).264 Among 100 Canadian prostituted women from Downtown Eastside Vancouver, who were specifically surveyed about chronic health problems, there were many reports of muscle aches/pains, joint pain, stomach problems, and headaches/migraines—each reported by over half the sample (Farley et al., 54 tbl.10). Among other problems were jaw/throat pains and vomiting, each reported by over a third (tbl.10). Regarding homicide rates in prostitution, it is telling that an article in the American Journal of Epidemiology from 2004 showed that in a population of 1969 prostituted persons in Colorado Springs the years 1967–1999, active ones ran a risk of murder eighteen times higher than in a comparable non-prostituted population.265 Corroborating the high incidence of murder in prostitution, a Canadian federal public inquiry’s final report into prostitution in 1985 quoted estimates, submitted by the City of Regina, suggesting that between violent death and drug overdose, mortality for prostituted persons may be forty times higher than the national average.266 Women in prostitution are documented as particularly vulnerable to victimization by serial murderers, who often target women (and men) who are prostituted.267

Against the backdrop of their high mortality rates and other physical symptoms, it is not extraordinary—as has been documented above—that pimps as well as tricks use threats and violence against persons in indoor and street prostitution, as well as in pornography. Many tricks around the world even admit, corroborated by testimonies from prostituted women, that they use these women precisely in order to have the sex that others would refuse them, including among other things sadomasochism and pissing on someone.268 If unsafe, abusive, and violent sex is truly prevented in prostitution, as opposed to being controlled by pimps, business might disappear to a large extent.

265 John J. Potterat et al. “Mortality in a Long-term Open Cohort of Prostitute Women.” Am. J. Epidemiol. 159, no. 8 (2004): 782–83. The homicide rate for prostituted women (204 per 100,000) was “many times higher than that for women and men in the standard occupations that had the highest workplace homicide rates in the United States during the 1980s (4 per 100,000 for female liquor store workers and 29 per 100,000 for male taxicab drivers).” Ibid., 783
268 See, e.g., Durchslag and Goswami, Interviews With Chicago Men, supra chap. 1, n. 114, at 12 (reporting that 46–48% of 113 Chicago tricks admitted purchasing prostituted women to have sex that they “either felt uncomfortable asking of their partner or which their partner refused to perform,” including violent sex and other fetishes); Farley et al., “Men Who Buy Sex in Scotland,” 374–375 (reporting that tricks in Scotland emphasized “pleasure in asserting their dominance over women in prostitution,” such as “freedom to do anything they want in a consequence-free environment”); Farley et al., “Sex Buyers & Men Who Don’t,” 30 (quoting Boston trick who explained that “the people that I wanted to do it with didn’t want to do it with me, so I started going to prostitutes”); In Harm’s Way, ed. MacKinnon and Dworkin, supra chap. 1, n. 126, at 116 (testimony by T.S.) (survivor attested for a group of prostitution survivors during public hearing: “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”); Mimi H. Silbert and Ayala M. Pines, “Pornography and Sexual Abuse of Women,” Sex Roles 10, no. 11/12 (1984): 863–64 (among 193 prostituted women and girls who reported rape by a trick, 24% made unsolicited comments during interviews attesting that the rapists referred directly to some pornography he had seen, and insisted that victims enjoyed the rape and extreme violence); cf. Farley et al., “Nine Countries,” 44, 46 (47% of 854 prostituted persons reported being upset by attempts to imitate pornography).
Assessing Counter-Arguments

“Amateur” and “Women-Directed” Productions

In the public discourse terms such as “amateur,” “homemade,” or “alternative” are sometimes encountered, as if implying a substantial segment of pornography was produced under non-coercive circumstances (by contrast to the conditions described above). Yet to date no empirical data appears to have validated any meaningful prevalence of such pornography. It should here be noted that materials produced by the organized industry are still being highly profitable.269 Hardly unsurprisingly then, the term “amateur” and its various synonyms have largely been dismissed as a ruse in some more forthright accounts by the sex industry itself. For instance, Mr. Farrell Timlake, who operated a website that uploaded free sponsored clips intended to attract new paying customers, explained this situation to the New York Magazine in 2011:

Pretty much all the porn labeled “gonzo” and “reality” these days is a put-on, Timlake insists. In the Dancing Bear series, a male stripper wearing an enormous bear head performs for a bachelorette party until several fairly respectable-looking women suddenly lose control and start fellating him. “That stuff looks pretty real,” he says. “It takes a minute, but where are there roomfuls of women willing to have sex with a guy?” Watch a few of them, and you’ll notice the same women reappearing. Another series, Dare Dorm, claims to pay real college kids for tapes of campus orgies, but Timlake isn’t buying it. “I can always tell, because most college kids can’t afford as many tattoos as those people have.”270

In a world where women are yet socially unequal to men (cf. 4–9 above), the existence of a production of “sexually explicit media that are primarily intended to sexually arouse the audience,”271 employing women who are not in prostitution under uncoercive circumstances of mutual equality, must necessarily be subject to skepticism. It is, of course, not possible to disprove beyond all doubt something that appears never to have existed. While pornographers seem to employ the notion of “amateur porn” as a marketing technique to reach new audience segments, or to make existing customers pay for new materials,272 no tangible evidence exists that shows that home-made or amateur pornography would necessarily be made under less coercive circumstances, let alone under genuine conditions of social equality, than what has been documented above.

Regarding the impact caused by having a female (as opposed to male) director, a recent study found that the relatively few female-directed top selling movies contained as much (if not more) degrading and abusive acts directed against women as top selling materials made by male producers did.273 Its authors concluded that “the female targets almost always exhibited pleasure or indifference toward the aggression inflicted on them . . . . [and that such] female-directed films did not offer an alternative construction of sexuality and gender roles from their male counterparts”

269 See supra notes 122–124 and accompanying text (discussing misconceptions about shrinking profits).
273 Sun et al., “Male & Female Directors,” supra chap 1, n.106, at 317–20. The sample was composed of an equal number of randomly selected female-directed versus male-directed scenes (n = 122) from 44 randomly selected top selling pornography movies (n = 250). Further citations in text.
With respect to director’s gender, there were no significant differences in terms the number of aggressive or degrading acts directed against women (p. 321). The few significant differences were that women-directed scenes contained more women-to-women scenes than did their male counterparts’ scenes. Yet there was more violence performed against women under female directors since “[e]ven when controlling for gender composition of main characters, female-directed scenes continued to show significantly more woman-to-woman aggression (27.9% of female-directed scenes) than male-directed scenes (12.6% of male-directed scenes)” (p. 321; p < .001). The authors suggested that “socio-economic” demands mold the industry (p. 323). Even if this demand overwhelmingly comes from men and not women (pp. 33–37 above), it is not surprising that women directors treat females worse than male directors do, if it can acquire them more market success.

**Male “Performers”**

From the evidence above showing that inequality, discrimination, and coercive circumstances generally lie behind why women are found being exploited in pornography, would there be reasons to assume differently regarding the men whom are used to “perform” in pornography (or in male prostitution)? A number of biographies of more known gay male pornography “performers” converge on histories of childhood abuse, teenage runaways thrown out on the street with only a lower level of education; not surprisingly, such adolescent and young men became easy prey to an exploitative sex industry that broke them down, many getting AIDS during their time in the sex industry, and some committing suicide.\(^{274}\) If potentially successful male “performers” were harmfully exploited by the gay pornography industry, it is not surprising either with documentations of more vicious exploitation of impoverished boys and young men in parts of the world (e.g., former Eastern Europe) where the economy has significantly became worse.\(^{275}\) Apparently there are men used in gay male pornography that share a similar background to those female populations who are vulnerable to sexual exploitation. Furthermore, the content of much gay male materials themselves, such as violence or unsafe sex, suggest that exploitation or even coercion may be present to a significant extent during its production.\(^{276}\) Indeed, a quantitative study published in 2014 (discussed previously) showed frequent high-risk sexual behaviors in a fairly representative sample of gay male pornography on the internet, including, for example, unprotected anal intercourse (36% of videos), “rimming” (oral-anal contact) (17%), ejaculation into mouth (8%), “ejaculation in/on or rubbed into the anus” (7%), and unprotected oral sex (99.5%).\(^{277}\)

By contrast to most women who are used in pornography, there exists a peculiar type of male participant who may genuinely have chosen to be there; for example, the tricks mentioned above who paid $10 to be admitted to a sex club in Stockholm in the 1990s where they could have sex on camera with prostituted women.\(^{278}\) However, in more expensive productions that form the standard in the sex industry, at

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\(^{274}\) See, e.g., Kendall, Gay Male Pornography, supra chap. 1, n. 91, at 78–81.


\(^{276}\) See, e.g., Christopher N. Kendall and Rus Ervin Funk, "Gay Male Pornography's 'Actors': When 'Fantasy' Isn't," in Prostitution & Traumatic Stress, ed. Farley, supra chap. 1, n. 115, at 104–06.


\(^{278}\) SOU 1995:15, supra note 190, at 96–97.
least as early as 1986, if not earlier, the men were under constant pressures to perform more or less like “a machine.” In the words of a then leading model agent:

You have to get it up, get it in and get it off on cue . . . . in any situation. For example, if you’re working on location for a film shoot and staying at a motel for seven days, you have to cope with being in unfamiliar surroundings, getting irregular sleep and living on McDonald’s and Kentucky Fried Chicken, and still be able to perform sexually no matter what else is on your mind.279

These requirements can be assumed not to be met by the “occasional” acting trick. Thus, at least in the 1980s, the more organized and commercial pornography industry in heterosexual materials generally seemed to use a very small segment of male “‘superstars’ who ‘end[ed] up in all the videos,’”280 quite different from the female cohort. What social characteristics do such men share? With respect to the small segment of men in heterosexually oriented “glossier, commercial ‘X’ rated material,”281 the 1985 U.S. Attorney General’s Commission on Pornography found that many male “models” shared similar social characteristics as prostituted women generally do, for example, poverty or specific and dire financial needs. Accordingly, Harry Reems, actor in the 1970s movie Deep Throat, reportedly explained how he “‘was making a whopping $76.00 per week [as a New York actor],’” thus “‘needed to supplement’” his “‘income.’”282 Accounts from other male “models” corroborated that economic situations had propelled them into the industry.283 Similarly as with women who drift between off-camera and on-camera prostitution, some male “performers” had transited to pornography from nude dancing or other prostitution.284

Male pornography “performers” might be a more diverse social cohort than the female one, but many similarities exist that are also mirrored in male prostitution in general. For instance, a population survey of high school third graders in Sweden (published in 2009), which had been complemented with a smaller concomitant survey among LGBT populations age 18–25, showed that there were no significant differences among young males who had been bought for sex and among young females who were bought in terms of their self-esteem and mental and physical well-being—indicators that scored significantly lower than among the average youngsters for both genders.285 Despite that these anonymous surveys were bound to exclude the most disempowered groups, who are likely not to respond on mail, nor generally being present at school—a condition likely responsible for a relatively high rate of boys relative girls who reported occasional (as distinguished from systematic) prostitution—among those who responded, both males and females reported significantly more childhood sexual abuse and neglect, poverty, or more difficult circumstances

280 Ibid., 865 (citing Bennet, “Breaking into X-Rated Films” (interview with Margold), 71).
281 Ibid., 842.
282 Ibid., 860 n.987 (brackets in original) (quoting Adult Video News (includes interview with Harry Reems), April 1985).
284 Ibid., 865 (citing testimonies at public hearings in Los Angeles and Washington, DC, in 1984).
otherwise, as well as being less content with life in general than the average youngster.286

By contrast to general population surveys that may fail to account for more vulnerable people in prostitution,287 the nine country study previously mentioned used an interview questionnaire administered personally by the researchers on various sites frequented by regularly prostituted people.288 The interviews included male and transgender respondents in South Africa, Thailand, and the United States—groups showing no significant differences in PTSD-symptoms from the females (Farley et al., 49). Thus, the findings from male and transgender persons in this study corroborate the individual biographies above from men who “performed” in gay male pornography. Taken together with other evidence of male prostitution, including in pornography, such data suggests that non-female prostitution may harbor similar intrinsically unequal conditions that produce the forms of exploitation now well documented in female prostitution. Although some gay male sexually explicit media may be made with different intentions compared to the typical commercial pornography, such as being part of the identity struggles of LGBT-people, when there is a demand for gay pornography and male prostitution generally, there nevertheless is a risk of exploitation. As argued by legal scholar Christopher Kendall, there is “little reason to believe that gay men driven by profit incentive will be any more motivated to protect the people whose abuse makes them more likely to be in pornography and who, as vulnerable, are easily exploited.”289

**Evaluating the Evidence**

If there were a convincing preponderance of empirical evidence showing where mass-consumed pornography was made under non-coercive conditions or circumstances of social equality between the sexes, such data would indeed deserve to be considered. In face of a lack of such data, some sex industry researchers seem to portray the existing social conditions of prostitution and pornography production as

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286 Priebe and Svedin, “Unga, sex och internet,” 75, 112, 135; Ungdomsstyrelsen, ”Erfarenheter av sexuell exponering och sex mot ersättning.” 161–69. See also ibid., 156 & 158 (commenting on socioeconomic status). In recent large and midsize surveys in the Nordic countries, male respondents tend to be overrepresented among those who report having (ever) been bought for sex—a finding contrasting with more qualitative interview studies that emphasize girls or women as the most common and vulnerable people in prostitution. See, e.g., Abelsson and Hulusjö, I sexualitetens gränstrakter, 13–15; Priebe and Svedin, “Unga, sex och internet,” 38. This male overrepresentation has precipitated some speculative discussions in Sweden, some suggesting boys may be bought for sex more often than girls, or that the social expectations regarding gender dissuade girls or women from either reporting (or even recognizing prostitution experiences for what they are—i.e., sex for remuneration). See, e.g., Abelsson and Hulusjö, I sexualitetens gränstrakter, 15 (referring to what appear to be essentially hypothetical explanations to the overrepresentation of boys in larger surveys). Although it may certainly be that male prostitution is less visible, or has received less scholarly attention than female prostitution, when considering the plights of homelessness, abuse, and mental disorders, inter alia, that many regularly prostituted women suffers from, see supra pp. 55–72, they are less likely to respond to anonymous surveys than those who are only occasionally bought for sex. Indeed, a research report from Linköping University published in 2012 notes that people identified by the specialized Swedish health units treating prostituted people, most who are female, are “not likely reached” by such population surveys. Svedin et al., *Prostitution i Sverige: Huvudrapport, supra* p. 26 n.75, at 17. Not surprisingly, the surveys that sparked debate in Sweden about an alleged underemphasized male prostitution population seem typically to have been conducted either as a mail questionnaire for adults, or during class in high schools, or as a web survey, see Priebe and Svedin, “Unga, sex och internet,” 38. These are sampling venues where cohorts with severe social problems can be presumed to be proportionally underrepresented.

287 See supra note 286.


so highly complex and diversified that to them, these practices should not be regarded as inherently exploitative or an expression of sex inequality. Accordingly, researchers in this strain argue, for example, that “[w]hile exploitation and violence are certainly present in prostitution, there is sufficient variation across time, place, and sector to demonstrate that prostitution cannot be reduced to gender oppression and is much more complex in terms of workers’ experiences as well as power relations between workers, customers, and managers.”\textsuperscript{290} In response to such theoretical accounts, it should be noted that neither this dissertation, nor its empirical or scholarly sources, suggest that prostitution is an expression of a simple and linear “gender oppression” exclusively. As evidenced above, prostitution is often a result of multiple structural disadvantages against certain vulnerable populations, such as sexism, racism, childhood abuse and neglect, social discrimination, and cultural perceptions of male sexual entitlement and female submission. Admittedly, in no country or particular situation where these multiple disadvantages materialize are their parameters exactly the same; sometimes there is more of one structure than the other. Yet to take such variation to imply that prostitution is “much more complex” than an expression of “gender oppression” glosses over the importance of social structures.

The attempts to downplay gender seem further difficult to maintain when considering that pornography users and tricks overwhelmingly are men, while a majority of vulnerable prostituted persons seems to be women.\textsuperscript{291} Considering women’s generally subordinate position vis-à-vis men in society (pp. 6–9 above) suggests that the sex industry is indeed an institution of “gender oppression,” even while this relationship may be moderated and exacerbated by other related social structures. By contrast, the sweeping claims above of a “variation across time, place, and sector” proceed as if variation by itself qualifies the conclusion that prostitution is not significantly an intersectional expression of “gender oppression.” Unless the gendered “power relationships” in prostitution were truly and commonly reversed, with male tricks and pimps being frequently abused and oppressed in prostitution by women, and tricks forced under coercive circumstances to pay for sex, the “gender oppression” in the industry does not appear particularly complex. The evidence does not either suggest that prostituted persons operate under equal conditions similar to that of other vocational categories in the general labor market. Few, if any legitimate occupations today, whether or not gender-oppressive or exploitative, include similar prevalence of PTSD-symptoms, physical abuse, threats, and health risks as well as a lack of alternative survival options for its practitioners (cf. 55–72). The gender disparity in using and being used in the industry is not particularly complex and should be theoretically and empirically addressed, rather than evaded by a position that reflexively emphasize diversity and variation over structure.

\textit{Methodological Problems and Credible Representation}

In evaluating studies of prostitution and the production harms in pornography for their methodology, bear in mind that scholars and researchers, along with social


\textsuperscript{291} For instance, while having written numerous articles favorable of a legalization of brothel prostitution, nowhere does Weitzer seem to address the fact that the tricks are almost entirely men, except for noting that “female customers . . . are a small fraction of the market but have important theoretical implications,” Weitzer, “Sociology of Sex Work,” 227. However, it is never clarified what, exactly, those “implications” are.
workers, law enforcement officers, doctors, and journalists, are frequently not trusted by persons exploited in the sex industry. Those who have left prostitution have often made it clear that they fail to seek help because they fear being adversely judged by social services agencies. A Swedish government commission in 1995 acknowledged that what is needed is “long time and close contact with prostituted women in order to acquire knowledge of their real situation,” and a survival strategy was even said to “entail that the more gross violence . . . the less becomes her propensity to report it.” This commission’s observations are understandable given that many experienced being let down by various authorities during their childhood and adolescence when those authorities failed to identify or prevent abuse. Likewise, journalists who solicit prostituted persons to do interviews may have incentives, such as providing titillating stories to commercial outlets that can lead the prostituted persons to be disbelieved or harassed. There is thus a need for researchers to establish the trust that enables prostituted persons to reveal sensitive information reliably, particularly without being endangered or risking disbelief or prejudice, or being arrested or institutionalized or stigmatized for not having left prostitution. In order to do this, perceptive researchers, particularly those who are not psychologically trained and experts in the field, have frequently used interviewers who have been prostituted and can communicate their understandings of the difficulties faced based on direct experience, and who know how to interact in and interpret the interview situation.

Scholars also often fall short of accurately perceiving the complexity of prostituted persons’ situations, as they may be at risk (e.g., from third parties who may threaten them for revealing incriminating information) and thereby be incentivized to give researchers misleading information about prostitution. This problem may not only cause the person to distrust scholars in handling incriminating information but can also cause researchers unwittingly to contribute with biased reports and disinformation about the sex industry. It

294 SOU 1995:15, supra note 190, at 144.
295 A Swedish research evaluation published in 2012 found many accounts by prostituted persons suggesting that general childhood social service and psychiatric programs as well as judicial authorities and parents often failed to identify and prevent prostitution among children and young persons, in contrast with the few specialized units that primarily work with persons in prostitution directly. Svedin et al., Prostitution i Sverige: Huvudrapport, supra p. 26 n.75, at 8–10, 17–18; cf. SOU 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering 1999–2008 [government report series] 232 (Swed.) (reporting that necessary and adequate knowledge among social service agencies to prevent or stop prostitution often doesn’t exist nationally outside the few specialized units in the metropolitan areas). Early studies in the United States have also indicated severe problems related to early prevention of prostitution, such as detecting child sexual abuse, which is an early antecedent to prostitution that can predict further sexual exploitation. See Mimi H. Silbert and Ayala M. Pines, “Early Sexual Exploitation as an Influence in Prostitution,” Social Work (1983): 286–87 (reporting that only 37% of those 60% of 200 prostituted persons who reported sexual abuse as children had told anyone about it, and in only 21% of those cases did the abuse stop); see also supra notes 198–211 and accompanying text (discussing the prior role of child sexual abuse in prostitution).
297 See supra note 233 (citing and summarizing sources).
is therefore imperative to consider whether bias is more or less likely in their responses, and in what direction. As discussed further below, the very fact that some persons work in ostensibly legal businesses, such as the more well-organized pornography industry in Los Angeles, CA, may increase the incentive to underreport abuse, management misconduct, unsafe sex, or other illegal activities, as reporting such activities could not only cause public resentment against the industry but also jeopardize the businesses’ legal status.298 There can thus be problems with validity when interviewing persons who are currently in prostitution, as opposed to interviewing survivors who have left the industry. The latter are not under influence of third parties or otherwise dependent on continuing in prostitution, thus would seem less likely to provide responses biased in favor of the sex industry.

A study that leaves unaddressed a number of important methodological questions mentioned above was published in Journal of Sex Research in 2013.299 It contained a survey made with a “convenience” sample of 177 female commercial pornography performers in Los Angeles, accessed at the premises of the Adult Industry Medical Healthcare Foundation (AIM) (Griffith et al., 623). The study also included a female community control group that was matched on age, marital status, and ethnicity, sampled at a university (38.4%) and an airport (61.6%) respectively (p. 623). The AIM, which facilitated the sampling of performers, was an organization closely associated with the L.A. pornography industry at the time. For instance, the AIM ran a private clinic that tested for Sexually Transmitted Diseases (STDs) as well as providing a database to commercial pornography producers that allowed them to “confirm” whether performers had any records of a negative STD tests, particularly HIV, within 28 days (p. 623). During the collection of the study’s data, the AIM clinic was said to test roughly 1,200 performers each month (p. 623).

Many studies show how women in the sex industry report significantly and substantially more childhood sexual abuse than women in the general population,300 including the online survey from 2011 of pornography “performers” that were contacted through American industry databases or websites, of which roughly three times more than among the controls from California had reported “forced sex” during childhood.301 By contrast, the AIM-study allegedly showed no significant differences of subjection to childhood sexual abuse among their two groups composed of 177 women each: 36.2% of the pornography performers reported it compared to 29.3% among the control group (Griffith et al., 625).302 Similarly surprising were findings showing that the pornography performers reported significantly higher self-esteem

298 Not surprisingly, other venues in the sex industry, such as brothels, are notorious for preventing transparency and access to researchers, even in Nevada where they are formally legal, as distinguished from brothels in California. See, e.g., Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 23 (denied entry in 6 out of 14 Nevada brothels); Kuo, Prostitution Policy, 79–80 (noting that when attempting to access brothels in Nevada for research purposes the author was “consistently informed that women were permitted entrance only under the auspices of George Flint, president of the Nevada Brothel Association.”); cf. Tooru Nemoto et al., “HIV Risk Among Asian Women Working at Massage Parlors in San Francisco,” AIDS Education and Prevention 15, no. 3 (2003): 247 (denied entry in 13 out of 25 parlors where men could buy sex in San Francisco). Brothels run by third parties are legal under a state law in Nevada that sets out certain conditions for their operations. See supra note 192.


300 See supra notes 198–200 and accompanying text.

301 Grudzen et al., “Female Adult Film Performers,” 642. Further citations in text.

302 These numbers appear consistent with childhood sexual abuse reported by general U.S. female populations. See, e.g., supra note 199.
compared to women in the control group (Griffith et al., 626). Furthermore, the AIM-survey reported significantly higher quality of life among pornography performers compared to the control group in terms measuring “sexual satisfaction, positive feelings, social support, and spirituality,” as well as energy, body image, and financial dimensions (p. 626 & tbl.2).

By contrast, the 2011 Internet survey of commercial pornography “performers” reported that the mental health was “significantly worse” among them than among controls on every items that measured mental health: 33% of the performers met current depression criteria compared to only 13% among female California controls of similar age (Grudzen et al., 642; p<.01). Consistent with such finding, the AIM-study did report though that performers significantly more commonly had a history of alcohol problems than controls, and were typically 3 to 9 times more likely to have tried any of 10 drugs (ranging from marijuana to ecstasy) than were controls (Griffith et al., 626–27). Despite these significant differences in prior history of drug use, there was nonetheless only one significant difference related to recent drug use in the six past months; performers were said to use marijuana (but no other drug) more often than women in the control group (p. 627; \( m = 1.68, sd = 1.46 \) versus \( m = .99, sd = 1.15 \)). Though it is of course impossible to rule out that these performers did not stop using every drug except marijuana during the six months before they were surveyed, this particular finding suggests a bias not to report current illegal or otherwise incriminating evidence in the survey.

With respect to the reliability and validity of the AIM-study’s findings, they exhibit a number of serious problems on the level of methodology as well as in terms of conflict of interest. Regarding the latter it is notable that one of the four co-authors, Sharon Mitchell, is a former pornography “performer, director and producer,” said to have founded the Adult Industry Medical Healthcare Foundation (AIM), which then provided the sample of subjects to the researchers (Griffith et al., 623). The AIM’s clinic appears to have come into existence as a convenient response to public criticism when the L.A. pornography industry was starting “voluntary testing in an effort to keep state regulators appeased and avoid further regulation.” AIM was supported by major pornography producers in L.A. as such, for instance as a means to avert mandatory condom requirements. By contrast, such requirements of condom use have been advocated for some time in L.A. by HIV organizations, former HIV infected performers, and pornography producers with dissenting views. The AIM clinic managed to stay operative for almost 12 years,
from 1998 to December 2010 when it was shut down by L.A. County and state health officials following public criticism regarding a number of issues including, inter alia, lack of licenses, failure to provide information on positive HIV cases to health authorities, failure to deliver follow-ups for positive HIV patients, and lack of a cooperating agreement with a hospital to refer patients as needed.\footnote{309}

With regard to conflict of interest, the AIM-study shows a remarkable deficit of credibility, as it was substantively facilitated by an organization that provided crucial services to the L.A. pornography industry, thus working in close association with third party sex industry profitiers. The survey was even made inside the premises of this organization, and during a time when these pornographers were under systematic public criticism. L.A. pornographers had a strong incentive to skew its results toward positive reporting. The accounts in AIM's survey are in such sharp contrast to the numerous other sources and research discussed elsewhere in this chapter that rather than presenting unbiased data, the study appears more as misleading advertising for pornographers. The AIM-survey and the 2011 Internet survey by Grudzen et al. are the only two large quantitative surveys of an active population of commercial pornography performers that exist to date. In particular, this should caution the reader. Indeed, in comparable cases where scholars attempted to study legal brothels, researchers were regularly denied entry.\footnote{310} Among those who have been given access, they often report surprisingly disparate frequencies of violence, abuse, unsafe sex, and management misconduct, especially when compared to interviews with brothel survivors who are no longer staying in or dependent on such venues.\footnote{311} Notably, the 2011 Internet survey of commercial pornography performers, which reached diametrically opposed conclusions to the AIM-study, did not need to get such permission as they used online survey techniques that do not require permission from organizations aligned with the industry (Grudzen et al., 640).\footnote{312}

With regard to more technical methodological problems, notable is the sampling procedure from which the study’s subsample was selected among their roughly 1,200 clients. Although sampling took place over four month while performers made roughly 4,800 visits to the clinic to test for STDs, the number of respondents surveyed were only 177 (Griffith et al., 623–24). Deeming from the approximated size

\footnote{309} See Molly Hennessy-Fiske and Rong-Gong Lin II, “HIV Infects Porn Film Performer: At Least 2 Production Firms Shut Down, and Other Actors and Actresses Are Tested,” Los Angeles Times, Oct. 13, 2010, AA, at 3 (Lexis) (quoting Michael Weinstein, president of AIDS Healthcare Foundation, in support of a mandatory condom requirement); Hennessy-Fiske, “Porn Clinic Denied License” (quoting producer Chi Chi LaRue who preferred “expanding condom use,” and considered the protection of testing by others to be illusory).\footnote{310} See supra note 298. The AIM-authors, who do not once notice Grudzen et al.’s findings to the contrary, nevertheless acknowledge this extraordinary situation repeatedly, noting “the extreme difficulty of gaining access to this population,” that there “is no public registry of actresses,” that previous scholars have failed to obtain interviews, that “no studies provide quantitative data on porn actresses,” and that “individuals outside of the pornography industry are not granted access to productions.” Griffith et al., “Pornography Actresses,” 622. Surprisingly, neither of these circumstances appears to cause these authors to reflect over why they were permitted to survey this population at all.\footnote{311} See, e.g., Max Waltman, “Assessing Evidence, Arguments, and Inequality in Bedford v. Canada,” 37 Harvard J. Law & Gender 459, 475–77, 490–92 (2014) (comparing findings from different sources and researchers on legal brothel prostitution in Nevada); cf. id. 474–510 passim (scrutinizing evidence of differing quality from legal brothels in various jurisdictions).\footnote{312} However, Grudzen et al.’s survey methods could still include cases where there was potential surveillance from pimps and “boyfriends,” though to what extent is difficult to know.
of the L.A. population of performers, which Griffith et al. estimates as only being slightly above or possibly the same as the clinic’s monthly number of visits (p. 623), the response rate is below 15%. According to the article, flyers were “posted in the reception area of the waiting room of AIM,” with information about the study and the incentive to participate (p. 624). The incentive accordingly was a lottery containing “two prizes of $300 in free STD testing” (p. 623). In addition, receptionists were said to inform every client about the study, even encouraging them to participate, referring those interested to the “chief medical officer” (p. 624). Considering these systematic efforts to solicit respondents, the high non-response rate is intriguing. In light of the many known problems discussed previously that dissuade populations in the sex industry from sharing information about their situation, it may well be less likely that abused, vulnerable, or generally dissatisfied performers would respond to a survey conducted under the auspices of the pornographers and their associates. The 2011 online survey expressed similar concerns of not being able to reach “potentially more vulnerable” segments of commercial pornography performers (Grudzen et al. 644).

The low response rate in the AIM-study inhibits drawing any useful conclusions from the data, even if the responses were actually unbiased. Surprisingly, there is also no attrition analysis in the article that looks into why so many performers (over 85%) refused to respond (Griffith et al., 623–24). The only thing said about this problem by the authors themselves is their observation that it “is certainly possible that there was a self-selection bias such that those who chose to participate were different from those who chose not to participate” (p. 630). Indeed, this is certainly possible. Although noting that such a self-selection bias “is an important methodological issue” the authors refrain from considering its importance further, choosing instead to defend their work on the rationale that it fills a research gap due to the “difficulty in accessing this population” (p. 630). The reasons why many persons in the sex industry have otherwise been difficult to access for surveys (e.g., due to their well-founded skepticism when providing information to outsiders) might have cautioned the authors against publishing data that could be seriously unreliable. If only the least vulnerable persons responded, while those exploited under worse conditions decided not to participate, it would provide an erroneous representation of the sample as a whole.

313 See supra notes 292–296 and accompanying text.
314 In addition, these roughly 15% among L.A. pornography performers are supposedly drawn from a more professional segment of the pornography industry that is also located close to the world’s most sophisticated motion film industry. As distinguished from pornographers who operate in less regulated venues in other cities or in other countries, including common pimps, tricks, “partners,” sex offenders, or war criminals, see, e.g., supra notes 125–129 and accompanying text, this is a peculiar branch that may be quite different from the rest of the industry. Positive reporting could thus also result if the minority of prostituted persons, who did not enter the sex industry primarily as a result of prior social vulnerability, if they exist at all, might be overrepresented among this sample. If so, and if not for the many other potential causes of bias discussed here, the AIM-study may be relevant only for a very small subsample of the entire population of pornography performers.
315 The same could be said about their sampling of the community control group that exhibited a response rate as low as 29%. Griffith et al., “Pornography Actresses,” 625. However, in the case of their controls, the authors appear more persuasive when they refer to other population studies that allegedly have shown similar responses on the measures surveyed in this study. Ibid., 630 (citing studies). For the record, a concerned reader may want to check whether their cited references are actually accurate on this point. If not, additional bias might exist.
316 See supra notes 292–296 and accompanying text.
317 By contrast, when a Swedish survey on attitudes to prostitution had a non-response rate of 54.6%, which is far better than the AIM-study’s non-response rate of over 85%, the Swedish researchers spent over one page of their journal article’s method section to discuss potential biases and to make compari-
Further notable methodological deficiencies in the AIM-study exist as well. For instance, even the authors themselves express doubts as to whether childhood sexual abuse was underreported (pp. 629, 631)—a form of abuse that has been reported and analyzed as a catalyst for entry into the sex industry among a majority of respondents in numerous samples of prostituted women.\(^{318}\) The AIM-study recognized that only asking subjects “where you a victim of childhood sexual abuse” (p. 623) is a measure that is “superficial (or limited)” (p. 629). It is especially unreliable in light of that this single question was asked “without further clarifications or definitions” (p. 631). Top-quality scholarly surveys typically even measures violence against adult women, as distinguished from child abuse, by asking about several types of specific behavior—not simply asking about an undefined abstract phenomena.\(^{319}\) It is thus common to break gender-based violence down into a range of intelligible and verifiable “behaviorally specific terms” that do not leave individual women with the task to label incidents as rape, sexual abuse, or otherwise risking minimizing their experiences when reporting them.\(^{320}\)

Another example of low conceptual validity is the AIM-study’s measurement of sexual enjoyment, which is surveyed by asking respondents “how much do you enjoy sex” on a 10-item scale going from “not at all” to “very much” (p. 624). The authors provide citations to any reliability or validity assessment of this question. Hence, it is unclear what is measured conceptually (e.g., do the respondents enjoy private sex, or do they enjoy sex for the camera?). Moreover, negative responses on such a question would likely be perceived by the performers as bad publicity for the pornography industry, but not at all for women in the female control group—a fact also reasonably likely to promote biased reporting. The pornography industry harbors exploitative and harmful production conditions of unusually severe gravity that have been corroborated by multiple sources over an extended period of years (pp. 55–75 above). Inexperienced students who encounter the AIM-study in their quest for knowledge will see a disingenuous glamorization of the pornography industry in L.A., though without necessarily understanding its highly unreliable data. The

See supra notes 198–206 and accompanying text.

\(^{318}\) See supra p. 2 n.10, at 167 tbl.3, where one example among a 10-item battery of questions regarding sexual aggression read “have you had sex acts (anal or oral intercourse or penetration by objects other than the penis) when you didn’t want to because a man threatened or used some degree of physical force (twisting your arm, holding you down, etc.) to make you?”

\(^{319}\) See supra p. 2 n.10, at 167 tbl.3, and accompanying text.

\(^{320}\) See supra p. 2 n.10, at 167 tbl.3, and accompanying text.
study’s remarkable contrasts when compared with an otherwise large body of literature on the sex industry should compel skepticism.

**Representations of Prostituted Women**

Through the history of legislation surrounding the sex industry, conflicting statements from prostituted women have often been heard. As mentioned above, one woman “declared” before a U.S. federal government body the “myth” of “unhappy childhoods” among women in pornography, while two years later reporting to another federal government body about her own early sexual abuse along with several other “models.” Although the fact that vulnerable people may be manipulated to show support for the sex industry cannot by itself render their testimonies invalid per se, it should caution the reader to look more carefully at other evidence to see whether different sources corroborate each other or not. In one sense, this is an issue regarding the triangulation of individual testimonies with studies performed on larger samples and other substantive evidence. In another sense, this is also a matter of whether or not one begs the question; for example, when asking someone who sees no real or acceptable alternative to prostitution, whether or not she or he is comfortable with their situation, an honest response that acknowledges a wish to escape might not be expressed. This is especially likely to be the case when pornographers or other pimps will have access to her testimony.

Apart from methodological problems with researching the sex industry, issues of representation animate many conflicting accounts about it. While quite a few organizations have been formed by “survivors,” others portray themselves as “sex workers’ activists” (more below); both types of organizations claim to legitimately represent the interest and perspectives of prostituted persons, though they often have very different agendas. When organizations and individuals that claim to speak on behalf of prostituted women generally also have associations with third party profiteers such as pimps, brothel owners, pornographers, or strip clubs, it would appear to make them less credible. For instance, in a justice committee hearing in 2014 the legislative assembly for Northern Ireland (U.K.) questioned a witness who claimed to represent “sex workers”; in her responses the witness conceded that her organization included “managers,” “pimps,” and “those who control sex workers,” including a known large escort organization in the U.K. run by a Mr. Douglas Fox and his partner. Fox lead the so-called International Union of Sex Workers and presented himself as “an independent male sex worker,” in spite of the fact that his escort agency—an association of employers rather than workers—had been covered by Channel Four on British TV, among others. While surveying a large amount of organiza-

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323 Evidence suggests that third parties commonly threatens or abuse persons prostituted in pornography or other parts of the sex industry in order to keep them from revealing incriminating information to outsiders. See, e.g., supra note 233.


tions and individuals is beyond the scope of this dissertation, the further examples below caution against drawing hasty conclusions on the basis of statements by various organizations.\textsuperscript{326}

One of the earliest and most known so-called sex workers organizations often mentioned in academia is Call Off Your Old Tired Ethics (COYOTE)—an NGO formed in San Francisco in 1973.\textsuperscript{327} COYOTE supported “the repeal of all existing prostitution laws,” and, as opposed to taking the position that most of the problems of prostitution are related to the intrinsically unequal exploitation of persons for sex, took the position that “most of the problems associated with prostitution are directly related to the prohibition of prostitution and the stigma [accordingly] attached to sex and especially sex work.”\textsuperscript{328} The present Executive Director of COYOTE in Los Angeles, Norma Jean Almodovar—a former traffic law officer in the 1970s and early 1980s—was convicted in 1984 for the third party offense “pandering” (i.e., promoting prostitution).\textsuperscript{329} Almodovar herself claims that the conviction was a “set-up” by the Los Angeles Police Department, as she allegedly was about to reveal corruption there.\textsuperscript{330} Moreover, Margo St. James, who founded COYOTE,\textsuperscript{331} has testified for pornographers during trials; that is, being called by their defense attorneys as an expert witness.\textsuperscript{332} She was also convicted for running a “disorderly house” (i.e., a brothel) already in 1962; yet by contrast to Almodovar, St. James apparently appealed her conviction successfully.\textsuperscript{333} Whether or not she was one, it is a fact that a brothel operator or promoter who profits from prostitution typically can exploit

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\textsuperscript{326} I am indebted to sex trafficking survivor, activist, and organizer Stella Marr for drawing attention to many of the organizations and individuals described below.


\textsuperscript{328} Jenness, “Sex Work as Sin,” 403–04.


\textsuperscript{331} \textit{See}, e.g., Jenness, “Sex Work as Sin,” 403; Miller, “Sugar Dating,” 38 n.39.

\textsuperscript{332} See David McCumber, \textit{X-Rated: The Mitchell Brothers: A True Story of Sex, Money and Death} (New York: Simon & Schuster, 1992), 45 (describing how attorneys “Kennedy and Rhine and Roberts” had called St. James among others in “an impressive stable of defense witnesses” in obscenity trials against two notorious pornographers, the Mitchell Brothers). Thanks to Prof. Donna Hughes, who tracked down this source. Furthermore, according to the \textit{San Francisco Chronicle}, attorney Joseph Rhine not only represented “the Mitchell brothers and other adult business owners,” but also “adult bookstore operators, porno shops, skin flick theaters and topless clubs when they met with resistance while attempting to expand beyond their base in waterfront and industrial areas of the city and wider Bay Area.” Sam Whiting, “Joseph Rhine: Attorney on the Side of the Underdog,” \textit{San Francisco Chronicle}, June 3, 2003, A17 (Westlaw).

prostituted persons due to the latter’s vulnerable position (see, e.g., 55–64 above)—a situation usually providing more leverage to tricks and third parties in bargaining with the person or engaging in force.\textsuperscript{334}

Another well-known U.S. organization called the Sex Workers Outreach Project (SWOP), with a similar agenda as COYOTE’s, was founded by the late Robyn Few the year after she, similar to Almodovar, had been convicted of conspiracy to promote interstate prostitution—a legal offense that also applies to third parties.\textsuperscript{335} A comparable organization to hers called the Erotic Service Providers Union, who initiated an unsuccessful ballot proposal to decriminalize prostitution in San Francisco in 2008, was led by Maxine Doogan; reportedly, Doogan also was convicted for a third party offense while running a prostitution escort agency in Seattle.\textsuperscript{336} Her organization appears to present itself as a “union” for prostituted people, but their webpage makes clear that they also include “anyone who is . . . compensated for their support of someone else’s erotic service.”\textsuperscript{337} Being compensated for supporting someone else’s prostitution is what sets third parties such as brothel owners, escort agencies, and strip club owners apart from the persons who are actually prostituted and the persons who buy them (i.e., tricks). Not surprisingly Douglas Fox, who runs a large escort agency in the U.K. with his partner (see above),\textsuperscript{338} has been announced to having participated in Maxine Doogan’s Erotic Service Providers Union’s Internet radio show.

Furthermore, in Ireland a campaign named Turn Off the Blue Light presented itself as an “association of sex workers and others who care about the welfare of sex workers in Ireland . . . campaigning against calls to criminalise the purchase of sex.”\textsuperscript{339} However, according to Irish press, the person behind the site was former Northern Ireland law enforcement reservist and convicted pimp Peter McCormick.\textsuperscript{341} In Sweden, an organization called the Rose Alliance supports a similar agenda for decriminalizing tricks as the organizations above and, not surprisingly, lists SWOP along with similar organizations among their international affiliates.\textsuperscript{342}

\begin{itemize}
  \item \textsuperscript{334} See also Waltman, “Assessing Evidence in Bedford,” parts I & II (analyzing position of third parties in prostitution in terms of power over prostituted persons).
  \item \textsuperscript{335} “People: Robyn Few,” Sex Workers Outreach Project (SWOP) Las Vegas, accessed Jan. 28, 2014, archived at http://perma.cc/WZ3F-6DAY.
  \item \textsuperscript{338} See supra notes 324–325 and accompanying text.
  \item \textsuperscript{342} See Rose Alliance: Riksorganisationen för sex- och erotikarbetare i Sverige (Website), accessed Jan 28, 2014, archived at http://perma.cc/CNF5-7SYH?type=image (“screen capture” due to risk for computer virus) (affiliates under heading “Sexarbetars-organisationen”).
\end{itemize}
By contrast to so-called sex worker organizations who advocate decriminalization, survivor-led organizations are often abolitionist. A trafficking-survivor, activist, and organizer going under the pseudonym Stella Marr formed a global umbrella organization around 2012 along with several survivor-led NGOs: The Sex Trafficking Survivors United (STSU). This NGO describes their members as “abolitionists” intending to raise funds for exit programs and agreeing “that to end trafficking/prostitution we must address demand and focus on providing more choices and empowering recovery services for the victims.” In January 2014, this umbrella organization had at least 177 members. When they started in 2012, 25 of their members were running their own nonprofit organizations such as Trisha Baptie of Educating Voices (EVE), Vancouver, B.C.; Vednita Carter of Breaking Free, Minn., M.N.; Kristy Childs of Veronica’s Voice, Kansas City, M.O. and K.S.; Tina Frundt of Courtney’s House, Wash., D.C.; Natasha Falle and Bridget Perrier of www.sextrade101.com, Toronto, O.N.

Although organizations such as SWOP and COYOTE might simultaneously provide some legitimate services to prostituted people, it may appear inconsequent that they also explicitly recognize their ties with the profiteers of the sex industry. One possibility for this contradiction is that such information could function as marketing, where admitting these ties implies to the attentive observer that the organizations can facilitate recruitment for pornography production or other sex industry venues. The term “sex workers” and “unions” are quite misleading when used to describe these organizations, as some of them apparently include people who profit from selling others for sex. Using such terms and rhetoric seems equivalent to presenting an employers association as working in the interests of its employees. It is disingenuous. These organizations do not seem to be legitimate “representatives” for prostituted people, even though they might provide partial support for some. Any concerned reader, government, judicial body, or researcher has to diligently inquire into how organizations claiming to represent prostituted people are constituted before taking their representations at face value.

Conclusions

This chapter has assessed data on the conditions of pornography production in order to find to what extent those who perform in the materials are harmed or not. The conditions and preconditions in pornography production documented and corroborated by different methods and accounts mirror the conditions documented more systematically in other parts of the sex industry, from which many persons are recruited into pornography (e.g., off-camera prostitution and strip clubs). Although the data is

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346 Cf. Stella Marr, “Pimps Will Be Pimps Whether Male or Female or Posing as ‘Sex Worker Activists’ and Other Conflicts of Interest (Part 1 of 2),” Traffic(k) Jamming (Blog), Prostitution Research & Education, May 23, 2012, archived at http://perma.cc/KYV9-M5TJ (suggesting that pimps use such organizations “to connect with Johns while they recruit vulnerable young women”).
more complete with regard to females, evidence indicates similar conditions apply to male performers. The typical performer suffers from one or more disadvantages or coercive preconditions that are usually present already during their childhood, propelling their entry into the sex industry. Such conditions may include sexual abuse, physical abuse, parental neglect, or other disadvantages, for example, extreme and persistent poverty, racism, sexism, and/or social discrimination on other grounds. These persons have often been teenage runaways and suffered from homelessness during parts of their lives. Many lack the necessary education and job training as well as common social skills that would help them find an alternative for financial survival other than pornography and prostitution. An effect is that most of these persons are trapped in the sex industry, with no realistic or acceptable alternatives for escape. Numerous other obstacles further contribute in preventing their escape, some being of the bureaucratic kind while others are related to the general job market or conflicting public interests. Nine out of ten in the sex industry explicitly say they want to leave it but feel they cannot.

As a result of the troublesome and abusive preconditions to entering the sex industry, performers in the pornography industry typically lack sufficient leverage to avail themselves of requirements to perform unsafe or dangerous acts, including “ass-to-mouth” sex, multiple entries, and “gang-bangs” as well as torture materials. Moreover, numerous accounts attest that third parties frequently resort to violence and threats to make pornography performers comply with their demands. One symptom of these abusive conditions among others is severe mental disorders, whose prevalence in pornography performers has been documented to be even worse than in off-camera prostitution. Among both categories of the sex industry, as many as two thirds of 854 persons in nine countries had PTSD-symptoms that on average were in the same range as some of the worlds’ most traumatized combat veterans who sought treatment. When controlling for other relevant factors, a number of studies still found that being sold for sex significantly and strongly predicted mental disorders independently. Assumptions postulating that conditions under women-directed or so-called “amateur” productions would be substantially different, even non-coercive, seem to rely on theoretical speculation and were directly countered above by empirical studies and other sources. Empirical evidence further indicates that gay male pornography production harbors similar harmful exploitative dynamics as those in heterosexual pornography, though studies of this genre are fewer thus statistically less robust.

Some theoretical accounts have taken the diversity of experiences in the sex industry as evidence per se that prostitution and pornography cannot generally be seen as exploitative social practices based on gender. However, neither does evidence suggest that female (or male) prostituted persons are regularly oppressing, exploiting, or abusing tricks and third parties in pornography, nor that they do not operate under equal, or rather worse conditions as those of other vocational categories that may be regarded as more exploitative. The empirical evidence shows that pornography production, as a form of prostitution, is a particularly vicious form of sexual exploitation. Structural indeterminacy is not an accurate description here. Arguments to the contrary, such as those promulgated in a recent survey of pornography performers facilitated by those with ties to the Los Angeles sex industry, presented unreliable methods and conflicts of interest, suggesting their claims, which clash dramatically with other sources, may contain serious bias. Similar claims supporting decriminalizing tricks and sex industry third parties are often voiced by persons who deceptively pretend to represent “sex workers,” despite themselves often having a history of conflicting interest as profiteers of the prostitution of others. By contrast, survivors among prostituted populations and pornography performers who left the
industry typically favor criminalization of third parties and tricks, but decriminalization and support for prostituted persons and pornography performers to make real choices to escape their exploitation. Survivors lack financial interest in the industry, hence seem more reliable when expressing opinions about whether the conditions there are harmful or not. All in all, this chapter supports the conclusion that pornography production is a harmful social practice of inequality based on sex that exploits, tantamount to slavery, producing multiple social disadvantages.
3. Consumption Harms

The evidence discussed previously (pp. 33–37 above) shows that regular pornography consumption is prevalent among many men, with specific studies showing that a majority of young adult men reportedly consume it each month to varying degrees, occasionally or every day, and typically in solitude; by contrast, it seems very seldom to be used by women unless initiated by partners or friends, and then on a much less frequent basis than among men. Pornography is also more strongly associated with physiological arousal among men than among women who, compared to men, exhibit stronger negative mental affect in response to pornography than their relatively lower arousal might already suggest. The evidence in the chapter on production harms (pp. 55–89 above) further suggests that the predominant preconditions for producing pornography are premised upon social subordination based on sex coupled with coercive circumstances, sometimes brute force. In light of this evidence, would the typical male consumer subordinate, coerce, or brutalize other persons to experience in reality what he has experienced through mediation? Sexual stimulation involves positive rewards to the one who is stimulated, at least in the short term; thus, one may hypothesize that mixing subordination, coercion, or even violence with positive rewards leads to consumers adopting such behavior themselves with women outside the materials. Unfortunately, a large body of social science evidence further to be discussed supports that this behavioral hypothesis is generally true. The evidence below also suggests that men (and women) who are regularly exposed to pornography in addition will typically become desensitized to sexual aggression and adopt attitudes and beliefs that support or minimize violence against women. Just as exposure to pornography is shown below to have caused more laboratory aggression and predicted more self-reported sexual and other aggression against women in social context, the evidence shows such minimizing attitudes supporting violence against women by themselves also cause and predict corresponding behavioral aggression.

Methods and Measurements

Triangulation of Experimental and Nonexperimental Methods

Social science studies on the relationship between gender-based violence and pornography consumption have been produced in larger numbers from early 1970s and onwards. These studies can be divided into two main groups: experimental and

347 Allen, Emmers-Sommer et al., “Reactions to Explicit Materials,” supra p. 2 n.6, at 551, 553.
348 See, e.g., Final Report Att’y General’s Comm., ed. McManus, supra p. 27 n.78, at 246–90 (discussing studies from the 1970s to the mid 1980s); MacKinnon, Sex Equality, supra p. 6 n.23, at 1369 et seq. (discussing early studies); cf. Statens Offentliga Utredningar [SOU] 1969:38 Yttrandefrihetens gränser [The Limits of Freedom of Expression] [government report series] (Swed.) (mentioning few social science studies at the time of publication).
nonexperimental studies. What particularly distinguishes the experimental methodology from nonexperimental methodologies is that the former is more suited for assessing causality under controlled forms, for instance by exposing individuals to different frequencies or types of pornography (often including a no-exposure control group) and comparing its effects on them by testing their aggressive tendencies or attitudes. One general concern about such designs is that they have typically been executed only as laboratory studies, thus may not be replicated in social reality where “numerous factors interact and jointly impinge on the individual.”

Certainly exceptions exist. For instance, an experiment during a film festival exposed two college student groups to different non-explicit sexual materials related in contrasting ways to gender-based violence, then surveyed their respective level of endorsement of attitudes supporting violence against women and compared both with a non-exposure group. Perhaps more important though, numerous nonexperimental studies discussed below also show that the results from laboratory experiments usually are corroborated by predictive data from correlational associations in social context (e.g., social surveys). Hence, convergence across different methodologies in a theoretically consistent manner substantially strengthens the external validity of laboratory data.

Nonexperimental studies in particular also use more elaborate statistical techniques, for example, controlling for the interaction effect of “moderating” or “mediating variables,” to avert suspicions that the exhibited relationship between pornography consumption and sexual aggression is merely mediated by other predictors. Accordingly, the “Confluence Model” (e.g., 109–115 below) is one influential theoretical model build on research that has distinguished between and tested various individual predictors of sexual aggression alongside pornography consumption in social surveys measuring self-reported aggression. The Confluence Model has shown that it is unwarranted to assume (as skeptics might have done) that it would primarily be preexisting individual propensities for sexual aggression that predicted the ag-

350 See Neil M. Malamuth and James V. P. Check, “The Effects of Mass Media Exposure on Acceptance of Violence against Women: A Field Experiment,” J. Res. Pers., 15, no. 4 (1981): 436–446, who created three experimentally controlled conditions in social context during a campus film festival at the University of Manitoba. The exposure effect from two experimental films (Swept Away and The Getaway) that presented male aggression against women, non-explicit heterosexual sexual activity, and violence against women “as having justification and positive consequences” where compared with two nonaggressive control films containing sexually non-explicit presentation but without similar support for violence against women (n = 115 with 50 males, 65 females). Ibid., 438–39. A third condition included a no-film condition with 64 males and 92 females. Ibid., 440. Accordingly, the study found that compared to control movies and the non-exposure group, the two experimental films produced increased attitudes supporting violence against women significantly in male subjects in the form of “acceptance of interpersonal violence” against women (AIV), and that among female subjects the experimental films produced an opposing decreasing but statistically nonsignificant trend compared with control films and the non-exposure condition. Ibid., 441–42. Similar opposing attitudinal trends were found for “rape myth acceptance” (RMA) in both genders, though they were not statistically significant. Ibid., 441–42. For a definition and explanation of AIV and RMA, respectively, see infra notes 368–369 and accompanying text.
351 A mediating variable is usually posited when there are unexpected “weak or inconsistent” relations between independent and dependent variables, such as if pornography consumption was found to correlate strongly with self-reported sexual coercion for one male subpopulation, but not for another. Cf. Reuben M. Baron and David A. Kenny, “The Moderator-Mediator Variable Distinction in Social Psychological research: Conceptual, Strategic, and Statistical Considerations,” J. Pers. & Soc. Psychol., 51, no. 6 (1986): 1178. A mediating variable operates on a continuum where, in the most extreme end, it entirely eliminates the significant effect from the independent variable to zero (not likely in social sciences), while in less extreme cases it “significantly decreases” rather than reducing the correlation between independent and dependent variables to zero. Ibid., 1176. Statistical tests may control for how much independent effect can be attributed to the independent and the moderating or mediating variables respectively. See ibid., 1175 (describing tests and citing literature).
gression as well as the pornography consumption itself. Rather, the model shows that pornography consumption is an independent variable that significantly predicts sexual aggression beyond the variance that can be attributed to other predictors (below pp. 109–115). These nonexperimental methods by themselves cannot resolve puzzles of causality as the experimental methodology can. Yet when their correlations converge on the hypothesized causal path of similar variables within the experimental paradigm, they provide more robust and controlled social evidence in support of causal evidence from laboratories. Thus, when making conclusions about the social effects of pornography consumption, researchers draw support from multiple methods.

There also exist qualitative and quantitative interview data which, in the context of the experimental studies in particular, may strengthen a finding that pornography consumption has an independent effect on coercive behavior, rather than primarily being a proxy for other tendencies in consumers (see 122–129 below). For instance, such causal associations are indicated by testimonies from tricks how pornography inspired them to “imitate” certain coercive activity previously unknown to them with prostituted people. Similarly, such causal inferences are strengthened by corresponding evidence from prostituted persons’ experiences on how their abusive tricks explicitly referred to coercive or degrading content in specific pornography materials. Further potentially corroborating evidence is provided by quantitative surveys with battered women that inquire into what extent their batterers used (or did not use) pornography, sometimes controlling for alternative predictors (e.g., alcohol consumption or military service). Moreover, a body of literature analyzes correlations between reported sexual offenses and consumption of pornography with entire societies as the units of analysis, as opposed to population surveys where individual men are the units of analysis. For reasons explained further below (pp. 129–138), this “aggregated” method has become increasingly disfavored among researchers because of its many methodological pitfalls.

Using the three main methods accounted for above (experiments, nonexperimental survey-based analysis, and qualitative accounts) can be seen as a form of methodological triangulation; different methods are combined in order to address their respective individual flaws and weaknesses, which better validates their mutual claims about social reality. In the literature such an approach is termed “between-method triangulation,” which means combining “dissimilar methods to measure the same unit or concept”; such triangulation is to be distinguished from “within-method triangulation,” for example, a survey questionnaire that uses different scales or different questions for measuring the same theoretical concept. Triangulation in these senses conforms to the classic scientific notion of corroboration, validating a finding with a second or third method that controls for uncertainties inherent in the first method.

353 Ibid., 267. Later in his review, Blaikie suggests that “[p]erhaps it is time to stop using the concept of triangulation in social science,” alleging it receives “lip-service” rather than being used as a “validity check.” Ibid. 270. Alternatively, he believes it has become too vague and is being taken as an excuse for naïve views of science and reality. Ibid. However, invoking the triangulation concept to explain the combination of different methods used in research on pornography consumption effects appears precisely to describe the “validity check” that Blaikie thinks triangulation originally referred to. See ibid., 262 et seq. (tracing the origins of the concept).
Meta-Analysis: Making Statistical Sense of Multiple Small Studies

A meta-analysis offers a replicable technique for quantitatively summarizing (aggregating) data from several individual experimental and/or nonexperimental studies. Given that the data can be compared with sufficient validity to the problem inquired, meta-analysis has reliability advantages compared to traditional literature reviews.\(^{354}\) Meta-analysis is particularly useful when there exist a large number of smaller studies with insufficient sample sizes on their own to support significant correlations, although taken together they might provide sufficient statistical power. This dilemma is called Type II error, or false negatives. As suggested in several meta-analyses on pornography exposure effects, one important reason for prior controversies in the literature was that many individual studies lacked sufficiently large samples to provide statistical significance on their own.\(^{355}\) The problem is well illustrated with the following hypothetical example. Imagine four different studies observing a .20 correlation between pornography exposure and subsequent aggression, but two of the studies have samples of 50 subjects each and two have samples of 140 subjects each.\(^{356}\) The two smaller studies would not find a significant association within confidence intervals. A typical “box count” model literature review then suggests a cumulative research inconsistency that is simply a result of a Type II error (Cook and Leviton, 453–54). Consequently, a remedy is provided by a meta-analysis that increases the sample size by adding data from several studies into one analysis, reducing confidence intervals and enabling statistically significant effects to be more accurately estimated.\(^{357}\) Hence, meta-analysis has a particular advantage to “overly conservative” conventional literature reviews (Cook and Leviton, 453).

Nonetheless, despite the advantages of a meta-analysis it is just as imperative that it is based on studies that compare similar phenomena in a meaningful sense as with other literature reviews. For instance, a meta-analysis that blurs the concepts by mixing data on pornography consumption with other media consumption (e.g., general media violence or documentaries on sexual violence) could probably at best produce confusing (and at worst misleading) results of little use for answering the question whether pornography cause sexual aggression. Meta-analysis thus has to create broader concepts that cover the diversity in its data, since the individual studies included might differ slightly in their concepts (e.g., differences in categorization of pornography materials, consumer gender, aggression against either women, men, or both) or how these concepts were measured (e.g., prolonged versus short term exposure, attitudinal scales versus hypothetical sentencing of sexual offenses). Meta-analysis has therefore sometimes been criticized as a methodology that invariably runs the risk of aggregating “apples and oranges” (p. 458). However, so long as one is measuring “fruit” rather than apples or oranges, meta-analysis seems appropriate to its task (p. 458; citing G. V. Glass).


\(^{356}\) Example taken from Allen et al., “Exposure & Rape Myths [Meta],” 12.

\(^{357}\) Allen, D’Alessio, and Emmers-Sommer, “Reactions of Offenders [Meta],” 146.
Where effects from consumption are homogenous in a meta-analysis, such as if increased pornography exposure largely correlates with increased aggression, the analysis suggests that individual differences are caused only by sampling error; yet if results are more heterogeneous, such as when pornography exposure exhibits very different effects on a dependent measure, for example, ranging from positive to none (or even negative) on aggression, it becomes important to identify potentially moderating variables, such as the type of pornography or the individual differences among those who were exposed (e.g., different aggressive personality propensities). In other words, the moderating variables are used to differentiate between “apples and oranges” when the category of “fruits” appears too sweeping. Heterogeneity or homogeneity in a meta-analysis can be established by the use of various statistical tests. If a subsequent moderator test presents homogeneity within the chosen subgroups, for instance within types of pornography or types of consumers (men or women), and there are significant differences in mean correlations between these subgroups, a strong case can be made that the chosen subgroups are particularly explanatory relevant. A caution expressed against meta-analysis generally is that they may be biased against including studies with nonsignificant or null findings because such results are less likely to get published. However, this bias is unlikely to hold for pornography research, as many intellectuals frequently defend the freedom to disseminate pornography or claim there are no negative consumption effects. There seem thus to be quite strong incentives to publish null finding on this topic, even if meta-analyses in general may be biased against including null findings.

Triangulating Different Measurements: Aggression and Attitudes

The research on the impact from pornography consumption on attitudes related to sex equality seems partly to have been driven by other interests than the attitudinal implications per se. As will be shown below, a significant part of such research also validates experimental measurements of sexual aggression, as the latter could otherwise only be measured through proximate indicators of general aggression such as noxious noise, negative evaluations, or electric shocks (see 89–92 below). Self-reported criminality, including sexual aggression, may of course be fairly estimated through well-drafted anonymous surveys, as naturalistic studies do (see 109–115

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361 A study that tested a sample of 51 published meta-analyses on a range of social topics found that almost 80% of them showed a negative correlation between their sample size and the effect size, which indicates some support for a bias against publishing nonsignificant or null results among meta-analyses in general. Tim Levine, Kelli J. Asada, and Chris Carpenter, “Sample Sizes and Effect Sizes are Negatively Correlated in Meta-Analyses: Evidence and Implications of a Publication Bias Against NonSignificant Findings,” Comm. Monographs 76, no. 3 (2009): 286–302 (main results summarized in journal abstract). In particular, however, the authors did not specify the roughly 20% of studies that had not shown a negative association between sample size and effect size. Among all the 51 meta-analysis included, only 1 studied the pornography effects of concern here, and only laboratory aggression, not attitudinal effects. Ibid., 300; appx. A (listing individual studies included). Indeed, in that meta-analysis of experimental studies, several of the 33 studies included showed null or negative correlations even though the entirety of the sample showed a positive correlation. Allen, D’Alessio, and Brezgel, “Aggression after Exposure [Meta],” 268 tbl.1, 270 tbl.2.

362 See supra page 36 note 105 (citing criminology literature).
below). However, such data by itself can in principle only establish correlational claims—not causality, as the experimental paradigm can. Thus, in order to explore whether general aggression was a valid proximate of sexual aggression, or to find better measurements, early investigators wanted to know whether certain attitudes or characteristics could predict sexual aggression among individuals. If pornography exposure was then shown to cause changes to these attitudes or characteristics, it indirectly indicated a similar relationship to sexual aggression; hence, the need for experiments with electric shocks, noxious noise, and similar measurements of general aggression would be reduced. Such a finding would provide a “within-method triangulation,” where different indicators measure the same underlying concept (i.e., sexual aggression), and substantially validate pornography consumption research as a whole. Certainly, as two meta-studies showed with robust certainty in 1993, attitudes predict corresponding behavior in a vast number of situations. However, as sexual aggression may include criminal, or otherwise socially disproved behavior, analogies to other noncriminal behavior or criminal behavior dissimilar to sexual aggression and their attitudinal correlations are insufficient. Hence, one needs to look particularly at sexual aggression.

Psychologists have systematically studied the relationship between various attitudes supporting violence against women (ASV) and sexual aggression. They have, inter alia, compared the extent of such attitudes among the general male population to those of convicted or self-reported anonymous rapists (more below). Professor Neil Malamuth, among others, identified several common attitudes or personality factors that predicted sexual aggression among men. One such factor was self-perceived likelihood of raping (LR), typically measured with a 5 point survey scale, where 1 meant “not likely at all,” and 5 meant “very likely.” A qualification was usually added that respondents should rate their own LR on the assumption that they could be sure “not to get caught” (Malamuth, “Rape Proclivity,” 140). Various techniques were used, for example, surveying LR after subjects had been presented a rape scenario in a pornography presentation or through a written or spoken victim’s account. Sometimes the question was simply asked outright. Although response rates varied, an average of about 35% across the studies indicated any likelihood above 1, with 20% reporting 3 or higher (p. 140). When considering a broader set of sexually coercive acts than rape, an even higher likelihood has been indicated. For instance, among 356 males at a Canadian college, not only did about 30% report LR, but an additional 30% reported a likelihood of forcing “a female to do something [sexual] she didn’t really want to do.”

An indication that 60% of college men would sexually coerce a woman if they could avoid any social consequences might appear very high. However, a naturalistic study discussed further below (p. 109 et seq.) showed that 25% of almost 3,000 representative American college men already admitted to having sexually aggressed

363 Cf. Blaikie, Designing Social Research, 263, who cites Denzin’s two concepts of triangulation: “within-method” triangulation measures the same concept with different indicators, while “between-method” triangulation combines different methods that measure the same concept. For further discussion of triangulation in pornography consumption effects research, see supra pp. 89–92.


since age 14, on average 2 to 3 times, thus causing (or attempting to cause) someone else to comply with unwanted sexual activity. Moreover, those numbers probably were sizeable underestimation for various reasons. In light of such social surveys it does not appear unlikely if 60% of Canadian college men, assuming they could avoid sanctions, reported a LF. The question of whether such cohorts that report a high LR or LF are the same as those who actually behave sexually aggressive has to be further validated though. One way is to compare other attitudes and behaviors among those who reported LR and LF with the attitudes and behaviors among convicted sexual offenders, or among self-reported (anonymous) sexual aggressors. A series of early studies discussed more fully below thus inquired whether such sexually aggressive men exhibited more ASV than men who did not report sexual aggression.

One particular manifest construct of ASV was coined by Martha Burt as rape myth acceptance (RMA). RMA typically includes victim-blaming, not unlike the “‘just world’ hypothesis”; for example, a belief that “only bad girls get raped,” “women ask for it,” women who initiate sex “will probably have sex with anybody,” or that women report rape to cover-up unwanted pregnancies or hurt former boyfriends (Burt, 217–18, 222). The concept is sometimes measured with Burt’s specific RMA scale, but she also related it to other manifest attitudinal constructs such as adversarial sexual beliefs (ASB) and acceptance of interpersonal violence (AIV) (pp. 218, 222, 223). ASB measures to what extent people endorse perceptions that women are inherently sexually manipulative, that they secretly enjoy rapes, enjoy turning men down, and similar perceptions, or, endorse perceptions that other men would rape if they could (ibid.). AIV measures adherence to views such that domestic abuse is inevitable, that the only way for a man to turn on a “cold woman” is by using force, or that women say no to sex to avoid appearing “loose” though they genuinely want men to force sex on them, and similar views (ibid.). Early studies showed that convicted rapists not only often held callous attitudes toward rape, but particularly justified their actions through a high RMA. Although many early studies lacked controlled comparisons with the general population, making it unclear whether or not all men might endorse similar attitudes, these findings were soon corroborated by other studies with non-convicts. Hence, ASV were measured anonymously within normal college populations around 1980, and a stronger adherence to ASV was found among those men who reported a high LR or LF. In other words, normal men reporting high LR or LF appeared to hold more similar attitudes to convicted sexual offenders than men reporting lower likelihoods did. Yet some caution

367 See infra notes 432–434 and accompanying text.
371 Malamuth, “Rape Proclivity,” 142–43 (citing studies).
should be noted since convicted sexual offenders are too few, relatively speaking, in order to be regarded as representative for all undetected offenders.\textsuperscript{373}

In order to corroborate that the attitudinal correlations between convicts and other men who reported a high LR and LF are representative for rapists generally, the attitudes among men who report more sexual aggression in anonymous surveys have been controlled for. In 1985, a study measured self-reported sexual aggression, RMA, and other ASV in a sample of 1,846 representative male college students within an American state university of 20,000 students, finding increasing sexual aggression relative to the “degree of adherence” to ASV.\textsuperscript{374} In 1986, a similar study measured self-reported sexual aggression, ASV (primarily through AIV), and other predictors of aggression within a smaller sample of 155 males solicited through a variety of venues, with ages ranging from 18 to 47, and a mean of 23, finding that AIV had an independent significant correlation with self-reported sexual aggression, as did all other predictors except psychoticism (no mediating variable existed that could make AIV predictive contribution “redundant”).\textsuperscript{375} Comparable robust evidence of attitudinal predictors to sexual aggression is also found in a large representative sample of almost 3,000 American college men discussed further below (p. 109 et seq.), including measurements of RMA, AIV, and ASB that correlated significantly with self-reported sexual and nonsexual aggression.\textsuperscript{376} In the three different naturalistic samples above, men who anonymously reported more sexual aggression against women held more ASV than men who reported less aggression, which corroborates that stronger ASV is a significant shared attitudinal characteristic among convicted and undetected sexual aggressors alike. These self-reports also corroborate the studies with men who reported their own LR or LF, where those who adhered more strongly to ASV reported higher LR or LF than those who adhered less strongly to ASV.\textsuperscript{377} In other terms, since ASV is known to correlate positively with self-reported sexual aggression, LR or LF will also predict more sexual aggression by its association to ASV. Simply put, there is corroborating “within-method” tria-

\textsuperscript{373} For instance, only between 2% to 4% of rapists in the United States seem to be convicted. See infra note 443. Factors unrelated to their propensity to sexually offend may affect their incarceration rate, such as educational level, socioeconomic status, racism or other biases, or rape brutality. Cf. Neil M. Malamuth, Tamara Addison, and Mary Koss, “Pornography and Sexual Aggression: Are There Reliable Effects and Can We understand Them?,” \textit{Ann. Rev. Sex Res.} 11 (2000): 64 (citing studies); Malamuth, “Aggression against Women,” 23–24 (citing studies).

\textsuperscript{374} Mary P. Koss et al., “Nonstranger Sexual Aggression: A Discriminant Analysis of the Psychological Characteristics of Undetected Offenders,” \textit{Sex Roles} 12 (1985): 983–85, 989 (quote). The authors noted that though some ASV might have been developed as a way to “mitigate negative feelings” when aggressive acts had already been committed (e.g., due to remorse or shame), the studies on correlations between high-LR and ASV (above) contradict explanations that downplay the predictive capability of such attitudes. Ibid., 990. One can add that a triangulation with other sources, e.g., experiments where higher adherence to ASV produced more laboratory aggression against women, also contradicts explaining such attitudes merely as responses to remorse or shame for past aggression. See infra notes 384–387 and accompanying text.


\textsuperscript{377} For offenders and reported likelihood to sexually coerce, see supra notes 370–372 and accompanying text.
gulation of the above measures, suggesting they are measuring the same latent psychological construct of “rape proclivity.”

In order to further define the common characteristics of rape proclivity, several other studies have measured arousal to various rape presentations, typically manipulated according to three dimensions of consent: (1) mutually consenting sex, (2) nonconsenting “positive-outcome rape” scenarios (victimized woman presented as involuntary aroused), and (3) nonconsenting “negative-outcome” rape scenarios (victimized woman presented as reacting purely negative). Exposure to “positive-outcome” rape presentations produced particularly higher arousal among subjects scoring high on LR when compared to consenting presentations, and when compared to the arousal to “positive-outcome” rape presentations among subjects scoring lower on LR. Corroborating further that men with sexually aggressive propensities are similarly aroused more by sexually aggressive materials than men with fewer sexually aggressive propensities, a meta-analysis from 1999 found that not only are convicted sexual offenders slightly more aroused to pornography per se compared to normal men, but much more so if the presentation is matched to the individual’s offense. Other meta-analyses show similar results with regards to specific audiorecorded rape presentations, though there are some disagreements regarding the level of validity in the latter studies.

Another set of studies corroborating that ASV is an important cause for sexual aggression was provided in a series of early experiments, whose aim also was to validate laboratory aggression experiments in naturalistic settings. A 1988 study thus inquired into whether either (1) ASV, and/or (2) the men’s self-reported sexual aggression independently predicted laboratory aggression against female and male targets. The dependent variable consisted of a combination of aversive noise and small monetary rewards, both administered after a deliberate provocation had been made by a female or male confederate/target (Malamuth, “Laboratory Aggression,” 484–86). Among a number of independent variables were Burt’s AIV scale (n = 137), as well as self-reported naturalistic sexual aggression (n = 88) (pp. 479–83). Stronger AIV produced significantly more laboratory aggression against women, but

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382 See, e.g., Malamuth, “Aggression against Women,” 36 (reviewing studies).

not more against men; and self-reported sexual aggression produced significantly more laboratory aggression against both women and men (pp. 487–89). A prior set of similar experiments in 1983 with a sample of 42 males had in addition found that (1) RMA, (2) AIV, and (3) arousal to rape presentations (measured as increased penile tumescence) independently produced laboratory aggression, accounting for 43% of the variance of the aggression against women. A follow-up study also assessed the causal effects of a general acceptance of violence—as distinguished from violence against women in particular—and found that only women-specific factors produced laboratory aggression against women.

**Summary of Analysis.** A large body of social science research convincingly shows that ASV predict sexual aggression against women. This inference is corroborated by a triangulation of experiments and naturalistic studies inquiring into the associations between such attitudes and self-reported sexual aggression, perceptions of LR and LF, laboratory aggression, criminal records, and levels of arousal to presentations of sexual aggression among various male cohorts. The conclusion can be further applied to pornography consumption effect studies; that is, if pornography exposure causes ASV, such exposure eventually causes sexual aggression against women as well. Further below, the more direct associations between pornography exposure and behavioral aggression will be analyzed, then followed by similar research on the effects on ASV.

**Sexual Aggression**

Many exposure experiments on general aggressive behavior since the 1970s were often constructed as a learning situation ostensibly presented as the actual experiment, with subjects being exposed to various types of pornography or control materials (e.g., 99–101 below). Early research suggested that in order to properly distinguish exposure effects in laboratory settings, the social inhibitions among men to publicly aggress particularly against females would somehow have to be lowered. One method deliberately provoked subjects via a confederate participant, then gave subjects an occasion to retaliate aggressively against the confederate. In conjunction with these provocation and retaliation opportunities the subjects were, under various pretenses, exposed to either pornography or control materials. In addition to different pornography categories (e.g., nonviolent, or violent with positive or negative outcomes), additional moderating variables typically controlled for included manipulation of the targets of aggression (e.g., using men or women, promiscuously or non-promiscuously acting confederates), different levels of arousal and anger before or after exposure, modifications of the context (e.g., manipulating the duration of provocation effects or the social inhibitions on the situation), and type of media exposure (e.g., still-photography, motion films, or written content). A summary of a

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387 Malamuth, “Aggression against Women,” 38 (citing N. M. Malamuth and J. V. P. Check, “Factors Related to Aggression Against Women,” paper presented at annual meeting of the Canadian Psychol. Ass’n, Montreal (1982)).

few important experimental studies below will illustrate the diversity of approaches and methodology used, including their strength and weaknesses. Further below, a meta-analysis of the larger body of experimental research will be discussed within the context of additional studies that shed light on how to interpret its results.

**Experimental Exposure and Aggression: Demonstrating Approaches**

A key experiment published 1978 on manipulating social inhibitions against laboratory aggression, authored by Edward Donnerstein and John Hallam, was ostensibly presented to subjects as being about effects of stress on “learning and on physiological responses”; yet it measured male aggression against female and male targets after exposure to (1) a nonviolent “highly erotic” movie containing “explicit sexual behavior,” (2) an “aggressive” but non-erotic film, and (3) a no-film condition. Sixty undergraduate males wrote a short essay on marijuana legalization to be reviewed by a fellow subject who, in reality, was a confederate. The review was administered through a written evaluation and electric shocks on a ten point scale (more shocks, poor rating). All subjects received a negative evaluation and 9 shocks, and were then divided into the three exposure conditions and asked either to rate the respective film of 3 ½ minutes or to wait for a similar duration (controls). An ostensibly additional learning task experiment was then presented with the same confederate that had evaluated subjects negatively. The confederate was supposed to try to remember a list of nonsense syllabuses. Thus, subjects were given an opportunity to retaliate via shock (electric) or reward (small amounts of cash), now on an eight point scale. In order to make aggression appear as more socially condoned, this experiment provided a second opportunity 10 minutes later to repeat the exercise. The hypothesis was that inhibitions to aggress would become reduced in the second situation as subjects became more comfortable with aggressing in public. Already in the first aggression situation, the nonviolent pornography and the non-erotic aggressive film conditions produced significantly higher levels of aggression than the no-film condition. Then, as hypothesized, in the second aggression situation the nonviolent pornography condition produced significantly stronger aggression toward the female target—not only stronger than in the first situation, but also significantly stronger than the aggression toward the male target. Meanwhile, the aggressive non-erotic film’s effect did not differ significantly between male and female targets (Donnerstein and Hallam, 1275). Similar effects from pornography exposure could exist outside the laboratory, for instance in private relationships where aggressive inhibitions may be lower than in public, or in prostitution where aggressive inhibitions seem to be particularly low among tricks and pimps.

A typical experiment comparing short-term effect duration on aggression caused by different media content was published by Dolf Zillman and associates in 1974. (Their study does not distinguish the aggression target’s gender.) Immediately after first exposure conditions, subjects were shown an additional educational film about rivers containing displays of landscapes and rainfall for one minute, with speaker

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389 Donnerstein and Hallam, “Facilitating Effects on Aggression,” 1273. Further citations in text. For quotes and references not directly cited, see ibid., 1270–77.

390 See infra pp. 122–130 (analyzing naturalistic studies with battered women, prostituted women, and male tricks); cf. supra pp. 64–67 (analyzing sources that document aggression and abuse by tricks and pimps against prostituted persons in various sex industry venues, including pornography production).

voice muted. The following different media contents and their relative effects’ strength and duration after the interference were compared: (1) a neutral clip from *Marco Polo’s Travels*, (2) an aggressive clip from a vivid prize-fight (*The Champion*), (3) a violent clip from *The Wild Bunch* presenting brutal and lethal violence, and (4) nonviolent pornography that included foreplay and intercourse said to be “devoid of indications of wild passion which could have been interpreted as aggressive” (Zillman, Hoyt, and Day, 297–98). As another study was said to have found no “appreciable differences” between administration of electric shocks and “intense noxious noise” as measurements of laboratory aggression, either for provocations or retaliations (p. 294), the experiment used noise through headphones (p. 295). In terms of producing aggression, the nonviolent pornography significantly exceeded the neutral stimulus and the aggressive and violent film clips; by contrast, the latter two did not “differ appreciably” from the neutral condition (pp. 298–99).

A typical experiment comparing exposure effects from different types of pornography, published in 1980, used electric shocks and written evaluations in a 2 x 2 x 3 factorial design with 120 male subjects that were manipulated on the following dimensions: (1) level of prior anger (anger, no anger), (2) target of aggression (male, female), and (3) exposure to film category (neutral, nonviolent sexually explicit, violent/aggressive sexually explicit).\(^392\) The study found that, with no differences, both the nonviolent and violent pornography increased aggression against male targets beyond the neutral materials when subjects were angered, but not for nonangered subjects. The violent pornography produced a higher aggression in angered subjects against female targets relative male targets; even nonangered subjects aggressed more against females in comparison with those exposed to neutral materials or nonviolent pornography (pp. 274–275). Yet the author hypothesized that aggression would likely have increased after exposure to nonviolent pornography if this experiment had also used two opportunities for aggression, as in the 1978 experiment above where the second opportunity apparently reaffirmed subjects that there was no social disapproval for aggressing against a female (p. 275; citing Donnerstein and Hallam).

Another pair of experiments by Donnerstein and Leonard Berkowitz published in 1981 also exemplify effect studies of specific pornography content, but with additional specificity: they controlled for (1) a nonaggressive film presenting “a young couple engaged in various stages of sexual intercourse”; (2) an aggressive film where a woman is “tied up, stripped, slapped, and sexually attacked” by two men but with a “positive-outcome” ending where she smiles and stops resisting; (3) an aggressive film similar to the above but with a “negative-outcome” ending suggesting suffering; and (4) a control condition (talk show interview without aggressive or “erotic” content).\(^393\) The two aggressive movies’ endings (positive or negative) were additionally alluded to by an introductory voice-over. In the first of these pair of experiments, 80 male subjects were aggressed by a female or a male confederate, and then given one opportunity to retaliate. Only the two aggressive movies produced a statistically significant increase in aggression against female targets, and not against the male targets (Donnerstein and Berkowitz, 716–17). However, the authors implied that the anger manipulation was much stronger than in previous studies—a condition that could explain why nonviolent pornography produced no reliable dif-

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\(^393\) Donnerstein and Berkowitz, “Victim Reactions in Erotic Films,” *supra* chap. 1, n. 155, at 713. Further citations in text. For quotes and references not directly cited, see ibid., 710–24.
ferences for male targets despite that an increase in the predicted direction existed (pp. 716–17). Regarding nonviolent pornography and female targets the authors noted that when restraints had been reduced, for example, by using a second retaliation opportunity—a disinhibitory technique not used in their experiment—aggression would more likely occur (p. 717). The positive-outcome aggressive pornography was thought as communicating that aggression is permissible. Although the negative-outcome pornography may not have communicated a similar permissive message, the authors suggested that the latter amplified a gender-association between the confederate target and the movie victim’s pain cues which, in turn, stimulated preexisting anger in subjects (pp. 717, 722). These hypotheses were tested in a second experiment with female targets only, and 80 new subjects of which half were angered. The hypotheses were confirmed: only angered subjects increased their aggression under the negative-outcome violent pornography condition, while both non-angered and angered subjects increased their aggression under the positive-outcome condition compared to controls (p. 720). Subjects saw the negative-outcome woman as enjoying her situation less than the positive-outcome woman; yet angered subjects believed the negative-outcome woman enjoyed the situation more than nonangered subjects believed (p. 719). Although not specifically commented on by the authors, the latter finding indicates that men’s anger toward individual women might “spill over” and desensitize their view of women’s suffering in general.

Meta-Analysis and Key Conceptual Studies
Most laboratory aggression studies were done during the 1970s and 1980s. As demonstrated above, their design could have important implications on whether or not the effects became statistically significant (e.g., inhibitory or disinhibitory frameworks, number of retaliation opportunities, gender of provoker/target, and potentially diverting media). Nonetheless, a meta-analysis in 1995 on experimental data showed unambiguous effects when materials were subgrouped accordingly: (a) nudity, (b) nonviolent sexual behavior, or (c) violent sexual behavior. The meta-analysis showed homogenous effects for each of these three moderators that were significantly different from zero for all types of pornography: that is, exposure to nonviolent as well as violent sexual behavior increased subsequent aggressive behavior, while nudity diminished subsequent aggression (Allen, D’Alessio, and Brezgel, 271). The somewhat contradictory result regarding nudity will be subject to reconsideration in light of further analysis, as some individual research designs and other studies of sexist dehumanizing advertising or sexually charged but non-explicit and nonviolent media presentations contradict this finding (pp. 106–109 below). However, first it is important to consider the general design of the meta-analysis. Various differences between individual experiments make it imperative that a meta-analysis includes broader measurements; or, put otherwise, a comparison of “fruits” rather than a comparison of “apples” or “oranges.” Yet it needs to avoid becoming sweepingly broad by covering too much literature, thus stretching its concepts to the

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394 Allen, D’Alessio, and Brezgel, “Aggression after Exposure [Meta],” 276 (noting that little behavioral measures of aggression have been studied since the 1980s). There are some more recent experiments on pornography exposure and laboratory aggression that confirms prior research, such as a study where aggression was measured through a dart-throwing decision task with images of human faces as potential targets. Dong-ouk Yang and Gahyun Youn, “Effects of Exposure to Pornography on Male Aggressive Behavioral Tendencies,” Open Psychol. J. 5 (2012): 1–10.


point of triviality or vagueness. Overinclusiveness could also produce misleading findings, for example, by comparing studies with incomparable designs. For instance, we saw that some experiments showed null results contrary to others, for example, due to deliberately introducing diverting media to test the effect’s short-term duration, or due to a lack of disinhibitory strategies to facilitate aggression in public.

Hence, a closer look on the meta-study’s methodology is warranted to understand potential compromises in data selection that could affect its results.

Individual studies in the meta-analysis had to use a “pornographic stimulus” (Allen, D’Alessio, and Brezgel, 266), as distinguished from, say, sexually suggestive media. Consistent with common scientific definitions (cf. 41–44 above), pornography was defined as “media material used or intended to increase sexual arousal,” usually including “verbal or visual images of exposed sexual organs and depictions of sexual behaviors” (Allen, D’Alessio, and Brezgel, 259). The three further moderating conditions were (a) nudity, including “a single person depicted with minimal or a complete lack of clothing but not engaged in a sexual activity”; (b) nonviolent sexual behavior, including “petting, autoerotica, and fondling of genitals, as well as oral, vaginal, or anal intercourse”; (c) violent sexual behavior, including “sexual behavior with the intent to injure or against a person’s agreement; sadomasochism and bondage were included in this category” (p. 267). Moreover, studies had to contain a measurement of aggression that included a person’s attempt to knowingly injure another person “either physically, materially, or psychologically” (p. 266). Studies only including self-reported aggression, or physiological measures such as arousal, were excluded. Yet no distinctions were made between studies that had elaborate strategies to lower aggressive inhibitions (e.g., a second aggression opportunity) and those without—a decision leading to reflect weaker effects than expected in social context where aggression likely occurs.

A database of 1,300 works on pornography was subsequently retrieved and examined. Any study deemed suitable for inclusion needed endorsement by at least two research associates (pp. 265–66). Thirty studies containing 33 primary effect sizes (n = 2,040) were included (p. 269). The initial meta-analysis (raw correlation effects) demonstrated increased behavioral aggression, albeit with a heterogeneous finding. Further analysis of potential moderators showed only one set with homogeneous findings; that is, the three content types: (1) violent, (2) nonviolent, (3) nudity (p. 274). Other moderators, for example, gender of consumer or target, prior or no prior anger manipulation, media type (film, photography, written pornography), or sexual arousal (higher, lower) did sometimes show significant results; yet if so, always with heterogeneous correlations (pp. 269–73). As mentioned, moderators with homogeneous significant differences in mean correlations are particularly explanatory relevant. Hence, an important finding is that both nonviolent and violent pornography produced aggression in laboratory settings. In the words of the authors, “[v]iolent content, although possibly magnifying the impact of the pornography, is unnecessary to producing aggressive behavior” (p. 271). The exception was still photographs with “nudity” (pp. 271–72), also to be discussed further below.

**Dehumanization as Additional Moderator**

The meta-analysis’ finding that exposure to violent pornography caused laboratory aggression may not be surprising (see, e.g., 99–101 above), but the fact that nonvio-

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398 See *supra* note 360 and accompanying text.
lent pornography also produced aggression might benefit from more interpretation that explains the psychological mechanisms behind such outcomes. Here, I will draw on findings related to psychologist James Check’s three-pronged typology that was adopted by Canadian courts in the 1980s (see 41–44 above). Check distinguished between pornography that was (1) violent, (2) nonviolent but “dehumanizing or degrading,” and (3) neither (i.e., “explicit erotica”), with Canadian courts regarding only “erotica” as harmless.\(^{399}\) The meta-analysis’ nonviolent “sexual behavior” category is broader than Check’s nonviolent categories, lacking distinctions such as “dehumanization or degradation” or “erotica,” while the meta-analysis’ nudity category does not include sexual “activity,” as Check’s “explicit erotica” does; thus, nudity and erotica are not equivalents.\(^{400}\) Yet the meta-analysis’ finding that nonviolent materials produce aggression is consistent with most early research findings based on typologies similar to Check’s. For instance, in 1984 Donnerstein alluded to Check’s typology in a review (though referring explicitly to philosopher Helen Longino), noting that when nonviolent materials included “women in submissive and objectified roles”—as opposed to either “mildly arousing” materials, or materials that did not present aggression, nor present “unequal power relationships with women”—several studies indicated clearly negative consumption outcomes, for example, callous attitudes and trivialization of rape.\(^{401}\) Similar ASV significantly predict self-reported male sexual aggression, self-perceived LR and LF, male aggression against women in laboratory experiments, and are more common among sexual offenders (pp. 93–98 above). Since these different measurements are all conceptually related, exposure effects from nonviolent “dehumanizing” or “degrading” materials on one of the indicators can be presumed to be similar on the others (ibid.).

Testing Check’s typology in an empirical experiment, Check and Ted Guloien controlled for pornography exposure over a couple of weeks; the three exposure conditions produced more LR or LF among the male subjects than the control condition, though the effect from “erotica” was not statistically significant as the violent and nonviolent dehumanizing materials were.\(^{402}\) Yet although the “erotica” materials were not dehumanizing, they did not therefore reduce, as opposed to increase, LR or LF. Notably, the “strongest and most pervasive” exposure effects came from nonviolent dehumanizing materials—not from violent materials (Check and Guloien, 179). All in all, this experiment suggests that violent materials might not affect sexually aggressive behaviors among every individual as strongly as dehumanizing nonviolent materials do. Dehumanization therefore seems to be an important moderating variable that the broader and more inclusive meta-analysis above by Allen, D’Alessio, and Brezgel does not explicitly discuss, possibly because dehumanization is always present in popular pornography in some way, including in violent materials. This is also suggested by recent content analysis (see 44–50 above).

Other studies that suggest similar conclusions as Check and Guloien’s with regards to sexual stereotyping were reviewed by Zillman and James Weaver in 1989.\(^{403}\)


\(^{400}\) Allen, D’Alessio, and Brezgel, “Aggression after Exposure [Meta],” 267; cf. supra pp. 41–44 (discussing Check’s typology).

\(^{401}\) Donnerstein, “Effect on Violence against Women,” 62–63; reference to Longino at 79.

\(^{402}\) Check and Guloien, “Violent, Dehumanizing, & Erotica,” supra chap. 1, n. 138, at 171 tbl.6.1. Further citations in text. This experiment is also discussed more fully above, supra notes 138–139 and accompanying text, and below, infra note 449 and in its following text paragraphs.

\(^{403}\) Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 95–125. Further citations in text.
Men tended to stereotype women along dichotomous categories, for example, “prudish” or “promiscuous,” “whore” or “madonna,” and similar concepts (Zillman and Weaver, esp. 109–115). Such mental schemata, it was argued, mediate part of the exposure effects from pornography (pp. 109–21). This theory was confirmed in a couple of experiments by other researchers, where men were first exposed to pornography slides in company of a female confederate who ostensibly responded with either sexually permissive, neutral, or nonpermissive remarks; as hypothesized, during the second experiment the men aggressed significantly more against the female who had made sexually permissive remarks than they aggressed against the others.\footnote{404} Zillman and Weaver (p. 114) suggested that these experiments facilitated aggression by a psychological process of “target devaluation,” where stereotypical perceptions of female sexual permissiveness together with exposure to similarly suggestive pornography made the men, bluntly put, perceive the female as fair game.\footnote{405} This “target devaluation” concept shares traits with Check’s “dehumanization” concept, as well as with the Indianapolis Ordinance’s concept of “subordination” (see 43–44 above). All three concepts identify similar social mechanisms that degrade some women relative to other women, enabling men to rationalize aggression or negative attitudes against the former (e.g., trivialization of rape).

In an experiment further elaborating the target devaluation mechanisms, Weaver exposed a sample of both genders to one of five exposure conditions: (1) scenes of “consensual sex” where romance led to affectionate sex (e.g., Lady Chatterly’s Lovers); (2) “female-instigated sex” with promiscuous women (e.g., Lady on the Bus); (3) rape-pornography including abusive male coercion; (4) “slasher movies” with so-called eroticized violence (e.g., a nude woman unsuccessfully offering sex to avoid murder); or (5) nonviolent and nonsexual control materials (reported in Zillman and Weaver, 115). All non-control exposure conditions lowered the number of months recommended as prison sentences for a rapist; the second category of nonviolent “female-instigated sex” showed the largest effect for both genders (reduction from 846 months to 515 months), and the first category of consensual sex showed the weakest (non-reliable) effect (reduction to 747 months) (p. 118–119 & tbl.4.3). Only the fourth category of eroticized violence showed a marginally stronger effect among men than did “female instigated sex,” while the third category of rape pornography actually showed weaker effects among men than did “female instigated sex” (ibid.). Weaver’s experiment also had subjects make a parallel evaluation of various stereotypical female narratives along the promiscuous-prudish dichotomy, both prior and after the exposure conditions (p. 116), which enabled further interpretation of the psychological mechanisms underlying the exposure effects. The variations in evaluations tended to conceptually parallel the exposure effects on rape sentencing overall (see 116–20 passim). This co-variation suggested that exposure to pornography changes the perception of women as being more “permissive and promiscuous than they actually are,” which in turn mediates the more “callous dispositions toward the sexual victimization of women” expressed in lower sentencing for rape (p. 119). In other words, pornography generally makes people perceive women as stereotypically “sluttish”—an attribution taken as a cue for trivializing rape.

\footnote{404}{Leonard and Taylor, “Pornography, Permissive & Nonpermissive Cues,” supra chap. 1, n. 171, at 297–98.}
\footnote{405}{See Zillmann and Weaver, “Pornography & Men’s Callousness,” 114 (reasoning that male subjects probably thought something like “let the bitch have it,” then projected such thoughts less on prudishly acting females than on promiscuously acting ones). Cf. Leonard and Taylor, “Pornography, Permissive & Nonpermissive Cues,” 291–93, 297–99.}
Further clarifying the consumption effects, a prolonged exposure experiment by Zillman and Jennings Bryant in 1988 showed how common nonviolent pornography produced stronger beliefs among American nonstudents and college students that women are naturally sexually promiscuous. Exposure also significantly increased subjects’ acceptance of male dominance and female servitude (“Prolonged Effects,” 538). An older prolonged exposure experiment by Zillman and Bryant had similarly shown how common nonviolent pornography produced significantly stronger perceptions among college students that people were “doing more of anything pertaining to sex.” In this earlier experiment, the massively exposed group estimated that almost 30% of adults performed anal sex and group sex, while the no-exposure group estimated that only 10% did (“Trivialization,” 15 tbl.1). Conversely, exposure significantly reduced the recommended penalty for a hitchhiking rape in both men and women; nonexposed controls recommended an average of almost 10 years imprisonment, while the massively exposed group recommended only 5 years (p. 17 tbl.3). Moreover, a similar reduction of support for the women’s liberation movement was shown, and a parallel increase in men’s “sexual callousness” toward women (a measurement similar to other ASV) (pp. 17–18).

Just as in Weaver’s experiment above, Zillman and Bryant’s prolonged exposure studies show how nonviolent pornography promotes precisely those perceptions in males that are conducive to aggression against women and reduces empathy for women’s victimization; a stronger belief that many women are promiscuous, so “fair game” for sexual advancements, including aggression. As distinguished from the broad brush of meta-analysis, the detailed individual studies thus show that pornography exposure produces (in Weaver’s words) a “target devaluation” process where women, as a group, become dehumanized and subordinated relative an otherwise higher standard for recognition of sexual victimization. Rather than the violence being determinative for the strength of such effects, as might be implied by the meta-analysis, even “nymphomania” in “total absence of coercive or violent action” produced “the strongest trivialization of rape overall” in one experiment (Zillman and Weaver, 120). As trivialization of rape, along with other ASV, are positively and significantly related to behavioral aggression against women (see 93–98 above), these detailed studies suggest that compared to nonviolent pornography, violent pornography may not generally be the strongest cause of aggression. In this light, assuming that the nonviolent materials in the meta-study usually included dehumanizing or degrading materials, and particularly materials presenting women as sexually promiscuous and “nymphomaniac”—a condition implied by the homogeneity of correlations, qua lack of further moderators (Allen, D’Alessio, and Brezgel, 271)—causing laboratory aggression against women makes much sense.

A minor remark made by Donnerstein in 1984 may seem slightly inconsistent with Check’s findings that dehumanizing materials are stronger causes to ASV than are non-dehumanizing “erotica.” Donnerstein mentioned that studies he conducted before 1984 on nonviolent pornography were made with materials “chosen to be

406 Dolf Zillmann and Jennings Bryant “Effects of Prolonged Consumption of Pornography on Family Values,” J. Fam. Issues, 9, no. 4 (1988): 531–35. Perceptions of promiscuity were measured as a decreased belief in women’s faithfulness and an increased belief in women’s acceptance of nonexclusive sexual access, e.g., multiple partners or extramarital sex. Ibid. Further citations in text.
407 Zillmann and Bryant, “Trivialization of Rape,” supra p. 3 n.13, at 15. Further citations in text.
408 The Sexual Callousness (SC) scale developed by Mosher was used. Ibid., 14. It contains items similar, among others, to Burt’s RMA and AIV scales. For instance, SC items includes “Pickups should expect to put out,” and “A woman doesn’t mean ‘no’ unless she slaps you” Ibid. Accordingly, RMA contains “Women who get raped while hitchhiking get what they deserve,” and AIV contains “Sometimes the only way a man can get a cold woman turned on is to use force.” See Burt, “Cultural Myths & Rape,” 222–23.
void of . . . any male-female power roles,” and accordingly should “be considered erotic rather than pornographic.”409 However, if such “erotic” materials were allegedly used, among other experiments those that Donnerstein and Hallam made in 1978 shows that “erotica” may produce similar effects as dehumanizing or violent pornography do.410 In order to reconcile the somewhat inconsistent use of the term “erotica” by Donnerstein then, one might postulate that his “erotica” were indeed non-dehumanizing, but contained promiscuous presentations of women that caused a “target devaluation” process of women as a group, similar to the mechanism documented by Weavers and others above. An alternative explanation would be that Donnerstein’s materials were more dehumanizing than he perceived them to be. The problems Check confronted when trying to find sexually explicit “erotica” for an experiment suggest some doubts concerning Donnerstein’s judgment about his materials being void of dehumanization. As recalled, Check and associates “simply could not find feature-length videos” of that kind, ending up making edited excerpts because available videos on the market always contained some dehumanizing or violent elements.411 Moreover, several content analyses of consumption patterns suggest that the most popular sexually explicit materials are either aggressive materials (including physical violence or verbal aggression), or nonaggressive but dehumanizing and degrading materials, for example, ass-to-mouth sequences; that is, Check’s “erotica” category is very low on demand (see 44–50 above). In fact, very few, if any, tangible examples of Check’s sexually explicit “erotica” category have been provided by intellectuals who championed that distinction.412 Hence, true “erotica” may be rarer than Donnerstein realized in 1984. Accordingly, the meta-analysis on laboratory aggression reasonably included mostly dehumanizing materials or promiscuous presentations in its nonviolent pornography category—a conclusion supported by the homogeneity of effect correlations from nonviolent materials, indicating no other moderators (Allen, D’Alessio, and Brezgel, 271). Moreover, Check’s category of “erotica,” when accurately identified as such and distinguished from dehumanizing pornography, still tended to produce rather than reduce psychological indicators that predict sexual aggression, albeit only with a statistically nonsignificant correlation.413

Nudity and Behavioral Aggression: Limitations of Meta-Analysis

None of the pictures in the nudity category implied overt sexual behavior (Allen, D’Alessio, and Brezgel, 267). Some studies included in the meta-analysis operationalized nudity with nude or seminude pictures taken from magazines such as Playboy or Penthouse.414 When considering all studies included, nudity produced a decrease in laboratory aggression in the meta-analysis (p. 271). Yet this finding appears slightly inconsistent with the research on other pornography categories discussed above. Moreover, one experiment done by Donnerstein and associates, and included in the meta-analysis, actually showed how exposure to nude Playboy pictures, even without frontal nudity, produced aggression effects in which the exposure group ad-

410 See supra notes 389–390 and accompanying text (summarizing experiment).
412 See supra notes 140–142 and accompanying text.
ministered **electric shocks of longer duration** than did controls.\textsuperscript{415} The study noted that previous research had shown how shock duration was under “less cognitive mediation” than shock intensity, which explained the variation of significance in outcome by these different measures of aggression in the same experiment (Donnerstein, Donnerstein, and Evans, 242). Considering the small sample of 54 subjects exposed to nudity (hence, restricted statistical power), the fact that the longer duration of shocks were only “marginally” significant (p. 242; \( p < .10 \))\textsuperscript{416} might nonetheless be of interest as the nudity category has otherwise shown little, or even negative exposure effects. A smaller increase of aggression is also consistent with some experiments on nonviolent sexually explicit materials (as distinguished from nudity only), were aggressive increases were seen only after experimenters used more sophisticated designs to lower aggressive inhibitions (\textit{cf}. 99–101 above). If only more sensitive measurement techniques reveal laboratory aggression effects after exposure to nudity, the experiments included in the meta-analysis that showed decreased aggression after exposure could be misleading. As shown below, studies on exposure to less explicit materials, such as sexually suggestive printed advertising, or \textit{R-rated movies scenes}, suggest that “milder” sexual materials can produce similar exposure effect as dehumanizing pornography.

For example, two experiments with different Canadian college student samples of varying ages reported that men exposed to printed advertisements presenting “women as sexual beings,” whose primary function in the ads were “to be erotically enticing,” scored significantly higher on ASV compared to men exposed to either nonhuman control ads, or ads presenting progressive “non-traditional role-reversed portrayals of women performing a variety of component social functions.”\textsuperscript{417} Another similar experiment was made with a twenty-two minute compilation of \textit{R-rated} movie scenes that rating boards had neither considered being pornography, nor “X-rated,” but which was nonetheless categorized as “sexually objectifying” by ten independent research assessors.\textsuperscript{418} The exposure group was thus exposed to strip-tease, lap-dancing, and similar presentations from the movies \textit{Showgirls} and \textit{9½ Weeks}, while the comparison group was exposed to a cartoon video (Milburn, Mather, and Conrad, 650–53). Later, when assessing a fictional acquaintance-rape scenario, men exposed to the R-rated presentations were significantly more likely than the comparison group were to believe that the victim derived “pleasure,” and “got what she wanted”: on a 7 point scale (1 = strongly disagree; 7 = strongly agree), the exposure group averaged around 4 on both items, while the control group averaged between 1 and 2 or around 2 on respective items (pp. 655–58 & figs.1 & 3). As recalled, similar ASV predict male laboratory aggression against women, self-reported naturalistic male sexual aggression, self-perceived LR and LF, and are more common among

\textsuperscript{415} Donnerstein, Donnerstein and Evans, “Erotic Stimuli and Aggression,” 242. Further citations in text.
\textsuperscript{416} The meta-analysis reports a sample size 54 for this experiment, with aggression produced by exposure to nudity (\( r = .109 \)) as well as nonviolent pornography (\( r = .218 \). See Allen, D’Alessio, and Brezgel, “Aggression after Exposure [Meta],” 270.
sexual offenders (pp. 93–98 above). Hence, sexist advertisements and R-rated movies in the three experiments above caused attitudes that predict male sexual aggression, even though the materials were not sexually explicit, qua pornography.

Certainly, dehumanizing and more sexually explicit materials that include or imply sexual behavior seem to exhibit a stronger aggressive exposure effect than plain pictorial nudity, and particularly when considering the latter’s contradictory results in the meta-analysis above. Yet more cautiously designed experiments might reduce the seemingly inconsistent effects and produce less dramatic differences between these different categories. This hypothesis is supported by the above experiments on printed advertising and R-rated movies, respectively, as well as by the nudity experiment above that showed stronger exposure effects on shock duration. These experiments suggest that even materials that do not present explicit sexual activity, but may be dehumanizing and objectifying, promote ASV and aggression. One way to interpret such findings is that men who consume materials that put women’s bodies on “display” are being reinforced in assuming an entitlement to sexual access. Regardless of degree of explicitness or whether or not particular behaviors are presented, men’s notion of entitlement may be further mediated by perceptions that female promiscuity (typically implied by such materials) invalidates social sanctions against male aggression, which eventually promote both ASV and sexual aggression. This theory is consistent with one of the Indianapolis Antipornography Ordinance’s pornography subcategories: “graphic sexually explicit subordination of women” that includes “postures or positions of servility or submission” (i.e., without implying physical activity).

419 The social science evidence above indicates that Indianapolis-style nudity (or related presentations) would not be harmless after all—a subcategory that is also conceptually similar to Check’s dehumanizing materials (above pp. 41–44), though the former does not contain overt sexual activity as the latter does. That is, both categories eroticize women’s degradation by presenting women as sexually servile, nondiscriminate, and effectively subordinated to men and their perceived entitlement to aggress, as opposed to the stereotypical images of nonpromiscuous “prude” females. Such a hierarchical construct can also be termed sexual objectification. Assuming such objectification produces pleasurable feelings in men (as opposed to hostility), it may be unsurprising if their aggressive feelings are temporarily reduced—even so after provocation in a manipulated laboratory condition. Yet their sense of entitlement may increase in the long term. Such an interpretation makes sense of the contradictory effects from nudity exhibited in the meta-analysis on laboratory aggression above, assuming that nudity generally causes weaker effects than more sexually explicit materials presenting behavioral conduct. Outside the laboratories, however, male or “masculine” aggression is romanticized or condoned (e.g., in sports, movies, literature, and music videos). Simultaneously, pornography presents submissive females, including servile nudity that implies indiscriminate intimate access to them. In this context, men’s expectations of unconditional sex with women are likely to increase. Thus, it is hardly difficult to imagine that certain males will aggress when they are denied sex by unwilling women. In such situations, a prior systematic exposure to Playboy semi-nude centerfolds and similar materials will likely contribute to male aggression, as would other pornography. Thus, presentations of sexually explicit female “nudity” are not harmless in a social reality that eroticizes women’s subordination, promotes male aggression, and aggrandizes men’s perceptions of being entitled unconditional sexual access to women.

419 See supra note 144 and accompanying text.
Summary of Analysis. Exposure to pornography that presents actual or implied sexual behavior, whether violent or nonviolent, generally produce laboratory aggression, and against women in particular. Although exposure to nudity, that is, sexually explicit materials without actual or implied sexual conduct, diminished aggression in almost all experiments included in the meta-analysis, an analysis of other research suggests that the designs of most experiments in the meta-analysis were not sensitive enough to measure exposure effects from nudity in social situations where sexual aggression against women more likely occurs. Studies indicate that men’s sexually aggressive propensities are fueled by exposure to dehumanizing or degrading materials that present graphic sexually explicit subordination of women, for example, in positions of servility or implied promiscuity and nonconditional access, even when such materials only present nudity without sexual activity. This analysis suggests that pornography presenting sexual objectification of women that promotes perceptions of male entitlement to more unconditional sex in turn contributes to increased aggression against women in a culture where male aggression is implicitly elevated or tolerated.

Nonexperimental Quantitative Studies on Aggression

Naturalistic studies of correlations within population samples—especially those that control for other significant mediators or moderators of aggression against women—demonstrate the extent to which laboratory effects may occur in social context. Combining experimental and naturalistic studies thus provides a between-method triangulation that could either strengthen or weaken their respective conclusions and implications (cf. 89-92 above). A comprehensive naturalistic quantitative study within this research paradigm was published in 2000, and was based on a survey from 1984–1985 of roughly 3,000 males that approximated a representative U.S. population enrolled in post high school education with a mean age of 21 (“the 2000 study”). Before looking into its details, a brief summary paragraph is warranted (more details and precise citations below).

The 2000 study measured college men’s self-reported sexual and nonsexual aggression against women since age 14, while controlling for a number of well-known independent moderating variables related to aggressive propensities that enabled a categorization of men into low, middle, and high risk subgroups. Subsequently, it was found that pornography consumption predicted a significant sizeable increase in men’s self-reported aggression independently of the moderators—even among the lowest risk group (Malamuth, Addison, and Koss, 77–78, 85, & passim). Despite potential underestimation of sexual aggression and its correlation to pornography use (more below), low risk men admitted a mean number of sexually aggressive acts going from 0.40 per individual since age 14 for those reportedly “never” using pornography to 1.12 for those who reported “very frequently” using it (p. 77). In the moderate risk level, mean admitted sexual aggression ranged from 1.5 per individual for the “never” use pornography group to 3.03 for those “very frequently” using it (p. 78). In the high risk group (7% of the total sample), those “never” using pornography admitted a sexual aggression means of 1.09 times per individual while “very frequent” users admitted a sexual aggression means of 7.78 times since age 14 (p.

420 Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 61–63. Full citation, supra note 373. Further citations in text. Malamuth and Koss were senior researchers in these fields at the time. The sampling procedures are described more fully in Koss, Gidycz, and Wisniewski, “Scope of Rape,” supra p. 2 n.10, at 162–70.
— a subgroup comprising roughly 1% of the total sample (p. 85).\footnote[421]{} Survey data was also used for another study on the relationship between pornography use and ASV specifically, which noted that although the population was sampled before Internet became widespread, the “fundamental psychological processes” linking pornography use and aggression have unlikely changed substantially since.\footnote[422]{} This conclusion is strengthened by a 2007 follow-up study on sexual aggression, which used a smaller but more recent convenience sample while providing a replication and extension of the results from the older dataset.\footnote[423]{}

By relying on self-reported measures of sexual aggression rather than laboratory measures of general aggression, naturalistic studies address those who criticize the laboratory paradigm for “ecological artificiality” or “demand characteristics,” among other perceived problems.\footnote[424]{} Given that a survey measures its concepts with caution (wordings, order of questions, etc.), and that sensitive content is embedded or framed in an unobtrusive way, a number of studies show that the anonymous self-reported criminal behavior survey method have high validity and reliability.\footnote[425]{} The 2000 study inquired into with what frequency, if at all, respondents had sexually aggressed or performed other nonsexual aggression since age 14. \textit{Sexual aggression} could, for example, include “a position of power over a woman to get her to engage in unwanted oral sex, holding a woman down and causing her pain in an attempt to get her to engage in unwanted intercourse, etc.” (Malamuth, Addison, and Koss, 63). It could also include unwanted sexual activity because of a man’s overwhelming “continual arguments and pressure,” or because he “threatened or used some degree of physical force,” or because he abused a position of authority; or include unwanted alcohol or drug-induced attempted intercourse.\footnote[426]{} \textit{Nonsexual aggression} included behaviors such as “arguing heatedly, yelling and/or insulting, pushing, hitting the other person, and hitting with something hard” (Malamuth, Addison, and Koss, 64).

The 2000 study measured pornography consumption by asking respondents how often they “read any of the following magazines [on a 4-point scale]: \textit{Playboy, Penthouse, Chic, Club, Forum, Gallery, Genesis, Oui, or Hustler} (Check one)” (p. 63).

\footnote[421]{See also infra notes 435–437 and accompanying text for more statistical specifications of the numbers cited in this paragraph, including intra-group differences among the four consumption groups: (1) never, (2) seldom, (3) somewhat frequent, and (4) very frequent consumers.}
\footnote[423]{Vanessa Vega and Neil M. Malamuth, “Predicting Sexual Aggression: The Role of Pornography in the Context of General and Specific Risk Factors,” \textit{Aggr. Behav.} 33, no. 2 (2007): 104–17. For specific results, see \textit{infra} note 438 and accompanying paragraph.}
\footnote[425]{See \textit{supra} chap. 1, n. 105 (citing criminology literature).}
\footnote[426]{See Koss, Gidycz, and Wisniewski, “Scope of Rape,” \textit{supra} p. 2 n.10, at 165 & 167, for exact wordings in the 10 item scale that was used for measuring sexual aggression (the Sexual Experiences Survey (SES)).}
Using these common magazines as consumption indicators addresses commentators who have questioned the representativeness of pornography materials used in many experiments otherwise.\textsuperscript{427} Furthermore, the survey systematically controlled for \textit{alternative individual predictors to sexual aggression} beside pornography exposure, basing its analysis on the Confluence Model—a theoretical model initially developed by Malamuth,\textsuperscript{428} then validated by other researchers in successful replications and extensions of its empirical findings, including in cross-cultural contexts.\textsuperscript{429} The model has been described as a “jigsaw puzzle” where each independent predictor of aggression becomes more predictive in combination with the other predictors (Malamuth, Addison, and Koss, 60). Overall, it consists of two main psychological “paths” labeled Hostile Masculinity (HM) and Sexual Promiscuity (or Impersonal Sex) (SP/IM); both these are latent constructs composed of a number of manifest variables (p. 60).

HM is a “personality profile” that includes “(a) an insecure, defensive, hypersensitive, and hostile-distrustful orientation, particularly towards women, and (b) sexual gratification from controlling or dominating women”; SP (IS) entails “a promiscuous, noncommittal, game-playing orientation towards sexual relations, which is statically predicted by certain early familial aggression and adolescent delinquency.”\textsuperscript{430}

In the 2000 study, HM was measured by surveying two scales developed by a number of researchers—the Negative Masculinity Scale and the Hostility Toward Women Scale (Malamuth, Addison, and Koss, 65). SP was measured through surveying age of first intercourse and number of sexual partners since age 14—both measures having been validated as related to Sexual Promiscuity in prior research (pp. 64–65).

From responses on these measurements, men were distinguished as either (1) low, (2) moderate, or (3) high risk individuals for committing sexual aggression (pp. 74–

\textsuperscript{427} See, e.g., William A. Fisher and Azy Barak, “Pornography, erotica, and behavior: More questions than answers,” \textit{Int’l J. Law & Psychiatry} 14, no. 1–2 (1991): 78 (questioning whether violent pornography is consumed relatively to the degree implied by experimental research). Indeed, the authors noted that correlations found with a less specified definition cannot be attributable only to extreme or “fringe” materials (e.g., sadomasochism). Cf. Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 63. Yet a potential drawback by a more common pornography definition might be that it prevents a \textit{direct} control for different content (e.g., violent or nonviolent, “positive or negative” rape-outcome) as much experimental research does. However, studies suggest that those who consume more violent materials are likely to have consumed pornography since longer, and with greater frequency than other consumers, since one documented effect of prolonged consumption of nonviolent material is \textit{desensitization} and a tendency to seek more “extreme” materials. \textit{See supra} pp. 50–51. Consumption frequency thus mediates the diversity of content exposure to some degree. Hence, as the former is partly an \textit{indirect} measurement of the latter, it reduces the need for measuring both variables in the same survey. Moreover, the 2000 study noted that asking details about specific content could make survey respondents more “self-conscious” about the survey’s focus, which introduces similar problems of “focus-awareness” mentioned by critics of experimental studies as well as reducing the time to control for other risk factors. Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 63.

\textsuperscript{428} For its origins, see Malamuth, “Predictors of Naturalistic Sexual Aggression,” 953–62; see also Malamuth and Koss et al., “Characteristics of Aggressors,” 670–81.


\textsuperscript{430} Vega and Malamuth, “Pornography, General and Specific Risks,” 105.
HM and SP together accounted for 78% of the latent variance of sexual and nonsexual aggression against women in the survey (p. 60).\textsuperscript{431}

The 2000 study then controlled to what extent \textit{pornography consumption} would predict aggression independently of the other variables included in the Confluence Model (SP and HM). Three additional manifest variables were also controlled for: abusive family background, delinquency, and ASV (pp. 72–73). The frequency of pornography use was measured by a four point scale: “Never (1), Seldom (2), Somewhat frequently (3), Very frequently (4)” (p. 63; italics omitted). The authors admitted that this categorical variable could contain more subjective interpretations compared to continuous variables with specific frequencies, such as times or hours per week, but noted that a more detailed survey “might have made subjects more self-conscious” about its focus, and, within the limits of a national survey, reduced time to assess moderating variables (p. 63). Yet the variety of individual interpretations could lead to underestimation of correlations if low consumers overestimate their exposure relatively speaking, and high consumers conversely underestimate their consumption. When respondents have little frame of reference, which is potentially a problem when considering that pornography may be an issue surrounded by many taboos, such underestimation may be prevalent. Even so, the 2000 study showed that more pornography use predicted more sexual aggression significantly for all risk levels, although this increase was most dramatic among high risk men (pp. 75–78). Thus, when controlling for HM and SP, pornography use independently predicted an increase in sexual aggression.

Approximately 25% among all male students reported/admitted to some form of \textit{sexual aggression} among 10 types of acts since age 14, with a mean of perpetrated acts ranging from about 2 to 3 for each act, and a frequency of reporting ranging from 1% to 19% among the 10 aggression types.\textsuperscript{432} However, the admitted sexual aggression among the entire sample of men is likely a substantial underestimation, although its exact extent is unclear (Koss, Gidycz, and Wisniewski, 169). For instance, about 54% of slightly above 3,000 college women who participated in the same parallel survey reported experiencing such sexual aggression since age 14 that only 25% men admitted perpetrating (p. 169). This discrepancy might be explained in part by perpetrators who did not participate in the survey (e.g., nonstudents). Yet the number of times that 25% of men admitted perpetrating each act is “virtually identical to the number of times” that 54% of women reported experiencing them; thus, additional underestimation is indicated (p. 169: see also 167 tbl.3). As recalled, 53.7% of the women reported subjection to sexual aggression; additionally, 15.4% specifically reported rape, and 12.1% reported attempted rape (pp. 166 & 168 tbl.4). Sometimes the percentage of women reporting on one of the 10 individual types of aggressive acts were several times higher than the percentage of men reporting the same item; especially notable, 9% of women reported enduring unwanted intercourse after threats or physical coercion, but only 1% of men admitted perpetrating such conduct.\textsuperscript{433} Not surprisingly, previous research has observed how convicted rap-

\textsuperscript{431} Pornography use also \textit{indirectly} predicted aggression through a significant correlation with SP and HM, though this indirect increase in variance accounted for was “modest” Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 70.

\textsuperscript{432} Koss, Gidycz, and Wisniewski, “Scope of Rape,” supra p. 2 n.10, at 166–68. Further citations in text.

\textsuperscript{433} See ibid., 167 tbl.3. Similarly, 13% of women reported unwanted “sex play” (fondling, kissing, or petting, but not intercourse) after physical coercion or threats, although only 2% of men reported such coercion. More proportional to the general aggregate though, 44% of women experienced unwanted “sex play” after being “overwhelmed by a man’s continual arguments and pressure,” while 19% of men admitted to exercising such sexual aggression. Ibid.
ists seem to hold stereotypical rape myths and fail to accurately perceive sexual coercion or women’s nonconsent in sexual situations they’ve experienced.434

Potential underestimations notwithstanding, the statistical correlations conform surprisingly well to the theoretical predictions and prior research: when the Confluence Model was controlled for, pornography use predicted considerable sexual aggression even among relatively low risk individuals; that is, those that reportedly “never” use pornography admitted to having sexually aggressed on average 0.40 times since age 14, while those reporting using it “very frequently” admitted sexually aggressing on average 1.12 times (Malamuth, Addison, and Koss, 77).435 In the moderate risk level, those that reported “never” using pornography admitted to having sexually aggressed on average 1.5 times, while those who reported using pornography “very frequently” admitted sexually aggressing on average 3.03 times (p. 78).436 Finally, in the high risk group (7% of the total sample) those who reportedly “never” used pornography admitted to having sexually aggressed on average 1.09 times, while those who reportedly used pornography “very frequently” admitted sexually aggressing on average 7.78 times (p. 78).437 These “very frequent” users comprised roughly 1% of the total sample (p. 85), and likely included serial sex offenders.

A smaller follow-up study from 2007 used similar methodology as the 2000 study and corroborated the previous findings—not only by conforming the association of independent and moderating predictors to sexual aggression within the Confluence Model, including pornography (see below), but also by controlling for an additional conceptual aggregate of predictors.438 The 2007 study used a smaller convenience sample of 102 male psychology undergraduates from the University of California, Los Angeles (Vega and Malamuth, 106). The added predictors had previously predicted sexual aggression in studies with convicted criminals, for example, adult and juvenile sex offenders (pp. 104–06). As a latent construct, the predictors were labeled General Hostility (GH) and measured personality traits such as grandiosity, arrogance, lack of empathy, impulsive irritability, and short temperedness (p. 105). However, GH was found to be almost exclusively mediated by HM (pp. 105, 115).

Most importantly, even when entering GH with the Confluence Model in the regression equation, pornography kept contributing “significantly to the prediction of sexual aggression both as a main effect and in interaction with other factors” (p. 114). By contrast, the predictive gain of GH “was only modest” (p. 114). One of GH’s three underlying manifest constructs with the most important predictive role was already included in HM in the study from 2000: the Negative Masculinity Scale (p.

434 See, e.g., Scully and Marolla, “Convicted Rapists’ Excuses,” 534–36 (eliciting several interview responses from rapists suggesting beliefs that women’s “no” tend to mean “yes,” and/or that those victimized enjoyed it). For further discussion of the concept of rape-myths, see infra notes 368–370 and accompanying text.

435 Regarding intra-group differences for low risk individuals, the linear trend was significant (p < .002), though post hoc comparisons showed that not all consumption levels were significant to each other. Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 77. However, those between Very Frequent and Never users were, and Somewhat Frequently users also differed significantly from Seldom and Never users. Ibid.

436 Though the moderate risk group as a whole exhibited “a significant linear trend” (p < .03), the 4 categories of users (from Never to Very Frequently) were not significant individually in relation to each other. Ibid., 78.

437 Only the “very frequently” category differed significantly from the others in the high-risk group as a whole, and very frequent users were also significantly more aggressive than all groups in the entire sample. Ibid. The sexual aggression mean for the high risk group as a whole was 2.77 times. Ibid., 78.

438 Vega and Malamuth, ”Pornography, General and Specific Risks.” Further citations in text.
which was used to measure GH in the 2007 follow-up along with two other scales that measured the concepts of Impulsive Irritability and Empathic Concern, respectively (Vega and Malamuth, 115). Hence, it is unsurprising that GH “did not have any direct link to sexual aggression,” and that HM was a mediating variable that accounted for the relationship between GH and sexual aggression (p. 115).

Apart from the naturalistic studies above, a doctoral dissertation from 1994 surveyed 480 college men’s pornography use while inquiring into the capability of various variables to predict sexual aggression, controlling for mediators or moderators such as impulsivity, anger, hostility, psychopathology, and peer pressure. Pornography was found to be the strongest predictor, accounting for 12% of the total variance in sexual aggression and remaining significant after control had been made for the other variables (Crossman cited by Malamuth, Addison, and Koss, 49). It was also found that the more violent pornography the men had used, the more likely they had sexually coerced someone, including by rape (p. 49). Another naturalistic study with 477 college men found that pornography consumption predicted behavioral sexual aggression and likelihood to sexually aggress. However, due to an incomplete statistical analysis of inter-correlating variables that risked hiding a “suppressor effect,” it was unclear whether or not all four types of pornography measured did so (including less explicit magazines, such as Playboy, Penthouse, and Hustler).

As recalled, studies suggest that consumption of nonviolent pornography often leads to desensitization and a demand for more variety, such as extreme or violent pornography (see 50–51 above). Without having adequately disentangled the contribution of different pornography categories to the variance in sexual aggression and its likelihood, it is difficult to know if stronger correlations for violent materials may rather reflect more frequent consumption of pornography among individuals who also happen to consume violent materials.

**Summary of Analysis.** Naturalistic population studies shows that even when adding important alternative predictors of sexual aggression identified in previous literature—studies including both non-criminal and criminals—pornography consumption unambiguously emerges as a strong independent predictor by itself. Although nonexperimental methods cannot ultimately account for causality, a triangulation approach that assesses their results in light of the large body of experimental work discussed previously (above pp. 99–109) suggests that the predictions seen in the nonexperimental data reflect similar causal relationships as found in experiments. According to the naturalistic studies above, consumption of pornography seems to predict a sizeable number of sexually aggressive acts performed by normal men—even so among those who “but for” pornography would have been at low risk for being sexually aggressive. Much of the aggression measured by the surveys above fulfills legal criteria for rape or other related sexual abuse. Yet considering the very low conviction rate for such criminal conduct, the persons responsible for those

439 For how HM was measured in 2000, see supra note 430-431 and accompanying text.
442 See Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 49–51 (noting how Boeringer’s four pornography types inter-correlated to a significant extent, which necessitated a particular type of statistical analysis to disentangle their independent effects to account for possible “suppressor effects” that he never performed).
acts were most likely never held accountable.\textsuperscript{443} Having the prevalence of violence against women in mind, the likelihood that maybe a third of all women are victimized at some point (see 4–6 above), and that not only “high risk” but also low and mid risk men are sexually aggressive, the fact that pornography consumption is such a systematic predictor of sexual aggression should inform future policy making.

Attitudes Supporting Violence Against Women (ASV)

As recalled, ASV significantly predicts behavioral sexual aggression against women—a finding corroborated by measurements of, for example, self-reported sexual aggression, laboratory aggression, criminal records, and arousal to rape presentations (pp. 93–98 above). Hence, by measuring ASV, one indirectly measures sexual aggression. The pornography research paradigm has inquired into both attitudinal and behavioral exposure effects in order to better validate and triangulate their respective findings (ibid; cf. 89–92). Two comprehensive meta-analyses of the relationship between pornography exposure and ASV have looked at experimental and nonexperimental naturalistic studies. The first was published in 1995 and the other in 2010—the former authored by Mike Allen and associates, and the latter by Gert Martin Hald, Neil Malamuth, and Carlin Yuen.\textsuperscript{444} The second study was partly a response to a couple of major errors in the first study pertaining to the analysis of the nonexperimental data (Allen et al. covered both experimental and nonexperimental studies); thus, only the second meta-analysis is reliable when it comes to nonexperimental data.\textsuperscript{445} Both meta-analyses include several attitudinal scales relat-

\textsuperscript{443} See, e.g., Kilpatrick, et al., Drug-facilitated, Incapacitated, & Forcible Rape, supra p. 5 n.18, at 56–58, who found a prevalence of 18% of all American adult women having been raped, and that 16% of all adults had been subjected to “forcible rape.” Among the latter, only 18% reported the offense. Ibid., 43. The reporting rate of drug or alcohol-facilitated or incapacitated rapes was 10%. Ibid. The report frequency has not increased between 1991 and 2005 despite common misperceptions to the contrary. Ibid., 60. Notably, the prevalence of the more conservative category of “forcible rape,” as distinguished from drug-induced rape, increased by 27.3% per capita since 1991. Ibid., 57 & 59. FBI’s statistics on forcible rape in 2010 show that among 84,767 reports, only 20,088 led to an arrest. Federal Bureau of Investigation, U.S. Dep’t of Justice, Crime in the United States, 2010 Uniform Crime Reports (2011), archived at http://perma.cc/Z3WT-HEL5 (tbl.1, reports); http://perma.cc/NGS9-SMMH (tbl.29, arrests). In other words, an arrest was made in about 4% of all forcible rape cases in America in 2010. Presumably, the number of convicted rapists is even lower. Moreover, alcohol and drug-facilitated/incapacitated rapes (without physical force) apparently exhibits only half the frequency of reports as forcible rape does. Ibid. Unfortunately, such low figures seem consistent with previous findings. For instance, a majority report from the U.S. Senate Committee on the Judiciary concluded that “98% of rape survivors have no chance of seeing their attacker brought to justice” (an assessment based only on “forcible rapes”). Majority Staff of Senate Comm. on the Judiciary, 103d Cong., The Response to Rape: Detours on the Road to Equal Justice (1993), 34 (quote), 37 (on definitions). Similar low conviction estimates are found in the literature. See, e.g., Jane Kim, “Taking Rape Seriously: Rape as Slavery,” 35 Harv. J. of Gender & Law 263, 264–65 (2012); Joan McGregor, “Introduction to Philosophical Issues in Rape Law,” 11 Law & Phil. 1, 2 (1992); cf. Mary P. Koss et al., No Safe Haven: Male Violence Against Women at Home, at Work, and in the Community (Am. Psychol. Ass’n, 1994), 167–71 tbl. 1 (reviewing prevalence rates in the literature).

\textsuperscript{444} Allen et al., “Exposure & Rape Myths”; Hald, Malamuth, and Yuen, “Revisiting Nonexperimental Studies.” Further citations in text.

\textsuperscript{445} There were two major problems with the first meta-analysis of nonexperimental data. First, half of the included studies (4 out of 8) by Allen et al. should, accordingly, not have been included in the meta-analysis because of a “lack of fit in concept definitions, sampling procedures, subject samples, and/or the assessment instruments used.” Hald, Malamuth, and Yuen, “Pornography and Nonexperimental Studies,” 15. For instance, one study that was included by Allen et al. had been done by Martha Burt and contained estimations of “exposure to media treatments of sexual assault,” defined as ‘television, motion picture, dramatic, and newspaper treatments of rape or sexual assault.” Ibid., 15 (quoting Burt, “Cultural Myths
ed to the concept of ASV discussed previously above, for example, RMA, ASB, AIV, LR or LF, or Level of Punishment for Rapists (i.e., hypothetical rape case assessments) (Allen et al., 14–17; tbls.2 & 3; Hald, Malamuth, and Yuen, 16–17; tbl.1). 446

In their meta-analysis of experimental data, Allen et al. (pp. 18–19) found a significant positive correlation where pornography exposure caused ASV ($r = .146, n = 2,248$). No other experimental moderators were suggested as the statistical test showed homogenous effects (pp. 18–19). All three comparisons in the literature that were subject to meta-analysis—that is, (a) control to violent materials, (b) control to nonviolent, and (c) violent to nonviolent effects—were also found significant and produced homogenous effects (p. 19). Studies that directly compared effects from violent materials with effects from nonviolent materials showed an overall stronger increase in ASV from the violent category (p. 19; $r = .163, k = 8, n = 762$). By contrast, where the exposure effects from nonviolent or violent pornography were compared against controls (p. 19), the nonviolent materials had a stronger effect ($r = .125, k = 7, n = 1,048$) than did violent materials ($r = 1.12, k = 5, n = 719$). In their meta-analysis of nonexperimental data, Hald, Malamuth, and Yuen (p. 18) found that pornography use predicted ASV with a significant and positive average correlation across nine studies with 2,309 participants ($r = .18, p < .001$). When comparing the within-group correlations between violent ($r = .24, n = 1,394, p < .001$) and nonviolent materials ($r = .13, n = 1,617, p < .001$) and attitudes, the slightly higher correlation for violent materials was significant compared to nonviolent materials (p. 18; $p < .001$). Statistical tests also indicated the “likely presence of a moderating variable” (p. 18), as the correlation results were heterogeneous for both categories. The meta-analysis of experimental studies will be discussed first below, with additional analysis in light of individual and more detailed studies. Then, further analysis will be done on the findings from the nonexperimental meta-analysis.

**Experimental Studies**

Attitudinal exposure experiments typically use anonymous survey instruments to measure various ASV, whereas aggression exposure experiments use psychological tactics to cause anger and disinhibitions to aggress in the laboratory, with indirect indicators of sexual aggression such as evaluations, electric shocks, and noxious noise. Attitudinal experiments, whose typical design should be fairly clear from a number of previous examples in this chapter, are less complex to execute than those

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446 Allen et al. labeled all such attitudes “rape myths,” which may confuse readers because what they measured actually include more concepts than the original RMA scale developed by Burt. See Burt, “Cultural Myths & Rape,” 217–23. Therefore, it seems more appropriate to view their analysis as covering “attitudes supporting violence against women” (ASV) in the broader sense. See Hald, Malamuth, and Yuen, “Revisiting Nonexperimental Studies,” 15.
measuring behavioral aggression. There were 16 experimental attitudinal studies included in Allen et al.’s meta-analysis, with 2,248 participants in total (Allen et al., 17–18), several studies notably containing female as well as male subjects (pp. 14–15). Hence, the results cited above also suggest that by being exposed to pornography females may adopt more ASV, for example, higher beliefs in rape myths, as males do. Individual studies were excluded if, inter alia, they failed to report sufficient statistical information that could permit recovery of information for the meta-analysis, or did not fulfill the inclusion criteria in terms of exposure materials or dependent measures. Allen et al.’s main pornography definition included “material intended or expected to create sexual arousal for the receiver” (p. 13). A summary of individual studies indicates that the meta-analysis included films, written stories, and audiotapes (pp. 14–15). Since exposure effects were homogenous (p. 19), there is less need to further differentiate these materials into subgroup moderators.

In order to further interpret the results of the meta-analysis, one may again consider the study by Check and Guloien mentioned previously that distinguished materials into (1) “erota,” (2) “dehumanizing” (nonviolent), and (3) violent or aggressive pornography. As recalled, Check and Guloien did not find feature movies of “erota” on the market that did not contain some scenes with dehumanization, aggression, or violence, but they claimed to have successfully edited such materials from excerpts (see Check and Guloien, 162–66, for methodology). Subsequently, they designed a two-week long exposure experiment (p. 162). The dependent measurements included ASV—primarily LR or LF. Sample subjects were more diversified than in many previous experiments, containing 319 male adult nonstudents and 117 male adult college students residing in Toronto of virtually all ages, occupations, educational levels, and otherwise diverse demographic characteristics (pp. 163, 167). The experiment found that nonviolent dehumanizing and violent materials caused significantly higher LR and LF than did the “erota” or control conditions (pp. 170–72). The “strongest and most pervasive” effects came from nonviolent dehumanizing materials—not from violent materials (p. 179).

Furthermore, a statistically nonsignificant effect of increasing LR and LF was seen when comparing subjects exposed to the edited excerpts “erota” to controls (p. 171 tbl.6.1). Although nonsignificant, when considering that dehumanization is typically present in popular pornography (see 44–50 above) the effect is consistent with the homogeneity of exposure effects in Allen et al.’s meta-analysis; that is, no substantial part of the meta-analysis materials appears to have belonged to a category that could produce significantly weaker, neutral, or (unlikely) contrary effects. Indeed, more recent content analyses of consumption patterns suggest that the most popular materials unfortunately rather belong to those categories that invariably produced laboratory aggression or ASV, such as violent materials with a positive or

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447 Allen et al. note that “every case” where statistical information was insufficient was due to “the use of multivariate techniques without recourse to zero-order correlations or other statistics permitting recovery of information.” Allen et al., “Exposure & Rape Myths,” 16. Furthermore, they list a number of examples of studies whose design did not otherwise fulfill requirements to be included for various apparent reasons. Ibid., 13 n.3.

448 The more homogenous effects on ASV measures compared to laboratory aggression measures might suggest that subjects’ attitudes are more unambiguously influenced by pornography exposure than measures of laboratory aggression are—a likely hypothesis when considering the need for disinhibitory tactics to gain significant effects of aggression during laboratory experiments. Cf. supra pp. 99–101.

449 Check and Guloien, “Violent, Dehumanizing, & Erotica,” supra chap. 1, n. 138, at 162. Further citations in text. This study is also included directly in the total data of Allen et al.’s meta-analysis, which makes sense since it specifically measured ASV, not laboratory aggression. See Allen et al., “Exposure & Rape Myths,” 14 (citing Check and Guloien’s study only as “Check, 1985”).

450 See supra notes 365–367 and accompanying text (explaining the LR and LF measures).
neutral (as opposed to negative) victim reaction, or nonviolent but degrading materials that tend to present sexually indiscriminate “promiscuous” women (pp. 44–50 above). Here, Allen et al.’s meta-analysis provides support for those who wish to legally challenge pornography as it showed that pornography promotes ASV—attitudes also shown to promote corresponding behavioral sexual aggression (cf. 93–98).

Nonexperimental Studies

As recalled, nonexperimental population surveys illuminate to what extent the experimental studies are validated in social context (e.g., 89–92). The above-mentioned meta-analysis of nonexperimental data from 2010 attempted to cover the most relevant studies by including those that would conform to following criteria: studies had to include (1) a definition that would match or “approximate” pornography as “sexually explicit materials intended to create sexual arousal in the receiver”; (2) a presumably valid measure of ASV; (3) enough statistical information to measure the association between consumption and ASV; and (4) a non-convicted sample, as “the veridicality and validity of self-reports” from convicted offenders had been questioned by “various researchers” (Hald, Malamuth, and Yuen, 16; citing studies). The meta-analysis excluded data with female participants (except for a fraction of 10 women in one study), as research had shown gender to be a “differentiating variable” relative to pornography consumption effects (p. 16). Considering that 9 studies with 2,309 participants were included in the final analysis, the 10 female subjects would not impact the total results substantially (p. 16).

As mentioned, self-reported pornography use predicted ASV significantly (p. 18; \( r = .18, p < .001 \)), and the higher correlation for violent materials (\( r = .24, n = 1,394, p < .001 \)) was significant compared to nonviolent materials (\( r = .13, n = 1,617, p < .001 \)) (p. 18). Moreover, statistical tests were heterogeneous for both categories, which suggest moderating variables. However, it should be noted that no data was reported on the frequency of pornography consumption in this meta-analysis (e.g., hours of use per month). Those who use pornography more frequently will likely also encounter more variety of materials, including violent pornography, than those who use pornography less frequently. As mentioned previously, an effect of prolonged consumption of common nonviolent materials has been desensitization, and a concomitant tendency to select more extreme, often violent materials (see 50–51 above). In other words, the stronger correlations for violent materials may be a proxy for frequency of consumption, which would then be the underlying mediating variable.

The problem of separating consumption frequency from content of materials can also be seen in a more recent individual survey from 2011 with 489 male fraternity members at a large American Midwest public university.451 This study measured the correlation between reported pornography use and ASV, subdividing consumption during the last 12 months into three categories: (1) “graphic sex acts” (reported by 83%), (2) “sadomasochistic portrayals” (reported by 27%), or (3) “explicit rape” (reported by 19%) (Foubert, Brosi, and Bannon, 219–22). Reported consumption predicted more ASV for all three categories (pp. 220–22). Although there was a significantly higher correlation between certain ASV and the two more violent categories than between supposedly nonviolent materials and such attitudes (pp. 220–21

tbs.1–3), no data on the frequency of consumption was reported—a “limitation” explicitly admitted by the authors (p. 227). The fact that percentages who reported using more violent materials was markedly lower than those who reported nonviolent materials (pp. 220, 222) support a suspicion that violent materials could covariate extensively with consumption frequency. In other words, this study has not controlled for a potentially major mediator/controlling variable in order to distinguish whether individual differences in ASV are predicted by the frequency of consumption, and/or by the content of materials.

A large nonexperimental survey (the “2012 study”), published two years after Hald, Malamuth, and Yuen’s meta-analysis, used the Confluence Model research program to control for individual personality characteristics that moderate consumption effects on ASV, hence focusing on other moderators than specific pornography content. The 2012 study used data from the same American college sample of about 3,000 males discussed previously with regards to self-reported sexual aggression and pornography use in the 2000 study (p. 109 et seq. above). ASV were measured through three related scales: ASB, AIV, and RMA (Malamuth, Hald, and Koss, 432). As will be further discussed below, using the Confluence Model to control for moderators that predicts the adoption of ASV might be less appropriate than controlling for moderators to sexual aggression. Many of the Confluence Model’s moderators include similar concepts as are measured in the dependent variables (e.g., hostile attitudes).

In other words, this design runs the risk of tautologically asking whether “hostility predicts hostility.”

The average correlation in the full sample between ASV and pornography use was significant at a similar magnitude (Malamuth, Hald, and Koss, 433; \( r = .12, n = 2,871, p < .001 \)) as found on nonviolent materials in the above mentioned nonexperimental meta-analysis by Hald, Malamuth, and Yuen (p. 18; \( r = .13, n = 1,617 \)). Moderators are not taken into account in calculating these “raw correlations.” Notably, when there was missing data on some variables in the 2012 study, that data was replaced by the mean score for the entire sample, which typically reduces rather than accentuates group differences (p. 431). Similarly, the measurement of pornography use was based on a four point categorical scale: “never,” “seldom,” “somewhat frequently,” or “very frequently” (p. 431). Because these categories have subjective meanings—for example, “somewhat frequently” might mean twice a week to one man, but twice a month to another—it could lead to underestimation of correlations if low-consumers overestimate (and high consumers underestimate) their consumption relatively speaking. This is likely if the respondent has little frame of reference, which could be the case considering that pornography is fraught with social taboos. A better approximate would have been continuous variables with specific frequencies, such as 1–3 times a week, and/or a number of hours per week.

Even with potential underestimations, a significantly stronger correlation between pornography use and ASV emerged among men who were relatively most high on the risk factors for sexual aggression according to the Confluence Model (the study subdivided risk-level into 6 groups) (Malamuth, Hald, and Koss, 435–36). This result may appear unsurprising; those predisposed to hold more ASV, which

453 See infra notes 457–459 and accompanying text paragraph.
454 The authors, however, defended not using more specific measurements since they wished to avoid respondents becoming too aware of the study’s purpose, and to provide them sufficient time to properly assess moderating variables within the time constraints of a national survey. Malamuth, Addison, and Koss, “Pornography & Sexual Aggression,” 63. Further citations in text.
more sexually aggressive men generally are \((cf.\ 93–98\ \text{above})\), are also likely to adopt more ASV if they increase their pornography consumption. Yet despite an increasing linear trend over all 5 lower risk groups showing that pornography consumption predicts more ASV \((pp.\ 435–36\ \text{tbl.2 & fig.1})\), that trend was not statistically significant \textit{within} each of the five lower risk groups when Confluence Model moderators where controlled for. However, as recalled, this part of the study’s design is questionable, as it \((1)\) uses similar variables in the moderating and dependent variables, and \((2)\) divides the sample in as many as 6 different risk groups, producing a self-made exponential increase of the risk for Type II error within each smaller subsample.

With regards to statistically comparing the effects of four different degrees of pornography consumption within as many as six risk levels, the 2012 study made a questionable decision \textit{not} to combine all four low risk groups \((p.\ 434)\) as in the earlier 2000 study on sexual aggression \((Malamuth,\ Addison,\ and\ Koss,\ 77)\). The 2000 study had “judged it more appropriate to combine” the lower risk groups “based on both theoretical and empirical considerations,” and unsurprisingly found significant relationships between pornography use and sexual aggression already among this combined low risk group: admitted sexual aggression since age 14 ranged from an average of 0.40 acts for those who reported “never” using pornography to 1.12 acts for those who reported “very frequently” using it \((p.\ 77)\).\footnote{Regarding intra-group differences \((1–4)\) for low risk individuals, the linear trend was significant \((p < .002)\), though post hoc comparisons showed that not all were. However, those between Very Frequent and Never users were significant, and Somewhat Frequently users also differed significantly from Seldom and Never users. Ibid.} When groups are combined and each subsample size increases, it is obviously more likely that a general overall trend is found statistically significant within each subgroup. The high risk group is a special case, as a multiplicity of risk factors can be theoretically expected to add more “fuel to the fire” that magnifies the strength of correlations—an assumption underlying with the Confluence Model \((Malamuth,\ Hald,\ and\ Koss,\ 430)\). An increasing linear trend seems visible among the 5 lower risk groups also in the 2012 study, if somewhat irregular at moments \((pp.\ 435–36\ \text{tbl.2 & fig.1})\).\footnote{Both the 2000 study and 2012 study pertain to social reality where “numerous factors interact and jointly impinge on the individual.” \textit{Final Report Att’y General’s Comm.}, ed. McManus, \textit{supra} p. 27 n.78, at 281. Hence, some irregularity can be expected among various predictors, though a “broader brush” would exhibit the linear trends more clearly.} The decision not to combine some of them into larger subgroups might therefore explain why significant correlations between pornography use and ASV were only found among the highest risk level group \((p.\ 434)\).

Moreover, in other studies using the Confluence Model, the moderator path HM \(\text{(hostile masculinity)}\) has been measured partly with the same manifest variables that are now measured on the dependent variable \(\text{(ASV)}\) in the 2012 study—\(\text{that is, ASB, AIV, and RMA.}\footnote{See Vega and Malamuth, ”Pornography, General and Specific Risks,” 107 \text{(AIV, RMA, ASB)}; Malamuth, Koss et al., “Characteristics of Aggressors,” 673 \text{(ASB)}; Malamuth, Hald, and Koss, “Pornography, Risk & Acceptance of Violence,” 432 \text{(AIV, RMA, ASB)}.} Perhaps attempting to avoid having the same constructs in moderating and dependent variables, the 2012 study choose other manifest variables to measure HM; here, the “Negative Masculinity” and “Hostility Toward Women” attitudinal scales, respectively \((p.\ 432)\). Negative Masculinity measures undesirable “unmitigated agency,” including traits like arrogance, boastfulness, egoism, greed, cynicism, self-interestedness, hostility, and dictatorial attitudes.\footnote{Janet T. Spence, Robert L. Helmreich, and Carole K. Holahan, “Negative and Positive Components of Psychological Masculinity and Femininity and Their Relationships to Self-Reports of Neurotic and Acting Out Behaviors,” \textit{J. Pers. & Soc. Psychol.} 37, no. 10 (1979): 1675–76.} The scale can be
measured by adherence to statements such as “most people are out for themselves and I don’t trust them very much” (Malamuth, Hald, and Koss, 432). Yet all three scales measuring ASV in the 2012 study (p. 432) also measure some sort of undesirable hostility with quite similar items, such as “[i]n a dating relationship a woman is largely out to take advantage of a man” (ASB), “People today should . . . use ‘an eye for an eye and a tooth for a tooth’ as a rule for living” (AIV), “If a girl engages in necking or petting and she lets things get out of hand, it is her own fault if her partner forces sex on her” (RMA).459 Likewise, Hostility Toward Women can be measured by adherence to undesirable hostility attitudes such as “I feel upset even by slight criticism by a woman” or, inversely, “I rarely become suspicious with women who are more friendly than I anticipate” (p. 432). Not coincidentally, very similar characteristics are included in ASV: “[w]omen are usually sweet until they’ve caught a man, but then they let their true self show” (ASB); “[s]ometimes the only way a man can get a cold woman turned on is to use force” (AIV); and “[a] woman who is stuck-up and thinks she is too good to talk to guys on the street deserves to be taught a lesson” (RMA) (Burt, 222–23).

The result of the similarities of measurements is that HM (a moderator) captures virtually the same basic personality characteristics as contained in ASV (the dependent variable). This design likely produces an unusually strong correlation between moderators and the dependent variable that is tantamount to asking whether “hostility predicts hostility.” In turn, when the research design builds on as many as six distinct moderator risk levels, and their underlying constructs are already strongly correlated with the dependent variable (ASV), it leaves little variance unaccounted for in ASV within each level that pornography use could possibly explain despite that its overall raw correlation with ASV is substantial and significant.

By contrast, the 2000 study on sexual aggression and pornography consumption, which also controlled for the Confluence Model’s moderators, measured a dependent variable not composed of attitudinal constructs per se, but behavioral aggression. In the 2000 study there was thus less of a tautological relationship between moderators and dependent variables, hence more explanatory power even though correlations would technically be weaker. It would have been recommended that the 2012 study excluded HM from the Confluence Model and only used IS (impersonal sex) as a moderator. It may thus be hypothesized that the association between pornography use and ASV in the 2012 study would have been significant across all risk level groups for sexual aggression—not only among high risk individuals, had the authors to the study (1) combined more low risk groups, and/or (2) omitted the moderator HM, focusing only on IS. However, their study still provides important insights insofar as it corroborates the experimental paradigm in the predictions found in naturalistic conditions: increased pornography consumption predicts more ASV in social context, consistent with the relationship of pornography exposure and subsequent ASV documented in laboratories.

Summary of Analysis. The experimental and nonexperimental studies on ASV show that pornography exposure causes or predicts such attitudes. As suggested already by early investigators who found that such attitudes were positively associated with behavioral sexual aggression (above pp. 93–98), the associations between pornography consumption and these attitudes will eventually also cause or predict such aggression against women. Moreover, when controlling for important moderating and/or mediating variables in the experimental and nonexperimental studies, virtually any form of pornography documented to be demanded on the market emerges as an independent factor in causing or predicting ASV. The fact that studies on ASV

corroborate studies on behavioral aggression (above pp. 98–115) strengthens the overall conclusions in the body of literature on consumption harms. It is additionally notable that a triangulation “between” as well as a “within” methods exists; the hams were corroborated with different measurements (attitudes or behaviors) within similar methods, and with similar measurements in different methods (experimental or nonexperimental). The following section will further inquire to what extent the findings from the population based social science studies above are reflected in naturalistic data (quantitative and qualitative) from specific populations that are particularly exposed to or responsible for gender-based violence.

Specifically Abusive Or Targeted Populations

Women’s Shelter Surveys of Batterers

A number of studies below surveyed battered women who made contact to women’s shelters or health care services, inquiring into what extent their batterers used pornography and what impact it had on the abuse. Accordingly, a survey in 2008 of 2,135 female residents of a domestic violence shelter in an American metropolitan area 1998–2002 asked whether or not their partners “viewed” pornography or utilized “the sex industry” (e.g., visiting strip clubs). Just above 40% reported that their partner used pornography and/or the sex industry (Simmons, Lehmann, and Collier-Tenison, 410). Those women who reported that their partner used such materials or venues reported more sexual violence—conceptually defined as either sexual abuse, forcible rape, or stalking—than those women whose partners reportedly did not use them (pp. 410–11). Those batterers who reportedly used pornography and/or the sex industry were also reported to exhibit more controlling behaviors against women than men who did not use them, such as minimization, denial, blaming, intimidation, threats, economic abuse, enforcing “isolation” and/or enforcing “male privilege” (pp. 410–11).

Earlier studies of battered women show similar findings. For example, a survey published in 2004, asked 271 women in a New York program for battered women between 1988 and 1991 (most of them seeking shelter from their batterers) about their batterers’ pornography use, alcohol use, and fre-
quency of abuse, among other things. Accordingly, 30% of the abusers reportedly used pornography (Hinson Shope, 63). Further, as distinguished from general abuse, 46% of all women reported that they had been sexually abused (p. 63). Women whose batterers reportedly used pornography ran an increase odd of 1.9 of having been sexually abused comparable to women reporting their abusers used alcohol (p. 63). When “teasing out” the joint effects of pornography use and alcohol, both factors independently showed a significant increase in predicting sexual abuse—“only” pornography at 1.277, “only” alcohol at 1.270 (p. 65; \( p < 0.01 \)). Although the odds were 3.2 that abusers who reportedly used both alcohol and pornography would sexually abuse, when comparing this group with those who reportedly only used pornography the differences were not significant; hence, alcohol apparently did “not exacerbate the effects of pornography on the odds of sexual assault” (p. 66).

Another American study published in 1998 inquired particularly into the associations of violent pornography and violence against women, using an ethnically stratified sample of 198 women that were drawn from public medical clinics and who had reported abuse a year prior to or during pregnancy. The sample consisted of roughly a third African Americans, a third Hispanics, and a third White Americans (Cramer et al., 323–34). Among all women, about 41% indicated that their abuser used violent pornography defined as “sexually violent scenes where a woman is being hurt,” which “for example” could include being “held or tied down” (p. 326). The percentages were different among the ethnic groups, with the reported proportions of pornography consumers being markedly higher among the white subgroup (58.7%) than among the Black (27.1%) and Hispanic (38.5%) subgroups (p. 326). The most severe violence was reported by women who reported that their abuser “forced” them to “look at, act out, or pose for pornographic scenes”—a group constituting 25.8% of all 198 women (p. 327). Yet there were no significant differences in severity of violence between women who only reported that their partners used (i.e., not forcing imitation, posing, or looking at) violent pornography (20.2%) compared to those who did not reportedly use it (54%) (p. 327).

Other accounts corroborate the general findings above. For instance, in a Massachusetts public hearing in 1992, an agency for battered women testified in writing how they asked clients whether or not their abusers used pornography as part of the abuse; their “conservative” estimation was that half the abusers did. A founder/director of programs for sexual assault survivors in New York testified in a similar public hearing in Minneapolis in 1983 that she met an increasing number of throat-rape survivors who sometimes reported how their assailants referred to the pornography movie Deep Throat prior to assaulting them. Moreover, prosecutors with


464 A finding contrary to other expectations was that military service among the abusers significantly decreased the odds of sexual abuse. Hinson Shope, “Words Not Enough,” 63–64, 66 & tbls.2–3. The authors express caution though since military men were few, had higher education, and had witnessed less parental abuse than the sample average had. Ibid., 68.


significant experience of sexual abuse investigations, clinical psychologist who treat sex offenders or survivors, and other representatives of battered women’s shelters have testified how pornography played a similar important role in literally hundreds of cases of abuse. There is also an abundance of individual testimonies by ordinary women and girls at various public hearings and elsewhere in the United States reporting how they were abused by males who forced, or attempted to force them to imitate pornography.

Prostituted Persons’ Accounts of Tricks

Findings among samples of battered women who were forced to imitate pornography are consistent with samples of prostituted persons. For instance, in a San Francisco study of 200 prostituted women and girls, numerous spontaneous and unsolicited comments by respondents were encountered mentioning how abusive tricks had referred explicitly to pornography they had seen. Notably, this sample was not overrepresenting prostituted persons seeking assistance, but intentionally used informal recruitment and advertising in order to avoid “arrestable” or “service oriented” respondents. Similar reports about abusive tricks that force or attempt to force women to imitate pornography are also seen in other studies. For example, the nine country study discussed in chapters 1 and 2 found 47% of 802 prostituted persons sampled at different venues (e.g., indoors and outdoors) reporting being upset by attempts at making them imitate pornography. Consistent with such findings, a woman who attested for a group of survivors at a public hearing in Minneapolis in 1983 said that “[m]en 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.” Not surprisingly, a Swedish government appointed commissioner also reported in 1995 that social outreach workers testified how it was not uncommon “that men approach prostitutes with a pornography magazine and points out at the pictures what sexual services they want to have performed.” Other reports from survivors testifying in public hearings in the United States attest to simil-
lar situations, where tricks show or constantly refer to pornography that they wish the prostituted woman should imitate.475

Attesting that pornography plays a role in abusive situations, numerous respondents in the San Francisco study made spontaneous unsolicited comments in their open-ended responses or in responses regarding particular cases of juvenile sexual exploitation how they had been used to make pornography before age 13, and/or how child sexual abusers showed it to them during their childhood as part of their attempts to make them comply with the sexual exploitation (Silbert and Pines, 865–66). Twenty-two percent of the women who had reported 178 juvenile sexual abuse cases (such abuse was reported by 60% of 200 respondents) also spontaneously mentioned that adults had used pornography prior to the abuse in a variety of ways, for example, in order to persuade the children to accept sexual abuse, to legitimize the adults’ actions, or to arouse the adults themselves before the abuse (pp. 865–66).476 Similar corroborating accounts have been made by non-prostituted women who were subjected to child sexual abuse, and by various experts on sexual offenders and their behaviors.477

Furthermore, among 193 rape cases that were reported by 73% of Silbert and Pines’ 200 respondents, 24% of the interviews included unsolicited remarks how the rapist had consistently referred to pornography materials they had seen or read and how those very materials suggested to him that the prostituted woman or girl must enjoy not only being raped, but also being subjected to extreme violence (Silbert and Pines, 863). In 19% of the mentioned 193 rape cases, the respondents had explicitly mentioned to the interviewers that they tried to stop their rapist by saying approximately “‘Calm down, I’m a hooker. Relax, and I’ll turn you a free trick without all this fighting’” (p. 864). However, rather than calming the rapist, this information “increased the amount of violence in every single case,” with most rapists starting to scream and demand “that she take back what she had said, insisting on taking her by force” (p. 864). In all cases where the woman disclosed her status as prostituted, she sustained “even more serious injuries” than women who did not disclose their status similarly (p. 864). Moreover, in 12% of all the 193 rape cases where those victimized told the rapists about their prostitution they brought forward “overt” pornography-related comments, and in most other similar cases there were “indirect references” to pornography made by rapists (p. 864). In one such case where a woman tried to calm the rapist down by disclosing that she could turn him “a free trick” if he’d just stop “hurting” her, the opposite reportedly happened:

He started calling me all kinds of names, and then started screaming and shrieking like nothing I’d ever heard. He sounded like a wailing animal. Instead of just slapping me to keep me quiet, he really went crazy and began punching me all over. Then he told me he had seen whores just like me in (three pornographic films mentioned by

475 See, e.g., Brief on Behalf of Trudee Able-Peterson et al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Books v. City of Bellingham, C88-1470D (W.D. Wash, 1989) (unreported), reprinted in Margaret A. Baldwin, “Pornography and the Traffic in Women,” 1 Yale J. L. & Feminism 111, 141–42 (1989) (quoting Minneapolis Public Hearings); Att’y General’s Comm., Final Report, 784 (quoting from Washington, D.C., Hearing) (survivor testifying about being exploited during convention weekends in New York, where pornography films had first been shown to male audiences that “often set the tone for the kinds of acts we were expected to perform”).

476 Moreover, in open-ended responses or in responses to questions how respondents made a living as runaways, 38% of 200 women or girls reported that they had been photographed for pornography under the age of 16, either for “commercial purposes, and/or the personal gratification of the photographer.” Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 866.

477 See In Harm’s Way, ed. Dworkin and MacKinnon, passim.
name), and told me he knew how to do it to whores like me. He knew what whores like me wanted. (p. 865; quoting respondent)

Testimonies as the above exhibit the tendencies shown in controlled laboratory experiments on normal men discussed above, where men categorized women in stereotypes such as “Promiscuous” vs. “Prudish,” “Whore” vs. “Madonna,” and where exposure to pornography amplified perceptions that women were more “sluttish” (pp. 102–106).

As recalled, experiments show how materials that present women as indiscriminately promiscuous, even without presenting any violence, caused stronger ASV and more callous attitudes to rape victims than almost all other pornography categories did. Such attitudes significantly predict aggression against women (see 93–98 above). Indeed, exposure to pornography and experimental cues suggesting that a confederate woman was more promiscuous caused more laboratory aggression against that woman compared to controls. Researchers suggested that the thoughts among these men who aggressed in the laboratories went something like “‘let the bitch have it.’” The San Francisco study corroborates those observations, suggesting that when aggressors are informed that the women they are abusing are prostituted persons, it feeds their stereotypical perceptions of these women as sexually indiscriminate in the same way as the pornography exposures or other cues did in the experimental studies. That is, it causes a similar “target devaluation” process as in the experiments, where the women were “dehumanized” and the aggressors believed them to be more “fair game” for abuse than otherwise. For instance, one San Francisco rapist allegedly said “I know all about you bitches, you’re no different; you’re like all of them. I seen it in all the movies. You love being beaten” (Silbert and Pines, 864). The rapist quoted above also claimed that he had “seen whores just like” the respondent, and “knew” what “whores” like her wanted (p. 865). In both these accounts, the women’s status as prostituted person, qua sexually indiscriminate, is explicitly taken by the trick as offering a carte blanche to be even more violent against them. The tricks’ pornography consumption apparently provided them more legitimacy for rationalizing their otherwise outrageous abuse. These behaviors are thus consistent with behaviors observed in other studies with very different methodologies and population samples. Such a level of consistency across research paradigms should be properly termed triangulation, as it is understood within social science (cf. 89–92 above).

Tricks’ Accounts

Many tricks anonymously admit that they use prostituted women in order to have sex that others would refuse them, such as dominance and submission, or various acts presented in pornography. For instance, in an anonymous interview study with 110 tricks in Scotland who were randomly sampled through advertisements, many emphasized their “pleasure in asserting their dominance over women in prostitution” as an important reason for buying sex. One trick submitted that prostitution pro-

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478 Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 118–19 & tbl.4.3.
480 Zillmann and Weaver, “Pornography & Men’s Callousness,” 114.
481 See supra notes 403–408 and accompanying text.
vided men the “‘freedom to do anything they want in a consequence-free environment’” (Farley et al., “Scotland,” 376). Another trick explained that “[s]ome guys watch a lot of pornography and expect their partners to perform certain acts. They’ll either pressure their partner to a certain point or then go and get what they want” (p. 374). A methodologically similar study with 113 tricks in Chicago, IL, reported that 46–48% wanted sex from prostituted persons that they “either felt uncomfortable asking of their partner or which their partner refused to perform,” most commonly anal sex, then oral sex, but also violent sex such as sadomasochism and domination, or fetishes such as group sex, or using sex toys. The Chicago tricks likewise referred “frequently” to “re-enacting” pornography scenes with prostituted women (Durchslag and Goswami, 13). As mentioned by the woman attesting for a group of survivors in the 1983 Minneapolis public hearing (above), pornography presents behavior that consumers wish to imitate whether or not their partners want it, in turn creating demand for more prostitution. Unsurprisingly then, among the 110 tricks in Scotland the frequency of their pornography consumption significantly predicted their frequency of using prostituted women (Farley et al., “Scotland,” 374; \( r = .26, p = .006 \)). A similar predictive correlation was found among 1,672 men arrested for solicitation in the United States, and who were additionally compared to national samples of men. The type of responses and associations as reported from Scotland and Chicago above were found among tricks sampled and interviewed with similar methods in Boston, MA (\( n = 101 \)), Cambodia (\( n = 133 \)), and London, UK (\( n = 103 \)).

For instance, 71% among Cambodian tricks reportedly imitated pornography with women they bought (Farley et al., “Cambodia,” p. 26). In Boston, 52% of the tricks acknowledged the same (Farley et al., “Boston,” pp. 30–31). Cambodian tricks elaborated with statements such as “Whenever I went for sex, I’d like to try new styles I had seen in sex movies,” “We want to try to follow what we see in the pornographic movies,” and “I copied those styles from sex movies and tried them all” (Farley et al., “Cambodia,” p. 26). A Boston trick similarly explained what he did to imitate pornography: “the people that I wanted to do it with didn’t want to do it with me, so I started going to prostitutes” (Farley et al., “Boston,” p. 30). Reflecting on his imitation of anal sex with a prostituted woman, a Cambodian trick submitted that he “fucked her asshole like it was in the sex movie” (Farley et al., “Cambodia,” p. 27). Moreover, 41% of Cambodian tricks acknowledged they had participated in gang-rapes (called bauk in Khmer), with 28% of those men saying they had done it once, 42% two to five times, 19% six to ten times, and 17% reportedly participated more than ten times (p. 30). With regards to how pornography influenced such gang-rapes, one trick explained that they “took turns to have sex” and “used different styles that we saw in the movie” (p. 26). Hence, not just one man, but a whole

483 Durchslag and Goswami, Interviews With Chicago Men, supra chap. 1, n. 114, at 12. Further citations in text.
484 The Minneapolis Hearing, supra note 468, at 116 (testimony by T.S.).
486 Farley et al., “Comparing Sex Buyers [Boston],” supra chap. 2, n. 221, at 27, 30–31; further citations in text; Melissa Farley et al., “A Thorn in the Heart: Cambodian Men who Buy Sex” (paper presented at conference co-hosted by Cambodian Women’s Crisis Center and Prostitution Research & Education, Phnom Penh, Cambodia, July 17, 2012), 25–26, 32, archived at http://perma.cc/KU76-5FT5; further citations in text. Farley, Bindel and Golding, Men Who Buy Sex [London], supra chap. 1, n. 114, at 20–22. Note that even though Cambodian tricks provided similar responses with regards to pornography use, their self-defined reasons for buying women for sex were somewhat different than those provided by tricks in the studies above from U.K. and the United States.
group, made prostituted women submit to all the varieties of abuse shown in contemporary pornography. In order to do this, a great deal of force and coercion is needed, which is clearly reflected in many interviews: “Sometimes the woman changes her mind when she sees how many people are waiting at the place. If that happens, my friends threaten and force her, sometimes beating her” (pp. 30–31). Another man told how his “friends beat her and forced her to do all that they wanted; sometimes my friends threatened her with death should she not follow what they say” (p. 31). A third trick said “we bet on who was strong enough to prolong the sex. Anyone who could not prolong would be called the loser” (p. 31). Considering the abuse involved, and how these tricks show no concern for the women’s health, no wonder one of them said that at “the end” of a gang-rape, the woman “was in so much pain I was afraid she had died” (p. 31).

The Cambodian study is the latest in a string of interview studies with tricks referred to above. Hence, the survey battery was likely developed more, thus capturing more important details about the relationships between pornography, abuse, and gang-rapes. Yet similar de facto gang-rapes animated by pornography, where women had little possibility to deny any sex, have been reported in the United States since long, as well as in Sweden. For instance, in a public hearing in 1986 held by an American federal government commission, the following testimony was made:

My pimp also made me work “stag” parties . . . . attended by an average of ten to twenty men . . . . in catering halls, bars and union halls. I was also forced to work conventions . . . held at major hotels in New York attended by hundreds of professional men. The series of events was the same. Pornographic films followed by myself and other women having sex with the men. The films that were shown most often set the tone for the kinds of acts we were expected to perform. 487

Likewise in Sweden, as mentioned in chapter 2, there were several reports in the early 1990s about “sex clubs” where pornographic movies were produced with crowds of paying male guests, reportedly coercing women beyond prior agreements; as in the case that included a financially distressed woman coerced to serve over 10 men with vaginal and oral intercourses, and unprepared anal intercourse. 488 Such a situation is accurately described as “gang-rape.” Less explicitly, though indicative of similar situations, in Chicago one trick told interviewers how he and his friend were in Las Vegas, and while having “a threesome . . . [they] came on her face at the same time, like in the porn movies” (Durchslag and Goswami, 13). Another trick admitted how he and his friends vacationed on Cuba and paid a “travel agent” for women to stay in their apartment for three days, and to clean the room and “perform” the “sex acts requested by the man and his friends” (p. 11).

It is likely that pornography figures as an active element in all the type of situations in prostitution above. Considering the tendency of imitating pornography that half or even more of the tricks in the samples discussed above openly admitted to, the allegation of 38% among the 133 Cambodian tricks that “Western sex videos” was to blame for gang-rapes might not be entirely inaccurate (Farley et al., “Cambodia,” 31) even though it attempts to legitimize their otherwise hideous abuse. Indeed, all Cambodian tricks who admitted gang-rape claimed that neither their fathers, nor their grandfathers had done it, and the statistical analysis corroborated their accounts in the sense that the younger ones more likely than the older men reported gang-rape

Consumption Harms

(p. 30; $r = -0.20$, $p = 0.018$, $n = 133$). As pornography movies have become more available—for example, with the VHS cassette, CD-ROM, and Internet—the younger generation’s potentially more frequent pornography use may have made previously relatively uncommon sexual abuse, such as gang-rape, more prevalent. Many testimonies above attest that tricks want to “imitate” or “try out” not just abusive sex in general, but particular acts that they did not know about before seeing pornography. Even if they were predisposed to abusive conduct, their accounts suggest that they would not have done the particular form of conduct chosen (e.g., gang-rape, ejaculation in someone’s face, forced anal sex) unless having consumed the particular materials they consumed. A stricter interpretation of these accounts from tricks, and their corroborating accounts from prostituted women, would regard them as “correlational” predictions rather than “causal” ones. Yet the sequence of events suggests that such an interpretation is too limited. The accounts converge on the observation that first came exposure, then came abuse. This order and outcome of events is consistent with the “causality” that numerous experiments on pornography exposure with controls show (see 98–109, 115–118 above).

**Summary of Analysis.** Quantitative and qualitative data on tricks and batterers in this section support the prior analytical conclusions (pp. 98–122) derived from experimental and quantitative naturalistic population data on “normal” men. Tricks themselves, surprisingly consistent with prostituted women, indicated a similar causal path as experimental studies, showing how pornography consumption promotes specific forms of gender-based violence against prostituted women. The qualitative interviews suggested that these behaviors derived directly from the specific pornography materials that tricks consumed. Furthermore, in both battered women’s and general population samples, pornography consumption as reported predicted more sexual aggression and coercive behavior. Alternative predictors of aggression were controlled for, for example, alcohol consumption and military service, or the Confluence Model’s individual moderators. This analysis suggested that pornography predicted abuse independently, even though it may be moderated to some extent by other factors. Hence, quantitative and qualitative analysis of abusive or targeted populations validate the experimental and nonexperimental population-based analysis by a triangulation of samples as well as methods, strengthening the inference that pornography consumption is not merely a “symptom” of an underlying phenomenon, but has an independent causal impact on gender-based violence and attitudes promoting or condoning such violence.

### Aggregated Studies on Crime Reports

An additional body of literature studies correlations between pornography consumption and crime reports of gender-based violence with entire societies as the units of analysis. It is referred to as the “aggregated” approach—as distinguished from population based surveys, where individuals are the primary units of analysis (e.g., 109–115 above). For reasons explained below, this aggregated approach has become more disfavored among researchers, although it could potentially support an argument for or against legal regulations of pornography. Among the different methodologies within the consumption effects research paradigm, the analysis below suggests that the aggregated approach is the most vulnerable to problems such as “ecological

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489 For a further brief discussion of the triangulation concept, see supra notes 352–353 and accompanying text.
fallacy” and “over-determination.” Over-determination occurs where there are two or more “sufficient and distinct causes for the same effect” (Malamuth and Pitpitan, 140–41), here causing changes in the reporting of crime. For example, difficulties may lie in knowing what alternative factors to control for apart from pornography consumption—that is, variables affecting prevalence and/or reporting of sexual offenses. Ecological fallacy refers to the risk of drawing conclusions on the wrong units of analysis, for example, making erroneous generalizations about individuals or groups on basis of data about the larger society (pp. 138–40).

Measurement Problems
Finding a valid index of pornography consumption in a geographical area is not without obstacles, though a relatively minor measurement problem compared to others within aggregated approaches (more below). Ideally, a representative population survey that unobtrusively asks about individuals’ pornography use appears reliable. Yet such surveys often do not exist for the particular nation, region, or legal jurisdiction. Even when they exist, they may not be standardized as to enable cross-geographical or longitudinal comparisons. Since researchers may not have the resources to collect such primary data, they often rely on more easily accessible indirect indices of consumption; for example, the official circulation of known pornography media, or (even more indirectly) the presence or absence of legal regulations, alternatively the presumed “availability” of pornography over time. The validity of such indirect indices may be questionable. As noted by an American federal government commission, in several early aggregated studies “the availability of pornography was simply assumed to have increased or decreased following legal changes.” Today, more evidence is usually needed to support such inferences.

A more difficult problem within the aggregated approach is related to measures of crime reports of rape or other sexual offenses, and how to interpret their correla-

491 For various examples of such surveys conducted in a number of countries, see supra notes 95–104 and accompanying text. The reliability of well-worded anonymous crime surveys is well-corroborated in the literature. See sources cited supra note 105.
493 For instance, a recent longitudinal aggregated study of the Czech Republic claimed that “even items like Playboy magazine were banned” from the mid-1970s to 1989, referring only to official legal codes and statements unsupported by citations pertaining to how those codes were applied. See Milton Diamond, Eva Jozifkova, and Peter Weiss, “Pornography and Sex Crimes in the Czech Republic,” Arch. Sex. Behav. 40, no. 5 (2011): 1038. In addition, the study had to cite personal communication with one pornography distributor as support for presuming a marked increase in sale since 1989. However, merely one pornographer is not much evidence. Hence, in addition the study referred to official statistics showing that Czech households had a significant increased access to the Internet since 2002. Ibid., 1039. Although weak in all three instances, taken together these measurements reasonably suggest an increase in pornography consumption over time. In an earlier cross-geographical aggregated study of 50 American states by Larry Baron and Murray Straus, pornography consumption was measured by the circulation of eight common sexually explicit magazines, with numbers provided by a nonprofit certifier, the Audit Bureau of Circulation. Larry Baron and Murray A. Straus, “Four Theories of Rape: A Macrosociological Analysis,” Soc. Problems 34, no. 5 (1987): 476. Although several people could read from the same magazine, it is reasonable that substantial variance in commercial sale (as opposed to minor fluctuations) reflects actual consumption trends. In an even earlier aggregated study from Denmark, it was assumed that “liberalization” of pornography laws and “the ensuing high availability of such materials” provided an accurate measurement of increased consumption. Berl Kutchinsky, “The Effect of Easy Availability of Pornography on the Incidence of Sex Crimes: The Danish Experience,” J. Soc. Issues 29, no. 3 (1973): 163 (abstract). Such a measurement exhibit even more uncertainties. Yet the more the availability increases; at some point it likely affects consumption trends.
tions to pornography consumption. Typically, researchers either study variance over time in one unit, or compare variance in different units at a single point in time. However, sexual offenses are particularly plagued by low reporting rates. For instance, a large U.S. prevalence study published in 2007 (the “2007 survey”) found that only 18% of all adult females who were victimized through “forcible rape” reported it to the police, and only 10% of those victimized through drug or alcohol-facilitated or incapacitated rape reported it. Among the female college population, reporting was even lower (16% and 7% respectively) (Kilpatrick et al., 44 tbl.36).

Reporting “forcible rape” had not increased during fifteen years in the United States (p. 60), even though its prevalence increased by 27.3% from 1991 to 2006 according to estimates (p. 57). In 2006, it was estimated that 16% of all American women had been subjected to “forcible rape” (when including drug or alcohol-facilitated or incapacitated rapes, the total number increased to 18%) (p. 58). Unsurprisingly, several sources suggest that only about 2% of all U.S. forcible rape cases are successfully prosecuted. In light of substantial underreporting and low conviction rates, many researchers recognize, at least superficially, that fluctuations in official crime reports are influenced by a number of factors other than the actual crime rates; thus, these numbers are “over-determined,” and researchers have to control for all relevant alternative variables.

Moreover, it is uncertain whether or not the correlation between pornography consumption and crime reporting (as opposed to crime prevalence) should be assumed to be negative, positive, or neutral on an aggregated level. The fairly equal likelihood of these seemingly contradictory hypotheses is due to the fact that pornography exposure produce and predict increased ASV in individuals, including a higher beliefs in “rape myths” among both men and women; the result entails, inter alia, that consumers perceive a reduced level of punishment for rapists as more appropriate, and/or blame the victims more for sexual aggression (e.g., 115–122 above). When studying relationship between pornography and gender-based violence, these well-documented exposure effects compel us to ask if crime reports is a fundamentally flawed measurement to begin with. If women expect society to be more indifferent to their suffering of sexual victimization, would that not make women less inclined to report it? Evidence suggests this is likely. For instance, the main reasons found in the U.S. survey from 2006 for why adult women did not report forcible rapes were facts such as that 44% feared “bad treatment” by the criminal justice system, and that 63% did not want “family” or “others” to know about the incidents (Kilpatrick et al., 47–48 & tbl.41).

Furthermore, women’s own perceptions of what counts as “rape” may also be affected by attitudes diminishing the credibility of rape victims and desensitizing persons to sexual abuse—attitudes evidently promoted by pornography consumption (see 115–122 above). It may thus not be coincidental that the 2007 survey found that only 37% among victimized college women identified the incident as rape, despite 494 Kilpatrick, et al., Drug-facilitated, Incapacitated, & Forcible Rape, supra p. 5 n.18, at 43 tbl.35. Further citations in text.
495 See citations supra note 443.
496 See, e.g., John H. Court, “Sex and Violence: A Ripple Effect,” in Pornography & Sexual Aggression, ed. Malamuth and Donnerstein, supra chap. 1, n. 155, at 151–54 (citing literature and discussing “change in reporting rates” and other problems associated with the aggregated approach); Baron and Straus, “Four Theories of Rape,” 472–73 (discussing underreporting in rape crime statistics); Kutchinsky, “Danish Experience,” 167–73 (discussing changes in reporting of rape caused by attitudinal changes among the public and/or law enforcement officers).
497 For the original concept and various measurements of rape-myths, see Burt, “Cultural Myths & Rape.”
that the additional 63% also provided behaviorally specific responses consistent with criteria for forcible rape and other recognized forms of rape (p. 44). The college women who did identify their experience as rape were almost ten times more likely to report it than those who did not identify their rape as a rape (p. 44). For aggregated studies on the relationship between pornography consumption and gender-based violence, societies’ desensitization to sexual aggression risks making crime reports a gross misrepresentation of its prevalence; thus, serious bias could easily enter the equation. The aggregated approach needs to find reliable measures for sexual offenses and/or control for such underreporting that may be caused by the consumption of pornography itself, just as any other factors that could influence reporting needs to be identified. A few examples will illustrate the limits of aggregated research in these and other regards.

**U.S. Inter-State Controlled Comparisons 1980–1982**

One of the most sophisticated aggregated studies that inquired into the association between pornography consumption and rape reports was made by Larry Baron and Murray Straus. They used data from the years 1980–1982 in a design that controlled for a number of relevant alternative predictors in 50 American states, hence addressing the problems of over-determination. Apart from pornography consumption, which was measured indirectly via sale of eight sexually explicit magazines, the study measured three latent constructs: (1) cultural support for violence, measured by, for example, indices of corporeal punishment in schools, executions, circulation of violent media; (2) social disorganization, for example, geographical mobility, divorce, single headed household, secularism, proportion of tourists; and (3) gender equality, for example, income equality, women in government, indicators of legal equality (Baron and Straus, 472–77). Seven additional manifest constructs where controlled for that had predicted frequency of rapes in other research: the percentages of (i) urbanized people (living in cities >50,000), (ii) young adults (age 18–24), (iii) population being Black, and the (iv) the sex ratio (m/f) at age 15–24, (v) economic inequality (Gini Index), (vi) percentage of single males age >15, and (vii) unemployment percentages (p. 477). As hypothesized, pornography consumption and social disorganization directly predicted higher rape reports, while gender equality directly predicted reduced rape reports (p. 480). Only cultural support for (general) violence was not correlated with rape reports (p. 480).

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498 Among the general adult female population who provided behaviorally specific responses consistent with criteria for rape, 63% perceived their experience as rape and were three to four times as likely to report it as those who did not perceive their rape as such. Kilpatrick, et al., Drug-facilitated, Incapacitated, & Forcible Rape, 44.

499 See Baron and Straus, “Four Theories of Rape” (cited supra n. 493). Further citations in text.

500 For a further description of this index, see supra note 493.

501 The five states with most reported rapes per 100,000 population were Alaska (rate 83.3), Nevada (rate 64.5), Florida (rate 55.5), California (rate 55.0), and Washington (rate 49.6). Baron and Straus, “Four Theories of Rape,” 474 tbl.1. Their ranking in circulation rates of sexually explicit magazines per 100 males age 15 and over correlated with reported rapes fairly well: Alaska (rank 1, rate 59.0), Nevada (rank 2, rate 49.7), Washington (rank 10, rate 28.3), California (rank 11, rate 28.2), and Florida (rank 23, rate 23.9). Ibid., 474 tbl.1. Similarly, the five states ranking lowest on reported rapes correlated fairly well with circulation of pornography magazines per 100 males age 15; the circulation rates fluctuated between 20.0 and 23.2, the lowest rank being 37 and the highest 25. Ibid., 474–75 tbl.1.

502 Baron and Straus cautioned against making causal inferences from the association between magazine circulation and rape reports and suggested that a “hypermasculine or macho culture” that included a number of ASV similar to Burt’s concept of rape myths might cause the increase in both pornography sale and rape reports. Ibid., 482; cf. Burt, “Cultural Myths & Rape,” 218. However, such ASV have been
A study published by other scholars in 1988 largely replicated Baron and Straus’ design for the year 1982, including controlling for similar alternative variables. The replication found that a higher circulation of ten common sexually explicit magazines in 51 American states (including DC) significantly predicted a higher proportion of reported rapes (Scott and Schwalm, 245–46). The replication’s statistical model contained eight variables that accounted for 64% of the variance in reported rapes; when the sexually explicit magazines were excluded from the regression statistics, only 47% of this variance could be explained by the remaining seven variables (p. 246). The distribution and rankings of states were literally the same as in Baron and Straus’ study, with minor exceptions in magazine circulation rates for the five states with the least reported rates (p. 247 tbl.1).

Although the two U.S. inter-state aggregated studies showed a significant impact from pornography consumption on rape reports, both used a measurement of rape that suffers from underreporting: the FBI Uniform Crime Reports (UCR) (Baron and Straus, 473; Scott and Schwalm, 243). Baron and Straus recognized that underreporting is a problem of the UCR, but believed that the relative differences between the 50 states’ reported rapes are the same as their relative differences in rape prevalence, referring to prevalence data in the National Crime (Victimization) Survey (NCS) (Baron and Straus, 473). Yet the NCS’s definition of rape has been criticized by researchers for not using a clear behaviorally specific definition of rape, instead relying “heavily” on the subjects’ own labeling of the incident as “rape”—a procedure likely to cause substantial underreporting. Moreover, the NCS does not include forcible rapes that involve oral sex, anal sex, penetration with fingers or objects, and drug- or alcohol-facilitated rapes (Kilpatrick et al., 24–25). Furthermore, the NCS had a number of additional serious problems that contributed to more underreporting; for example, it relied on interviews in the households that could be monitored by an abusive partner or other relatives thus endangered those victimized if sensitive information would fall into the wrong hands. Such problems existed when Baron and Straus’ data was collected in 1980–1982. For instance, a thorough review in 1990 noted a “widespread suspicion” that the NCS was underreporting specific crimes; tellingly, “very little domestic violence was reported,” officially reported “crimes by nonstrangers were not very accurately recalled, and the recall rate for incidents involving relatives and marital partners was terrible.”

Yet to the extent that factors influencing underreporting are of the same kind and frequencies in each of the 50 states of the United States, Baron and Straus’ and the replication data may be regarded as reliable to highlight the relationship between pornography consumption and rape within states as a whole. Indeed, the internal consistency of results also supports the validity of the UCR as a relative indicator of consistently produced by pornography exposure in experimental studies and predicted by pornography consumption in naturalistic surveys independently from other control variables. See supra pp. 115–122. In light of such research, of which a significant part has been made after Baron and Straus’ study was published, it seems more likely that pornography consumption itself would contribute to a “macho culture” and rape-myths, even though such a culture could simultaneously contribute to increases in pornography sales as hypothesized by Baron and Straus.

rape prevalence when comparing states within the United States. That is, the fact that three of their four theoretical concepts were so closely correlating with the crime reports (pornography, social disintegration, and gender inequality), and, perhaps expectedly, not cultural support for general (nonsexual) violence. Other aggregated studies have more measurement problems, as many are not validated by similarly sophisticated conceptual designs, nor have controlled for as many alternative predictors as Baron and Straus did (more below). In comparison with longitudinal studies and cross-national studies in particular, by comparing fairly similar sub-national units Baron and Straus had the advantage of controlling for significant cultural and social changes that may otherwise have impacted the propensity to report sexual crimes. Thus, they avoided many typical problems of over-determination.507

**Ambiguous and Inconsistent Longitudinal Data**

Authors to a longitudinal aggregated study of the Czech Republic from 1971 to 2007 interpret their data as suggesting that pornography consumption reduces sexual offenses.508 They measured official reporting of adult rape, child sexual abuse, and “lesser sex-related crimes” over a period in which pornography was thought to become more prevalent and consumed, particularly so after the end of communism in 1989 (Diamond, Jozifkova, and Weiss, 1038–39). However, the explicit data on crime reports from the Czech Republic, as reported, is far from unanimous. The official rape reports even increased from 1989, with an exceptional high rate in 1990 of about 900 reports, then lying just below 750 reported rapes annually until 1998 (p. 1039 & fig.1). From 1999 to 2007 the reported rapes stabilized between 500 and 750 cases per year, which is an annual rate similar to the period 1971–1989 (p. 1039 & fig.1). The authors refers to an increase of the male population aged 15–64 from 3,225,960 in 1971 to 3,726,148 in 2007, which implies a de facto decrease of rape reports per capita (p. 1040). Even so, the decrease would only amount to 15.5%. There are many alternative factors that could cause such a decrease during a period over 35 years that included rapid social, economic, cultural, and political transformation, including the Velvet Revolution, the change from communism to capitalism and liberal democracy, and the national separation of Slovakia among other important events. A reduction of about 15% in official crime reports (which is no equivalent to crime prevalence) over roughly 35 years that included such tumultuous events may have several distinct and sufficient causes—not just a single cause such as pornography or public attitudes. To interpret this relatively modest change in crime reports will have to face the potential over-determination from numerous alternative causes in a very complex socio-historical context.509

With regards to so-called lesser sex-related crimes and child sexual abuse, the Czech study authors note that although those official crime reports saw a sudden drastic drop in 1989, almost by half, child sexual abuse reports soon increased just as drastically while reports of “lesser” sex-related offences also increased, though more slowly (p. 1039 & fig.1). Eventually, in 1998 child sexual abuses decreased in crime reports to a lower frequency than in the period 1974 to 1989 (ibid.). Yet alt-

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507 Cf. Malamuth and Pitpitan, “Effects of Pornography,” supra p. 27 n.78, at 140–42 (discussing problems with over-determination and cross-cultural comparisons in aggregated consumption effects studies).

508 Diamond, Jozifkova, and Weiss, “Pornography in Czech Republic,” 1039–40. Further citations in text. For a discussion of indirect measurements of pornography consumption, including this study, see supra notes 491–493 and accompanying text.

hough “lesser” sex-related offenses were reported in higher frequencies just before 1989 than afterwards, there exist no data on these crimes before 1986 (ibid.). It is thus impossible to know whether the higher frequency of reports of “lesser sex-related crimes” in the period 1986–1988 are exceptional or representative of a general trend from 1971 to 1986. With respect the dramatic increase in child sexual abuse reports in the period 1989 to 1998, the Czech study authors suggest some peculiar hypotheses. For instance, divorces increased after communism; with reference to one Czech study, it was then suggested that up to 55% of all child sexual abuse accusations in divorce cases were “false” during this period, allegedly pushing crime reports upwards. The authors also suggest that a social sensitivity to “rape and sex-related crimes” increased after communism, which is additionally said to explain the increased reports 1989 to 1998 (p. 1041). Another explanation attempted for the rise in child sexual abuse reports between 1989 and 1998 were the growing problems with prostitution “following the introduction of capitalism,” among other things (p. 1041). However, when a reduction in reporting is seen after 1998, it is simply assumed that “the child prostitution surge” had been “dealt with” (p. 1041), without any citation being provided to support that contention.

The Czech study authors never discuss the large body of experimental studies and naturalistic surveys showing that pornography exposure produce or predict more aggression against women as well as more ASV (see 98–122 above), including a dramatic propensity among both genders to recommend lower sentencing for rapes.510 Similarly, the authors never discuss such qualitative accounts from tricks and prostituted persons that illustrate how pornography use is linked to an increased demand for prostitution, as many men want to imitate what they have seen in pornography but face difficulties in doing so with non-prostituted women (see 122–129 above). In light of all this research, it is possible that the initial increase of reported rapes and child sexual abuse in the Czech Republic in 1989 to 1998 reflect a substantial increase in crime prevalence, possibly due to pornography, and not just an increase in reporting. An interpretation of the reduction of reports after 1998 could then be that the attitudinal desensitization that pornography use causes or predicts in consumers (above pp. 115–122) made successful prosecutions of sex crimes less likely after 1998. Put in simple terms, those victimized after 1998 might increasingly have found it not worthwhile to report the crimes in light of such a more desensitized society.

By contrast to the Czech study, Baron and Straus could control the conceptual validity of their rape reports by comparing the relative differences in rape reporting between fifty states with the states’ relative differences within a prevalence index (NCS) of rape (above pp. 132–134). The Czech study (Diamond, Jozifkova, and Weiss) does not provide prevalence studies to validate whether the variance in official crime reports over time is consistent with its actual prevalence over time. Nor does the Czech study provide comparative data from countries like Slovakia or similar societies in neighboring East European post-communist countries that could validate their interpretation of the Czech data. Certainly, the Czech study refers to a dramatic increase in reporting statistics for nonsexual crimes in 1989 and onwards, such as “robbery,” “willful battery,” or robbery-related murders (p. 1040). The un-

510 See, e.g., Zillmann and Bryant, “Trivialization of Rape,” supra p. 3 n.13, at 17 tbl.3 (finding that non-exposed controls on average recommended almost 10 years imprisonment, while massively exposed subjects recommended only 5 years for a hitchhiking rape, the relative decrease being similar for both genders though men consistently recommended lower penalties); Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 118 tbl.4.3 (finding exposure to nonviolent “female-instigated sex” reduced recommended prison sentences from 823 months (men) and 869 months (women) among controls to 515 months (women) and 514 months (men) in the exposure group).
derlying assumption seems to be that these reports are “comparative markers of social change” (p. 1039). Yet the authors never makes clear how this “social change” is conceptually related to the reporting frequency of sexual offenses, and if so, whether positively or negatively. For instance, dramatic increases in reports of robberies, battery, or murders since 1989 likely caused a substantial increase in workload for law enforcement. As sex-related crimes are already notoriously difficult to investigate and prosecute successfully, even in rich countries with powerful criminal justice systems, a dramatic increased crime rate across the board could discourage reporting sex related crimes even further. That is, if women and girls know that not only might people be more biased against taking sexual offenses seriously, in part due to increased proliferation of pornography (cf. 115–122 above), but that law enforcement are also increasingly overwhelmed by other criminality in a rapidly transforming post-communist society, such a situation may cause even stronger disincentives for them to report sexual offenses.

Another well-known early longitudinal study from Copenhagen, Denmark, further illustrates the limitations of the aggregated approach and the Czech study in particular. Its author, Berl Kutchinsky, observed that official reporting of rape was virtually the same from 1959 to 1970 there, though child sexual abuse and “lesser” offenses such as “exhibitionism,” “peeping,” “verbal indecency,” or “other” offences against women and girls, were reported less over time. His data called for further inquiry since the prevalence of different sexual offenses in society was assumed to follow fairly similar trends, and not develop differently. In order to control for potential underreporting, Kutchinsky interviewed 198 men and 200 women in Copenhagen in 1969 to see whether public attitudes toward reporting sexual offenses had changed (Kutchinsky, 168). These people’s responses suggested that the public had become considerably less likely to report both “exhibitionism” and “physical indecency towards women” to such an extent that could explain “a major part” of the decrease in reporting of “exhibitionism,” and “fully, or at least to a large extent” explain the reduction in reporting of “physical indecency towards women” (pp. 169–70). Furthermore, a quantitative survey of attitudes among “50 young policemen” and qualitative semistructured interviews with police officers at various levels were made to assess potential changes in the willingness to report crimes within the law enforcement (pp. 171–72). In the interviews, the lower officers revealed that they were trying “to calm people down instead of taking action when minor cases of sexual interference are reported”; hence, they would “sometimes” not report their cases unless it concerned children (p. 172). Higher officers did not admit to exercising such more lenient behavior though.

No similarly public attitudinal index of views regarding sexual offences have been provided in the Czech study as those provided in Copenhagen by Kutchinsky; nor were any interviews with law enforcement officers made (see Diamond, Jozifkova, and Weiss). It is therefore telling that, by contrast to the Czech study, and despite that official reporting might suggest otherwise in Copenhagen without his investigation of public attitudes, Kutchinsky concluded that increased pornography consumption had not affected the frequency of exhibitionism or other sexual offences against adult women, except for “peeping” (Kutchinsky, 176, 178). Furthermore, an alternative interpretation of Kutchinsky’s data would suggest that pornography consumption partly caused a decreased in reporting sexual offences, as it evidently has produced or predicted desensitization to violence against women and other ASV in large number of experimental and naturalistic population samples (see 115–122

511 See supra note 443 (discussing rape conviction in the United States).
512 Kutchinsky, “The Danish Experience,” 166 tbl.1. Further citations in text.
above). Kutchinsky never considered such a hypothesis in 1971 though. Similarly, when considering experiments and naturalistic studies showing how pornography causes or predicts gender-based violence, not just attitudes (see 93–115 above), Kutchinsky’s assumption that pornography consumption contributed to a substantial decrease in child sexual offences (Kutchinsky, 178) also seems premature. Notably, the same assumption about child sexual offenses was made in the Czech study (Diamond, Jozifkova, and Weiss, 1042).

With regards to children, Kutchinsky’s attitudinal survey did not measure attitudes supporting child abuse according to such well-validated scales as Martha Burt’s conceptualizations of “rape-myths.” He merely provided examples of child sexual offenses to respondents in one or two sentences, then asked whether they personally regarded such behaviors should be criminal or not (Kutchinsky 168). Kutchinsky admitted that this measurement had not been validated in earlier studies (ibid.). Moreover, Kutchinsky’s measurements did not observe the subjects’ unconscious attitudes, such as Burt’s attitudinal scales do. That is, Burt’s scales do not ask outright about rape, which would likely make the respondents more conscious about the survey focus. Rather, they unobtrusively solicits the subjects’ opinions to what extent, for example, “any female can get raped” (a lower response implies a perception that only “bad women” are raped), or if a “woman who goes to the home or apartment of a man on their first date implies that she is willing to have sex” (Burt, 223 tbl.2), or “the only way a man can get a cold woman turned on is to use force” (p. 222 tbl.1). In this context it should be noted that neither did the Czech study contain any such sophisticated attitudinal survey, nor contain even a simple measurement of public opinions about well-specified sexual behaviors between adults and children as those that Kutchinsky included in his survey (Diamond, Jozifkova, and Weiss).

Kutchinsky’s crude attitudinal survey (above) may not have been sensitive enough to measure unconscious attitudes supporting sexual abuse against children, particularly against teenagers—attitudes that might explain the lower reporting of child sexual abuse over time in his data. It is also possible that prevalence of child sexual abuse decreased, while sexual abuse against adults stayed the same, or even increased. Indeed, people tend to regard general child abuse as more reprehensible today than they did before, for example, corporeal punishment being increasingly frowned upon in modern societies. Sexual abuse is also typically regarded as more reprehensible when committed against children than against adults (e.g., the former is usually subjected to stricter laws than the latter). These conflicting hypotheses show, just as with other types of anti-social behavior, that reporting and prevalence of child sexual abuse is socially over-determined on an aggregated level. Such conditions make it difficult to disentangle its predictors within the aggregated approach. For that reason, many of the explanatory hypotheses regarding Kutchinsky’s data will be hard to prove in any event, lending further doubts to the usefulness of the aggregated method in general, and longitudinal data as the Danish and Czech’s in particular.

Some of the demographic predictors for rape previously identified in the United States include a population’s unemployment rates, number of singles and/or single parent homes, economic decline, urbanization, and city size. The aggregated longitudinal studies in the Czech Republic and in Denmark above proceeded without considering any such alternative demographic predictors of rape. In part for such reasons, the two U.S. studies of the fifty states are more reliable as they statistically

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513 See generally Burt, “Cultural Myths & Rape.” Further citations in text.
controlled for more important variables. Furthermore, the two U.S. intra-state comparisons were not based on longitudinal data, so did not need to control for cultural changes that could introduce unknown variables. By contrast, the longitudinal study of the Czech Republic were made with data drawn from 1971–2007 (Diamond, Joziškova, and Weiss, 1038–39)—a period entailing fundamental social transformation from communism to capitalism, including a separation from Slovakia. The Danish study’s data was drawn from a post-war and post-industrialization period 1959–1970 (Kutchinsky, 166 tbl.1) that was also accompanied by fundamental social transformation and significant cultural changes. These two longitudinal data sets are potential candidates of cultural over-determination, apart from the already existing social over-determination of anti-social behavior in general. Moreover, changes in the legal definitions (i.e., what is counted or excluded as rape) also impact the rate of reporting. Neither one of these additional social predictors needs to be controlled for in experimental studies on individuals, nor in representative social surveys of self-reported sexual aggression and ASV such as those previously discussed (pp. 98–122 above). Hence, non-aggregated methods appear far more parsimonious and reliable than aggregated approaches, and specifically when compared to aggregated longitudinal data.

Summary of Analysis. Aggregated findings call for strong caution. Their underlying methodology is plagued by the obstacles to control for an invariably “over-determined” social phenomenon. Certainly, well-executed aggregated studies that control for the relevant known alternative predictors, as the American interstate controlled comparisons discussed above, may persuasively show a correlation between prevalence of sexual offenses and pornography consumption—not just the reporting of such crime. Yet even such conclusions are more vulnerable to be questioned on basis of potentially unknown variables on the aggregated level than are conclusions drawn from data on the level of representative population samples of individuals. Not surprising, the aggregated studies above suffered to different degrees from insufficient measurements of sexual aggression. The studies relied predominantly on official crime reports, with the exception of the interstate American study that compared state crime reports to state prevalence surveys, which validated the relative state-differences of both measures. Yet the complexity of having many ”sufficient and distinct causes for the same effect,” as is common in aggregated data, precipitates asking what insights about pornography exposure effects can possibly be gained that could not be provided by more parsimonious experimental and nonexperimental methods (cf. 98–129 above). Additionally, the fact that the aggregated approach has provided deceptive narratives to careless audiences, as the Czech study above does, suggest readers should be cautious when encountering it.

Conclusions

The objectives of this chapter were to show whether or not consumption of pornography causes gender-based violence. Evidence shows it invariably does. This conclusion has been corroborated above across a number of different relevant indices and variety of methodologies; it includes measuring different but statistically and

515 See, e.g., Baron and Straus, “Four Theories of Rape,” 472–77 (main predictors), 477 (control variables).
significantly related concepts such as sexual aggression and attitudes supporting violence against women (ASV); it includes drawing from experimental and nonexperimental psychology, qualitative and quantitative data, using general population samples and samples of particularly abusive or targeted groups. In other terms, the evidence has been corroborated across a range of relevant measurements, providing a triangulation “within” as well as “between” different methods (cf. 89–92 above). The conclusions are robust and statistically significant, showing that consumption of pornography in all the forms typically demanded on the market causes gender-based violence as well as an array of attitudes that minimize, trivialize, or normalize it. More detailed psychological experiments suggest that it may not primarily be the level of aggression or violence in pornography materials that determines the level of antisocial outcomes (e.g., rape and rape-myths), but rather to what extent materials dehumanize, degrade, or present women as sexually indiscriminate. This finding is empirically consistent with legal conceptualizations in the 1980s that challenged materials presenting “graphic sexually explicit subordination of women,” for example, in position of servility or implied promiscuity, even if only presenting nudity without sexual activity. Although certain classes of materials may produce stronger effects than others, similar type of effects can be observed significantly and across the board in all pornography materials that are not trivially in demand by consumers, be they violent or nonviolent.

Nonexperimental surveys in naturalistic contexts consistently corroborate the experimental paradigm. Pornography use in population-based samples of males substantially predicts increased sexually aggressive behavior and more ASV. The findings are statistically significant and independent also when controlling for potentially moderating or mediating variables (e.g., sexually aggressive personality characteristics, or violent/nonviolent presentations). Even among men who otherwise are not predisposed to be sexually coercive, pornography use significantly and substantially increases the likelihood that they will sexually aggress against women. The increase of behavioral aggression predicted by pornography use is mirrored by similar increases in ASV—two empirically and statistically associated indices. These findings are corroborated in naturalistic studies of populations that are either particularly exposed to gender-based violence or are particularly responsible for such abuse. For instance, male tricks and prostituted women’s accounts consistently confirm the causal path shown in experimental research: quantitative surveys and qualitative interviews with tricks suggest that they imitate even specific gender-based violence they’ve seen in pornography, subsequently forcing them upon prostituted women. Furthermore, quantitative data reported from battered women shelters, corroborated by numerous testimonies and affidavits from individuals in public hearings, show that batterers who use pornography are significantly and substantially more likely to sexual aggress, coerce, control, and abuse women than batterers who do not use pornography, even when controlling for alternative predictors (e.g., alcohol consumption or military service).

Aggregated correlational studies of pornography consumption and reported sexual offenses within entire societies as primary units of analysis (as opposed to studies with individuals as primary units of analysis) appear more unreliable and problematic. The reporting rate of sexual offenses are demonstrably “over-determined” by a number of disparate social factors apart from pornography consumption (e.g., unemployment rates, number of singles and/or single parent homes, economic decline, urbanization, and city size). Moreover, aggregated studies typically suffer from in-

\footnote{Indianapolis, Ind. Code Ch. 16 § 16-3(q) (1984), \textit{invalidated in} American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).}
adequate measurements of sexual aggression, relying on unreliable official crime reports rather than more reliable prevalence surveys. In addition, this approach does not take into account that exposure to pornography causes or predicts more ASV in individuals, including minimization, trivialization, and normalization of sexual aggression, as has been convincingly shown in experimental and nonexperimental studies. All other things being equal, increased pornography consumption thus promotes attitudes (e.g., minimization) that dissuade victimized women to report sexual abuse to others—a phenomenon that could make it look as if pornography use reduces the prevalence (as distinguished from only reducing reports of) sexual offenses, while it does the opposite. Although some aggregated studies have attempted to control for these problems, and supports the findings from the other methods discussed above, other aggregated studies did not. The many methodological pitfalls associated with the aggregated paradigm suggest that it provides little insights that cannot be gained through more parsimonious and reliable methods.

All in all, this review has shown that pornography consumption causes gender-based violence and ASV. For example, exposure to pornography makes normal men more likely to rape their dates, pester their partners with unwanted sexual demands, and trivialize or minimize sexual abuse as jury members. Men who consume pornography are also statistically more likely to buy women for sex and to participate in gang-rapes of prostituted women more often, as well as being more likely to make prostituted women imitate pornography even when it is violent, unhealthy, degrading, or traumatizing for the women. The findings in this chapter refute the hypothesis that pornography consumption is merely a “symptom” mediated by another underlying phenomenon, or that other factors moderate most of its effects on gender-based violence and ASV. Pornography produces harmful consumption effects that are significant, substantial, and independent of other causes.
This chapter will discuss various democratic foundations and theories that may explain the obstacles and potential for legal challenges to pornography, gender-based violence, and sexual exploitation in modern democracies. Previous chapters concluded that pornography production is a harmful social practice of inequality based on sex that exploits multiple social disadvantages (chapter 2). Similarly, it was concluded that pornography consumption causes gender-based violence and attitudes supporting violence against women (chapter 3), and as such promotes the subordination and inequality of women to men by promoting a form of violence that (in the words of the United Nations) “is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”

As discussed previously, gender-based violence is intrinsically related to the inequality of women, both being molded by and precipitating that same inequality (pp. 4–9 above). In order to interpret and explain the relative success or failure in legal challenges to pornography with regards to combating gender-based violence and sexual exploitation accordingly, the dissertation draws from democratic theory that has covered similar social inequality and the obstacles to change it, including gender-based violence, poverty, racial or sex discrimination, or multiple social disadvantages that occur in the intersection between various grounds of inequality. While such democratic theory is far from exhaustive and might be complemented with other works, the selection is not arbitrary but specifically relevant for the subject; the theories, perspectives, and critique discussed below have been used by others to interpret similar political and legal challenges as addressed in this work. No one else has yet to my knowledge, however, used these approaches systematically in analyzing the legal challenges to pornography within a comparative perspective.

Early psychological studies began to map consumption harms systematically in the 1970s and other groundbreaking works were made that centered on prostitution generally, some covering the pornography industry. These developments took place during a time when the women’s movement generally became more vocal on a range of subjects. Much of the empirical evidence of production and consumption harms presented in previous chapters have thus likely been known in part by the women’s movements that have fought against pornographers since the 1970s, at
least in general terms. To date, despite successes in other areas, none of these social
movements have been particularly effective in their challenge to pornography; the
sex industry has continued to grow (above pp. 38–41) and a majority of young adult
men seem to regularly consume pornography each month to varying degrees (occas-
onionally or every day) while women, evidence shows, rarely use it (above pp. 33–37). However, there are differences further to be discussed between countries in their
laws regulating pornography that make them relatively more or less efficient in chal-
lenging the production and consumption of pornography (see Part II and III). Some
of the more efficient regulations were put in place while accompanied by public
pressures from the women’s movement, even though other causes to their existence
may also have been present (see Part III). Whether or not existing differences in
pornography regulations in various countries are regarded as relatively minor or ma-
jor, they make possible systematical comparisons of democracies and the obstacles
to legal change.

Perspectives, Interests, and Obstacles

Historically, political efforts to promote social equality in democracies have often
been institutionalized by establishing new legal rights for individuals or groups. As
pornography contravenes equality by exploiting inequality and promoting gender-
based violence (see chapters 1–3), one way to study progressive politics would be to
compare events where new rights or obligations were attempted or created with the
purpose of challenging these production and consumption harms accordingly. With
respect to the harms associated with pornography production (see chapter 2), these
harms are not simply related only to one form of inequality though, such as gender
or poverty, but to the exploitation of multiple social disadvantages. Apart from gen-
der and poverty such social disadvantages often include child abuse and neglect, rac-
ism, ethnic or other forms of social discrimination (pp. 55–72 above). Similarly, the
evidence presented in chapter 3 indicates that socially more vulnerable populations
may also be more exposed to consumption harms than other populations. For in-
stance, prostituted persons often encounter tricks who buy them precisely in order to
imitate sex from pornography that other persons who are less vulnerable do not want
to imitate, thus can deny these men (see 123–129); for example, demands to accept
degrading or unsafe acts, or directly abusive gender-based violence that the trick in-
tends to imitate from pornography (ibid.). Their documented lack of real or accept-
able alternatives for survival to prostitution (see, e.g., 55–59) makes such persons
more vulnerable to the pornography consumption harms than other populations.
Other vulnerable groups could include children, prisoners, or civilians exposed to
war and other individuals at risk.

The more complex social circumstances of disadvantage associated with porno-
graphy production and consumption must arguably be considered for any political and
legal strategy to be effective. This section will account for problems with democratic
representation and accountability toward the interests and perspectives of constitu-
encies that are most exposed to the harms of pornography.\footnote{For a definition of “perspectives” and “interest” in this context, see infra note 582 and accompanying text.} It progresses from how
conceptualizations of democracy have developed historically, beginning the analysis
at the founding structures of democracies. The modern democratic legacy, including
to various extent its underlying implicit perspectives and priorities, still harbor ma-
For instance, John Stuart Mill argued for a graded franchise based on wealth and education in one of his works. See infra note 534 and accompanying text.

528 David Held, *Models of Democracy*, 3rd ed. (Cambridge, UK: Polity Press, 2006), 19. According to Held, the proportion of slaves to free citizens were at least 3:2 during the age of Pericles (c.450 BCE), ibid., though it is unclear whether he refers only to male slaves or whether this proportion also included female slaves.


As the various social eminences which enabled persons entrenched on them to disregard the opinion of the multitude, gradually become levelled; as the very idea of resisting the will of the public, when it is positively known that they have a will, disappears more and more from the minds of practical politicians; there ceases to be any social support for nonconformity—any substantive power in society, which, itself opposed to the ascendancy of numbers, is interested in taking under its protection opinions and tendencies at variance with those of the public. (Mill, 120)

Mill here provides an indirect defense of substantive inequality when implying that more equality reduces incentive for progress. However, he failed to recognize a central cause for that same inequality—discrimination—which seems to be diametrically opposed to the values of diversity he cherished: preclusions of opportunities on basis of poverty (class), gender, race, ethnicity, or sexuality among other grounds can hardly be said to promote diversity. Another implicit assumption that economic equality can be counter-progressive to progress could be perceptions that inequality provides incentives for the working or middle class to improve their lot—a productive dynamic for economic growth presumably benefitting everyone, which more equality supposedly would dismantle. This view is principally opposed both to restrict high executive pay and to raise minimum wages. Its assumptions, of course, fail to recognize other incentives for progress and economic growth than those of wealth—for example, social and cultural recognition, solidarity, or intellectual stimulus—that may provide just as much incentive for work as mere economic benefits.

Given that Mill believed substantive equality to be an obstacle to progress, it is unsurprising that his Considerations on Representative Government (1861) outlined a representative democracy including a franchise graded according to wealth and education. Mill thus disfavored granting the masses power by popular vote, believing they would use it to arbitrarily restrict individual wealth and creativity to the detriment of human diversity and progress. In so taking a stance against granting too much power to popular democratic decision making, Mill also reiterated a theme from other early liberal contract theorists, such as John Locke, who may be read as implying a more restricted role for the state that is primarily concerned with protecting life, liberty, and private property. Similarly, Mill’s ideas are reminiscent of liberals who came after Locke, who sought a number of checks and balances to control the government so it would not easily be able to make and execute politically far-reaching decisions, even if acting with the consent of a legislative majority.

531 The distinction between “substantive” equality and “formal” equality is explained in detail, infra pp. 243–248.

532 As it may seem contradictory to defend diversity by defending inequality when the latter relies in part on discriminatory practices, more recent liberals may be tempted to distinguish between “unfair” inequality based on discrimination and “fair” inequality based on merit. Though such distinctions are important to scrutinize, they fall beyond the scope of this dissertation apart from the recognition that empirical evidence shows how inequality may lead to exploitation (e.g., extreme poverty), and that pornography is enabled by (as well as it promotes) exploitative practices based on precisely such inequality. See supra chapter 1-3. Hence, inequality is a problematic phenomenon that needs to be addressed regardless of whether or not it may be characterized as “fair” or “unfair.”

533 Any reader of this dissertation who is engaged in voluntary activity such as oppositional grass-root politics or other social movements, or who is pursuing a career in the academy of social sciences or humanities (not likely leading to high incomes relatively speaking), would recognize that ideological or intellectual incentives may provide just as much productive stimulus as a higher pay.


For instance, Charles Louis de Secondat, Baron de Montesquieu, entertained the idea of an executive that should be able to veto a legislature’s initiative and a bicameral legislature with a house representing the “nobles” that could, similarly, reject initiatives from a house representing the “people.” Likewise, as Locke earlier perceived a government using power “arbitrary and at pleasure” as being contrary to the public’s interest, thus violating an implicit social contract that distinguished societies from a “state of nature” where no one is subjected to the rule of others, James Madison later expressed a somewhat similar though more complex fear about “factions”: that is, certain groups of citizens, whether majorities or minorities, who could become “violent” in their struggle to control the power of government in order to pursue interests “adverse to the rights of other citizens or the permanent and aggregate interests of the community.”

Indeed, many political regimes, from left to right, representing “factions” of the population, have used the powers of the state to torture and deprive their opponents of their life, liberty, and property. Political persecutions in South America during the Cold War, arbitrary punishments of imagined or real dissidents in the former Soviet Union, crimes against humanity committed by the Assad regime in Syria, and genocides committed against Croatian populations in Kosovo may all be examples of precisely the kind of atrocities thought to be guarded against by the teachings of Locke, Montesquieu, and Madison. However, as noted most incisively by Robert Dahl already in 1956, the remedy of an assortment of constitutional checks and balances to such horrors may be insufficient, as “in the absence of certain social prerequisites, no constitutional arrangements can produce a nontyrannical republic.” Dahl exemplified with the Supreme Court of the United States’ legacy, noting that though it was popularly perceived as protecting democratic freedoms and rights at the time of his writing, it had nonetheless consistently obstructed all Congressional efforts to protect and extend such rights to African American populations.

Dahl’s remarks and examples are also principally pertinent when considering the exploitative abuse in the pornography industry and its impact on gender-based violence in society. Though official abuse of power have been the predominant interest among the liberal political theorists mentioned above, a similarity between state actors and non-state actors such as pornographers’ is that their forms of abuses have been de facto and sometimes extensively tolerated among many populations. Another similarity is that both abuses of power (whether social or political) typically targets a distinct social, political, religious, ethnic, or national group, on basis of their group membership. Just as public abuse of power may be systematic and performed by one clearly distinct social group against another, tolerance for gender-based violence targets a group selected on basis of their gender, similarly, pornography targets groups based on certain multiple disadvantages (above pp. 55–63, 122–129). Yet the form of abuse of power envisaged as dangerous in classic liberal theory is predominantly related to the exercise of government power. For instance, this view is particularly dominant in the liberal conceptualization of freedom or liberty above

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536 Held, Models of Democracy, 68.
537 See Locke, Two Treatises, 160–61 § 137 (Second Treatise).
540 Ibid., 58–59.
as something generally being promoted best by granting only minimal rights for states to intervene in non-public spheres.

The concepts of “negative” freedom and “positive” freedom are useful in describing contrasting approaches within liberalism on promoting individual freedom in a modern complex society with intrinsic social interdependence between individuals, groups, and government institutions. The roots of the concepts of “negative” and “positive” freedoms have been traced back to Immanuel Kant. These terms were more systematically articulated by Isaiah Berlin in the 1950s; negative freedom, accordingly, could be described as the absence of tangible obstacles to a person’s actions (e.g., a roadblock or a law prohibiting travelling), while positive freedom signified the ability or potential for self-determination (e.g., access to food, health care, or literacy). These two concepts, albeit limited to liberty, are related to the legal concepts of negative or positive rights within liberalism: the former generally disfavor government interventions, while the latter view them more as instruments for emancipation. An empirical example of such “negative rights” as the right to be free from government intervention can be seen in judicial responses to legal challenges to domestic child abuse in America in 1989. As explained by the U.S. Supreme Court, who made an interpretation of the Fourteenth Amendment in defining their concept of rights:

Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended . . . . to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes. Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

Here, the Court takes the position that the Constitution primarily protects the person’s right to be free from government abuse (negative rights), rather than protecting the person’s right to be free from abuse by other individuals (positive rights). The latter would have granted children, women, or same sex partners a “positive” entitlement to affirmative government intervention against domestic abuse.

By contrast to the U.S. Supreme Court’s application of negative rights with regards to government interventions, an expression of positive rights can be seen in similar cases decided in other federal nations or supranational systems than the United States, such as the Republic of South Africa and in Europe. There, the highest courts affirmed government obligations to intervene in cases of violence between non-state actors such as domestic violence and rape. For instance, South Africa’s Constitutional Court recognized that “in certain well-defined circumstances [there exists] a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual,” while quoting jurisprudence from the European Court of Human

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Rights. Similar conclusions affirming government obligations to intervene have been made more recently by the latter court with regards to domestic violence. A corollary from the positive rights view that the South African and European courts have conceptualized in their jurisprudence on government interventions, by contrast to their U.S. counterpart, entails that government abuse of power is merely one of several ways that, in Madison’s words, factions (e.g., men) may exercise their powers over others (e.g., women). According to such a standpoint, the concept of negative rights, when entailing various level of government toleration of private abuse, may simply mean the toleration of privatized terror.

Inequality itself can also be perceived as another form of power; economic inequality may lead to exploitation, for example, when a person is vulnerable to starvation, homelessness, poverty, or severe social exclusion due to lack of means. The state does not necessarily need to be directly involved in exercising this power for it to be exercised, though in terms of the state’s legal architecture (e.g., competitive and individualistic capitalism) it might be indirectly involved in its dynamics. Similarly, gender inequality may entail that certain women do not possess enough social power to avoid exploitative relations with men, as the evidence with regards to pornography production and social inequality suggested (e.g., above pp. 55–63). From this perspective, inequality and gender subordination are circumstances that make persons particularly vulnerable to abuse of power by non-state actors. Conversely, as recognized by the U.N.’s Declaration on the Elimination of Violence Against Women from 1993, gender-based violence is also among the “crucial social mechanisms” that force women into subordinate positions relative men. Put otherwise, women may fear men’s violence, thus accept an exploitative situation. There is thus a reciprocal relationship between gender-based violence and gender inequality (see also 4–9 above).

Locke, Montesquieu, Madison, and Mill, belonging to a privileged class among men, most likely had no need for protection of liberty and life in the private sphere, as in protection against gender-based domestic violence. However, their class of men had an admittedly legitimate need for a “social contract” protecting them from arbitrary intrusions from other men in their private sphere, as in protecting them from a totalitarian state acting on behalf of factions of other men. Locke’s famous critique of Thomas Hobbes’ willingness to confer power in the hands of one sovereign ruler is instructive to their perspective.

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

The power of the state is likened by Hobbes to that of the animal king, whereas the power of private actors is seen almost as little more than a nuisance. There are, however, dangers of viewing such private actors as more insignificant than public actors,

548 Locke, Two Treatises of Government, 140 § 93.
as it may further a limited concept of politics that inadequately recognizes the consequences of power in the private sphere—a point frequently made in feminist political theory, as in the women’s movement’s expression “the personal is political” from the 1970s.

When considering the importance of personal perspective, that men historically set the “norm” for what rights and freedoms were regarded as “human rights,” and that in their personal lives the early liberals could not conceive the threat of gender-based violence as comparable to government abuse of power, it is clear even without retorting to conspiracy theories that other groups’ needs may have become wrongly perceived as exceptions to the standards of human rights. The implication of these observations is that political issues of power and inequality are most easily recognized if men, as a group, can relate to them—for example, religious persecution, harassment at work, or racial discrimination. By contrast, issues such as rape, domestic abuse, and prostitution are not as easily recognized in their collective experiential framework. While this tendency of non-recognition tends to follow the dichotomy of public and private, it is actually a more complex and reciprocal process where “private” is sometimes simply defined according to the subjective perspectives and interests of the observer, rather than according to actual location. For instance, even when some activity is unquestionably viewable in public, such as prostitution and pornography, these are nonetheless traditionally often implied to be “private businesses,” “victim-less crimes,” or “moral” offenses of depravity, indecency, obscenity, respectively (cf. chapter 6 below on obscenity law). The views of pornography and prostitution as being non-public and harmless activity stand out in stark contrast to the compelling evidence now thoroughly corroborated, showing severe human victimization caused by these social practices (see chapters 2–3 above).

**Feminism, Social Movements, and Legal Change**

The classic liberal public/private dichotomy is beginning to be replaced by a more nuanced view of power, for example in numerous contemporary sources of international human rights law; gender-based violence in the private as well as public spheres is now regarded a violation that states are obliged to provide adequate protections and remedies for. Deeming from the strong influence of classic liberal thought on modern societies, democracies, and the law, this international development may be seen as a revolutionary change of thought. Dahl’s candid remark that no constitutional arrangements can guarantee respect for human rights has, of course, implicitly been understood by the many feminists who fought for recognition of the “personal” as a political subject; classic liberal constitutional arrangements could obviously not guarantee that sex discrimination, or gender-based violence, were adequately addressed by legislatures or courts. If such a view was regarded as revolutionary in the 1970s, but has now taken root and expanded in international law, one may ask what could account for such revolutionary legal challenges to transform into legal change? How come this development succeeded with respect to

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550 See, e.g., Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester: Manchester Univ. Press, 2000), 231–44 (showing how international human rights law have developed in a “gendered way” chronologically, with women’s rights being recognized first during later developments); MacKinnon, “On Torture,” 26 (noting that women’s interests as a group have been ignored relative to men’s in human rights law).

551 See supra p. 5 n.16 (citing applications, cases, regional and international instruments).
politicizing the private sphere in the international legal community, turning it to a subject for legal regulation consistent with feminist political theory?

Some important empirical clues to the above questions are provided by Laurel Weldon and Mala Htun in a recent article in the *American Political Science Review* published in 2012, where they make a large-N comparative analysis of an original dataset drawn from 70 nations longitudinally over 30 years. Their question was what causes some governments (but not all) to adopt progressive policies for combating violence against women such as providing services to those victimized (e.g., funding shelters and crisis centers), making legal reform (adopting specialized legislation recognizing various forms of abuse), addressing vulnerable populations of women, training professionals, adopting prevention programs, and making administrative reform (Weldon and Htun, 550–51). Their data shows that the predominant factor predicting which governments are comprehensively addressing violence against women accordingly and which governments are not is the presence, or the absence, of an autonomous feminist social mobilization drawing attention to gender-based violence (pp. 548, 564). Other significant predictors of much lesser magnitude than the former where the withdrawal of reservations to international and regional human rights instruments on gender-based violence, or the ratification of such instruments; similarly, regional diffusion of efficient policies was a significant though less strong predictor (pp. 561–62).

By contrast, other commonly assumed predictors of progressive policies for women generally, such as the proportion of women in government, the presence or absence of “left” parties, and the presence or absence of higher levels of national wealth or modernization, were all comparably negligible and often statistically insignificant according to Weldon and Htun (pp. 563–64). Consistent with previous research, further evidence suggested that the autonomous feminist movements against gender-based violence “predate” government policies to address it “by a long period of time” (p. 560). This order of events indicates that longitudinal and cross-national predictions harbor a path where social movements not only predict, but influence governments in *causal* terms, with the result of getting them to legally challenge gender-based violence under the pressures from these nongovernmental actors.

As distinguished from general policies against gender-based violence, comprehensive and effective policies against the harms of adult pornography seem still to be virtually absent in more or less all nations. But it should be noted that international human rights law exhibits a systematic unambiguous position against pornography, if not as strong as that against gender-based violence more generally though. For instance, already in 1992 the U.N.’s monitoring body for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) identified “pornography” as a practice that “contributes to gender-based violence,” and held that states parties were obliged to “take all legal and other measures . . . including . . . civil remedies and compensatory provisions” to fight it. Moreover, in 2000

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553 The mere ratification of (as distinguished from withdrawal of reservations to) the international human rights instruments, here measured as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), only predicted significantly and positively when interacting with a strong autonomous feminist movement on the domestic scene. Ibid., 562–63. In fact, when only a moderately strong autonomous movement was present, the mere ratification only produced a small positive but statistically insignificant effect; when a strong movement was absent, there was a negative effect though “barely significant (p = .05).” Ibid., 562. The authors explain these findings with suggesting that unless “pressured by local activists, governments may ratify CEDAW merely to look good internationally and even to substitute for serious domestic policy action.” Ibid., 563.

554 U.N. Comm. on CEDAW, “General Recommendation No. 19,” *supra* p. 5 n.15, ¶¶ 11–12, 24(t, t(i)).
the U.N. Human Rights Commission issued a General Comment on how to interpret the International Covenant on Civil and Political Rights (ICCPR) in terms of balancing women’s equality to men versus the competing interest of freedom of expression. Here, the Commission followed the CEDAW Committee’s view of pornography, thus held that since “pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States parties should provide information about legal measures to restrict the publication or dissemination of such material.”

This norm under CEDAW and ICCPR on how to respond to the problems of pornography has also been seen independently expressed, or repeated, in other international and regional instruments and jurisdictions, including being invoked in part in domestic case law on sexual harassment.

The fact that existing laws or policies in modern democracies are ineffective in addressing most of the substantial harms from pornography was recognized at the same time that gender-based violence became more pronounced as a topic of public concern. That is, the observation was made by parts of the women’s movement already in the 1970s, which formed organizations that took visible actions such as picketing outside pornography stores or organizing marches and rallies. For instance, when the movie Snuff was released in the United States in 1976 (Snuff presented murder and dismemberment of a woman as erotic entertainment), it ignited feminist opposition to pornography in both Canada and the United States; women’s


Notable early U.S. organizations against pornography were: (1) Women Against Violence Against Women (WAVAW), formed in L.A. in 1976; (2) Women Against Violence in Pornography And Media (WAVPAM) in Berkeley, California; and (3) the Women Against Pornography (WAP), formed 1979 and based in New York City, being the largest thereto organized attempt against pornography by the women’s movement. See Brownmiller, In Our Time, 298–99 & 303–12 (mentioning WAVAW, WAVPAM, and WAP); cf. Lederer, “Introduction,” in Take Back the Night, supra, at 15 (mentioning WAVAW). Some know the early days were Julia London, Susan Boyzonmiller, 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 United States A small women’s organization called Women Against Violence Against Women (WA VAM) picketed outside the screening of Snuff already in 1977. See Susan Cole, Pornography and the Sex Crisis (Toronto: Amanita Enterprises, 1989), 72. 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. See Dany Lacombe, Blue Politics: Pornography and the Law in the Age of Feminism (Toronto: Univ of Toronto Press, 1994), 78–79.
movements picketed, demonstrated, and committed civil disobedience against the film, with demonstrations occasionally being violent. Yet the women’s movements against pornography in the United States, Canada, and elsewhere, such as in Sweden, have not resulted in a similar change as compared with the broad and significant changes in policy approaches seen with respect to gender-based violence more generally. Legal challenges (as distinguished from agenda-setting by social movements) have been largely unsuccessful, though some national differences exist nonetheless.

For example, the commercial pornography industry tends to enjoy a de facto freedom of liability, even though it engages in a form of prostitution that is usually regulated outside the media industry (cf. chapters 2 & 9). For example, U.S. obscenity law—still the existing legal tool for directly regulating distribution of adult pornography there—has been considered arbitrary, ineffective, and is used increasingly seldom since the last 20 years. Some recent American obscenity convictions of high-profile pornographers exist as potential evidence to the contrary though. In Canada, heterosexual materials that were once held dehumanizing and degrading by

558 Brownmiller, In Our Time, 297–98; Lederer, Take Back The Night, 15; Cole, Pornography & Crisis, 72. The analysis and courage of radical feminist writer Andrea Dworkin, among others, was particularly influential in this movement.


560 See, e.g., Waltman, “Legal Challenges in Canada and United States,” supra p. 24 n.72, esp. at 224–234; cf. LaSelva, “‘I know it when I see it,’” supra p. 24 n.72 (analyzing differences in legal challenges to pornography within the Canada and United States).


the Supreme Court in 1992, even violent materials, thus criminal under an equality and harm-based obscenity law, have in some instances and provinces been viewed as legal under various judicial interpretations of prior holdings. However, a more recent appeals decision in 2012 from the province of Ontario enforced a stricter view against producing and distributing audio-visual as well as written materials that presented simulated sexualized lethal violence against semi-nude and nude women; the view taken was that such acts did not amount to “victimless crimes” because “undue exploitation of sex and violence directed at women is a poison in our society. . . . It has become acceptable and increasingly graphic entertainment. It has the power to change our perceptions, our attitudes towards each other. It may even prompt us to act on these negative attitudes. And then to justify ourselves.” The Ontario opinion is consistent with the empirical evidence presented above in chapter 3. Otherwise, consumption of adult pornography is largely legal in western democracies, if not by law so de facto.

Regarding addressing the production harms in pornography (see chapter 2), Sweden is a notable case study. Buying sex was criminalized in 1999 while being bought for sex was decriminalized on a gender-equality rationale related to policies fighting gender-based violence (pp. 277–286 below). Nonetheless the prostitution laws regulating buying, pimping, and other third party profiteering have yet to be applied to pornographers (see chapters 9 and 12). Moreover, prostituted persons in Sweden are still generally not regarded as victimized under the law unless additional offenses have been judged committed against them. For instance, even though a clarification in the legislative history in 2011 did state that buying of sex itself could constitute an offense liable to damages to the prostituted person, it also stated that the question of whether or not it is the prostituted person or merely the “public” inter-

563 See Factum of the Intervener Women’s Legal Education and Action Fund ¶¶ 4–5, in the case of R. v. Butler, [1992] 1 S.C.R. 452, reprinted in Women’s Legal Education and Action Fund (LEAF), Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada (Montgomery, Can: Emond Montgomery, 1996), 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).


566 See Prop. 1997/98:55 Kvinnofrid [Women’s Sanctuary] [government bill] at 22 (Swed.) (stating that prostitution and violence against women were “issues . . . related with each other. Men’s violence against women is not consonant with the aspirations toward a gender equal society . . . . In such a society it is also unworthy and unacceptable that men obtain casual sex with women for remuneration.”). For further analysis of the legislative history and rationales for criminalizing tricks and decriminalizing prostituted person in Sweden, as well as the law’s impact and potential, see infra pp. 284–288, 479–503; cf. Waltman, “Sweden’s Law’s Potential,” supra p. 26 n.75, at 449–74; cf. Waltman, “Ending Trafficking,” supra p. 26 n.75, at 133–57.
ests that are harmed by the act must be decided on a case by case basis.\textsuperscript{567} To date, no adult prostituted person seems to have been awarded damages from any trick for the act of being bought for sex in Sweden, even though technically possible. This situation seems to hold whether or not the trick repeatedly bought the person, including via pimps, and as a result of exploiting the person’s preconditions of disadvantage and lack of real or acceptable alternatives to prostitution—a situation typical for prostitution and documented extensively (above pp. 55–63). Similarly, specific funding for social programs intended to facilitate escape for persons in the sex industry are still not grounded in law in Sweden, but rather subject to the whims of political majorities in various jurisdictions,\textsuperscript{568} nationally or at the municipal levels.\textsuperscript{569} By contrast, persons victimized by other forms of gender-based violence (e.g., rape or sexual harassment) tend to have legal rights against both the perpetrators and the state. When competing for scarce public resources, these distinctions will most likely matter.\textsuperscript{570}

\textbf{Decision Making and Social Empowerment}

To inquire what the democratic obstacles are to challenge the production and consumption harms in pornography, democratic theory written by political scientists Iris Marion Young, Jane Mansbridge, Ian Shapiro, and legal scholar Kimberle Crenshaw may provide some additional insights. They have analyzed how democracy might be rethought in order to empower socially and politically subordinated groups to account for their perspectives and interests (below). I use the label \textit{hierarchy theory} to denote those commonalities within their analytical approaches. That is, these theories seek to unravel how democracies may better recognize inequality in order to promote substantive equality, qua promoting social relationships that are less hierarchical. As previously shown in the review of the empirical evidence on production


568 See Waltman, “Sweden’s Prohibition,” 464–68 (discussing the legal grounds as distinguished from political aspirations for support and “exit” programs in Sweden).

569 The only specialized units with social workers, psychologists, and doctors that support prostituted persons are run by three municipalities in the center of metropolitan areas (Sweden has over 200 municipalities with varying population sizes). See Svedin et al., \textit{Prostitution i Sverige: Huvudrapport, supra} p. 26 n.75, at 6. The access to these units is not only geographically unequal throughout the country. Moreover, an additional decision to fund treatment is always needed even from a neighboring municipality, and there are examples of prostituted persons who were either denied such funding, or had to “argue and fight” extensively to receive it. Ibid., 27; see also Ingrid Åkerman and Carl Göran Svedin, \textit{Ett års kontakter med prostitutionsenheterna (FAST): En beskrivning av insatser till personer med prostitutionserfarenhet (Försäljare av Sexuella Tjänster; FAST): Delrapport 3 ur Prostitution i Sverige [A Year of Contacts with the Prostitution Units: A Description of Support for Persons with Experience from Prostitution (Sellers of Sexual Services): Section Report 3 in Prostitution in Sweden]} (Linköping Univ. Electronic Press, 2012), 45, http://liu.diva-portal.org/smash/get/diva2:506246/FULLTEXT01.pdf (reporting cases where treatment funding was denied by external municipalities).

570 It may be noted though that the National Assembly in France, according to news reports in December 2013, passed a law criminalizing tricks and decriminalizing prostituted persons, “fining those who pay for sex . . . , while providing programs for sex workers to train for different work. It would also set up a fund to offer protection to prostitutes who want to leave the sex business, including short-term residence permits for foreigners.” Editorial Board (\textit{N.Y. Times}), “France’s Approach to Prostitution,” supra p. 25 n.73, at A32 (emphasis added). Whether such funds or programs would be guaranteed by law is unclear, but if so it could signify a stronger protection than those in the Swedish law mentioned in \textit{supra} note 569 and accompanying text.
and consumption harms, those groups who are exploited in the pornography industry (above pp. 55–63, 72–75) and those who are particularly vulnerable to consumption effects of gender-based violence—not seldom the same populations (above pp. 122–129)—generally belong to other socially subordinated groups as well; for example, poor people, battered women, and/or children subjected to prior sexual abuse and/or parental neglect, as well as ethnic or racial minorities, or otherwise discriminated populations. Analyzing legal challenges to the pornography industry in light of political theory that addresses the empowerment of such groups in order to promote less hierarchical social relationships should provide more particular insights in how to construe a democratic framework that successfully facilitates challenges to the pornography industry. The insights of such an inquiry should be possible to extent to other social practices of inequality, exploitation, or abuse as well.

Groups, Hierarchy, Dominance and Oppositional Consciousness

Iris Marion Young has in numerous works analyzed obstacles that underprivileged social groups face vis-à-vis privileged groups in terms of their unequal influence over democratic decision making. As mentioned, persons used in pornography share many social commonalities of under-privilege, such as prior vulnerability to child abuse, neglect, homelessness, poverty, or being members of racially discriminated groups (above pp. 55–63, 72–75). Although Young’s work does not treat these populations in particular, many of her general conclusions appear applicable to them.

Young criticizes the concept of deliberative democracy in “contemporary participatory democratic theory”—a concept that is deliberative in the sense of generally promoting more public access to the deliberations in legislative bodies; here she highlights how, without democratic representation of underprivileged groups, the interests and perspectives of the privileged invariably tend to be amplified. Empirical examples from local forms of more open and accessible government are instructive to why Young reached her conclusions. Citing Jane Mansbridge’s work on New England town meetings, Young notes that women, Black people, the working class, or poor people did not participate in public meetings to the same extent as men, whites, or other members of the middle- and educated classes; the perspectives and experiences of the former were hence not accounted for as much as those of the latter.

Among other things, Mansbridge had found that while white middle class men generally “assume[d] authority more than others do” and also had an advantage in being more trained to speak persuasively, single mothers and old people had difficulties to attend meetings. The social dynamics at work at the New England town meetings tended to silence historically underprivileged groups—a dynamic that Amy Gutman’s work also confirmed in the context of community control of schools; Gutman showed how increased participatory democracy increased segregation on racial grounds in many American cities, and that more privileged white people better


573 Young, “Polity & Group Difference,” 121 (citing Jane Mansbridge, Beyond Adversary Democracy (New York: Basic Books, 1989)).

574 Ibid.
articulated and promoted their “perceived interests” over those of Black’s “just demand for equal treatment in an integrated school system.”

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

Although Young identifies a problem similar to those that many early liberals critically observed—for example, unchecked freedoms for legislatures to make decisions and the dangers of removing restraints on popular democratic participation—she did not reach similar conclusions as to what should be done about it. According to Young’s analysis, a concept of negative rights that limits the reach of government intervention (including separations of powers) would not be in the best interest to protect against the dangers from dominant “factions” of majorities or minorities. Rather, an implication from Young’s democratic theory entails that simply constraining the possibilities for making collective decisions would not counter the special interests of Madison’s feared factions, but conserve those existing asymmetric distributions of power and privilege that her work is fundamentally critical of. Her theory, instead of suggesting more negative rights, advances the concept of specific representation of historically underprivileged groups to counterbalance dominant factions that would otherwise reproduce their own privilege.

Following Young’s line of thought, one may read Weldon and Htun’s recent longitudinal work with data from 70 nations that inquired into various predictors of states that adopted comprehensive policies to fight gender-based violence as empirical support for a democratic theory of group representation. As recalled, when Weldon and Htun controlled for the predictive effect from autonomous feminist organizations that are formally situated outside established legislative arenas, other predictors such as the number of women in government and the number of “progressive” left-parties, religious parties, wealth, modernization, did barely have a negligible impact on the adaptation of policies. One explanation that Weldon and Htun refer

576 Young, Justice & Politics of Difference, 4.
577 The stronger interest in fighting these practices for women (whether the social consciousness exist to do it or not) is presumed based on the evidence found in previous chapters 1–3. There it was concluded, supra pp. 86–89, 139–142, that pornography production is a harmful social practice of inequality based on sex that exploits multiple social disadvantages, and that consumption promotes gender-based violence and attitudes supporting violence against women. The evidence also shows that regular pornography consumption seem to be prevalent a majority of young adult men who typically use it in solitude each month to varying degrees (occasionally or every day), by contrast to women who very seldom seem to use it unless initiated by others. Supra pp. 33–37. Moreover, compared to men, women are exhibiting stronger negative mental affect in response to pornography than their already relatively lower arousal might suggest. See Allen, Emmers-Sommer et al., “Reactions to Explicit Materials,” supra p. 2 n.6, at 551, 553.
578 Young, “Activist Challenges to Deliberative Democracy,” passim.
to (p. 553) in accounting for why autonomous feminist movements are as important as they seem to be for progressive legal change is the necessity of consciousness raising to precede any effective challenge of gender-based violence. The epistemology of “consciousness raising” has been theorized as a method for generating “social knowledge” that women, in the capacity of belonging to a specific group that is particularly exposed to gender-based violence, may provide them with and that is otherwise partly hidden to other groups.\textsuperscript{580} This is not to say that women, as a group, harbor other conflicting social interests on racial, economic, ethnic, age, or other grounds.

Indeed, as will be theoretically discussed further below in relation to the concepts of representation and intersectionality (pp. 159–168), far from affecting all women equally seriously, pornography may sometimes be perceived as a politically “divisive” issue in terms of priorities among women due to its asymmetrical impact on different subdivisions of them. Nonetheless, the documented harms are compellingly severe for those whom it affects and are likely to impact the general social status and physical and mental health risks for all women to various extents, for instance by increasing violence against women and the attitudes (e.g., rape myths) that promote it.\textsuperscript{581} Hence, it is likely not a coincidence that the antipornography movement that specifically raised the connections between the sex industry and gender-based violence has been most pronounced and vital in the women’s movement. Similarly to gender-based violence more broadly, there is no coincidence that “the issue of violence against women was first articulated by and diffused from women’s autonomous organizing,” and not by socialist parties, liberal parties, conservative parties, or religious organizations (Weldon and Htun, 553), nor by organizations such as Amnesty International, or Human Rights Watch (cf. 555).

The self-organization among distinct groups with a shared history of political, social, economic, or cultural subordination by other groups often lead to empirically grounded “oppositional consciousness” (p. 553) and priorities that reflect their shared experiences, social perspectives, and interests. Following Young, a perspective in this sense may imply certain common starting-points for a discussion that do not determine the outcome, while an interest more strongly implies common and specific goals.\textsuperscript{582} A perspective among sex industry survivors might thus imply that pornography is a sexually exploitative and abusive expression of inequality (cf. chapter 2 above), while this perspective does not by itself set out how to address pornography as a social problem. Their interest might accordingly here be exemplified as the goal to abolish prostitution and support those victimized. The priority of articulating these perspectives and interests may often be different to and in conflict with priorities of other groups (including generally oriented feminist groups). That is, as Weldon and Htun (p. 553) concludes generally with respect to other “social groups” who “self-organize,” survivors’ perspectives and interests “cannot be developed in more generally focused organizations” or settings where such concerns “must be subordinated” to other imperatives.

According to the above, it was theoretically consistent to expect autonomous feminist organizations to be necessary, even crucial, to the development of efficient


\textsuperscript{581} For the empirical evidence that amply highlights the asymmetry in terms of whom pornography harms and to what extent it does, see, e.g., supra pp. 55–72 (production harms), 72–75 (production harms for men), 98–130 (triangulation of its effect on gender-based violence and attitudes across quantitative experimental and nonexperimental, and qualitative research).

\textsuperscript{582} Cf. Young, Inclusion & Democracy, 134–41, for a conceptualization distinguishing between “perspective” and “interest.”
policies against gender-based violence. Following this logic, one may expect that a democracy that intends to facilitate efforts against other group-based systems of oppression, beside gender-based violence, would also need to facilitate the autonomous political organizing among the groups sharing a history of social domination on basis of their collective situation (e.g., having systematically and substantially experienced pornography-related abuse). Weldon and Htun’s statistical evidence on progressive policies against gender-based violence corroborates Young’s argument above that many social perspectives or interests of historically subordinated groups cannot adequately influence the democratic process from the inside at current.\footnote{583} Thus, proactive support would need to be developed more if status quo is to be changed. As discussed further below, democratic representation could include procedural measures that complement and support autonomous social movements’ among underprivileged groups. Developing such positive measures would raise the perspectives and interests in politics of the underprivileged, as opposed to abiding to principles of public non-intervention and separation of powers consistent with a negative-rights concept.

What distinguishes the politics of gender-based violence in general from the politics surrounding the pornography industry is that given the evidence of harm of the latter (chapters 2–3), there may be less evidence of legal progress than for other gender-based violence such as domestic violence or sexual harassment at work.\footnote{584} The question then is how to address the fact that social mobilization among autonomous feminist organizations, or others who oppose sexual exploitation and gender-based violence caused by pornography, have not had a significant political impact. If assuming that formal arenas for decision making may be part of the problem, Young suggests some concrete systemic remedies below that might illustrate what is in the way for democracies to challenge the production of pornography, all being consistent with the empirical conclusions generated by Weldon and Htun’s data. As Young’s analysis of classic liberal rules of representation and decision making also indicates that they tend to reinforce social inequality, her proposals include various systems of affirmative proactive policies as a complement to counter inequality.

In the context of politics that affect those victimized by the sex industry, Young’s suggestions might include the following: (a) public support for autonomous “self-organization” of groups in order “that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of the society” (e.g., survivors of gender-based harms related to pornography, or persons who were exploited in the sex industry; see more below pp. 159–168 on representation); (b) institutional mechanisms that oblige decision-makers to account for the perspectives voiced by such groups (e.g., being legally obliged to give special consideration to their briefs or submissions, or to account for potential consequences of policies on basis of appropriate data); and (c) a veto-power for issues immediately affecting them as a group (e.g., legal reform).\footnote{585} Moreover, along the lines of public proactive approaches Young has suggested quotas with members from socially subordinated groups in various representative settings; with regard to specifically important issues (e.g., legal reform of pornography regulation), or key institutional settings (e.g., juries interpreting pornography laws), such quotas would be less compli-

\footnote{583} See, e.g., Young, “Activist Challenges to Deliberative Democracy,” passim.
\footnote{584} Compare supra note 551 (citing numerous international legal instruments, applications, and case law mandating intervention and remedies for gender-based violence in general), with supra notes 554–556 and accompanying text(citing fewer international legal instruments and case law mandating intervention and remedies regarding harms of pornography).
\footnote{585} These proposals were drawn from Young, “Polity & Group Difference,” 124 (quoted text), and Young, Justice & Politics of Difference, 184.
cated to implement as special commissions, public hearings, courts, and similar bodies are found at the lower level, thus are not perceived as controversial representative bodies by the general public. Just as the other forms of proactive policies mentioned above, quotas provide a balance against arbitrary judgments from privileged classes in part since the latter are obliged to confront social experiences and circumstances that they are unaware of (having lived in ignorance thereof).

For instance, during public deliberations a perceived but nonetheless biased “common good” tend to be invoked, which privileges the already privileged social groups. Such bias may be the case, for example, with the idea that the common good benefits from as much freedom of expression as possible. Quotas of historically subordinated groups, such as survivors from the sex industry, at least when applied directly into various issue-related political bodies, may thus balance perceptions of “common good.” These groups are often better situated to predict the effects of policies that affect them, thus should be represented during policy deliberations in order to increase public knowledge. Another argument for specific representation is that it is needed to counter other groups’ who may benefit from the fact the existing inequalities and exploitation continue, for example, the pornography consumers themselves, or the producers, distributors, and other business profiteers. Accordingly, the issue is not only about different experiential perspectives, but also one of conflicting interests.

Political scientist and lawyer Ian Shapiro principally takes a similar position on the virtues of group representation as Young. Underlying his position is the conclusion that social domination is not inevitable. For instance, while discussing Foucault, Weber and Plato, Shapiro notes that hierarchies are sometimes a legitimate part of democracies and that power may indeed be ubiquitous in many senses; yet he rejects “domination,” exemplifying it with a teacher who sexually harasses a student rather than exercising legitimate power by requiring her to do homework. Such domination arguably reinforce other illegitimate hierarchies, just as gender-based violence in general is thought to reinforce sex inequality, which is also a form of social hierarchy based on gender (cf. 4–9 above). Considering various inequalities in democracies caused by social domination, Shapiro looks at how such domination can be countered by institutional mechanisms. Consistent with Young and others, he finds consensus by deliberative politics as insufficient on its own, noting that if “the hand” of socially subordinated or otherwise vulnerable groups was generally to be “strengthened” in the deliberative processes where their “basic interests” are threatened, that would reduce some problems of social domination qua illegitimate social hierarchy.

As recalled, Young stressed that quotas of various groups that have historically been subjected to social dominance would not only confront the privileged groups in political bodies with social experiences and circumstances they may be unaware of,

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586 Cf. Young, Inclusion & Democracy, 149 (noting that quotas are most contested in the context of national legislatures, as opposed to local legislatures, official political committees, commissions, party organs, or other civil society organizations).
587 Young, Justice & Politics of Difference, 185–86.
588 Young, Inclusion and Democracy, 40–44.
590 Cf. Young, Justice & Politics of Difference, 186.
591 Ibid., 185.
592 Ibid., 48.
but also balance against social dominance and hierarchies in situations of a conflict of interests between these groups. Shapiro similarly concludes that even if “strengthening the hand of the weaker party” in deliberative political institutions can improve public “wisdom” accordingly, it is already a sufficient reason to supporting representation of those groups if it improves their “bargaining power” to counter dominance. In other terms, whether representation of vulnerable groups tangibly improve the quality of public decision making or merely increase bargaining power among otherwise unequally situated groups in society, it fulfills legitimate goals to fight social dominance nonetheless. Although Shapiro does not discuss pornography per se, it may be seen as a particularly telling example where domination of groups such as women and desensitization of consumers (chapters 2–3 above) work against a rational deliberative politics, thus an appropriate instance for applying his conceptualization of strengthening socially vulnerable groups.

Consistent with Young’s suggestion of a veto-power for underprivileged groups in issues that immediately affect them as a group, Shapiro also proposes 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.” People with experiences of being exploited in the sex industry and people vulnerable to the consumption harms of pornography (see chapters 2–3 above) may all be viewed as more “vulnerable” in the sense of being subjected to (in Shapiro’s terms) “the powers of others.” However, rights to veto must distinguish empirically between inequality and privilege. Shapiro recognizes that “[u]nless we limit rights of delay to those whose basic interests are threatened, we privilege the status quo, making it impossible for government to prevent domination.” Extending rights to delay decisions to any social group whose interests are threatened might be consistent with the liberal concept of negative rights scrutinized above. Yet it brings with it problems associated with public non-interference in putatively “private” abuse that will invariably precipitate continuing social dominance (see 143–148 above). Hence, hierarchy theory suggests that identifying and recognizing empirical inequality and social dominance is imperative for democracies that intend to challenge harms similar to those of pornography.

**Representation, Intersectionality, and Grounded Knowledge**

Jane Mansbridge argues that political representation of women promotes equality, particularly in contexts of conflicting interests and “mistrust” between the genders and where women’s interest historically have been unarticulated. Pornography poses such a conflict of interests and mistrust between the sexes as it exploits gender inequality and breeds gender-based violence (see chapters 2–3 above). Moreover, the politics that regulates pornography (mostly by tacit approval) have apparently disregarded women’s voices and interest. In further support of group representation, Mansbridge notes that a “history of dominance and subordination typically breeds

598 Ibid., 48 (citations omitted).
600 For a brief summary of the key aspects of pornography regulations in Canada, Sweden, and the United States, see supra notes 560–570 and accompanying text.
inattention, even arrogance, on the part of the dominant group and distrust on the part of the subordinate group” (Mansbridge, 641). Her description is a pertinent illustration that does not overestimate the conflicts seen during the women’s antipornography movement in the 1980s.601

Mansbridge also recognizes that the relevant descriptive representation may be historically contingent with issue and context. In her words, when there is “evidence that dominant groups in the society have ever intentionally made it difficult or illegal for members of that [oppressed] group to represent themselves,” or where there is a “history of strong prejudice” against them, the oppressed “group appears to be a good candidate for affirmative selective representation” (p. 639). As many nations traditionally regarded prostituted persons to be criminals,602 making it difficult if not illegal for them to represent themselves publicly on issues concerning their interests, a stronger case for group representation could thus be made for their population. Assuming that issue and context is crucial also entails that when 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 particular women may represent those victimized by pornography. In more general instances, the fact that this may be a problem can be seen in a sometimes uncritical loyalty shown among constituencies of incumbents who ostensibly represents disadvantaged groups (cf. Mansbridge, 640–41).

As suggested from the research analyzed in chapters 2–3 above, compared to women in general, prostituted women are more likely subjected to the worst negative effects of both the production (pp. 63–72 above) as well as the consumption (pp. 122–129). Battered and sexually abused women likely also experience the consumption effects in particular severity (e.g., 122–123). In addition, certain intersectional disadvantages such as race and poverty may increase the exposure to the harm associated with the sex industry, adding sources of vulnerability to individuals already at risk. For instance, race may target certain populations for sexual abuse more often, such as sexual harassment at work.603 Race (or class) may also be a factor that reduces public concern for those victimized, even though their abuse is just as severe, or worse, than sexual abuse among the racial majority.604

601 See supra notes 557–559 and accompanying text(describing the early antipornography women’s movement)
603 As expressed in the first successful case against sexual harassment as a case of sex discrimination at the level of the Supreme Court of the United States in 1986: “All too often, it is Black women like Ms. Vinson who have been specifically victimized by the invidious stereotype of being scandalous and lewd women, perhaps targeting them to would-be perpetrators. This is not to say that this is a case of race discrimination, but rather that minority race aggravates one’s vulnerability as a woman by reducing one’s options and undermining one’s credibility and social worth. In the context of such beliefs, beliefs which animate this case, a picture can be painted which destroys the victim’s liability to complain of sexual violation, such that sex acts can be inflicted upon her and nothing will be done about it.” Brief of Respondent Mechelle Vinson at 67–68, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986) (9-0) (No. 84-1979) (Lexis). Brief authored by Catharine MacKinnon, joint representation with co-counsel Patricia Barry. See Catharine A. MacKinnon, “Intersectionality as Method: A Note,” Signs: Journal of Women in Culture and Society 38, no. 4 (2013): 1025 n.23.
604 See, e.g., Crenshaw, “Mapping Intersectionality,” supra p. 6 n.24, at 1268 (comparing “special attention given to the rape of the Central Park [white] jogger during a week in which twenty-eight other cases of first-degree rape or attempted rape were reported in New York,” mostly involving “a woman of color,” some being gang rapes and many “as horrific as the rape in Central Park, yet all were virtually ignored by the media”) (citations omitted).
Given the above, women in legislatures may share different commonalities than the former groups related to their exposure to the harms of pornography. Their voter constituent base may not either provide them with the necessary perspectives nor incentives to seek such insights out. In other terms, female politicians in general might not only lack the same social “consciousness” necessary for mobilizing the interests and experiential knowledge of the groups that are particularly harmed by the social practices of producing and consuming pornography. Female politicians may also lack apparent political rationales for representing such disadvantaged groups in public. As implied above with reference to Weldon and Htun, self-organization among distinct social groups with a shared history of political and cultural subordination by other groups is therefore pivotal to establishing the empirically grounded “oppositional consciousness” necessary to successfully challenge social domination, here in the form of pornography as a social practice. The priorities of these groups of mostly women and children may thus be moderated by the intersection of multiple disadvantages that are not necessarily reflected in generally shared experiences, perspectives, and interests of women (and children), as they are among those who experienced the worst harmful effects. The concerns of the victimized populations may thus be different from broader groups of women and children, hence might not be able to be articulated and “developed in more generally focused organizations” or settings where their concerns “must be subordinated” (p. 553) to other general imperatives, whether labeled as feminist or otherwise.

Moreover, political research on political mobilization in male dominated contexts, particularly in party politics and political organizations, suggests the existence of certain parameters or group-dynamics tending to exclude women who are critical of male dominance, favoring those less critical. The legislative arena is often built upon cooperation and coexistence of men and women, which by definition is the opposite to the social mobilization of “oppositional consciousness” as envisaged in autonomous organizations intending to challenge the dominant gendered social forces that precipitate the production and consumption of pornography. Any effective democratic strategy to empower those victimized must therefore account for the fact that their perspective might not be articulated adequately by a general descriptive representation of women in legislatures or in other political decision-making arenas. In certain contexts, such a descriptive representation could even be counterproductive, offering pro-pornographers false legitimacy by symbolic gender representation (cf. Mansbridge, 640–41).

In contrast, a stronger legal emphasis, especially on law that is grounded in findings of social subordination, such as those presented in the review of empirical evidence in chapters 1–3 above, may counter the influence of legislative deliberation regardless of who is representing whom. Without strong social mobilization, however, such law might not even come into existence in the first place. As implied by Weldon and Htun, the autonomous feminist movements against gender-based violence “predate” government policies to address it “by a long period of time” (p. 560). It thus appears easier to amass the support to challenge gender-based violence outside formal legislative arenas. Such social mobilization may be assumed to have

been formed by persons who, if not having directly experienced, at least share very similar perspective as those whom have been exposed to gender-based violence; subsequently, persons so engaged deem gender-based violence to be one of the highest political priorities, and in that sense are “representative” to those whom they address politically. However, in the case of those exploited in the pornography industry, or those particularly subjected to its consumption harms, social mobilization have yet to give any tangible results. The problems therefore appear more complex than for gender-based violence in general.

The analysis of multiple structures of social oppression made by Kimberle Crenshaw, the law professor who coined the political and legal concept of intersectionality,\textsuperscript{607} may be applied to the democratic problem of the obstacles to challenging pornography. As such, her theory complements Young, Shapiro, and Mansbridge’s theories of group representation. In an early and influential article which, among other things, analyzed how “Black women are marginalized in the interface between antidiscrimination law and race and gender hierarchies,”\textsuperscript{608} Crenshaw made use of an analogy of a basement filled with people. Her analogy may also be seen as appropriate for the obstacles to those who are exploited or particularly harmed by the pornography industry to influence policy in democracies:

Imagine a basement which contains all people who are disadvantaged on the basis of race, sex, class, sexual preference, age and/or physical ability. These people are stacked—feet standing on shoulders—with those on the bottom being disadvantaged by the full array of factors, up to the very top, where the heads of all those disadvantaged by a singular factor brush up against the ceiling. Their ceiling is actually the floor above which only those who are not disadvantaged in any way reside. In efforts to correct some aspects of domination, those above the ceiling admit from the basement only those who can say that “but for” the ceiling, they too would be in the upper room. A hatch is developed through which those placed immediately below can crawl. Yet this hatch is generally available only to those who—due to the singularity of their burden and their otherwise privileged position relative to those below—are in the position to crawl through. Those who are multiply-burdened are generally left below unless they can somehow pull themselves into the groups that are permitted to squeeze through the hatch.\textsuperscript{609}

The population of sex industry survivors harbor a number of “but for” (using Crenshaw’s terms) that preclude their protection under singular categories of legal disadvantage. For instance, many survivors describe their daily experiences as being ones of “paid rape,” whether or not being bought for sex in legal or illegal venues.\textsuperscript{610} Some tricks even describe prostitution as “paid rape.”\textsuperscript{611} Much of the abuse these victimized person endured might have been rendered rape legally “but for” the fact

\textsuperscript{607}For the origins of the seminal political and legal theory of intersectional discrimination and how to challenge it, see Crenshaw, “Demarginalizing Intersection,” 139–67; For an application to gender-based violence, see Crenshaw, “Mapping Intersectionality,” 1241–99 passim.

\textsuperscript{608}Crenshaw, “Demarginalizing Intersection,” 151.

\textsuperscript{609}Id. at 151–52.

\textsuperscript{610}In a study of prostituted persons in legal brothels in Nevada, one prostituted woman said prostitution was “like you sign a contract to be raped”; another said “[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, rape, violated”; a third explained that she “cried all the time” during her first six months in legal prostitution. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 34; cf. Giobbe, “Confronting Liberal Lies,” supra chap. 2, n. 198, at 121 (noting survivors described prostitution “like rape”).

that these persons were paid for sex; however, they tend to enter prostitution because of such multiple disadvantages in their lives that create coercive circumstances essentially forcing them into the sex industry, often precisely in order to get paid to survive, whether in prostitution for the camera or in off-camera prostitution (above pp. 55–63). Nonetheless, prostituted persons are generally not regarded as victimized by rape under existing law, even though that is often their own experience of prostitution. Moreover, they are frequently also not regarded as raped even when ostensibly forced by violence or threats and not being paid—a situation likely precipitated by judicial acquiescence to widespread bigotry.

Put otherwise, the multiple disadvantages of those exploited in the sex industry are far too many for either a singular dimensional social theory to comprehend, or for a simplistic legal concept of victimization to address. They have typically been subjected not only to severe poverty, but also to the disadvantages of early child abuse and neglect, being teenage runaways, suffering homelessness, lacking education and job training, thus having to engage in criminality to survive, causing more problems to them by often involving the stigma and obstacles gained by having crime records (above pp. 55–63). Moreover, they face a stacked deck of cards in life due to broad disadvantageous structures such as racism and sex discrimination, all of which they endure when seeking help to escape sexual exploitation (ibid.). Following Crenshaw’s theory of intersectionality, it is not surprising that the dominant political and legal systems have not adequately recognized prostituted people’s problems. The multitude of causes to their disadvantage makes it virtually impossible for them to “squeeze through” the narrow needle’s eye of the law that would enable them some restitution. The main character in one of writer Andrea Dworkin’s novels conceptualized this same theory in a “stream of consciousness,” though using a different vocabulary:

these men are tormenting us . . . it’s true, though not recognized, that you got to stop them, like stop the War, or stop slavery; . . . [but] even if there’s laws by the time they have hurt you you are too dirty for the law; the law needs clean ones but they dirty you up so the law won’t take you; there’s no crimes they committed that are crimes in the general perception because we don’t count as to crimes.

Prostituted people are not neatly clean in the sense of being “singularly” burdened by one disadvantage, or victimized by a single observable act such as forcible rape; rather, they are prostituted under socially coercive circumstances under long time. Crenshaw notes that the difficulties of analyzing intersectional disadvantage frequently leads to a situation analogously similar to a traffic accident at a cross of

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612 See infra chap. 5, nn. 674-680 and accompanying text for a further discussion of problems to apply rape laws to prostitution.


617 Cf. Dworkin, “Prostitution & Male Supremacy,” supra chap. 2, n. 225, at 3 (questioning that “gang rape” is inherently different from prostitution because it is perceived as entailing an “innocent woman” being “taken by surprise” when a contrasting perspective could be that prostituted women are “taken by surprise over and over” again, the only relevant differences being that her gang rape “is punctuated by a money exchange”).
intersecting roads where multiple vehicles collide, an individual is harmed, but ambulances and doctors refuse to intervene unless an individual responsible for the injuries who is also covered by medical insurance is identified.\(^{618}\) The analogy of a street intersection converges with the victim-blaming implied in Dworkin’s literary stream of consciousness in visualizing a reason why challenging sexual exploitation in pornography is so difficult. The problem becomes even more evident when considering the fact that prostituted people, in addition to not often getting treatment, nor support, nor being recognized as victimized by crimes, historically have been regarded as the ones responsible themselves for the abuse and sexual exploitation they’ve endured. For instance, despite that the overwhelming majority of persons prostituted in the sex industry wish to escape it,\(^{619}\) many have been stigmatized by criminal fines or sometimes jail time for being prostituted, and by the practical and public victim-blaming that comes with being regarded as criminals under laws in many nations, sometimes just as severely as the pimps and profiteers who exploit them are.\(^{620}\) Such legal treatment obstructed their opportunities to escape prostitution, victimizing them further by imposing fines, criminal records, and other troubles that can prevent them from getting jobs, acquiring housing, or gaining access to women’s shelters.\(^{621}\)

Crenshaw argues that if law, rather than addressing singular disadvantages one by one began addressing intersectional multiple disadvantages and “the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”\(^{622}\) Conversely, a democratic theory that addresses the problems for groups who are multiply disadvantaged and situated in a complex intersection between conflicting democratic rights and freedoms—as people who are prostituted in pornography evidently are (see generally Part II on the conflict between expressive rights and equality rights)—may be more useful for many other groups that are singularly disadvantaged in less complex situations. Crenshaw’s vision of the vertically intersectional basement accordingly implies that when prostituted persons “‘enter’” and crawls through the top hatch, “‘we all enter.’”\(^{623}\) In light of the theory of intersectional disadvantage, it does not appear as a coincident that Weldon and Htun found clear evidence of what causes successful challenges in democracies to violence against women in general (see above), whereas finding such evidence with respect to the pornography industry appears more difficult. Because victimization and exploitation in pornography is an intersectional problem of multiple disadvantages by contrast to violence against women in general, which can be presented as a problem with a singular non-intersectional rationality on basis of gender, the latter is easier to

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\(^{618}\) Crenshaw, “Demarginalizing Intersection,” 149.

\(^{619}\) Farley et al., “Nine Countries,” supra chap. 1, n. 115, at 48, 51, 56 (finding that 89% of 785 prostituted persons in nine countries said they wanted to escape prostitution); MacKinnon, Sex Equality, supra p. 6 n.23, at 1250 (citing Elizabeth Fry Society of Toronto, Streetwork Outreach with Adult Female Prostitutes: Final Report (1987), 12–13) (finding approximately 90% of women drawn from street prostitution indicated they wanted to escape); cf. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 23–24, 29 (81% of the 45 respondents in legal brothels said they wished to leave prostitution during interviews, while many were subject to surveillance by listening devices and responded in whispers as they were under strong pressures not to reveal information that “reflected badly” on the brothels to outsiders).

\(^{620}\) See, e.g., supra note 602 (citing Canada criminal code sections that criminalized prostituted persons prior to 2013).

\(^{621}\) Cf. supra notes 192–194 and accompanying text.

\(^{622}\) Crenshaw, “Demarginalizing Intersection,” 167.

\(^{623}\) Id. (paraphrasing the title of Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America (New York: William Morrow, 1984)).
address politically and legally. A theory that addresses exploitation in, and victimization caused by pornography, is thus more ambitious. However, it may also yield more empirically useful conclusions applicable to other intractable political problems of inequality.

Crenshaw’s concept of intersectionality could be applied to the issue of how to develop theories on political promotion of autonomous self-organizing, including nurturing the necessary “specific knowledge” and “oppositional consciousness” that for other historical and larger cohorts of oppressed groups’ have been decisive in politically mobilizing their interests and perspectives relatively speaking (e.g., women or African Americans). When intersectionality is seen as a necessary complement to Young, Shapiro, and Weldon and Htun’s theories of group representation and social mobilization, and considering Mansbridge’s observations that effective representation of such subordinated groups need to account for the specifics of the issue and its context, the conclusion implies that successful legal challenges to the production and consumption harms need the intersectional knowledge generated by the populations most adversely affected. Such populations are the sex industry survivors and others who are particularly exposed to its harmful consequences; their common denominator is the condition of having been subordinated by multiple disadvantages related to sexual exploitation or sexual abuse.

The existing social science evidence generated elsewhere, including controlled studies as well as evidence generated more closely to the ground (chapters 1–3), amply supports taking action. However, such evidence does not by itself set out what legal action, regulatory policies, or politics otherwise is effective or not. By contrast, following Young (and others above), sound foundation for developing such strategic action must invariable build on the knowledge generated by the groups that share similar collective experiential insights into what the specific consequences and possibilities of certain public action would have had for persons who are victimized. Here, the concept of intersectionality further highlights that legal strategies to address the harms of pornography should particularly include those groups that are most severely disenfranchised by such singular distinctions that have historically excluded them from meriting restitution under the law. As discussed above, many who are being exploited in pornography are legally unprotected when reaching the legal age of adulthood; the patently abusive conduct against them in commercial sexual exploitation is then often by definition disregarded as “paid sex,” as opposed from domestic abuse, and the harmful conditions precipitated by having to accept numerous unwanted sexual acts every day (pp. 67–72 above) are rarely put on a par legally even with just one instance of forcible rape. All such singular distinctions serve to minimize the coercive circumstances and destructive abuse de facto present in pornography (see chapter 2 above).

Groups who have been subject to the multiple disadvantages accounted for above, which facilitate the exploitative social practice of pornography, are better situated to visualize what it would take to successfully challenge such conditions than others. These groups’ perspectives should be accounted for in legal challenges, grounding the choice of strategies—legislative, judicial, or otherwise. Considering the problems for outsiders to gain access and reliable information from people currently exploited in the sex industry (see 76–86 above), survivors may be the most reliable sources to consult. The persons directing survivor organizations are not in a

625 Young, Justice & Politics of Difference, 186.
626 See supra notes 610–617 and accompanying text.
627 Cf., e.g., Weldon and Htun, “Civic Origins,” 553; Young, Justice & Politics of Difference, 185–86.
vulnerable position of dependency of the sex industry, by contrast to people who are currently involved in the sex industry who generally are (see chapter 2). The former are experienced organizers gaining increased influence in the public opinion in a range of arenas. They lack any incentive to produce misinformation to increase profits from those who profit from the sexual exploitation of others. Evidence unfortunately indicates that a number of representatives for organizations ostensibly working with people currently exploited by others, claiming to represent women in prostitution as “sex workers” and advocating for the deregulation of the sex industry (including legalizing those who profit from the prostitution of others), might exploit persons in prostitution for their own gain (pp. 76–86 above). Assuming that organizations directed by survivors are not hiding such third-party activities, hence do not exploit their network of constituencies to facilitate a trade in persons to pornography producers, pimps, or tricks, they are substantially more reliable than the former type of organizations who work with people currently exploited for commercial sex.

A theoretical conclusion from the analysis offered in this chapter, corroborated by a number of works in democratic theory, law, and politics, suggests that public actors, who seek to develop efficient policies against harms caused by production and consumption of pornography, should support as well as consult autonomous organizations that genuinely represent survivors. There exist a number of such organizations today. In the course of the further chapters of this dissertation, it will thus be of interest to assess to what extent legal, political, and public responses have recognized survivor perspectives. Although the autonomous organizations of survivors described above are preferable as consultants and participants in political deliberations for developing policy, there are alternative ways for making survivors influential when organizations are inaccessible in legal drafting or conduct of political affairs. Scholars, legislators, and judicial actors may solicit relevant information for policy through people who are survivors, or from sources with similar and reliable information.

As a complement to the discussion on intersectionality above, it should be noted that Crenshaw’s concept has been ostensibly used and elaborated by other scholars since her early work was published—certainly within the subfield of politics and gender, where it has become something of a buzzword. Yet it is debatable that these more recent theoretical accounts would improve its application for this study of the politics of legal challenges to pornography. One example is provided by Weldon, who has written about intersectionality more lately. She argues that “in order to illuminate the various ways that women and men are advantaged and disadvantaged as women and men, gender analysis must incorporate analysis of race, class, sexuality, and other axes of disadvantage, and explore interactions among them.” These formulations are hardly controversial. Yet it is unclear how Weldon assumes that her contributions are substantively different, let alone advancing beyond Crenshaw’s original approach, in her further elaborations of the concept.

For example, we might think of gender, race, and class as having some independent effects and some intersectional effects. Or we might think of gender and race as being mutually reinforcing, while class undermines these systems. Or we might think of all three systems as being mutually reinforcing but analytically separable, and also having some intersectional effects. (Weldon, 241)

628 See, e.g., Letter from STSU, to President Obama (2013), supra chap. 2, n. 345, at 6–7 (unpaginated) (listing survivors and survivor-led organizations).
629 See supra notes, 343–345 and accompanying text for names of some survivor-led organizations.
Certainly, thinking about intersectionality in this sense seems reasonable. But these are also trivial statements, in which Weldon simply describes what many researchers who study prostitution and pornography already do. For example, this dissertation traces in particular how sexual exploitation and abuse in pornography production, and the sexual aggression and attitudes supporting violence against women that are caused by its consumption, asymmetrically affect poor women, women of color, LBGT-populations, and on other minorities (e.g., 57–64, 73–75, 122–129 above). Those groups of women are all overrepresented in prostitution (ibid.), where pornographers typically recruit participants (see, e.g., 55–57), and where possibly also the most severe consumption harms occur (see, e.g., 124–126). Thus, pornography is in Weldon’s words (p. 241), “mutually reinforcing” the social structures of race, class, and gender oppression, but nonetheless “analytically separable” as such. This is no news if reading the vast number of empirical studies on pornography and prostitution (ibid.), and it forms the basis of further legal and political analysis in this dissertation.

Accordingly, Part II and III analyze legislative and judicial obstacles and attempts to address in particular the intersectional legal problems, such as (as mentioned above) how to craft efficient laws that recognize production harms not as “consent”—an assumption ignoring the poverty, racial discrimination, and other adversities affecting multiply disadvantaged population, which push them into prostitution and pornography—but as a frequently abusive form of sexual exploitation (a fact shown by the empirical evidence amassed over forty years, see chapter 2). This politico-legal analysis is, if anything, an intersectional endeavor that, in Weldon’s words, recognizes that “women of color are disadvantaged as women of color; poor women are disadvantaged as poor women,” and that “these marks of the female conditions are . . . not shared by all women, and may not even be visible unless we focus on specific race-class-gender groups” (Weldon, 240). Indeed, even Andrea Dworkin—generally denoted a “radical feminist”—for instance wrote about Jewish and Palestinian women in Israel while showing how class, ethnicity, religion, and imperialism were all intertwined in male dominance; a form of structural oppression affecting Palestinian and Israeli women differently and disproportionally, although certain elements (e.g., gender-based violence) had a constant presence within both groups. Similarly, Catharine MacKinnon already in her seminal book Sexual Harassment of Working Women from 1979 made intersectional analyses, among other things inquiring why “black women have brought a disproportionate number of the sexual harassment lawsuits to date.”

Black women’s least advantaged position in the economy is consistent with their advanced position on the point of resistance. . . . Compared with having one’s children starving on welfare, for example, any battle for a wage of one’s own with a chance of winning greater than zero looks attractive. In this respect, some black women have been able to grasp the essence of the situation, and with it the necessity of opposition, earlier and more firmly than other more advantaged women. (MacKinnon, 53)

These are precisely the type of intersectional analyses that Weldon still calls for, almost 30 years later: “gender analysis must incorporate analysis of race, class, sexuality, and other axes of disadvantage, and explore interactions among them” (Wel-

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Surely, there are excellent empirical works doing intersectional analysis today. Yet from a theoretical point of view the framework developed by Crenshaw appears the same, if not actually more advanced for instance in its elaboration on how existing laws against race and sex discrimination often fail to recognize Black women’s intersectional disadvantage. Thus, Wendy Smooth have explored how female African American state legislators often pursue issues traditionally not seen as “women’s issues,” but which they nonetheless regard as such, including children’s issues, race issues, or criminal justice issues. Smooth suggested that political scientists have to be careful not to frame “women’s interests” in ways “simplifying multifaceted issues” that “obscures how issues affect women differently, particularly as it relates to the material consequences of race, class, and sexual identities” (p. 437). Smooth notes—just as Crenshaw did before her—how the inability to adequately understand the intersection of race and gender issues can disempower African American women. One example mentioned is the disproportional incarceration rates of Black men, which has an adverse effect on female single-headed households and their children (Smooth, 436). Accordingly, a legislator representing an urban district saw her work on criminal justice “as representing ‘women’s interests,’” in part due to the “financial toll exacted on women” by such policies that amplify the problems of her constituencies (p. 436). Another example mentioned by Smooth was the “pressure” on various “women’s interests groups” to “simplify” their work as addressing either “race, gender, disability, or sexuality,” due to such reasons as funding; and when relied on by researchers, such articulations “contributes to the amplification of the most privileged women’s voices, while further subordinating the interests of diverse groups of women” (p. 438; citations omitted).

Likewise, Smooth has elaborated on electoral statistics in other works, noting how Black and Latina women systematically vote Democrat more often than white women do. Citing Carol Hardy-Fanta, she observed that “Clinton would not have returned to the White House in 1996 had black and brown women stayed home.” Smooth concluded that when there is no intersectional lens, “the story of the gender gap engages a form of essentialist politics that limits voters to their race, sex, or class,” and further “pick off the most desirable, sought-after voters . . . . targeted by the parties through elaborate recruitment initiatives, while women of color and other voters are rendered invisible.” Although Smooth certainly expands Crenshaw’s empirical insights, it is by empirical analysis and not by theoretical development. Even though others have attempted to develop Crenshaw’s work, her approach to intersectionality is still among the most lucid ones. In this light, Crenshaw will serve as the chief interlocutor representing the intersectional theory in this dissertation.

Postmodernism: An Alternative Theory

An alternative theory that is critical toward hierarchy theory, promulgated among a group of scholars that may be denoted as “postmodernists,” questions the usefulness of legal rights as strategy for challenging male dominance. The perhaps most well-
known among the theory’s representatives, Judith Butler, published a piece entitled “Sovereign Performatives in the Contemporary Scene of Utterance” in the journal Critical Inquiry, and as part of her book Excitable Speech in 1997, where she attempts to question the idea that legal challenges against hate speech or against the harms caused by pornography may emancipate subordinated groups such as women, people of color, or sexual minorities:

Consider that hate speech is not only a production of the state . . . but that the very intentions that animate the legislation are inevitably misappropriated by the state. . . . It will not simply engage in a legal discourse on racial and sexual slurring, but it will also reiterate and restage those slurs, this time as state-sanctioned speech. 636

Butler’s account is seemingly based on the assumption that pornography can be equated with hate-speech in a legal context. Using incorrect citation, Butler indeed claims that legal scholar Catharine MacKinnon “argues that pornography ought to be construed as a kind of hate speech and that it both communicates and enacts a message of subordination.”637 In fact, nowhere has MacKinnon made an equation of this sort between hate speech and pornography, though she opposes both on different grounds.638 The equation of pornography with hate speech disregard that pornography is a social practice that physically exploits people for sex in order to arouse consumers sexually (see chapters 1–3 above); by contrast, a “text” or a “speech” by the Ku Klux Klan can be produced without exploiting any person, and sexual arousal is at most a potential side-effect. Butler ends her piece by asking to what extent “the state produces and reproduces hate speech” (and, assumingly, injuries from pornography), further stating that “[t]he only question that remains is: How will that repetition occur, at what site, juridical or nonjuridical, and with what pain and promise?”639

She does not offer a more conclusive position apart from a general skept-

637 Butler, “Sovereign Performatives,” supra p. 16 n.51, at 352 (footnote omitted). In Excitable Speech, Butler changed this sentence. While beginning with the uncited claim that MacKinnon is “Relying on recently proposed hate speech regulation,” Butler then proceeds differently: “pornography ought to be construed as a kind of ‘wound,’ according to MacKinnon, because it proclaims and effects the subordinated status of women.” Butler, Excitable Speech, 73 (note omitted).
638 The grounds for Butler’s misunderstanding can be seen already in her attached footnote, which quotes text where MacKinnon actually never mentions pornography: “Whatever damage is done through such words is done not only through their context but through their content, in the sense that if they did not contain what they contain, and convey the meanings and feelings and thoughts they convey, they would not evidence or actualize the discrimination that they do.” Butler, “Sovereign Performatives,” 352 n.4 (quoting Catharine MacKinnon, Only Words (Cambridge, MA: Harvard Univ. Press, 1993), 14); cf. Butler, Excitable Speech, 174 n.4. Further left out from Butler’s quote is the explanation MacKinnon offers for why the “words” she refers to were legally regarded as sex discriminatory in case law (words like “help wanted—male,” “sleep with me and I’ll give you an A,” or “it was essential that the understudy to my Administrative Assistant be a man”). See MacKinnon, Only Words, 13–14. Additionally surprising is the fact that Butler omits the passage immediately following her selected quote that would have patently shown why MacKinnon could never have conceived an argument equating such speech with pornography: “Pornography, by contrast [to discriminatory speech], has been legally framed as a vehicle for the expression of ideas . . . limited as it was to ‘who wants what, where, when, how, how much, and how often.’ Even this criticism dignifies the pornography. The idea of who wants what, where, and when sexually can be expressed without violating anyone and without getting anyone raped. There are many ways to say what pornography says, in the sense of its content. But nothing else does what pornography does.” MacKinnon, Only Words, 14–15 (citation omitted). Butler further claims, based on her erroneous reading and without further citation, that “pornography is considered by MacKinnon, through a legal catchphrase, to be a form of speech and a harmful utterance at that.” Butler, “Sovereign Performatives,” 353 (emphasis added).
cism toward law. This reluctance to take a political position is consistent with the systematic tendency in her work to force the readers to deduce any conclusions indirectly—for example, via skeptical questions or non-interrogative sentences that occur even near the end, where one would otherwise expect more decisive claims.

Political scientist Wendy Brown, another prominent proponent of the postmodern critique, in her book States of Injury: Power and Freedom in Late Modernity implies a similar stance as does Butler. Here she asks: “When does legal recognition become an instrument of regulation, and political recognition become an instrument of subordination?” Undoubtedly the question whether rights will “become an instrument of subordination” is an important one to consider. Brown herself describes, at various instances, the problematic abstract personhood assumed under liberal rights that are gender-neutral and based on presumptions of similar individuals without regards to class, race, or other social particularities. For instance, Brown approvingly reiterates Marx’s “criticisms of bourgeois rights,” mentioning the contradictions between a liberal “illusory politics of equality, liberty, and community in the domain of the state,” and a substantive politics characterized by “the unequal, unfree, and individualistic domain of civil society” (States of Injury, 114). Her critique is not unlike the critique noted above regarding the liberal concept of “negative rights,” which traditionally creates an illusionary distinction of public and private that has been blind to other abuses of power or forms of dominance than public ones, such as social subordination of women by men, dominance through entrenched inequality or poverty, or via private non-state discrimination against minorities (see 143–148 above). Indeed, such negative rights may easily “become an instrument of subordination,” if using Brown’s terms (cf. States of Injury, 99).

However, Brown has not yet shown whether the concept of group rights advanced by Young, Crenshaw, Shapiro, Mansbridge and others, and intended to remedy such subordination as criticized by Brown, will also become instrumental to “subordination.” Brown’s further rendition of Marxism holds that liberal “bourgeois” forms of rights “legitimize by naturalizing various stratifying social powers in civil society, and they disguise the state’s collusion with this social power, thereby also legitimating the state as a neutral and universal representative of the people” (States of Injury, 114). Again, this is a statement not unlike the criticism advanced above, where it was concluded that the liberal concept of negative rights disguises the role of the state as a neutral arbiter protecting freedom when it often acts in (again, using Brown’s terms) “collusion” with “social power” (ibid.), thereby protecting the private abuse of women by men through a politics of toleration (cf. 143–148 above).

Similarly, Brown criticizes an “analysis of abortion proffered by liberal legal and political theorist Bruce Ackerman, an analysis that does not once mention gender, women, or the constitution of gender through regimes of sexuality and reproductive work,” concluding that even its “grammar . . . suppresses the fact that it is women who have abortions, that conception and abortions occur at the site of women’s bodies, and that this site is the effect of the very social powers (of women’s subordination) making abortion a political issue in the first place” (States of Injury, 140–41). In a related article, Brown also noted that a limited perception of abortion rights as

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640 In Excitable Speech, but not in Critical Inquiry, Butler states: “I am not opposed to any and all regulations, but I am skeptical . . . . I do think that the ritual chain of hateful speech cannot be effectively countered by means of censorship.” Butler, Excitable Speech, 102.

641 Cf. Martha C. Nussbaum, ”The Hip Defeatism of Judith Butler: The Professor of Parody,” The New Republic, Feb. 22, 1999, p. 38 (noting that “a large proportion of the sentences in any book by Butler—especially sentences near the end of chapters—are questions,” or non-interrogative sentences, and Butler often “never quite tells the reader whether she approves of the view described” in such statements).

642 Brown, States of Injury, supra p. 16 n.50, at 99. Further citation in text.
“‘constitutional right to privacy’” neglects the substantive inequality at issue: “grant women formal legal equality, and grant them limited abortion rights on the basis of privacy, and watch the analytic disappearance of the social powers constitutive of women’s unfree and unequal condition as reproductive workers. Instead, watch the public debate for decades whether or not a fetus is a person” (“Response to Baynes,” 476). Here, Brown’s criticism of “a liberal discourse of generic personhood [that] reinscribes rather than emancipates us from male dominance” seems amply justified (States of Injury, 141; cf. “Response to Baynes,” 476). Not the least so when considering that abortions are generally precipitated by coercive circumstances.644 Yet that is the very reason why democratic theorists like Young argue for recognition of particularized group rights to counter such social dominance and coercive situations, including a group veto power for women on reproductive rights policy.645

The approaches to group representation and rights advanced in hierarchy theory (pp. 153–168 above) are fundamentally opposed to the abstract “bourgeois” or “generic” rights criticized by Brown. The former group rights are concretely built from knowledge generated by the social consciousness of historically subordinated communities (see 154–159 above). The latter, by contrast, are supposedly abstract and universally applicable to all of humanity, though at closer inspection they predominantly derive from the experiences, perspectives, and political imperatives of privileged men (see 143–148 above). In many ways the “postmodern” feminist critique of rights apparently identifies the same problem as the former group of scholars, but they reach different conclusions on how to address it. For instance, in her critique of legal scholars who’ve advanced the conceptualization of concrete group rights against domination in a number of areas (e.g., against sexual harassment), Brown alleges that such rights are “abetting rather than contesting” social dominance and “discursively renaturalize” social powers; “rights must not be confused with equality nor legal recognition with emancipation,” she rhetorically concludes (States of Injury, 133). She appears to say that just as “liberal discourse . . . reinscribes rather than emancipates us from male dominance” (“Response to Baynes,” 476), group rights intending to counter such domination do the same. According to this critique, the “positive” representation of the perspectives and interest of historically disadvantaged groups would supposedly produce the same results on the ground as has been said about the fundamentally opposed “negative” concept of rights in liberalism. As recalled (pp. 143–148 above), the “negative” concept of rights was criticized for implicitly being grounded in the privileged men’s general social interests of being protected from arbitrary abuse of state power, and unduly downplaying other forms of

644 For instance, roughly the same percentage of abortions was performed while it was illegal in the United States as when it became legal. See Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees at 18, Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (No. 88-605); Barbara Hinkson Craig and David M. O’Brien, Abortion and American Politics (Chatham, NJ: Chatham House, 1993), 251 (finding a stable number over time of approximately 1.5 to 1.6 million annual abortions performed in the U.S.). Moreover, abortion related maternal deaths were estimated to be roughly eight times higher for illegal abortions than for legal abortions right before Roe v. Wade, 410 U.S. 113 (1973). See Willard Cates Jr. & Roger W. Rochat, “Illegal Abortions in the United States: 1972–1974,” Fam. Plan. Persp. 8, no. 2 (1976): 92. Considering that an illegal abortion apparently jeopardized the lives of women, subjecting oneself to such risks is presumably caused by a coercive situation. For further discussion of reproductive politics, see Catharine A. MacKinnon, “Reflections on Sex Equality Under Law,” in Women’s Lives, Men’s Laws, supra p. n.45, at 136–50.
645 Young, Justice & Politics of Difference, 184.
abuse of power (e.g., domestic violence and labor exploitation), thus reinscribing male dominance.

Butler reached a similar position as Brown, although via a different line of arguments when alleging that laws intending to combat group-based injury of dominance (e.g., hate-speech laws) would produce counter-intentional results by invariably being “misappropriated” by the state.\textsuperscript{646} Butler does not propose any legal alternative, concluding instead that the “only question” is when and where the state will “repeat” the injury of the hate-speech it intends to regulate.\textsuperscript{647} By contrast to Butler, Brown actually suggests a legal alternative, though it recants a surprisingly familiar liberal position:

If rights figure freedom and incite the desire for it only to the degree that they are void of content, empty signifiers without corresponding entitlements, then paradoxically they may be incitements to freedom only to the extent that they discursively deny the working of the substantive social power limiting freedom. In their emptiness, they function to encourage possibility through discursive denial of historically layered and institutionally secured bounds, by denying with words the effects of relatively wordless, politically invisible, yet potent material constraints. . . . It is, rather, in their abstraction from the particulars of our lives—and in their figuration of an egalitarian political community—that they may be most valuable in the democratic transformation of these particulars. (\textit{States of Injury}, 134)

In short, Brown advances a concept of rights without “content” that nevertheless “incites” desire for freedom and figure an “egalitarian political community,” but without recognizing any particular grounds so as not to “renaturalize” those grounds as oppression.

Any positive-rights concept that includes protections against discriminate impact of laws where grounds, such as disadvantaged groups based on sex, race, or sexuality, are identified and recognized for affirmative measures to promote equality, inevitably runs afoul of not offering “empty signifiers without corresponding entitlements.” Brown’s concept of rights would then presumably resemble abstract protections to equality, such as a negative right from state interference and protection against facial discrimination; that is, explicit discrimination against groups by statute, interpretation, or executive fiat, as opposed to the discriminatory impact of facially neutral laws. As recalled above, she criticized similar universal \textit{abstract} rights in the context of abortion as “a liberal discourse of generic personhood” (\textit{States of Injury}, 141). Somewhat perplexingly then, Brown seems to adopt such universalizing generic posturing that she previously concluded failed to address the substantive inequality underlying women’s subjection to male dominance in reproductive politics.

Brown’s seemingly contradictory positions above invite the question how abstract rights, simply by encouragement “through discursive denial” but without any claims of “entitlement,” possibly can challenge any “potent material constraints” such as gender-based violence or sexual exploitation? This apparent contradictory question might be answered though by looking at underlying ontological assumptions of power, social dominance, and gender inequality in postmodern theory. Such assumptions are expressed indirectly in an instance where Butler criticized the putative approach by legal scholar Catharine MacKinnon (a proponent of recognizing and remedying inequality via group-based rights) and others with whom she disagrees, subsuming her opponents under the rubric of “gender theory” that she claims

“misunderstands the ways in which that asymmetrical relation between the sexes is installed through the primary workings of language, which presuppose the production of the unconscious.”

According to Butler, such an “analysis of gender . . . tends toward a sociologism, neglecting the symbolic or psychoanalytic account by which masculine and feminine are established in language prior to any given social configuration.”

Butler here emphasizes language as the primary locus for gender inequality, which Brown also seems to assume indirectly. As recalled, Brown preferred rights against dominance that “encourage possibility through discursive denial . . . by denying with words” otherwise “relatively wordless” material inequalities (States of Injury, 134).

Brown’s postmodern political strategy thus relies on languages and abstract equality rights that “deny” inequality; it rejects concrete rights that do not deny, but rather identify and challenge, substantive inequality (States of Injury, 134). In challenging multidimensional forms of dominance and discrimination that covers practices ranging from reproductive politics, childrearing, and discriminatory pay at work to sexual exploitation, pornography, and stereotypes in the media, Brown and Butler seem thus to construe, if not a linchpin theory of inequality, nonetheless a theory implying that language is the main site for progressive or “subversive” resistance. Not surprisingly, Brown implies that MacKinnon lacks insights of the linguistic realm when her theory is said to be “at odds with poststructuralist insights about . . . social subjects who bear some capacity for subversive resignification” (States of Injury, 95; emphasis added). Locating social dominance primarily in the workings of language, as distinguished from other causes such as the organization of sexuality, labor, housework, reproductive politics, or gender-based violence, may carry the dangers of “totalizing” to the extent that it reduces social complexity under a more singular linchpin theory of resistance to power via language.

The empirical evidence presented in chapters 1–3 on pornography does not suggest language to be particularly constitutive of its harms; the gender inequality that pornography has been documented extensively to promote is caused via its behavioral influence on violence against women, via attitudes supporting violence against women, and via sexual exploitation in its production. None of these three elements would appear as dependent per se on the “primary workings of language,” even though language may sometimes communicate attitudes or command actions. Neither does empirical evidence suggest that language is the underlying phenomenon producing these effects. Put otherwise, as a harmful social practice of inequality based on sex that exploits and produces multiple social disadvantages, it appears counterintuitive to analyze it as primarily a language game or even a secondary outcome of such. In this sense, Butler and Brown are indeed correct in assuming that those who advocate group-based rights to challenge gender inequality base their theory on a “sociologism” that does not recognize “language” as the predominant cause for social dominance. By contrast to their theory, hierarchy theory appears to center on society and social theory in which language occupy a position on a par with several factors of importance—neither diminished, nor amplified by others.

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649 Ibid., 18.
650 Considering that Brown often accuses other theories for being “totalizing,” this danger is notable. See Brown, States of Injury, supra p. 16 n.50, at 95 (alleging that “the very structure and categories of [MacKinnon’s] theory—its tautological and totalizing dimensions”—are related to a “potentially fascistic interplay of manipulated despair and libidinal arousal”); cf. ibid., 133 (implying that representing experiences of subordinated groups in law may lead to “inevitably totalized formulations of identity” that “produce levels of regulation . . . not imagined even by Foucault”).
Crenshaw has criticized certain theories for conflating “the power exercised simply through the process of categorization” with the “power to cause that categorization to have social and material consequences,” labeling such theories “vulgar constructionism.” Vulgar constructionism accordingly challenges only the “categorization,” for example, sexist stereotypes of submissive women or sexism de jure, but fails to challenge their “social and material consequences,” for example, the sexual exploitation of women, sexism or submissive women de facto. According to Crenshaw, such theories assert “that since all categories are socially constructed, there is no such thing as, say, Blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.” This dismissal of group politics can be seen systematically in Butler and Brown’s skeptical postmodernism. For instance, when Brown claims that institutionalizing rights based on the social consciousness of historically subordinated groups will “discursively renaturalize” social powers rather than “discursively deny” them (States of Injury, 133–34), she seems to adopt the position of vulgar constructionism that asserts that group rights of that kind will simply “continue reproducing” social categories such as Blacks or women. According to Crenshaw, such “vulgar constructionism” is distinguishable from legitimate constructivist critiques that “leave room for identity politics.” Brown’s and Butler’s politics do not leave much room for identity politics based on the oppositional consciousness among historically oppressed groups. Indeed, Brown effectively dismisses the legal codification of historically subordinated groups’ perspectives and interests with her concept of rights as “empty signifiers without corresponding entitlements” (States of Injury, 134). Her “discursive denial” of “potent material constraints” (p. 134) suggests a denial of the constraints of group-based oppression, and with it a denial of politics that could effectively challenge that same material reality.

Moreover, the claims by postmodern theory on legal challenges to pornography and its harms are sweepingly broad; a “renaturalization” of women’s subordination or a “misappropriation” of laws and legal discourse may, if taken seriously, occur in many contexts, far from that of the pornography laws themselves. Assuming the postmodern account accordingly, a discourse on women’s equality within a legal challenge to pornography can hypothetically be misappropriated to support international military interventions in religious conservative societies, putatively as a means to promote gender equality. Similarly, a discourse on gender-based violence within such a challenge may hypothetically be misappropriated by democratic majorities to support racially discriminatory and otherwise arbitrary domestic interventions among vulnerable minority or religious groups, including overzealous surveillance of their families. In turn, such policy may hypothetically stigmatize minority women as being unreliable or less capable in public, thus renaturalizing their subordination as minority women. Such misappropriation may also indirectly harm women via its effects on vulnerable minority men, such as husbands or fathers who are subject to racial profiling, mass incarceration, and poverty. Powerful institutions can in theory misappropriate nearly anything, including civil rights laws based on race

651 Crenshaw, “Mapping Intersectionality,” supra p. 6 n.24, at 1297.
652 Cf. id. at 1298, where Crenshaw exemplifies with the challenge to racial segregation attempted in Plessy v. Ferguson, 163 U.S. 537 (1896). Accordingly, there were two potential targets for Plessy: the “construction of [racial] identity” (i.e., who was to count as Black or white?) and the “system of subordination based on that identity” (i.e., whether or not Blacks and whites could sit together on the same train). Id.
653 Id. at 1296.
654 Cf. id., at 1296.
655 Id. at 1296 n.180.
and any prohibitions against rape, sexual harassment, domestic violence, or child abuse. Taking the position this could happen fails to consider, among other things, what is to be done about those victimized by the practices such laws prohibit.

In addition to its overbreadth, amounting to a simplistic anti-state position in a vacuum of understanding of unequal social status, the explanatory power of postmodern theory for evaluating legal challenges to pornography is very difficult to verify empirically. For instance, to the extent it matters for purposes of evaluating pornography laws what governments say to motivate their military or racially discriminatory actions, it raises the question of how many such instances of government discourses the researcher would have to analyze to refute or verify the postmodern hypothesis that pornography laws can inferentially contribute to gender renaturalization. Moreover, similar problems would arise, for example, with equal pay laws, although these have not been targeted by postmodernists. The underlying normative posture appears to be that women’s situation should not be improved by government action, that their needs—except, presumably, for some?—should not be responded to or taken into account in public policy. In these respects, the broad hypothetical implications of Butler and Brown’s postmodernism amounts to what the methods literature refer to as “stretching the theory beyond all plausibility by adding numerous exceptions and special cases” that must be controlled for, which in turn creates a theory that is “inulnerable to disconfirmation.”

Moreover, none of the postmodern critics have ever offered what, in their view, would be an approach to the real production and consumption harms of pornography that does not have the problems they say exist. Because the claims of postmodern theory are so difficult to confirm or rebut empirically, being essentially fear-based and conjectural, this dissertation will not systematically test postmodernism in the same way it tests hierarchy theory in the comparative case study design. However, as part of the concluding discussion in this dissertation, Butler’s critique will be revisited, her accounts assessed for veracity and persuasiveness, particularly in light of the legal challenges to pornography in the United States that she has written about more specifically (see 525–531 below). Hierarchy theory, by contrast, is subject to stringent testing by combining within-case methods that includes pattern matching and a small-N comparison of Canada, Sweden, and the United States (cf. 17–31 above, on research design). Here, it will be asked to what extent an institutionalization of historically subordinated group perspectives and interest in politics and law, such as those of prostitution survivors or battered women, have caused the policy to change progressively or not. To the extent it has, it supports hierarchy theory.

Conclusions

This chapter sets out a number of theories that explains the obstacles and potential for legal challenges to pornography, gender-based violence, and sexual exploitation in modern democracies. It traced obstacles to some of the ancient foundations related to democracy as a form of deliberative policy process among formally equal participants. Early liberal political theorists warned against theories of the state that failed to account for the dangers of unbridled legislative and executive mandates, arguing that there is a potential for abuse of power among “factions” (using Madisonian terms) who fight for control over such public institutions. A feminist critique has highlighted that the solutions offered to public abuse of power by these

656 King, Keohane, and Verba, Inference in Qualitative Research, supra p. 19 n.58, at 104.
early liberals, such as a separation of government powers and a reduced public mandate for intervention in social or putatively private affairs, is based on a limited conception of liberty and democracy. It was argued that private abuse of social power, when tolerated under the liberal doctrine of “negative rights,” may simply mean privatized terror for those subjected to gender-based violence or sexual exploitation by non-state actors. This feminist position is amply supported by the empirical evidence of production and consumption harms presented in chapters 2 and 3—harms that are generally caused by non-state actors, though effectively tolerated by public powers. Via more recent domestic and international legal developments, regulation of non-state abuse of social power has swept across the globe and in a sense revolutionized the liberal foundation of western democracies. The concept of “negative rights” is being increasingly replaced by an affirmative concept of “positive rights” that entails compulsory active public intervention and support for survivors of general gender-based violence (e.g., domestic abuse), including civil remedies. A similar progress with regards to those victimized by the production and consumption harms of pornography is however yet to be seen.

In order to explain the further obstacles and potential for legally challenging the production and consumption harms of pornography, contemporary democratic theory was consulted that emphasized the need to address social perspectives and interests among unequal groups in democracies. For any foreseeable future, democracies will harbor inequality and social dominance. Not the least, this situation is corroborated by the empirical evidence in chapters 1–3 suggesting that pornography is a social practice of inequality, constituted by and further enabling social dominance as it sexually exploits vulnerable populations and promotes gender-based violence. To address these problems, contemporary democratic theories, here termed “hierarchy theory,” together with empirical research suggest that recognizing those disadvantaged groups that are particularly victimized by pornography’s production and consumption harms is imperative for grounding policy and legal challenges. This body of literature supports the position that the particular insights needed to challenge the harms effectively are better developed and articulated among similar peers that share an “oppositional consciousness” derived from being in the situation of social subordination by pornography. The literature also corroborates that these disadvantaged groups generate more efficient knowledge for challenging their situation in autonomous organizations, as opposed to organizing in more general organizations with competing priorities that may conflict or dominate activities.

Furthermore, representational and intersectional theories highlights structures of multiple disadvantages, suggesting that it is primarily the perspectives and interests of survivors from pornography production and those who are most exposed to its harms who can further key perspectives and interests for grounding efficient legal challenges. The reason is that any effective strategy has to account for the complex situation surrounding victimization through pornography, which is generally caused by a multitude of factors that include poverty, gender or racial discrimination, child sexual abuse and neglect, among others. Such multiple disadvantages make more linear concepts of victimization derived from situations such as domestic abuse, rape, or sexual harassment at work, inadequate. For instance, much exploitation in pornography, even when patently degrading and abusive, would be regarded as rape “but for” the presence of money. Yet this abusive condition is caused by a lack of alternatives to survival among prostituted persons, which effectively force them to accept unwanted sex—a situation few existing legal systems recognize as rape. By contrast, recognizing survivor perspectives and interests in legal challenges would more adequately identify the multiple disadvantages and their coercive social circumstances leading prostituted persons to such abusive situations, as opposed to ex-
cluding them from protection, support, or restitution under more singular theories of disadvantage that currently guide most laws against gender-based violence and sexual exploitation.

An alternative theory on the subject of legal challenges to victimization and social dominance is suggested by “postmodern” accounts that, contrary to what has been said above, hold that democracies should refrain from recognizing vulnerable or subordinated groups in law or policy processes. Among the reasons professed, it is said that such laws that target social dominance, for instance antipornography or hate-speech laws, will inevitably be misappropriated by the state and reinstate the same injuries on the populations that the laws intended to rectify. Similarly, it is suggested that legal recognition of those victimized by pornography will “abet” rather than “contest” their situation, and “discursively renaturalize” social powers. A postmodern alternative suggests instead the use of generic rights void of content as abstract aspirational ideals figuring equality and freedom, encouraging possibility but without “corresponding entitlements.” A critique from the viewpoint of hierarchy theory against the postmodern position on legal challenges by contrast suggests that it leads to the same problems identified in the classic liberal concept of “negative rights,” where abuse by non-state actors becomes largely ignored by law; without identifying historically unrecognized abuse by recognizing the social groups concerned, there is little possibility to challenge it under law. An intersectional critique similarly charges the postmodern position for being a form of “vulgar constructionism” that leaves no room for “identity politics” among groups with a shared social situation of oppression, who would benefit from its legal recognition.

Further, the theory of substantive group recognition (hierarchy theory) will be tested systematically, as it provides predictions that can be verified or refuted by empirical analysis. One may thus ask to what extent the recognition of grounds for social dominance in the legal challenges to pornography’s harms have led to less or more progressive legal change, and to less or more gender-based violence and sexual exploitation. Conversely, it will be asked to what extent situations where no such recognition was given precipitated an increase or decrease of progressive policies and harms. By contrast, the postmodern theory on legal challenges provides more sweeping accounts with far-reaching hypothetical implications, predicting that legal recognition of vulnerable group’s perspectives and interests with regards to pornography would inevitably be misappropriated and used to renaturalize those groups’ oppression in other contexts (e.g., purportedly rationalizing military interventions or racial profiling in gender equality terms). Because such a sweeping theory is difficult to subject to systematic empirical testing, the main theoretical objective with this dissertation will be to test hierarchy theory systematically. Yet in light of legal challenges that one of the postmodern theory’s representatives has written about specifically, postmodernism will be revisited in the conclusions chapter and briefly assessed for its veracity and persuasiveness (see 521–521 below).

657 For instance, it raises the question of how many such instances are needed to refute or verify the postmodern hypothesis that pornography laws can inferentially contribute to gender renaturalization.
Part II: Legal Architecture

5. Regulatory Frameworks

This chapter is an introduction to Part II—a part aiming to analyze the flexibility of existing law in challenging pornography’s production and consumption harms, as those have been documented in chapters 1–3. I begin by describing the issues to be inquired into in chapters 6–9. Furthermore, I present a broad historical description of relevant differences in constitutional law between the three main units of analysis (Canada, Sweden, and the United States). This description is partly intended to illuminate the more detailed choices of empirical materials that are analyzed later on. The last section presents a summary of the obstacles and potential of the legal frameworks further analyzed in the dissertation, focusing on the problem of how to effectively address the harms of pornography by law. All chapters in Part II can also be said, in methodology terms, to be concerned with concept measurement; that is, they measure the degree to which the legal frameworks where legal challenges to pornography’s harms have taken place fit the democratic concepts developed in chapter 4 regarding conditions that are predicted to facilitate or obstruct legal challenges. Such conditions include, inter alia, substantive equality, representation of perspectives and interests of the harmed groups, legal problems of intersectionality, and “negative” and “positive” rights (cf. chapter 4).

Comparative Issues in Part II

To understand what is needed to legally challenge the production and consumption harms, those remedies that would likely require more change need to be distinguished from those that would call for less. Amending constitutions, passing new legislation, or adhering more strongly to international instruments would require considerable legislative or political intervention. Understanding the politics of legal challenges therefore requires first an analysis of the flexibility of existing law in this area. Put otherwise, the question is: to what extent are the obstacles to addressing the harms of pornography predominantly legal and to what extent are they predominantly ideological. Both have political dimensions. The distinction between them warrants some clarification.

*Law*, on one hand, is generally conceived as “a system of enforceable rules governing social relations and legislated by a political system.”⁶⁵⁸ Stated differently, law

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provides rules of the game that offer continuity and predictability in democratic societies. Certainly, law may be more or less ambiguous, and offer greater or lesser latitude of ideological interpretation. Yet by contrast, ideology “refers, in a general sense, to a system of political ideas”—ideas that are neither typically a result of legislation, nor enforceable in the same sense as law. Although the differences between law and ideology are important, one could still, as Daniel Bell, take the view that “[i]deology is the conversion of ideas into social levers.” That is, ideology may convert ideas into action, just as a “social movement” may “simplify ideas, establish a claim to truth, and, in the union of the two, demand a commitment to action” (Bell, 401). According to this view, “not only does ideology transform ideas, it transforms people as well” (p. 401). For instance, ideologies compel people to take political action that changes even the law, for example, through legislation or litigation.

A different view of ideology than that of Bell’s was pioneered by Karl Marx and Friedrich Engels. They argued that dominant ideologies represent an inverse “up-side-down” image of the material reality. From this standpoint, ideology does not simply compel action in general, but more specifically it may legitimize social relations of dominance and subordination as natural, given, and equal, in spite of widespread exploitation and inequality. Further empirical analysis in this dissertation suggests that in contemporary democratic jurisdictions, there is not simply one ideology that underlies legal frameworks that facilitate or obstruct legal challenges to pornography’s harms. Rather, there is a mixed combination of competing underlying ideological foundations. These include, among others, classic Millian liberalism (emphasizing “negative rights”), conservatism (e.g., obscenity law), and balancing frameworks with substantive (as opposed to formal) equality law (see chapters 6–12 below). From these observations, one may conclude that an ideology is a source suggesting how the law ought to be construed in modern democracies. It is then an empirical question to what extent such ideology, as Marx and Engels argued, legitimates or challenges social dominance. Yet by contrast to a law, an ideology by itself does not provide enforceable rules within the political system. The evidence in this dissertation corroborate that such legal rules typically result from political compromises between competing ideologies, which are then acted on by legislatures and/or courts.

To answer the question what obstructs and what enables legal challenges to pornography’s harms, one has to distinguish those obstructing or enabling political claims that are persuasively grounded in legal sources from those claims that are predominantly grounded in ideology rather than law. Understanding to what extent obstacles to address pornography’s harms are ideological rather than legal calls for understanding what existing legal architecture already provides without too much additional intervention, and what existing legal architecture is less hospitable to addressing pornography’s harms, thus more in need of political (and ideological) challenges. The democratic theories that address social dominance in chapter 4 will be used further to interpret and analyze existing legal architectures in Part II, asking questions such as to what extent historically disadvantaged and subordinated groups are recognized and supported by the law, with the goal of understanding and predict-

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659 Synowich, “Law and Ideology.”
ing the law’s potential to challenge pornography’s harms to such groups. A comparative approach, looking at different legal frameworks and systems, provides a diversity of materials for this inquiry. The object in chapters 6–9 is thus to analyze obstacles and potential for challenging production and consumption harms within *existing* laws and regulatory frameworks, also making hypotheses for further analysis in Part III. Hence, chapters 10–12 in Part III analyze the extent to which different regulatory frameworks identified previously have facilitated legal challenges as predicted, and if so, the extent to which those challenges *changed* existing laws.

One of the main obstacles to legal challenges to pornography has been conflicting interpretations of democratic rights and imperatives, further to be explained in this part. In reinterpreting existing laws or in making new ones, concern arises as to how to balance constitutional equality or other rights and state interests, such as the right to equality or non-exploitation and humane and dignified treatment for some against the freedom of expression guarantees of others. Western democracies have, through their judicial systems, putatively consistent with liberal principles, construed regulatory interventions against expression deemed harmful to a vast array of constitutional interests. Liberal approaches to freedom of expression have never been uniform, which is not surprising considering that liberalism has bred many offspring.\textsuperscript{662} The historically oldest forms of regulations thought to be applicable to pornography, that is, obscenity law, will be analyzed first, which could be seen as representing a concession to conservative thought in existing liberal regulatory frameworks. Then, further analysis will be made of mainstream liberal jurisprudence, in turn contrasted to alternative approaches that balance *substantive equality*\textsuperscript{663} rights against expressive freedoms more explicitly than typical liberal frameworks do.

The first three chapters in Part II assess the main categories of regulatory frameworks for pornography that are predominant (with some exceptions) in the west, and in other countries ideologically under its influence: (1) *obscenity law*, (2) *liberal regulations* (deference to expression), and (3) a *balancing approach* (e.g., gender equality rights vs. expressive rights when regulating pornography). These three categories can be viewed as “ideal types” in the Weberian sense, as typically no country contains exclusively one type of regulative framework and no others. Following Weber, these ideal type frameworks are “not a *description* of reality,” although they aim “to give unambiguous means of expression to such a description.”\textsuperscript{664} As will be


\textsuperscript{664} For a detailed distinction between “substantive” and “formal” equality, \textit{see infra} pp. 243–248.

\textsuperscript{664} Weber, \textit{Methodology of Social Sciences}, supra p. 21 n.64, at 90. Weber’s more full definition of the concept of ideal type that is usually quoted as authoritative states that an “ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concretes individually, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct (Gedankenbild). In its conceptual purity, this mental construct (Gedankenbild) cannot be found empirically anywhere in reality.” \textit{Ibid}; \textit{cf.} Smelser, \textit{Comparative Methods}, supra p. 21 n.65, at 54; Gabriel Kolko, “Max Weber on America: Theory and Evidence,” \textit{History and Theory} 1, no. 3 (1961): 243.
Further shown, Canada, Sweden, and the United States have legal architectures that either enable or obstruct more or less elements from all of these three frameworks.

For instance, balancing forms part of the legal architecture in all these countries, but to varying degrees depending on their architecture’s predominant approach (see Table 1, p. 24 above). One can position the countries on a continuum relative their liberal deference to expression vs. a more balancing approach to equality and expressive rights. Visualizing such a continuum, the United States would be the most liberal architecture, Sweden in the middle, and Canada as the most balancing one (ibid.). Different elements of the ideal typologies may also occur at different levels of law depending on the predominant characteristics of the particular country. For instance, while balancing is an explicit element already in the Canadian constitutional language, some balancing occurs in the context of U.S. case law. Similarly, in Sweden balancing elements may have been spelled out explicitly in legislative history, but often without specific constitutional reference. The latter may partly be a result of the aspirational as opposed to binding character of many equality provisions in Sweden’s constitution. Even elements from obscenity law are found in some form among all the three countries at present, though nowhere does it form an underlying fundamental structure in their constitutions to the same extent as the liberal or balancing frameworks do.

The three main ideal types of regulatory frameworks for pornography laws will be further explained and exemplified from the three countries in chapters 6–8. Chapter 9 deals with challenges exclusively against production harms, as distinguished from consumption harms, and presents an alternative for regulating production harms where expressive rights are not necessarily engaged, depending on the legal interpretations advanced. The analysis will primarily use the Swedish system of legal regulation of prostitution as a case example, due to its novel approach since 1999 to criminalize tricks and third party profiteers while decriminalizing prostituted persons. Certainly, Norway adopted a similar law in 2009, Iceland in 2010, Canada as late as November 6, 2014, and France most likely will soon along with Northern Ireland. Similarly, the European Parliament in a recent resolution urges its member states to take similar action. Yet the law’s rationale, impact, and potential have been most well-researched in the Swedish context, where it originated and has been enforced and officially studied. Here, it will be argued that this law applies a notion of substantive sex equality in fighting sexual exploitation that already would seem to cover pornography production without the need for legislative amendment in Sweden, despite not having been applied in this way. The issue will be revisited in Part III, where it will be argued that ideological confusion rather than legal requirements have caused production harms to be largely unaddressed by Sweden’s laws against sexual exploitation.

Just as there is a rationale for focusing on Sweden in chapter 9 regarding legal challenges against production harms exclusively, Canada or the United States are the central examples in certain other chapters due to their stronger adherence to either  

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666 “Resolution on Prostitution,” Eur. Parl. Doc. (Feb. 26, 2014), supra p. 25 n.73 (passed 343 to 139, 105 abstentions) (urging governments in those Member States who deal with prostitution in other ways to review legislation in the light of success achieved by Sweden’s type of laws).

one of the ideal type of regulative framework (i.e., obscenity, liberal, and balancing). The conclusions drawn in this part on legal architecture will also further illuminate the rationale for selecting countries for the small-N comparative design in Part III that is combined with within-case methods (i.e., pattern matching). There, the focus is on more novel challenges in legislatures and courts to the harms of pornography that go beyond existing laws. The potential in existing legal architecture as analyzed in this part will hence serve in the next part as a complement to the democratic theories presented previously in chapter 4. This combined theoretical backdrop will be subjected to analysis in Part III in terms of its predictive capability of “policy output”—for example, legislation or case law. The theories will also, with regard to production harms, be assessed as to how well they predict “policy outcomes”—for example, changes in sexual exploitation, gender-based violence, and population attitudes to it, to the extent the evidence permits drawing conclusions on such outcomes (see 24–28 above, on the distinction between policy output and outcomes).

Constitutional History: Canada, Sweden, United States

Substantial parts of the U.S. Constitution were drafted domestically and put in place by the end of the 18th century. In contrast, Canadians were until 1982 dependent on the British Parliament to amend their domestic constitution. Before this point in time, the Canadian judiciary had been “inclined” to defer to legislators on federal and provincial levels, following judicial restraint rather than judicial activism. Moreover, the Judicial Committee of the Privy Council in London, U.K., was the site for final appeals of constitutional issues in Canada. This situation shifted dramatically when the Canada Act of 1982 was passed, and the British authority ended. After years of negotiation, a Charter of Rights and Freedoms was passed and ratified that year. The Canadian Supreme Court’s case-load “almost quadrupled” in the first 10 years of the Charter, and constitutional activism in courts took a similar shape as in the United States. The Charter remains fraught with some unsolved conflicts although these do not appear to impinge on the subjects of this dissertation.

Sweden has the longest history of a liberal constitution among the three, ranging from the 18th century when the first Freedom of The Press Act passed 1766 as a part of the country’s constitution’s “fundamental laws.” Neither the French nor American revolutions had yet occurred. At that time, Sweden was regarded as having one of the most liberal laws on freedom of expression in Europe, but during its early years it became subject of several modifications and occasional infringements.Independent judicial review in Sweden has played a limited role, relatively speaking. The reason is likely in part due to a constitutional clause in the Instrument of Government that until January 2011 imposed a very strict standard of review for when parliamentary or other government-approved provisions could be judicially invali-
dated: essentially, a successful judicial challenge had to show that a legal error was “manifest” to invalidate parliamentary legislation. (Review of legislation from lower government bodies was more relaxed.\textsuperscript{672}) A law that presumably was “manifestly” violating constitutional rights would rarely have passed the many procedural checkpoints already existing in the legislative process, even though it could sometimes do.\textsuperscript{673} The provision as such was repealed in 2011. So far, many political and other actors in Sweden seem to have deemed it more efficient to influence legislation for constitutional consistency by lobbying the Parliament than using the courts for this purpose. In this regard, North America is a more “litigious culture,” and is popularly perceived as such.

As will be further shown in this part, freedom of expression in Sweden appears more codified than in it is in Canada or the United States, where somewhat similar doctrines are found in case law (such as various “tests” and levels of “scrutiny” for different categories of expression). As the United States is a federal constitutional democracy with a stronger separation of powers between its legislative, judicial, and executive branches than Sweden (a unitary state), the legal framework governing regulation of expression is found more clearly within case law than in statutes, as it is in Sweden. American and Canadian case law opinions thus illustrate many of the key conflicts in this area more clearly than their Swedish counterparts do, which is also probably related to the adversary proceedings in courts compared to the more compromise-seeking discourses found in Swedish legislative documents. Although there are numerous and elaborate judicial opinions on these issues in the United States and Canada, in Sweden similar controversies have often been resolved during legislative deliberations, though not always so. In addition, Sweden’s democracy is a multi-party parliamentary system with proportional representative elections using party lists. It has one unicameral legislature from where the prime minister is drawn; the prime minister then appoints the executive government cabinet that becomes responsible to the Parliament. Compared to the procedural formalities characterizing a court, Swedish legislative deliberations may thus from time to time be conducted behind “closed doors,” due to the discretionary nature of contested issues—a situation compelled also by an often heterogeneous multi-party context where government is built upon compromises.

Many examples illustrating key concepts in liberal democracies and their historical roots will be drawn from the comparatively long history of U.S. jurisprudence, but to some extent also from the structure of Swedish law, which similarly illustrates key liberal conceptions of rights and freedoms. Many exceptions to the liberal approach will, however, be illustrated from the Canadian more overt balancing approach. Obscenity law, being an important subcategory of pornography regulation, originates from British obscenity laws (see further below); thus, Canada and the United States share some historical background to their regulative frameworks. Sweden, on the other hand, repealed major obscenity statutes in 1970, although retaining some elements in other provisions, or in more recent forms of pornography regulations. The law of obscenity will, in part for these reasons, not be exemplified as much from Sweden as from the U.S. law. Similarly, Canada has developed an internationally novel equality and harm-based approach to its distinctive obscenity law, in part due to its comparatively different constitution, but also in part due to different historical statutory developments and novel language of its law. Since at least


\textsuperscript{673} Of course, some international obligations, mainly under the European Convention on Human Rights and through Sweden’s membership in the European Union (EU), have modified this situation slightly.
1982, Canada’s obscenity law has been used as a vehicle for legally challenging pornography as a form of harmful sex discrimination to women and sex equality, as well as to men in a same-sex context (see chapter 11 below). Canada’s law is thus markedly different from the U.S. law or older Swedish law, which are (or were) more typical obscenity laws. For these reasons, the British legacy and U.S. obscenity law will be the primary focus in accounting for problems and potential with existing obscenity laws. For the same reasons, the substantive challenges to pornography under the Canadian obscenity law will not be fully discussed until later chapters on democratic legislative and judicial challenges, as it is not a traditional obscenity law in its approach. Some more recent developments moving in a similar direction as the Canadian law, but under the more traditional U.S. obscenity law, will also be covered in Part III as part of contemporary challenges, rather than in the chapters belonging to this part.

Obstacles and Potentials

Considering the empirical evidence previously reviewed, including the amount of exploitation of multiple disadvantages as well as the abuse directly involved in commercial sex (pp. 55–75 above), raises the questions of why existing laws against such practices have not been applied to stop them. One obstacle relates to the fact that production of most pornography literally feeds on social vulnerability among performers, who have been subjected to coercive circumstances such as early childhood abuse, poverty, or social discrimination (pp. 55–63, 72–75 above). Hence, although the typical “contract” in the sex industry may formally appear consensual, in reality it is not, or not meaningfully so; the overwhelming majority of persons in prostitution, whether in pornography or in other venues, are demonstrably in a situation with lack of real and acceptable alternatives but to submit to exploitation, even when they knowingly risk further abuse and serious harms (see generally 55–75 above). Ordinary laws appear ineffective against this exploitation of social inequality, which is the modus operandi of the pornography industry as well as of most forms of prostitution (see chapter 2). Bluntly put, and as prostitution survivors typically describe their experiences, one person in legal brothel prostitution said it was “‘like you sign a contract to be raped.’” Another said “[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, rape, violated.” A third explained that she “cried all the time” during her first six month in legal prostitution. Accordingly, prostitution has been described as paid rape by many prostituted persons, tricks, and observers alike. However, no prostituted persons can use a rape law in such circumstances when that law is premised on ostensive use of physical violence or threats, or which require evidence of such in order to legally establish nonconsent—a typical approach taken under many rape laws.

675 See, e.g., Giobbe, “Confronting Liberal Lies,” supra chap. 2, n. 198, at 121 (noting survivors described it “like rape”); Melissa Farley, “‘Bad for the Body, Bad for the Heart’: Prostitution Harm Women Even if Legalized or Decriminalized,” Violence Against Women 10, no. 10 (2004): 1100 (noting “survivors view prostitution as almost entirely consisting of unwanted sex acts or even, in one person’s words, paid rape”); Farley, “Prostitution & Cultural Amnesia,” supra chap. 4, n. 611, at 131 (quoting trick saying “[If you look at it, it’s paid rape”)
676 See generally MacKinnon, Sex Equality, supra p. 6 n.23, at 779–834 (discussing, inter alia, different degrees of requirements for a showing of violence, threats of violence, and similar forced conditions under various state rape laws in the United States).
For instance, the Swedish Criminal Code’s adult rape provision has until July 2013 been premised upon a showing of express force by assault, violence, or “threat of a criminal act,” with an exception only for persons being in a “helpless state.” Such terms imply a state of unconsciousness or mental disability. If prostituted persons can, say, negotiate the price, arguably they are not “helpless.” Nonetheless, evidence suggest that the overwhelming majority are sexually exploited under such compelling circumstances that roughly nine in ten want to leave prostitution, and two-thirds have posttraumatic stress disorder symptoms in the same range as battered women, refugees from state-organized torture, and treatment-seeking Vietnam veterans, with those prostituted in pornography showing higher symptoms than those who have been prostituted exclusively off-camer.a A number of additional studies show that time in prostitution significantly predicts PTSD without mediation from other factors (see 67–72 above), supporting the conclusion that prostitution itself causes an immense amount of harm to the persons used in the industry. Adult prostituted persons are nonetheless typically not seen as victims of rape under existing law—not in the routine occurrence of paid sex, but frequently also not when forced by violence and not paid. Most existing laws against sexual abuse or exploitation, such as rape laws, or laws against sexual coercion, torture, and assault have never been effective in the pornography setting either. The reason is that they were never intended adequately address the daily exploitation and harm the industry entails for persons used to produce pornography.

Pornographers and their apologists invoke the legal protection of freedom of expression for various reasons further to be illuminated (see esp. 214–225 below). Colloquially referred to as “the First Amendment flag” in the United States, the concept of expressive freedom has to date managed to invoke the ideological and cultural clout of modern enlightenment philosophy, including Milton and Mill (see chapter 7). Behind this forcefully resounding symbol of freedom ostensibly stands the authority of the key founding political struggles of the early modern western societies, as they purportedly did away with the arbitrary rule of despotism, inherited wealth, and irrational parochialism. Even the sympathetic narrative of the “left-wing” dissident often animates the defense of pornography by analogy, however questionable. For instance, the experience of the suppression of socialist speech during the Red Scare (1920s) and McCarthy-eras (1950s) in the United States has had a substantial impact on First Amendment doctrine that contributes to shielding pornography from accountability to its social consequences.

67 Brottsbalken [BrB] [Criminal Code] 6:1, paras. 1–2 (Swed.). From July 1, 2013, the statutory expression “helpless state” has been changed to a “particularly vulnerable situation.” Proposition [Prop.] 2012/13:111 En skärpt sexualbrottslagstiftning [A Strengthened Sexual Offenses Legislation] [government bill] at 6 (Swed.) (passed). Whether this wording change will facilitate a change in the application of the statute remains to be seen.

678 Farley et al., “Prostitution in Nine Countries,” supra chap. 1, n. 115, at 48 tbl.6 & 56; cf. Farley, “Legal Brothel Prostitution in Nevada,” 37. For more details regarding preconditions to prostitution and circumstances while there, see supra pp. 55–75 above.

679 Farley, “Renting an Organ,” supra p. 38, n.113, at 146 (finding that 49% of 802 prostituted women in nine countries reported being used by pimps or tricks to make pornography—a group diagnosed with statistically “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography without reaching the statistical ceiling effect reported for alternative factors such as childhood abuse or assault in prostitution); cf. Farley, “Legal Brothel Prostitution in Nevada,” 37 (when events in their lives triggered reminders of past trauma, the group who had pornography made of them reported statistically significant higher levels of emotional distress than prostituted persons who had not reported being used for pornography).

680 See, e.g., Waltman and MacKinnon, “Suggestions to Government’s Review” (Sweden), supra chap. 4, n. 613, at 22–29 (providing examples of rapes committed against prostituted women in Sweden but not recognized as such by courts).
Thus, pornographers and their supporters have successfully found support for sexually exploiting vulnerable populations under the most distinguished principles of contemporary democracy—principles mostly adhered to and rarely questioned in public. Existing laws and policies in modern democracies have been ineffective in addressing the substantial harms flowing from pornography production and consumption. With the partial exception of child pornography, the availability of most types of adult pornography is practically uncontrolled for anyone who is intent upon finding particular materials. Nonetheless, there are still notable differences in terms of policy output, such as what laws may be applied to production, distribution, or consumption in the different countries, though without further analysis, the trends are not always as clear as they might seem.

For instance, although Canada was thought of as a progressive leader in regulating pornography in the early 1990s for reasons explained further in Part III, more or less similar heterosexual pornography ruled criminal by the Supreme Court of Canada in *R. v. Butler* (1992) under its theoretically harm-based obscenity law is now legal by lower courts’ decisions: materials presenting women as sexually insatiable and constantly looking for sex with strangers, materials presenting men who repeatedly ejaculate into women’s mouths, and materials presenting a man verbally abusing a woman, then bending her backwards over a toilet while urinating into her mouth, furthermore “punishing” her when it overflows by scrubbing the toilet bowl with her head all the while she is “obviously not consenting,” according to the acquitting judge. However, a more recent appeals decision in 2012 from the province of Ontario enforced a stricter view against producing and distributing audiovisual as well as written materials that presented simulated sexualized lethal violence against semi-nude and nude women. Here, the view taken was that such acts did not amount to “victimless crimes” because “undue exploitation of sex and violence directed at women is a poison in our society. . . . It has become acceptable and increasingly graphic entertainment. It has the power to change our perceptions, our attitudes toward each other. It may even prompt us to act on these negative attitudes. And then to justify ourselves.”

The evidence from numerous experimental social science studies shows that both violent, degrading, and also ostensibly non-violent but degrading/dehumanizing materials of precisely these types litigated in Canada (e.g., women presented as promiscuous and constantly seeking sex) cause male consumers in particular to be more sexually aggressive against women and adopt more attitudes supporting violence against women such as “rape myths” (pp. 98–109, 115–118 above). Nonexperimental studies, for example, social surveys and qualitative research, corroborate the experimental studies, showing that male pornography consumption predicts more gender-based violence and attitudes supporting violence against women (pp. 44–48 above on the popular categories in supply and demand).

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681 See also supra pp. 44–48 above on the popular categories in supply and demand.
682 Factum of the Intervener LEAF ¶¶ 4–5, in *R. v. Butler*, [1992] 1 S.C.R. 452, *supra* chap. 4, n. 563, at 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).
109–116, 118–129 above). In other words, Canadian courts are still, if not always consistently, making decisions that in some instances promote, but in other instances deter gender-based violence and attitudes supporting violence against women, either by effectively legalizing or by criminalizing specific categories of pornography materials.

In the United States, obscenity law, which is still the existing legal tool for directly regulating distribution of adult pornography there, has been considered arbitrary, ineffectual, and is used increasingly seldom since the last 20 years. Some recent American obscenity convictions of high-profile pornographers exist as potential evidence to the contrary though. Alternatives to obscenity, such as “secondary effects” doctrines, appear tepid at best, and potentially harmful and politically divisive at worst. These laws zone, disperse, or otherwise regulate the time, place, and manner of sale or exposure to adult pornography based on non-obscene content-based classifications, but are evidently unable to reach the brunt of production and consumption harms, especially private consumption, which is to say, most consumption. Swedish laws regulating pornography are hardly different in any of the above respects, although they are constructed differently. Their constitutional foundation is similar but they use a different regulative framework. For instance, the criminal code contains provisions against the production and dissemination of violent pornography that contain less elements of obscenity and, according to its official legislative history, more explicit concerns for the negative influence on gender equality caused by such materials than does U.S. federal law on pornography. Sweden’s laws against sexual exploitation, that is, their prostitution and trafficking regulations, are markedly different from Canada and the U.S. laws though, further to be explained below. These laws contain unexplored potential for targeting production harms where real people are used, even under the present constitutional framework regulating expressive rights in Sweden. Nonetheless, in all these nations most forms of pornography, expressly violent or not, currently make their way to the market and to their audiences.


689 For further analysis of the secondary effects doctrines, see infra p. 224 et seq. For data on consumption patterns, see supra pp. 33–37.

690 See supra pp. 44-48 above on the popular categories in supply and demand.
6. Obscenity Law

[One man’s vulgarity is another’s lyric. Indeed . . . the Constitution leaves matters of
taste and style so largely to the individual.]

—Justice Harlan, U.S. Supreme Court (1971)

This chapter analyzes the obstacles and potential of obscenity law in addressing pornog-
raphy’s harms—for example, addressing its effect on gender-based violence, sexual
exploitation, and inequality as documented in chapters 1–3 above. The democratic theo-
ries on legal challenges to social dominance discussed in chapter 4 are used to further
evaluate obscenity law, which is a traditional form of regulation typical for many coun-
tries. I map the law’s cultural, social, and political roots in the British Commonwealth, as well as its conceptual development in the jurisdictions that are the focus of this dissertation from the seventeenth century and onwards. Al-
though traditional obscenity law is still predominant in the United States, in Canada
and Sweden pornography regulations do not conform to traditional obscenity ap-
proaches since the late twentieth century. These diverse jurisdictional conditions
are reflected in the dissertation’s comparative design (cf. Table 1, p. 24 above). Hence, the chapter draws mainly on primary sources from the United States and old-
er British case law—both being conceptually typical for obscenity law. Canadian
and Swedish materials are used to the extent that they complement key insights of
the analysis of obscenity law as a Weberian “ideal type.”

Origins and Legacy

Obscenity law has been the most common existing regulative framework for porno-
graphy in western democracies, and elsewhere as well. It has not been based on
recognizing sex inequality, exploitation, or sexual abuse, but historically aimed at
protecting morals of appropriate behavior and at countering dissolution of social

692 The Canadian law since the beginning of the 1980s is not a traditional obscenity law, but, by contrast
to the American obscenity law, a hybrid combining a harms-based equality perspective with a traditional
“contemporary community standards” test. Cf. infra chapter 11. Prior that that period, the Canadian judi-
ciary was “inclined” to defer to legislators, while final appeals of constitutional issues were settled in
London, U.K. See Newman, “Introduction,” supra chap. 5, n. 668, at 1–2. The Canadian law will be ana-
lyzed separately as a legal challenge in chapter 11. In Sweden, obscenity laws that were conceptually
similar to their Anglo-American counterpart were largely repealed in 1969, and as shown below have
only had a limited influence on other pornography regulations since then.
693 Weber, Methodology of Social Sciences, supra p. 21 n.64, at 90 (defining “ideal type”).
694 According to one observer, particularly the approach to obscenity taken after the British rule in R. v.
Hicklin, (1868) L.R. 3 Q.B. 360, has, “with minor local variations,” grounded the “legal approach to por-
nography from India and Australia, to the United States and Canada, to Kenya and Zambia.” Catharine A.
MacKinnon, “Pornography’s Empire,” in Are Women Human?, supra chap. 1, n. 127, at 113 (citations to
individual countries omitted).
structures by containing sexuality inside stable (heterosexual) relationships. Its Latin etymological roots refer to “ill-omened,” “adverse,” or off stage. What is obscene is often understood as “filthy or indecent,” or “repulsive,” “lewd,” “disgusting,” “foul,” “abominable,” “loathsome,” “inauspicious,” “offensive to the senses,” and the like. The word as such contains no lexical reference to the exploitation of women or anyone else, contrary to pornography, which is derived from the two Greek root words “writing, etching, or drawing” (graphos) and “whores” or “harlots” (pornē), who are almost exclusively women, as the latter’s etymology and cultural origins entails. While the word pornography retains a stigmatizing meaning to prostituted women (see 37–38 above), it nevertheless corresponds to how the contemporary sex industry exploits prostituted or other vulnerable persons to produce their materials (see 55–63, 72–75 above), by contrast to the traditional concept of obscenity, which ignores such inequality. Considering that criminal obscenity litigation in Canada and the United States, among other places, have been deployed to repress women’s reproductive and sexual autonomy by regulating birth control information, abortion, “women’s sexualities, alternative sexualities and dissident politics,” the discrepancy between the concept of obscenity and that of pornography appears symptomatic rather than coincidental.

Granted its use, the implicit purpose of obscenity law has been analyzed as control of materials that “makes male sexuality look bad.” In other words, obscenity is that which is also potentially subversive to male dominance. According to this analysis, pornography desired by expendable men to those in power, such as gay men, or materials promoting the viewing of men as sexual objects of coercion, will not be defended as easily by men in power. However, because of the diversity of interests among men, pornography regulation along such lines eventually appears not to have been without friction. Scholars have thus analyzed the more assertive attempts to defend pornography against obscenity charges in terms of an anxiety that one faction of men in power might (in the Madisonian or Lockean sense) restrict what another faction desires. Accordingly, in this light one may understand why accusations of relativism have often been made in the U.S. Supreme Court against the proposition implied in obscenity law that an audience may distinguish pornography from permissible expression: “Some like Chopin, others like ’rock and roll.’”

Most of the items that come this way denounced as ‘obscene’ are in my view...
trash.... But what may be trash to me may be prized by others.” 705 “What is one man’s amusement, teaches another’s doctrine.” 706 “What shocks me may be sustenance for my neighbor.” 707 Such tropes of relativism would, according to the “logic of factions,” be a means for some men to secure access to materials that may otherwise be disapproved of by other men. 708 In this light, each faction of men would protect their own sexual interests by protecting those of other men, whether they share those specific sexual interests or not.

Not surprisingly from the perspective of its historical legacy of interpretation, the early doctrinal British obscenity cases that subsequently influenced legal developments in the United States, Canada, and other Commonwealth countries, 709 did not primarily involve materials resembling the contemporary mass produced pornography materials, as implied in a contemporary standard psychology definition of pornography as “sexually explicit media that are primarily intended to sexually arouse the audience.” 710 In the early formative obscenity cases below, there are certainly few instances or elements of the contested materials that could be characterized as “the graphic sexually explicit subordination of women,” 711 or as “sexually explicit with violence [or] sexually explicit without violence, but dehumanizing or degrading,” 712 as compared with materials that are popularly demanded by pornography consumers today. 713 As shown previously in chapter 3, a triangulation of a massive amount of social science evidence collected with experimental and non-experimental quantitative methods as well as qualitative methods overwhelmingly shows that consumption of “subordinating,” “violent,” and “dehumanizing” materials perniciously cause normal men to behave sexually aggressively and to adopt more attitudes supporting violence against women, with particularly harmful consequences against vulnerable populations such as prostituted or battered women.

Early Developments

King v. Sedley (1663) 714 is regarded by some as the first “pure obscenity case,” 715 or at least “the first involving criminal obscenity under the common law.” 716 The case

705 United States v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 137 (1973) (Douglas, J., dissenting).


708 MacKinnon, “Not a Moral Issue,” 69–70 (“This is why the undefinability of pornography, all the ‘one man’s this is another man’s that’, is so central to pornography’s definition”) (footnote omitted).

709 Schauer, Law of Obscenity, supra chap. 1, n. 107, at 15–17 (discussing American law during the second half of nineteenth century, concluding that “in fact virtually every obscenity case of the time adopted the Hicklin [(1868) L.R. 3 Q.B. 360] definition of obscenity.” Id. at 15 (citations omitted)). See also MacKinnon, “Pornography’s Empire,” 113 (noting that the obscenity case of Hicklin virtually colonized pornography laws in many places over the world long after the British Empire’s decline).

710 Malamuth, “Pornography [Encyclopedia],” supra chap. 1, n. 131, at 11817.

711 Indianapolis, Ind. Code Ch. 16 § 16-3(q), invalidated in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).


713 See supra pp. 41–53 (analyzing research that describes popular contemporary categories of pornography in demand and supply).

involved a conviction of twenty-four-year-old Sir Charles Sedley of Kent (later a dramatist and known gay poet) and arose from events during in which he had gotten drunk with two friends. 717 His company had removed their clothes while, from a tavern’s balcony in London, they “pantomimed a series of indecent proposals” and “shouted indecencies to the passerby,” including with sexual content: they then urinated into bottles that were thrown at “a rapidly increasing” crowd below, causing a public riot. 718 According to some contemporary accounts, the case involved religious overtones as well, indicating Sedley’s “‘Eloquence’” in his sexual oration were also regarded as a “‘Blasphemy’”; yet these latter elements were not included in the law report. 719 Thus, the historical importance of the case seems to be that offending public morality and decency became “an element of an offence against the state” differentiated from “religious or political heresy.” 720 Sweden’s words for obscenity law and vice respectively, sedlighetlagstifning and oseldighet, may perhaps not coincidentally appear as derivatives from Sedley. The first four letters are the same, and their pronunciation differs marginally.

It is notable that Sedley did not concern graphic or written materials, but acts performed publicly that were regarded as repulsive, offensive, or indecent without the sexual content being the most prominent element. Even elements of violence were attributed to the successful conviction of Sedley (here spelled as Sidley) in a comment by Justice Powell in R. v. Read (1707), in which the court of the King’s Bench, contrary to the prior case, dismissed the prosecution: “As to the case of Sir Charles Sidley, there was something more in that case, than shewing his naked body in the balcony, for that case was quod vi & armis he piss’d down upon the peoples heads.” 721

The case of Read involved a publication of sexually explicit poems, The Fifteen Plagues of a Maiden-Head, where a maid lamented the lack of sexual activity as an unmarried. 722 As such, however harmless in comparison to 20th and 21st century pornography, the materials in Read were more consistent than the acts charged in Sedley were with the modern conception of pornography, to the extent one regards Read as more sexually explicit, or more as “primarily intended to sexually arouse the audience.” 723 However, even though one passage for instance read “For want of Bleeding by some skilful Man; Whose tender hand his Launcet so will guide, That I the Name of Maid may lay aside,” 724 and although unmarried women are presented as constantly looking for sex with men throughout the fifteen poems, such statements hardly amount to “graphic sexually explicit subordination of women, . . . in words, that also includes . . . [women] presented as sexual objects for domination,

722 See Gerber, Sex, Pornography & Justice, 56–64, where the poems are reprinted in full.
723 Malamuth, “Pornography [Encyclopedia],” supra chap. 1, n. 131, at 11817.
conquest, violation, exploitation, possession, or use.” Neither the quoted writings nor elsewhere in *The Fifteen Plagues* contains “graphic” or “sexually explicit” presentations. Such a harm-based pornography definition cannot persuasively be applied to the *Plagues*, contrary to more modern materials in supply and demand on the market.\(^2\)\(^2\)\(^5\)

The concept of harm as we know it, such as consumption effects that cause sexual aggression and attitudes supporting violence against women (see chapter 3 above), was not the concern of early successful obscenity prosecutions. Rather, where prosecution involved materials with written sexual content, as opposed to *Sedley*, such presentations often appeared as a pretext for political or religious charges. One such important case was *R. v. Curl* (1727).\(^2\)\(^7\) A London book publisher named Edmund Curl (spelled *Curll* by some sources) was charged for publishing a translation from French of *Venus in the Cloister or the Nun in her Smock*, which has been described as “an anti-Catholic tract” presenting detailed and explicit sexual acts and conversations between nuns in a convent.\(^2\)\(^8\) *Venus in the Cloister* was convicted by a court majority explicitly because they thought it tended “to corrupt the morals of the King’s subjects,” additionally mentioning that an act against “religion” or “morality” could be “against the peace of the King.”\(^7\)\(^2\)\(^9\)

Not surprisingly, indicating the substantive reason for why *Venus in the Cloister* became a matter for prosecution, one observer in 1965 claimed that similar materials without the “religious overtones” regularly “passed unnoticed.”\(^7\)\(^3\)\(^0\) Converging with this observation, another scholar in 1995 points to obscenity’s connection with “blasphemous libel” during the eighteenth century, noting that “the few cases involving obscene libel retained a religious aspect in some way; a merely indecent publication did not warrant a prosecution for obscene libel.”\(^7\)\(^3\)\(^1\) Although in order not to make hasty conclusions in this particular case, one should also consider that the tract was directed against Catholicism rather than against the Church of England. This fact prompted a scholar in 1976 to suggest that the reason for prosecution was rather Curll himself, allegedly a “constant source of political irritation.”\(^7\)\(^3\)\(^2\) One also wonders, as has been suggested by others above, whether the so-called lesbian convent context appeared as challenging to heterosexual norms, and as such was an additional source of irritation to men in power, or the power of men.\(^7\)\(^3\)\(^3\) In any event, most scholars would likely agree that *Curl* established more strongly obscenity as “an independent crime” regardless of its underlying causes,\(^7\)\(^3\)\(^4\) or, according to an additional observer’s plain analysis, that the effects of *Curl* had “placed the respon-


\(^{726}\) See *supra* pp. 44–48 on the popular categories in supply and demand, and pp. 101–109, which analyze experimental consumption harm research in light of different conceptual categories such as Check’s three-pronged classification (violent, dehumanizing, erotic) and the Indianapolis ordinance’s “graphic sexually explicit subordination.”


\(^{729}\) *Curl*, 2 Strange at 789, 93 E.R. at 851.


\(^{731}\) Levy, *Blasphemy*, 308.


\(^{733}\) Cf. MacKinnon, “Not a Moral Issue,” 68 (“Re-examining the law of obscenity in light of the feminist critique of pornography . . . it becomes clear that male morality sees that which maintains its power as good, that which undermines or qualifies it or questions its absoluteness as evil.”).

sibility for public morality in the hands of the judiciary.” Yet as will be further discussed, under obscenity laws this responsibility for “public morality” has not included any substantial concern for populations documented to be harmed by pornography. This becomes more evident also when looking at later developments, and should be considered when assessing to what extent obscenity law, as a legal framework, has the potential to recognize and represent such survivor perspectives and interests in legal challenges in democratic systems.

During the first two thirds of the nineteenth century many obscenity prosecutions were brought, and a growing number of obscenity statutes were passed, all while there was no legal definition of what obscenity was, apart from it being an offense against public morals, vaguely related to sex, and quasi-independent from religious and political heresy. Then the British rule in *R. v. Hicklin* (1868) came, which during most of the second half of the nineteenth century and partly beyond set the standard in England and had a significant influence in America of what was regarded as obscene. *Hicklin* defined obscenity as that which could potentially “corrupt the mind” among persons so predisposed: “[T]he test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.” The intent of the publisher was irrelevant to his/her liability.

From 1868 until 1957 American appellate courts “commonly applied” this test when reviewing appeals of convictions under state or federal statutes, but abandoned it during the later part of that period.

On the basis of its history and the scholarly analysis of obscenity law, it is perhaps not surprising that the convicted materials in *Hicklin* consisted of a booklet discussing issues such as whether women are “ever exempt from granting her husband’s request for sexual intercourse[,]” finding that a husband “should not demand it too carelessly, be drunk, make his request too often or immoderately.” Other questions raised were, for example, whether oral or anal sex were “always a mortal sin” or “always to be severely rebuked,” and whether there were times, places, and manners in which such acts as well as “touches, looks, and filthy words are permitted among married persons.” From a critical perspective on issues of male domi-

736 Compare Schauer, *Law of Obscenity, supra* chap. 1, n. 107, at 7 (arguing that during this time there was “little if any concern for precise definitions of the terms or application of the statutes, or for what constituted the common-law crime of obscene libel”), with Saunders, *Violence as Obscenity*, 104 (arguing that “Obscenity may have lacked a definition in the sense of the standard against which sexual depictions were to be measured, but it became clear in the era that the focus was on sex.”).
739 *Hicklin*, L.R. 3 Q.B. at 373 (Lord Cockburn, C.J.) (“I hold that, where a man publishes a work manifestly obscene . . . it does not lie in the mouth of the man who does it to say, ‘Well, I was breaking the law, but I was breaking it for some wholesome and salutary purpose.’”)
741 See Roth v. United States, 354 U.S. 476, 488–89 (1957) (remarking that although some courts adopted the *Hicklin* standard, later decisions rejected it).
742 The booklet was entitled “The Confessional Unmasked; shewing the depravity of the Romish priesthood, the iniquity of the Confessional, and the questions put to females in confession,” *Hicklin*, L.R. 3 Q.B. at 362, and raised issues concerning whether it was right for women to be questioned regarding their sexual life during the confession, and further discussed the topic. See, e.g., Gerber, *Sex, Pornography & Justice*, 81–84.
nance, sexual abuse, and pornography it makes perfect sense (if perhaps not in the publisher’s sense) to raise questions regarding sexual demands in marriage, whether foul vocabulary is appropriate (rather than permitted), and whether certain sexual practices might be “joined with danger of pollution.” Supressing such “speech” about issues such as inequality in marriage, and its association to sexual exploitation in private or in public, may appear contrary to what recognition of survivor perspectives in legal challenges against pornography’s harms requires (cf. pp. 154–168 above).

Considering that in the context of discussing Hicklin’s legacy, obscenity law has been analyzed as that which “prohibits . . . the public showing of sex that some men want to say they do not want other men to see[,]” one must ask whether the male judiciary here, apart from being occupied with dangers of depravity and immoral influence, simply did not want issues of marital rape, filthy words from intimate male partners, and immoderate spousal requests to be openly discussed in society? These are indeed issues that make “male sexuality look bad.” In reviewing the legal challenges to pornography presented in this thesis, it is necessary to analyze obscenity law for what it is, as well as facing the question why these laws are often still on the books in countries such as the United States, while fewer if any laws seem to exist against the harmful effects and production conditions of adult pornography. To what extent do such laws represent the perspectives and interests of survivors of pornography-related harms (e.g., gender-based violence and attitudes supporting violence against women) or the perspectives and interests of other more influential and conventionally respected segments of the general population? To what extent does this body of law have a democratic potential to represent the social consciousness of groups suffering the intersectional multiple disadvantages that are typically affected by consumption and production harms (e.g., child sexual abuse, poverty, sex and racial discrimination) and also legally challenge these social practices (cf. pp. 159–168 above)?

Development After the 19th Century

In modern times, obscenity, as defined, has been excluded from First Amendment protection in the United States, and similarly was regarded as an acceptable exception from freedom of expression in Pre-Charter (1982) Canadian law. Sweden’s primary obscenity statutes were abolished in 1970—that is, laws against “offending discipline and morality” (sårande av tukt och sedlighet)—after they were criticized in part for being applied asymmetrically in various jurisdictions during the 1960s; uniform case law did not exist in part because an acquittal by jury in the first instance could not be appealed in higher courts in obscenity prosecutions.

745 The Confessional Unmasked, reprinted in Gerber, Sex, Pornography & Justice, 82–84 (quotation at 84).
749 R. v. Prairie Schooner News Ltd., [1970] CarswellMan 76 ¶ 51. 75 W.W.R. 585 (Man. C.A.), (“Freedom of speech is not unfettered either in criminal law or civil law. . . . It does not serve as a shield behind which obscene matter may be disseminated”)
750 Proposition [Prop.] 1970:125 Kungl. Maj:ts proposition nr 125 med förslag till ändring i tryckfrihetsförordningen m.m. [government bill] at 79 (Swed.).
751 Id. at 69.
The concept of obscenity is nonetheless still retained in Swedish prohibitions against publicly exhibiting, mailing, or otherwise furnishing unsolicited “pornographic pictures” (but not disseminating such for private consumption) that are “apt to result in the public being offended”—the short-term offense being “unlawful exhibition of pornographic pictures,” where an offender is liable to fines or imprisonment up to six months. The statutory wordings appear to communicate intent to suppress expressions that are offensive, which is close to the Latin etymological roots of obscenity, for example, “ill-omened,” “adverse,” “off stage,” as well as synonyms such as “offensive to the senses,” “repulsive,” “lewd,” and the like. The regulation is similar to U.S. law that also permits consumption of obscenity in private, and it may also be seen as a form of “time, place, and manner” regulation of pornography dissemination with similarities to American “secondary effects” doctrines that do not target consensual exhibition of adult pornography for private consumption.

The legislative history of the Swedish prohibitions against unlawful exhibition of pornography contains further elements of the obscenity concept. For instance, the legislative intent was to prevent people from being forced to encounter such pornography that “according to a more widespread opinion may be perceived as offending to morality or offensive to feelings of decency.” Further, as defined in the Swedish legislative history, the legal term “pornography” does not recognize that it harms or subordinates by promoting sexual aggression and attitudes supporting violence against women, nor by sexually exploiting vulnerable populations: “A pornographic image is understood as an image that, without harboring any scientific or artistic values, depicts a sexual motif in a revealing and provocative way.” Even the producer’s intent is given more weight than the harms of pornography: “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, for example, artistic, it is not considered as pornographic.”

The Swedish pornography definition in legislative history is clearly inadequate in light of democratic theory, which suggests that to successfully challenge social practices of dominance, it is imperative to recognize and represent the perspectives and interests of the particular groups that are subordinated (pp. 153–168 above).

Sweden later passed laws against violent and coercive pornography in 1987. Compared with the Canadian obscenity law against dehumanizing, degrading, and violent pornography that was judicially upheld in part by concerns for sex inequality, the Swedish legislative history rationalizes the law against violent and coercive pornography in similar terms: it was recognized that women are “commonly depicted” in a “grossly offensive and dehumanizing way” in such materials—the government thus concluding that it “had to be obvious” that this pornography negatively

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752 See Brottsbalken [BrB] [Criminal Code] 16:11 (Swed.); see also Tryckfrihetsordningen [TF] [Constitution] 6:2 (Swed.) (corresponding constitutional amendment).
753 See supra notes 696–698 and accompanying text.
755 See infra pp. 224–265 (discussing permissible exceptions to the doctrine of “content neutrality”).
756 Prop. 1970:125 [gov’t bill], supra note 750, at 71 (Swed.).
757 Id. at 79–80.
759 BrB [Criminal Code] 16:10c (Swed.); see also TF [Const.] 7:4 ¶ 13 (Swed.) (containing constitutional amendment required for criminal laws regulating expression that is interpreted as an “offense against freedom of speech” rather than “unprotected speech”). For Sweden’s constitutional architecture regulating expression, see infra pp. 227–239.
affects boys and adult men’s view of women. Furthermore, the legislative history stated that “society’s efforts in various ways to promote equality between the sexes are countered by the fact that these materials may be freely disseminated.” In practice, this law against violent pornography is constrained by a number of procedural obstacles under Sweden’s constitutional framework that are not untypical for liberal expressive regulatory regimes, as further discussed in chapter 7 (pp. 225–233 below). By comparison, no U.S. law by its terms restricts dehumanizing or violent/coercive adult pornography outside, or significantly within, the limits of federal obscenity doctrine under the First Amendment, nor outside other existing U.S. regulatory frameworks such as time, place, and manner, or “secondary effects” doctrines, even though a narrowly tailored law to that effect appears constitutionally permissible if based on the legitimate interest to combat empirical evidence of harm (see chapter 7, for further arguments).

The exceptions for obscene materials under freedom of expression guarantees in Canada and the United States, and in Sweden (mostly before 1970), seemed to make it possible to restrict dissemination of pornography. Considering its relatively strong focus on religion or politics rather than sexually explicit materials in the obscenity law’s early foundational cases (see 190–194 above), it is perhaps unsurprising that the breath of obscenity laws could also sometimes harbor charges against potentially literary or artistic works, medically oriented information, or coarse but non-sexual language. Attempting to refine and tighten the concept of obscenity while observing that it had been sweeping in its reach, the U.S. Supreme Court in Roth v. United States (1957) rejected the Hicklin test from 1868 because it had enabled “judging obscenity by the effect of isolated passages upon the most susceptible persons,” as opposed to judging obscenity according to “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” According to the Court in Roth, their new standard had allegedly been “substituted” for Hicklin in many courts already at the time, and was said to provide “safeguards adequate to withstand the charge of constitutional infirmity.”

Roth notwithstanding, obscenity law continued infirm; observers note that in its wake came not only “years of litigation resisting attempted censorship of literary works that offended the establishment,” but also “an unprecedented increase in the availability of pornographic materials and a concomitant Supreme Court liberalization of obscenity standards.” This was seen among other things in the increasing requirements to qualify the application of the law added by the Court, in practice enabling increased legal protection to pornographers, distributors, consumers, and their materials. For instance, all adult pornographic materials are initially presumed

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761 Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] at 102 (Swed.).
762 Id.
763 See, e.g., Schauer, Law of Obscenity, supra chap. 1, n. 107, at 16–29 passim (exemplifying a diversity of applications from Hicklin to the 1950s).
765 Id. In the case of Sweden, the domestic pornography industry apparently had started to expand already before the obscenity laws were formally repealed. See Klar Anberg, Motsätningarnas marknad: Den pornografiska presseens kommersiella genombrott och regleringen av pornografi i Sverige 1950–1980 [A Market of Antagonism: The Commercial Breakthrough of the Pornographic Press and the Regulation of Pornography in Sweden 1950–1980], Umeå [Univ.] Studies in Econ. Hist. no. 42 (Lund: Sekel Bokförlag, 2010).
766 MacKinnon, Sex Equality, supra p. 6 n.23, at 1339 (citation omitted).
767 Downs, New Politics, supra chap. 4, n. 557, at 14.
768 See, e.g., 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,
non-obscene in the United States, which means that there always has to be a judicial determination before law enforcement may seize particular materials.\footnote{See Stanley v. Georgia, 394 U.S. 557, 564–65 (1969) (holding obscenity possession protected in privacy of home). \textit{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 returning foreign traveler’s materials not prohibited); United States v. Orito, 413 U.S. 139, 143 (1973) (holding \textit{Stanley’s} privacy-zone not controlling “once material leaves [home], regardless of a transporter’s professed intent”); Unites States v. Extreme Associates, Inc., 431 F.3d 150, 161 (3rd Cir. 2005) (holding that “Internet is a channel of commerce covered by the federal statutes regulating the distribution of obscenity,” and upholding decisions in \textit{Thirty-Seven, Orito, and Reidel, supra}, against a challenge in a district court that had attempted, inter alia, a privacy-analogy between obscenity and consensual homosexual conduct, stating in response to lower courts that “obscenity do not violate any constitutional right to privacy. \ldots Lawrence v. Texas [sodomy case] represents no such” departure), \textit{cert. denied} 547 U.S. 1143 (2006); \textit{cf.} United States v. Little, 365 Fed. Appx. 159, 162, 166 (11th Cir., 2010) (holding that Miller v. California, 413 U.S. 15, 24 (1973) remains the standard obscenity test regardless of medium, at 162, and “a local community standard is still proper,” as opposed to “a national or Internet standard,” at 166).} Furthermore, possession of obscenity is protected in the privacy of home, thus government action is restricted to the public sphere (e.g., mailing, customs, and Internet).\footnote{\textit{Roth v. United States,} 354 U.S. 476, 484 (1957).} Thus, neither \textit{Roth} nor its progeny stopped the trend of charging literature and artistic works, nor did it stop materials evidently harmful to sex equality. The reason, as elaborated below, was in part that its key elements—of which many, even most, for example, the “average person,” “contemporary community standards,” “prurient interest,” “taken as a whole,” and the discussion of social value per se are still “good law”—were too vague, difficult to define, problematic to apply systematically, or even counterintuitive, if the intent was to stop the pornography’s harms.\footnote{\textit{Schauer, Law of Obscenity, supra} chap. 1, n. 107, at 43.}

Regarding the concept of social value in obscenity law, it is notable that although \textit{Roth} additionally defined obscenity as that which is “utterly without redeeming social importance,”\footnote{\textit{Jacobellis v. Ohio,} 378 U.S. 184, 191 (1964).} this part was not a requisite element of the “test” of obscenity at the time of the decision.\footnote{\textit{Jacobellis v. Ohio,} 378 U.S. 184, 191 (1964).} However, since it had been expressed previously as \textit{dictum}, it is not surprising that subsequent decisions in 1964 entered it into the test, effectively protecting materials with “any other form of social importance.”\footnote{\textit{Jacobellis v. Ohio,} 378 U.S. 184, 191 (1964).} Furthermore, in 1966 it was held that lower courts had erred when, for example, stating that materials “need not be ‘unqualifiedly worthless before it can be deemed obscene,’” and for this reason any “book” was protected “unless it is found to be \textit{utter-}

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ly without redeeming social value,” as the court explained in Memoirs v. Massachusetts (1966).775 Anyone familiar with basic literary criticism would acknowledge that one may persuasively argue that there is at least “some” social value even in work appealing to prurient interest or being otherwise offensive. Indeed, seven years later in Miller v. California (1973), a majority of the Court remarked that an “utterly without redeeming social value” test imposed “a burden virtually impossible to discharge under our criminal standards of proof.”776 But even granted that material “taken as a whole” that is otherwise obscene may have other value, feminist scholars have consistently asked why that value per se should outweigh the interest in preventing documented sexual abuse and subordination of women’s social standing resulting from consumption and production of such materials.777 Certainly, it is not impossible to contend that many materials that have harmful effects may have other social value. Neither Roth nor Miller addresses this issue.

Miller came about in part due to a change of the composition of the U.S. Supreme Court in 1973 from its 1966 membership, with 3 new Justices on the bench. In an attempt to, according to one observer, “end case-by-case obscenity adjudications,”778 the Court now expressing the view that “there are legitimate state interests at stake in stemming the tide of commercialized obscenity,”779 eight obscenity decisions were handed down in June.780 Among them was Miller, where the Court managed to “forge”781 a majority of five Justices for the first time since Roth in 1957 to spell out a new definitional test of obscenity:

The basic guidelines for the trier of fact must be: (a) whether “the average person, applying contemporary community standards” [quoting Roth] 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. We do not adopt as a constitutional standard the “utterly without redeeming social value” test of Memoirs v. Massachusetts, 383 U.S., at 419.782

This test, still largely intact in the United States, did not manage to stem the growing pornography market, nor resolve previous ambiguity and application problems. Rather, following Miller, obscenity prosecutions have increasingly diminished in numbers over the years,783 in effect eroding the few obstacles deterring pornographers in their search for more profits, particularly by making more extreme and violent materials that attract what research now suggests is an even more desensitized and potentially growing market of male consumers.784 The next section will discuss why the Miller framework has been difficult to apply.

778 MacKinnon, Sex Equality, supra p. 6 n.23, at 1339.
780 Schauer, Law of Obscenity, supra chap. 1, n. 107, at 45.
781 Downs, New Politics, supra chap. 4, n. 557, at 17.
783 See supra note 561, for citations to works discussing and documenting declining obscenity prosecutions.
784 Consumption has been proven to desensitize consumers to demand more extreme and aggressive materials, such as ass-to-mouth or violent materials. Supra pp. 50–51. The popularity of such materials is
Conceptual Problems

A central element in the Miller-definition of obscenity is the appeal to prurient interest. Courts have tended to interpret prurience in terms of inappropriate, shameful, unhealthy sexual interest as opposed to “normal, healthy sexual desires.” The term prurience, similarly with the concept of obscenity generally, is insensitive to whether what is regarded as “normal” sexuality is harmful to women’s status in society. As the empirical evidence now shows (pp. 41–53 above), to a large extent pornography sets its own social standard for what is regarded as “normal,” partly by desensitizing consumers and moving them to demand more “extreme,” aggressive, and dehumanizing materials, including ass-to-mouth, deep throat, multiple entry “gang-bangs,” sexual torture and “snuff” materials (sexual violence explicitly intending to harm). This is a trend corroborated by experimental psychology methods as well as by content analysis of popular types of materials in demand (ibid.). To the extent pornography succeeds in changing social standards, prurience as an efficient legal concept to fight the harms of pornography becomes less meaningful. Moreover, similarly as the patently offensive element, prurient interest focuses on observers rather than on what is harmful to the ones victimized, implying the harm of pornography can be avoided by its victims “averting their eyes or not listening.”

Although other considerations of harm could also be part of the obscenity concept, as they are currently understood under the Canadian obscenity law that aims to counter the dehumanization and sex inequality promoted by pornography, a comparison with obscenity as understood in Sweden in 1969 illustrates how the observer focus in concepts such as “offensiveness,” when becoming prominent rather than a secondary concern, erodes the law’s empirical and legal rationale. A young Swedish criminal defense lawyer, later rising to national fame in his profession, described how he defended a magazine with “sadistic pictures” against charges under the obscenity laws for being against “offending discipline and decency” (repealed in 1970) with the argument that the reader of such magazines are active in obtaining them, hence “is well prepared” for their content. Therefore, he claimed, it “is very difficult to believe that this purchaser/reader may himself feel offended in his discipline, also consistent with studies showing what categories are in demand on the market. Supra pp. 44–48. The evidence discussed previously, supra pp. 33–37, also shows that regular pornography consumption is prevalent among many men, with specific studies showing that a majority of young adult men reportedly consume it each month to varying degrees, occasionally or every day, and typically in solitude; by contrast, it is very seldom used by women unless initiated by partners or friends, and then on a much less frequent basis than among men. Supra pp. 33–37.

787 R. v. Butler, [1992] 1 S.C.R. 452 at 509–10, 89 D.L.R. (4th) 449 (Can.) (finding that an obscenity law that targets degrading or dehumanizing pornography promotes equality since it “seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other,” and is therefore saved by § 1 under the Charter against challenges under § 2(b) under the Charter in part because “the restriction on freedom of expression does not outweigh the importance of the legislative objective”); see also Little Sisters Book & Art Emporium v. Canada, 2000 SCC 69, [2000] 2 S.C.R. 1120, para. 60 (affirming that the equality rationale under Butler, also applies to same-sex materials, in part because “non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable.”).
788 Prop. 1970:125 [gov’t bill], supra note 750, at 79 (Swed.).
pline and in his decency.”789 Furthermore he and a co-author argued that if one “is offended in one’s discipline and morality, this is one’s private business.”790 One of the protected legal interests under Swedish obscenity laws seems actually to have been the male consumer himself, evident for instance when a government commissioned inquiry in 1969, apart from discussing evidence of harmful attitudinal and behavioral effects directed against others, additionally mentioned “traumatic” impressions and other harms caused by exposure per se, particularly among adolescents and children, but also among adults.791

The essence of the Swedish defense lawyer’s argument against obscenity laws was that decency is a private business, and according to these authors there were not sufficient evidence of harm to merit action on other grounds.792 However, by observing the importance of such evidence they indirectly admitted that if there were compelling evidence of harm, their arguments might be reconsidered. This line of arguments against “decency” exposes the vulnerability and lack of surface plausibility in the obscenity approach: Can one argue for a constitutional right to “decency,” just as one can argue for a constitutional right to equality, or a right not to be subjected to gender-based violence? To my knowledge, there exists no “human” or constitutional “right” to either a private or public “decency.” By contrast, there exist ample constitutional guarantees as well as international laws against sex discrimination and against gender-based violence, some even defining pornography as a form of, or a contributor to, gender-based violence.793

Assuming that it is preferred that legal language reflects legitimate interests and is not archaic, rather being consistent with social evidence and imperatives, terms such as “prurience” and “patently offensive” are not adequate for a law intending to fight gender-based violence and sexual exploitation—empirically documented harms of pornography (chapters 2–3 above). Accordingly, concepts such as “offending discipline and decency” do not by themselves suggest that the legally protected interest would be to prevent productions harms where persons are exploited in the sex industry, or to prevent consumption harms where persons are being negatively affected by changing behaviors and attitudes among consumers. Nor do these concepts suggest that the legislative intent would be to fight pornography’s influence on society’s tolerance for women’s subordination that can be more reinforced by gender-based violence and female sexual exploitation.794 Similarly, “prurience” and “offensiveness”

789 Leif Silbersky and Carlösten Nordmark, Såra Tukt och Sedlighet: En debattbok om pornografin [Offending Discipline and Morality: An Opinion Treatise on Pornography] (Stockholm: Bokförlaget Prisma/RFSU, 1969), 26 (section written by Silbersky); cf. ibid., 185 (with co-author) (“Court after court holds that purchasers of these pornography papers are prepared to, or even want to, become offended in their discipline and morality. Other courts take the view of the same purchasers that they must be protected.”). His arguments were not accepted in his own case, but sadistic materials of more grave nature were allegedly acquitted in later decisions according to his account of contemporary events. Ibid., 25–26.
790 Ibid., 184.
792 Leif Silbersky and Nordmark, Tukt och Sedlighet, 186–87.
793 See supra notes 554–556 and infra notes 1596–1599 and accompanying text.
794 For instance, the cultural associations of widespread legal systems of sexual exploitation in prostitution with third parties in brothels was inquired in a social survey comparing undergraduate men in California, Iowa, Oregon, and Texas (n = 783) with similar young men in Nevada (n = 131) (brothels were operated legally by third parties in ten among Nevada’s seventeen counties at the time, see supra note 192). Melissa Farley, Mary Stewart, and Kyle Smith, “Attitudes toward Prostitution and Sexually Coercive Behaviors of Young Men at the University of Nevada at Reno,” in Prostitution in Nevada, ed. Farley, supra chap. 1, n. 128, at 173–80. The Nevada men not only consumed more pornography, but also adhered to attitudes supporting violence against women and endorsed prostitution to a significantly higher extent than the men from California, Iowa, Oregon, and Texas did. Ibid., 176–79. While offering predictive data, not causal evidence, the study nonetheless imply that places with legal prostitution can de-
as concepts appear too remote from what is empirically at stake when regulating adult pornography, such as preventing sexual aggression and attitudes supporting violence against women caused by its consumption (pp. 98–122 above), especially against vulnerable groups such as persons who are trapped in the sex industry due to lack of alternatives for survival or in domestic abuse (see 122–129 above). These preventive legal objectives do not appear vague, but compelling. In contrast, the term “prurience” and other elements of the Miller-test by themselves have been shown highly difficult to apply for persons supposed to practice law, even given their presumed objectives.\textsuperscript{795}

The relativism of Miller’s prurience-element is underscored by the method with which it is to be judged: the contemporary community standard of tolerance—a principal method for adjudicating obscenity law in both the United States and Canada\textsuperscript{796} as well as in Sweden at the time its obscenity statutes were still on the books, where the law’s objective was concerned with materials “offending to feelings of sexual decency” and was to take “consideration to the values that at each time are predominant in society.”\textsuperscript{797} When repealing a predominant part of these Swedish laws, a government bill noted that the “values” that are “predominant in society” are “obviously changing and have, during later years, been characterized by an increasing tolerance. It is a dubious task for prosecutors and courts, seeking to assess whether a presentation falls within or outside the ambit of criminal law” (Prop 1970:125 p. 66). It was further conceded that case law regarded presentations “as offending to decency” if they were it “sadistic or brutalizing” (\textit{id. at 66}) at the time. Nonetheless, some obscenity laws were arguably retained in the Criminal Code, even if the rhetoric of “discipline” and “decency” were toned down; other regulations were also passed a few years later against the production or dissemination of sexually violent or coercive materials that more clearly recognized the imperative to prevent dehumanization and the negative effects to gender equality.\textsuperscript{798}

However, whether in the Swedish or Anglo-American tradition, the concept of contemporary community standards is indifferent to whether a community tolerates subordination of women through pornography or not; if the object is to combat sexism it does not matter if the person applying this test is an “average person” (under Miller) or not if his or her community is sexist. In Canada, for instance, federal law prohibits 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.”\textsuperscript{799} This law has on its face not been interpreted gender-neutrally,\textsuperscript{800} but recog-
nized the problem of obscenity as being associated with “dehumanizing” treatment, including in gay materials. Nonetheless, the law is still ambiguously governed by the community standard of tolerance test in the sense that “courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.”

In effect, this has meant that if the community tolerates that harm “flows,” there is no legal remedy to those victimized. Different provincial courts in Canada have made substantively different interpretation of these laws, with opinions referring to the community standards while considering materials that have similar if not reversed levels of violence and degradation relative to the legal outcomes. Such a situation is not unlike Sweden’s in the 1960s when its government thought it was “a dubious task” for prosecutors and courts to interpret the community standards test, and noted that obscenity laws were applied asymmetrically in various jurisdictions when acquittal by jury could not be appealed in higher courts (Prop 1970:125 pp. 66, 69).

Equality and Democracy

As the empirical evidence suggests pornography sets its own standard of tolerance by desensitizing consumers and moving them to demand more “extreme,” aggressive, violent, and degrading presentations—materials that are made by unsafe methods of production, such as ass-to-mouth or multiple entry gang-bangs (pp. 41–53 above)—the obscenity framework appear as an unsound method of judging the harmfulness. One may ask why those social groups vulnerable to men’s increased propensity to behave sexually aggressive and to adopt attitudes supporting violence against women after having consumed pornography (pp. 98–129 above) should accept “community standards” simply because the community does so. Should those persons who are regularly exploited or abused to produce such unsafe materials, typically due to their social vulnerability and lack of alternatives for survival (pp. 55–

as, for example, the physical or mental mistreatment of women by men, or, what is perhaps debatable, the reverse.”).

See Little Sisters v. Canada, 2000 SCC 69, [2000] 2 S.C.R. 1120 ¶ 60 (holding that “[t]he potential of harm and a same-sex depiction are not necessarily mutually exclusive. Portrayal of a dominatrix engaged in the non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable. Parliament’s concern was with behavioural changes in the voyeur that are potentially harmful in ways or to an extent that the community is not prepared to tolerate. There is no reason to restrict that concern to the heterosexual community.”)

See further chapter 11 for an analysis of these legal challenges.

See, e.g., R. v. Price, 2004 BCPC 103, [2004] B.C.J. No. 814, CarswellBC 895 (Prov. Ct. Crim. Div.), where a judge found “strong evidence simply from the content . . . by which [one] may infer a risk of harm,” id. ¶ 88., but nonetheless held that evidence of the widespread availability of similar materials “to the general Canadian public either through theatres, video stores, well known book stores, public libraries or broadcast by cable television companies” id. ¶ 97, entailed “a reasonable doubt that the contemporary Canadian community would not tolerate other Canadians viewing [such materials] . . . on the basis that harm would flow from [them],” Id. ¶ 100. This case was never appealed. A more recent appeals decision in 2012 from the province of Ontario, however, convicted a producer and distributor of audio-visual as well as written materials that presented simulated sexualized lethal violence against semi-nude and nude women, but contained possibly less violent and degrading presentations than in the case of Price. See supra note 686 and accompanying text. In the Ontario case, the view taken was that such pornography “is a poison in our society.” R. v. Smith, [2002] CarswellOnt 6125 ¶ 31 (Super. Ct. J.) (mentioning community standards at ¶ 13), aff’d with modifications, 2012 ONCA 892, [2012] CarswellOnt 15792, 104 W.C.B. (2d) 864 (C.A.) (referring to community standards at ¶¶ 11, 29, reducing penalty slightly at ¶¶ 38–44).
accept a community standard that de facto legitimates abusive producers? Does the relative number of people supporting the standard make it more legitimate? For prostituted persons, children, or others particularly vulnerable to gender-based violence, there are compelling interests of promoting their equality in society and making democracy represent their perspectives that would suggest not accepting such a standard.

Adjudicating the community standards relies on public deliberation at some point, such as accepting or rejecting practices that the community as a whole is prepared or not prepared to “tolerate.” The implicit theory underlying this concept appears to be a lower-level deliberative procedure that shares features of democracy that are criticized across the board—by Madisonian right-wing liberals for lacking the necessary restraints and checks and balances of abuse of public power, and by political philosophers such as Iris Marion Young for easily adopting the perspectives and interests of the dominant groups over those socially more disadvantaged (chapter 4 above). The democratic theories advanced by Young and Shapiro suggest that recognition and representation of the perspectives and interests of those particularly affected by the forms of social dominance associated with pornography should rather be imperative (pp. 153–159 above). A corollary is to grant these groups some form of veto or substantive representation in legislative bodies or judicial bodies that deal with pornography-related policies (ibid.). By contrast, a legal framework that regulates pornography on basis of the contemporary community standard seems to enable social dominance to continue unabated.

Weldon and Htun’s theories and empirical research of social movements suggest that the necessary knowledge needed to challenge a social practice of inequality that exploits and produce multiple social disadvantages, as pornography evidently does (chapters 2–3 above), will need to be based in the “oppositional consciousness” generated from organized movements among survivors or others who’ve been particularly affected (see 153–168 above). The concept of obscenity, its historical legacy, and its method of application, as shown above, entail virtually the opposite: obscenity law was evolved during a time when women, particularly African American women, were legally regarded more or less as property slaves and had no democratic rights. The laws were used to suppress religious, political, or cultural dissidents as much as being used for suppressing sexually explicit materials (pp. 188–194 above). The definition of actionable materials since then is still applied by assessing what the mainstream public opinion tolerates, not even necessarily including any recognition of the fact that the production and consumption harms are associated with gender-based violence and sexual exploitation (pp. 194–202 above). Such a contemporary community standard is invariably influenced more easily by the perspectives and interests of those groups with social power than by those groups who are socially disadvantaged, hence mostly affected by pornography’s harmful social practices of inequality.804

Nevertheless, applications of obscenity law could be put in the hands of those particularly affected, for instance by representing legitimate survivors in obscenity juries, among panels of lay judges, or in other criminal or civil authorities that are vested with the power to apply obscenity laws. If this was done on behalf of such social groups who might be affected by the production and consumption of pornography materials, even obscenity laws might harbor progressive potential. Such an approach is also supported by Mansbridge and Crenshaw’s theories, which stress the

804 Cf. Young, Justice & Politics of Difference, supra chap. 4, n. 571, at 183–91, esp. 183–86 (highlighting how a lack of recognition and representation of disadvantaged groups’ perspectives and interest in democracies tend to amplify those of more privileged social positions).
need for a “politics” of particular representation and recognition of the groups who are situated in the “intersection” among multiple disadvantages, thus are likely to be systematically subjected to exploitation in pornography production or likely to be subjected to systematic consumption harms (see 153–168 above). As recalled, many of these groups suffer from preexisting and sometimes multiple disadvantages of childhood sexual abuse and neglect, extreme poverty, periods of homelessness, other forms of gender-based violence, and/or discrimination based on gender, race, or other grounds (see 55–64, 72–75, 122–129).

With its vague definitions, preoccupation with that which is offensive, loathsome, and inauspicious and the like, obscenity laws have not proven very useful in stopping the empirically documented harm from pornography. Nonetheless, if repealing obscenity laws across the board, there might be even less inhibitions on the pornography industry to exploit persons to produce more extreme materials to satisfy what was previously shown is an increasingly desensitized, but nonetheless demanding market.\(^805\) It is therefore notable that there have been renewed U.S. federal efforts during the twenty-first century to use obscenity law against producers of particularly violent, degrading, and misogynistic adult pornography (see 355–363 below). For instance, as a federal prosecutor who testified in a congressional hearing expressed the new approach: “Obscenity, by its very nature, reduces human beings to sexual objects.”\(^806\) Exemplifying parts of the materials they intended to prosecute, she referred to a presentation of “brutal rape and killings of three women” that were “hit, slapped, and spit upon.”\(^807\) Further allusions were made to productions harms when citing a letter from a woman whose daughter had “been reduced to an anorexic drug addict with severely compromised mental and physical health” after being exploited by pornographers.\(^808\) Although the statements in this congressional hearing are largely consistent with the content of much contemporary materials (pp. 44–53 above) as well as the documented production harms (pp. 67–72 above), they are not consistent with the concepts of obscenity law as traditionally understood (pp. 188–202 above). In terms of setting a precedent by convicting high-profile producers and distributors of violent and degrading and harmful pornography, the new U.S. efforts have been successful and have continued under the Obama administration (pp. 355–363 below).

For example, while setting a plea bargain in 2009 with two notorious pornographers who produced the excessively violent adult materials mentioned above, the government had also fended off their constitutional challenge to obscenity laws as a violation of due process privacy rights.\(^809\) Similarly, another well-known Los Angeles-based producer of such materials, as well as of more mainstream less extreme productions but with possibly a longer history in the business than the former, was also successfully convicted to a prison term of almost three years after a 2008 jury trial.\(^810\) In 2014, another relatively well-known producer and distributor of violent

\(^{805}\) See supra note 784, for a brief summary of chapter 1 in these regards.


\(^{807}\) Id. at 266–67.

\(^{808}\) Id. at 267.


\(^{810}\) See United States v. Little, 365 Fed. App’x 159 (11th Cir. 2010) (affirming convictions for obscenity charges in Middle Dist., Fla., but vacating sentence enhancement for pecuniary gain). Paul F. Little went
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pornography from Los Angeles had his jury conviction to four years imprisonment affirmed in the Ninth Circuit Court of Appeal. The new tack of litigating pornographers with obscenity laws were initiated during the younger Bush-Administration and has been described as “trying to set boundaries as to the acceptable realm of adult material.” It has also continued under the Obama administration. The approach has been contrasted with that taken during the Bill Clinton-era, when charges of obscenity were rather used as proxies for increasing prosecutorial leverage, thus were “piled onto other counts, like child pornography, to enhance a prison sentence or encourage plea bargains,” seemingly with less interest in challenging adult materials per se.

Although new strategies to use obscenity laws might potentially stall an expansion of extreme materials, they appear vulnerable to criticism for being empirically and conceptually unsound. Relying on a community standard that in itself set by the degree of a society’s pornography consumption, hence “tolerance” for sex inequality and sexual subordination—as opposed to crafting laws against pornography from the perspectives and interests of groups who are particularly affected by production and consumption harms—appears rather as a temporary strategy in face of political and judicial obstacles to create more efficient laws. Disinterest to enforce obscenity laws could also be expected from governments for the same reasons as the contemporary community standards concept is relative to the dominant perspective. From this point of view, obscenity law seems politically and legally unreliable as a guarantee for recognizing and representing survivor perspectives and interests. The potential and limitations of these developments are further dealt with in Part III.


Ward, “Federal Obscenity Case Stalled” (citing Todd Lochner).
7. Liberal Regulations

If pornography is what pornography does, so is . . . speech. Hitler’s orations affected how some Germans saw Jews. . . . None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. 815

—Judge Easterbrook, United States Court of Appeals for the Seventh Circuit (1985)

This chapter analyzes the obstacles and potential within liberal regulations in addressing pornography’s harms—for example, addressing its effect on gender-based violence, sexual exploitation, and inequality as documented in chapters 1–3 above. The democratic theories on legal challenges to social dominance in chapter 4 are used to evaluate the regulations. I begin by analyzing the regulation’s ideological roots, including the political thought of John Stuart Mill, showing how it relates to early freedom of speech cases and legislation, as well as to more contemporaneous doctrines. Even though the U.S. and Swedish political and legal systems and are very diverse, it will be illustrated how their legal frameworks regulating pornography share the same liberal ideological foundations. My detailed analysis of American and Swedish regulations also maps the ir limits in legislative, judicial, and constitutional terms. Knowing where the legal boundaries are drawn facilitates understanding to what extent or not the obstacles to legal challenges to pornography’s harms are based on law rather than ideology—that is, being based on enforceable rules laid down in law within political systems, as opposed to being based on political ideas that lack official enforcement mechanisms apart from rhetorical persuasion (see 178–179 above).

Foundations

Liberals tend to view expressive rights as central means for enabling autonomous and informed value judgments, for example, by making different views available so that “the deliberative forces should prevail over the arbitrary.” 816 As such, expressive rights have appeared as a means of preventing despotism, corruption, and tyranny by making dissident political opposition heard. 817 Freedom of expression is often associated with reason and enlightenment. Nonetheless, in an age of mass communication and complex industrial societies, liberal democracies have tried to develop vari-

ous approaches to deal with patently harmful speech and expressions by some form of regulations. Core liberal arguments to this end emerge eloquently in John Stuart Mill’s seminal treatise On Liberty (1859), but also the conflicts raised by promoting free expression as simultaneously attempting to avoid its harm. On Liberty argues that free expression and other freedoms, rights, and liberties are important for the development of progressive societies, thus restrictions only legitimate insofar as one’s rights would harm another’s. “The object of this essay,” his treatise states, “is to assert one very simple principle . . . . 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.”818 This principle leads to his conclusion that “Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind” (Mill, 121).

While Mill’s rhetoric implies that adjudicating between liberty and harm is uncomplicated, when applying his ostensibly parsimonious principle in social context, he introduces a conceptual distinction between direct or indirect harm—a more complicated principle still grappled with within liberal jurisprudence. In On Liberty, this distinction is exemplified by opinions that make a “positive instigation to some mischievous act,” such as the argument that “corn-dealers are starvers of the poor, or that private property is robbery”; according to Mill, these opinions “ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard” (p. 121; emphasis added). Here, the context within which the expression enables potential harmful activity distinguishes direct from indirect harm: a mob is inherently dangerous, thus a permissible realm for regulation of “speech”; by contrast, the press is perceived by Mill as, if not completely benign, not warranted similar regulation. The implication that circulating an opinion that corn-dealers starve the poor in the press, as opposed to in a placard, could incite an angry mob to cause just as severe danger, destruction, and death, is, if not rejected, nevertheless deemed an insufficient cause for public intervention. When he more realistically recasts his “simple principle” as a balance between competing interests, Mill appears to choose liberty over the prevention of harm.

Not surprisingly, when Mill later in his treatise confronts the complications in empirical settings where, if society tolerates indirectly harmful practices, the outcome may entail substantial damage, he defers to a hypothetical fear of excessive regulations. For example, Mill seemingly conceded that unregulated access to fermented liquors entail tangible costs, damages, and injuries to society and its members—harms that one of his contemporaries referred to as a “social disorder” and a “profit from the creation of a misery” that he and others were allegedly “taxed to support” (p. 152). Yet Mill opposed regulating fermented liquors on basis of such harms because, he implied, any regulation of that sort could legitimize a “monstrous a principle” that, in the name of preventing harm to others, might be invoked to infringe freedom of expression and other liberties without reasonable proportions (p. 152). His fear of, and rejection of this supposedly “monstrous a principle,” has since been referred to as the “slippery slope”819—an argument that future decision makers

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are unable to distinguish particular facts under a general principle, whether willfully or not. That is, it is presumed difficult to decide what the dangerous (as opposed to harmless) indirect causes of harms would be. Mill’s so-called harm principle has gained quite an appeal in political thought. It has been suggested that the reason for the popularity of On Liberty was its “attempt to subsume a large and complicated set of problems under ‘one very simple principle.’” The harm principle does indeed appear uncomplicated on its face, but when applied empirically things quickly get more complex (more below). On Liberty can also be seen in light of Mill’s personal life. For example, he appears to have assumed that friends and family disapproved his friendship with Harriet Taylor, who was the wife of an older man for many years (although marrying Mill after the former died)—a situation that may have contributed to his somewhat impassioned “animus against society” and its regulations in On Liberty.

The doctrines of freedom of expression under liberal legal architectures have, as mentioned, continued to wrestle with how to remedy Mill’s disqualification of the principle of harm in social settings where regulations seem justified, especially so-called indirect harm. The principled distinctions made by Mill can be seen particularly clearly in American case law. There, it is frequently required that one must show a “clear and present danger” from harm before freedom of expression can legitimately be infringed. As in Mill’s example of a person who instigates “an excited mob” with a passionate speech (Mill, 121), under U.S. law the commonly cited example of such “direct harm” is Justice Holmes’s famous quote in Schenck v. United States (1919) where he noted that even the “most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” Reformulating this doctrine further for when harm would legitimate intervention in the realm of expression, the American law of speech since Brandenburg v. Ohio (1969) makes a distinction between “mere advocacy” and “incitement to imminent lawless action.” This foundational case protected televised lynching and other acts against specific vulnerable groups, while discussing the organization of a “four hundred thousand strong” member-march ac-

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821 Cf. ibid., 16–20. Taylor was a writer on her own with whom Mill worked more systematically during later years. Though Mill and Taylor had known each other since 1830, it was not until 1851 that they would marry; “after a decent interval of nearly two years” after her husband’s death in 1849. See Edward Alexander, “Introduction” to On Liberty, by Mill, ed. Alexander, supra chap. 4, n. 530, at 20, 28 (quoted text); cf. Himmelfarb, “Introduction,” 19. However, already in 1834 Mill’s affair with Taylor, whether romantic or purely intellectual at that point, had been approved of by her husband in what appears as an agreement that she and Mill “took care to never be seen ‘in society’ as a couple, but would be allowed to go off on holidays together only—one of the more peculiar examples of the Victorian ‘compromise.’” Alexander, “Introduction,” 22. Mill’s private situation during these years might thus partly explain why, from a personal perspective, he hosted an “animus” against following customs and traditions, such as avoiding divorce, as opposed to living the life of an eccentric nonconformist that he urged liberal societies to support in On Liberty. See Mill, “Of Individuality, as One of the Elements of Well-Being,” in On Liberty, ed. Bromwich and Cateb, 121–38. Indeed, a significant portion of On Liberty revolves around alleged dangers of social pressure and conformity, subjecting creative or original individuals to various considerations or demands from the surrounding community. Ibid. In light of Mill’s own life, his appeal against conformity might have struck a nerve among readers who felt restricted by society. It is therefore unsurprising if complexities that are not easily accounted for by his “principle of harm” are often suppressed in discussions of his work and discussions of liberalism more generally.
823 Schenck, 249 U.S. at 52 (Holmes J., for the Court).
824 Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969). The per curiam opinion (as distinguished from the concurrences) itself never mentions the phrase “clear and present danger” although it is “reformulating” that very doctrine. Barron and Dienes, First Amendment Law, supra chap. 6, n. 768, at 76.
companied 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.”

Considering how speech such as expressed in Brandenburg are often disseminated in a social and political environment where real acts are consistent with, and sometimes even mimic the content of such “advocacy”, its doctrine appears problematic. In light of known American accounts of pogroms, lynching, and “riots” on racial grounds, it is unfortunate that such experiences did not prevent Brandenburg to interpret the First Amendment as protecting virulent advocacy to this end. For instance, accounts from the “race riots” in East St. Louis, Illinois, illuminate the arguably compelling state interest at issue (similar accounts are no less uncommon in the European history of persecuting minorities, of course): “On July 2 and 3, 1917, rampaging white men and women looted and torched black homes and businesses and assaulted African Americans in the small industrial city of East St. Louis, Illinois. The mob, which included police officers and National Guardsmen, wounded or killed many black residents,” and according to eyewitness, when “‘there was a big fire, the rioters . . . stop[ped] to amuse themselves, and [threw black] children . . . into the fire.’”

The particular problem with Brandenburg’s implicit distinction between direct and indirect harm is that it excludes precisely the form of harm to groups that practices such as pornography creates by promoting gender-based violence and sexual exploitation (see chapter 3 above), and that racial defamation or racist propaganda may also produce to an extent harrowingly visible in the accounts from East St. Louis. Such “expression” changes both attitudes and behaviors in large populations. The consequence is that members of already disadvantaged groups become exceedingly discriminated against, and eventually subjected precisely to direct harm. The evidence of pornography’s consumption and production harms (chapters 2–3 above) suggests that the line between direct and indirect harm is an ideological fiction, at least in this instance, perhaps others. Furthermore, it appears as if genocides or pogroms are possible due to a prolonged change of attitudes, beliefs, and behaviors among key populations. Such change may be caused by simple as well as by sophisticated propaganda, and pornography may even be included as one of the conditioners. Perhaps not coincidentally, in former Yugoslavia where pornography not only appears having been widespread before the genocide, sexually explicit media intended for propaganda were produced by Serbian soldiers during the atrocities, who filmed their rapes of Muslim and Croatian women; then, using voice overdubbing and other techniques, those victimized were presented as Serbian women, and the perpetrators as Muslim and Croatian men. Considering that consuming pornography is now well-documented to cause attitudes supporting violence against women and to produce behavioral sexual aggression (pp. 98–129 above), it is hardly diff-

825 Brandenburg, 395 U.S. at 446, 449.
827 A similar but not identical argument could thus be made regarding hate speech as with pornography, 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 the Intervener LEAF ¶ 30, in R. v. Butler, [1992] 1 S.C.R. 452, supra chap. 4, n. 563, at 210. Since racism isn’t explicitly sexual, an accurate analysis of its dynamic must also be made on its own terms.
cult to conceive the special effects caused by such politically manipulated pornography in the context of a genocide. Indeed, the legal consequences of the Bosnian genocide recognized, for the first time internationally, rape as an act of genocide.831

A Judicially Dominated System (United States)

Rational Review: Legitimate Interests, Unprotected Expression

Under liberal doctrines that distinguish between direct and indirect harms, there may seem to be limited protections for harmful expressions that promote genocides, violence against women, bigotry, prejudice, and discrimination in general. Nonetheless, even though a need for a “clear and present danger” to allow infringements of free expression is frequently the case, generally in the United States several exceptions exist for speech that are legally recognized as not posing such a clear danger (as under liberal frameworks elsewhere). For instance, so-called low value speech that includes, inter alia, obscenity, libel, and “fighting” words, are exempted from most expressive protections. As stated by the Supreme Court in Chaplinsky v. New Hampshire (1942):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words . . . . such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.832

Under U.S. law, regulation of such low value “speech” is constitutionally permissible under lower standards of review than speech regarded as more valuable to a democratic society. The lowest standard would be rational review, where effectively a presumption is cast in favor of the government since the regulation need only be rationally related to a legitimate state interest; that is, “the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”833 Any challenger under this stand-

831 See Kadic v. Karadzic, 70 F.3d 232, 244 (2nd Cir. 1995) (“appellants allege that acts of rape . . . were committed . . . with the specific intent of destroying appellants’ ethnic-religious groups . . . . alleged atrocities are already encompassed within the appellants’ claims of genocide and war crimes . . . . to the extent that they were committed in pursuit of genocide or war crimes”), cert. denied, 518 U.S. 1005 (1996).
833 Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–488 (1955). For further formulations of this standard of judicial review in various settings, see Martinez v. California, 444 U.S. 277, 283 n.6 (1980) (holding law that granted immunity to officials making parole decisions not arbitrary since it bears “a rational relationship between the state’s purposes and the statute”); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44 (1973) (5–4) (finding Texas school financing system nondiscriminatory and bearing “some rational relationship to a legitimate state purpose” (Powell, J., majority), despite “wide disparity in per-pupil revenue among the various districts.” Id. at 63 (White, J., dissenting)); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldburg, J., Concurring) (effectively defining rational review as “a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose.”); see also McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (9–0) (“exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official
ard must show the regulation is arbitrary. The Supreme Court applied rational review when holding that regulation of interstate transportation of obscene material, even if by private carriage and allegedly intended for constitutionally permissible use in transporter’s home, was not unconstitutionally overbroad:

Congress may regulate on the basis of the natural tendency of material in the home being kept private and the contrary tendency once material leaves that area, regardless of a transporter’s professed intent. Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause.

In other words, federal obscenity regulation is rationally related to a legitimate state interest in correcting “an evil at hand.” There was an attempt in the mid-2000s in lower courts pursuing the argument that regulating obscenity is not rationally related to any legitimate state interest, though it came without success.

**Strict Scrutiny Review: Compelling Interests, Protected Expression**

Regulating expression that is not deemed to be of low value accordingly need to pass higher constitutional standards. The most demanding is called strict scrutiny review. Here, the presumption is that the regulation is invalid, and the government must show they are employing “narrowly tailored” means to further “a compelling interest” for it to sustain. In some cases regulations may sustain constitutional

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834 For an early formulation of this test, see Mobile, Jackson & Kansas Railroad Co. v. Turnipseed, 219 U.S. 35, 43 (1910) (“a legislative presumption . . . shall not be so unreasonable as to be a purely arbitrary mandate.”); For successful challenges to legislation under this more relaxed standard, see Romer v. Evans 517 U.S. 620, 635 (1996) (finding a state constitution amendment that preemptively invalidated all legislative, executive, or judicial action to prohibit discrimination against “homosexual, lesbian or bisexual orientation” did not “bear a rational relationship to a legitimate governmental purpose”); Plyler v. Doe 457 U.S. 202, 230 (1982) (holding that denying “a discrete group of innocent children the free public education that it offers to other children residing within its borders” did not further “some substantial state interest.”); Turner v. Fouche, 396 U.S. 346, 363–364 (1970) (requiring members of county education board to own real estate did not serve a rational state interest but amounted to invidious discrimination); Griswold, 381 U.S. at 505 (White, J., concurring) (invalidating birth control statute, failing “to see how the ban on the use of contraceptives by married couples in any way reinforces the State’s ban on illicit sexual relationships.”); Smith v. Cahoon, 283 U.S. 553, 567 (1931) (invalidating highway safety regulation in part because “there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities”).


challenges if they pass an intermediate test that imposes more burdens on the government than rational review does, but fewer burdens than under strict scrutiny (see further 214–222 below).

Theoretically then, pornography can already be regulated without, as is the case under obscenity law, being categorized as having low value per se. Indeed, child pornography is currently regulated under a strict scrutiny standard, the Supreme Court having held that “prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.” This objective appeared compelling enough to exempt child materials from the rules and regulations otherwise governing application of obscenity law on adult materials under the Miller test. The Court in part rationalized the exemption by a fundamental critique of the concept of obscenity laws that could as well be applied to adult materials, but only if the latter was judged a compelling interest to regulate.

The Miller standard, like all general definitions of what may be banned as obscene, does not reflect the State’s particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the Miller test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be ‘patently offensive’ in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography. “It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value.” Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the Miller standard is a satisfactory solution to the child pornography problem.

[Note 12]: In addition, legal obscenity under Miller is a function of “contemporary community standards.” 413 U.S., at 24 . . . . It would be . . . unrealistic to equate a community’s toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation.

The social evidence reviewed in chapter 3 above shows that adult pornography promotes sexual aggression (pp. 98–115, 122–129) and attitudes supporting violence against women (pp. 115–129) including bigotry, prejudice, and incredulity toward accounts of sexual abuse and sexual exploitation (e.g., “rape-myths”). Such practices arguably violate the rights to equality, humanity, and dignity of those exploited in the production and those exposed to the negative effects of consumption. As adult materials promote gender-based violence and sexual exploitation it will likely affect deny public access to trials with, e.g., testimonies from minor victims to sex crime, must show “denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.”; Consol. Edison Co. v. Public Serv. Comm’n, 447 U.S. 530, 540 (1980) ("Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."); First Nat’l Bank v. Bellotti, 435 U.S. 765, 786 (1978) (holding that when prohibiting "'exposition of ideas' by corporations . . . intimately related to . . . governing,” the burden is on government to show a compelling interest, and “[e]ven then, the State must employ means ‘closely drawn to avoid unnecessary abridgment.’” (citations omitted)); cf. Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (U.S. 2010) (6-3) (finding that as “combating terrorism is an urgent objective of the highest order,” First Amendment and other rights may be limited accordingly).

841 For the test’s exact wordings, see Miller v. California, 413 U.S. 15, 24–25 (1973).
842 See also infra, chapter 6, for further critical analysis of the legal concept of obscenity.
843 Ferber, 458 U.S. at 761 & n.12.
children or adolescent populations even more, since these groups are particularly vulnerable to being sexually exploited by adults due to the power imbalance involved. Indeed, many older prostituted women have stated that they were first exploited in pornography before age 13, and that child sexual abusers often showed it to them to persuade compliance.\footnote{See, e.g., Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 865–66. See also supra pp. 123–130 (discussing relation between pornography consumption and abuse of prostituted women).}

Furthermore, among the preconditions for making available an adult population to be exploited by pornographers, child (sexual) abuse or severe neglect typically is included; as recalled, a majority of prostituted persons, from which those who are used in pornography are drawn (e.g., 55–57 above), were sexually abused as children (pp. 59–62). However, when passing the age of majority an overwhelming majority of these persons are effectively in a condition of slavery; lacking real or acceptable alternatives, they cannot leave prostitution and the pornography industries even though they want to, regardless of whether or not they are held back by express force.\footnote{Cf. supra pp. 57–59 above; consider that 89\% of 785 prostituted persons in nine countries explicitly stated they want to escape but cannot, Farley et al., “Nine Countries,” supra chap. 1, n. 115, at 51, those persons are apparently in a “status or condition . . . over whom any or all of the powers attaching to the right of ownership are exercised.” Convention to Suppress the Slave Trade and Slavery, art. 1 (1), Sept. 25, 1926, 60 L.N.T.S. 253, 263. Notably, 49\% of these persons found across five continents reported being used in pornography (n = 802), Farley et al., “Nine Countries,” 46, confirming numbers from previous studies. See Farley, “Renting an Organ,” supra p. 38, n. 113, at 145, who cite similar numbers from the WHISPER Oral History Project for survivors in 1990.} With respect to links between adult and child sexual exploitation, where child mistreatment invariably affects the chances of being exploited as an adult, the legal distinctions between children and adults makes little sense. These persons were simply extremely unfortunate not to have escaped from sexual exploitation before they reached the legal age of adulthood. Unless the rights of adults are strengthened and enforced, it appears as children will not either receive adequate protection from sexual exploitation, if not for the simple fact that if society fails them as youngsters they have no recourse at the age of majority.

**Childhood and Adults: Problems of Legal Intersectionality**

As argued by Kimberle Crenshaw, a theory that addresses the problems for groups who are intersectionally and multiply disadvantaged may be more useful for other groups that are more singularly disadvantaged.\footnote{Crenshaw, “Demarginalizing Intersection,” supra chap. 4, n. 520, at 167.} For instance, sex industry survivors are often in the words of Crenshaw’s trafficking metaphor treated as the victim at a multiple car accident at an intersection who receives no remedy since the public cannot identify whose trafficking insurance is primarily liable: the abusive parents, social worker and police neglect, structural poverty, bad schools, pimps, johns, racism, or sex discrimination? By contrast, because children are virtually always in a position of vulnerability relative to adults, such a position is less complex and ambiguous to remedy by law. But once they become adults, they’re generally presumed to be at an arm’s length with johns, pimps, and pornographers. This categorical presumption is also an obstruction for many nonprostituted adult women when trying to assert that they did not consent to sexual activity forced on them—a problem exacerbated by the well-documented consumption effects of pornography that cause “rape myths,” such as beliefs that “only bad girls get raped,” “women ask for it,” or that women who “initiate a sexual encounter will probably have sex with anybody”
(pp. 115–122 above). But even so, many adolescent children will suffer the same problems if the law harbors a scienter requirement (knowledge of their age) to be effective. Precisely for such reasons, rather than addressing singular disadvantages one by one by limiting protection to children, if the law began addressing the multiple disadvantages by a comprehensive intersectional approach that includes those adults whom evidently are vulnerable, the children whose disadvantage is more easily identifiable would benefit just as much, if not more, in the long run.

In light of the evidence above, eradicating the harms to both adults and children caused by the production and consumption of adult pornography is arguably a “compelling state interest” as it would substantially reduce sex discrimination against women and children (cf. chap. 10, pp. 299–346) below). Regulating adult materials could be sustained on the same arguments made in *Ferber*: a regulation narrowly tailored to achieve the compelling interest of protecting both adults and children from “sexual exploitation” and other enumerated harms would thus be permissible. Deference to a “community standard” of toleration for adult materials would, similarly as in *Ferber*, appear “unrealistic” when considering the “permissible scope of legislation aimed at protecting children [and adults] from sexual exploitation.” Consequently, literary, artistic, political or social value, and the patently offensive and prurient interest requisites, are also “irrelevant” and bear “no connection to” the more compelling interest of combating the consumption and production harms of adult pornography that are empirically well-documented to affect, often with terrible consequences, a great many disadvantaged and vulnerable persons (chapters 2–3 above). However, despite these arguably reasonable claims, neither have states nor federal government in the United States construed any regulations of adult pornography that attempt to challenge the strict scrutiny review accordingly. Existing regulations rather operate either fully within the parameters of obscenity law (a limited approach to the production and consumption harms of pornography, see chapter 6), or within intermediate standards for regulation that also have a limited reach of application (see 214–263 below). Most western democracies seem to differentiate strongly between adult and child pornography as under U.S. law, even though laws of other countries may be couched in a different vocabulary or regulated under different architectural frameworks.

**Intermediate Review: Substantial Interests, Viewpoint Discrimination**

Regulating obscenity once materials are classified as obscene in the United States, thus being of low value, is typically not thought to raise much problem for freedom of expression—at least not in the sense of stifling public deliberation, personal development, or obstruct social progress as envisaged by foundational liberal philosophers such as John Stuart Mill. However, the intermediate test for adult materials regulated outside the confines of obscenity law, that also have a limited reach of application (see 214–263 below). Most western democracies seem to differentiate strongly between adult and child pornography as under U.S. law, even though laws of other countries may be couched in a different vocabulary or regulated under different architectural frameworks.

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848 See also Burt, “Cultural Supports for Rape,” *supra* chap. 3, n. 368, at 217–18, 222 (defining how to measure rape myths).


851 *Ferber*, 458 U.S. at 761 n.12.

852 Id. at 761 & n. 12.
This doctrine is more in line with Mill’s classic liberal approach to expression. When considering the benefits of this law further below, the key-question might be whether the legal issues related to dissident political speech is an appropriate analogy to apply for regulating pornography’s consumption and production harms.

In United States v. O’Brien (1968), the Supreme Court articulated an influential test for the intermediate exceptions doctrine under the First Amendment. The case itself did not concern pornography, but the burning of draft cards during the period of the Vietnam War in the late 1960s. Accordingly, the defendant’s argument was an attempt to assert that burning a draft card was (in the paraphrasing of the Court) a form of “symbolic speech” protected by the Constitution because it included “communication of ideas by conduct... in demonstration against the war and against the draft” (O’Brien, 376). Given this description it was nevertheless held that prohibitions or regulations of similar activity, whether the conduct was symbolic or not, could be constitutionally sustained if four key requirements were fulfilled:

First, a regulation was “sufficiently justified” if being “within the constitutional power of the Government” (id. at 377).

Second, there had to be an underlying “important or substantial governmental interest” (id.), as distinguished from the less onerous “legitimate” or the more “compelling” interest standards associated with rational review and strict scrutiny respectively (see 210–214 above).

Third, proportionality was required so that “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest” (O’Brien, 377). Sweden’s written constitution contains a similar requirement for justifications that are proportional to their legislative objectives when restricting democratic rights and freedoms. Further, as later U.S. cases have indicated, if a law in some respects restricts the dissemination of legitimate informed deliberation on political, cultural, or social matters, but nonetheless offers “alternative” deliberative venues, the incidental restrictions may be permissible. The doctrine also proscribe that laws restricting freedom of expression should not be overbroad.

853 Cf. Barron and Dienes, First Amendment Law, supra chap. 6, n. 768, at 67 (noting about “First Amendment law” that “[m]ore specifically, it has its origins in the World War I era, emanating from prosecutions under the federal Espionage Act which prohibited activities disruptive of the war effort. The defendants argued that the Act could not be applied to their antiwar advocacy consistent with the First Amendment.”); MacKinnon, Only Words, 38 (noting that previous doctrinal attempts to “protect from suppression the speech of communism, thought by some to threaten the security of the U.S. government” underlie subsequent doctrinal obstacles to regulate pornography in face of its documented harms). See also Martin H. Redish, The Logic of Persecution: Free Expression and the McCarthy Era (Stanford, CA: Stanford Univ. Press, 2005), for a general analysis of the McCarthy era (1950s) and its implication for constitutional law in terms of boundaries of freedom of speech and government control, albeit without discussing pornography regulation.
855 The third is the most contentious, and is listed here as number four to ease presentation of analysis.
856 See Regeringsformen [RF] [Constitution: Instrument of Government] 2:21 (Swed.) (stating that restrictions “may be imposed only to satisfy a purpose acceptable in a democratic society. . . never . . . beyond what is necessary having regard to the purpose that occasioned it”).
857 Compare Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 53 (1983) (upholding restrictions excluding rival union from inter-school mail system, noting that “the reasonableness of the limitations . . . is also supported by the substantial alternative channels that remain open for union-teacher communication to take place”), with City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) (holding city ordinance prohibiting virtually all signs displayed on homeowner’s property was suppressing too much speech because, inter alia, for many people “a yard or window sign may have no practical substitute.” (citations omitted)).
vague, over or underinclusive; such problems might lead to biased, suspect, and ultimately unconstitutional law, whether as applied or on its face.858

Fourth, O'Brien requires that the restriction’s underlying “governmental interest is unrelated to the suppression of free expression” (O'Brien, 377), which seems to have become the most contentious requisite. Here, later doctrine attempts to distinguish regulations or applications according to whether or not they are content-based, or (what is regarded as more suspect) viewpoint-based, which is thought to indicate illegitimate suppression of free expression.859 Sweden has a similar doctrine that is codified in the written constitution.860 The implicit underlying philosophy seems to be that the state should not restrict particular views to be expressed, such as those of dissident leftists, republicans in opposition to the monarchy, religious minorities, or gay and lesbian literature, while legally privileging the views of the orthodoxy or the mainstream and vice versa. Hence, in a later decision in Police Dept. of City of Chicago v. Mosley (1972) the Court, while citing O'Brien,861 held an ordinance unconstitutional because it distinguished between “peaceful” labor picketing and all other peaceful picketing outside primary or secondary schools while in session, without showing other picketing was “clearly more disruptive” than labor picketing.862

Mosley was a white male picketing alone (usually) outside a Chicago school with a sign saying “‘Jones High School practices black discrimination. Jones High School has a black quota’” (Mosley, 93). Apparently, this was not a picketing case because of involvement “in a labor dispute” (id.) with the school, although he might have been perceived as more or less peaceful depending on whose group perspective and interests one adopts as one’s own. For instance, will the perspective be that of Blacks’, who as a group in America have been subjected to discrimination, slavery, and official complicity in genocidal human rights violations including pogroms and lynching by groups of whites? Or will the perspective be that of whites who view affirmative quotas and Black-only high schools, which intend to counter the unequal social and material consequences of hundreds of years of white supremacy by increasing the representation of their perspectives in society,863 as a “reversed” form of...

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858 For First Amendment law on these issues, see generally Barron and Dienes, First Amendment Law, supra chap. 6, n. 768, at 44 et seq.
859 See for example Snyder v. Phelps, 131 S. Ct. 1207 (U.S. 2011) (8-1), where the Court set aside a jury verdict imposing tort liability for funeral picketing that was “certainly hurtful”, id. at 1220, partly on the argument that “any distress occasioned . . . turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.” Id. at 1219 (emphasis added); compare Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2978 (2010) (5-4) (“Hastings’ all-comers policy . . . is a reasonable, viewpoint-neutral condition on access to the student-organization forum”), with id. at 3001 (Alito J., dissenting) (“the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. . . . [T]he Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups”); see also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (invalidating a law redistributing income from books or other works describing actual crime to the crime’s victims in part because “the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”).
860 RF [Constitution] 2:21, 2:23(3) (Swed.) (stating that limitations of rights may not “be carried so far as to constitute a threat to the free formation of opinion as one of the pillars of democracy. No limitation may be imposed solely on grounds of a political, religious, cultural or other such opinion. . . . The adoption of provisions that regulate in more detail a particular manner of disseminating or receiving information, without regard to its content, shall not be deemed a restriction of the freedom of expression or the freedom of information.”) (emphasis added).
862 Mosley, 408 U.S. at 100. The invalidated ordinance is quoted, id. at 92–93. Further citations in text.
863 Cf. Young, Inclusion & Democracy, supra chap. 4, n. 571, at 148–49 (arguing that “commitment to political equality entails that democratic institutions and practices . . . include the representation of social...
discrimination? The Court here sided with the “peaceful” perspective, stating that Mosley’s “lonely crusade was always peaceful, orderly, and quiet, and was conceded to be so by the city of Chicago” (id. at 93).

Further, the Supreme Court in Mosley held that lacking any permissible grounds for the ordinance’s distinctions, restricting his particular expression violated the Equal Protection Clause prohibiting states from denying “to any person within its jurisdiction the equal protection of the laws” (§1) under the Fourteenth Amendment (id. at 100). As will be shown further below, racist speech, cross burning, and adult pornography are also often protected under such content neutrality doctrines, as where they abstract and similarly situated “viewpoints,” detached from their arguably unequal social practices. Cross burning at Ku Klux Klan rallies or by white neighbors on the lawns of black families have been successfully prohibited as long as laws are construed using race-neutral terms to distinguish the prohibited “content,” such as “intent to intimidate.” In contrast, statutes prohibiting cross burning because—more consistent with reality—it “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” became regarded as impermissible “actual viewpoint discrimination” against “disfavored topics” in a judicial decision in 1992.

The American viewpoint-neutrality doctrine since at least 1992 thus attempts to assert the position that regulations may contain content discrimination, such as only proscribing speech that intend to intimidate, as long as the basis for such distinctions “consists entirely of the very reason the entire class of speech at issue is proscribable”—for example, the reasons for regulating “fighting words,” obscenity, or libel as low value speech. In such cases of content discrimination, it has been stated that “no significant danger of idea or viewpoint discrimination exists [because such] a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class.”

Furthermore, it is questionable whether or not the viewpoint-neutrality doctrine has any surface plausibility as a framework for regulating cross burning or pornography; these two practices and their expressions are not similarly intimidating or offending to everyone in the general sense of sweeping low value or otherwise unprotected categories such as “fighting words” or obscenity might suggest. For instance,

groups whose perspectives . . . are either a relatively small minority, or they are socially or economically disadvantaged”).


866 R.A.V., 505 U.S. at 388.

867 Id. Law professor Erwin Chemerinsky criticized this doctrine as effectively eroding the previous rational review standard under the First Amendment for unprotected speech: such categories “by definition, restrict speech based on their content,” he argued, and when any law regulating unprotected speech must “meet strict scrutiny” by avoiding viewpoint-discrimination it “undermines the rationale for the category in the first place.” Erwin Chemerinsky, “Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application,” 74 S. Cal. L. R. 49, 64 (2000). But see contra Black, 538 U.S. at 361 (“We did not hold in R.A.V. that the First Amendment prohibits all forms of content-based discrimination within a proscribable area of speech. Rather, we specifically stated that some types of content discrimination did not violate the First Amendment”); cf. R.A.V. 505, U.S. at 383–84 (remarking that low value categories, such as “obscenity, defamation, etc.,” were not “entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content”).
outside its racial context is there anything intimidating about lighting a piece of wood? In the case of pornography, the evidence reviewed previously shows that it is a harmful social practice of inequality based on sex that exploits, tantamount to slavery, producing multiple social disadvantages, and that its consumption cause sexual aggression and attitudes supporting violence against women (chapters 2–3 above). These aspects are not intimidating, offensive, or harmful in a generally neutral way relative to socially “disfavored topics” or “viewpoints.” Rather, the acts, content, and “views” in pornography determines its harm in a particular way; they’re not just harmful to everyone. They are especially harmful to prostituted persons, domestic abuse victims, and other persons who apart from their gender are often subjected to the multiple and combined disadvantages of poverty, race, age, childhood abuse and neglect, or other forms of social vulnerability (e.g., 55–64, 72–75, 122–129).

In light of its particular harms, it also appears disingenuous to render pornography a “view” or “idea,” when considering that visual materials with real persons has usually been produced through various subordinating conduct, such as exploitation and abuse (see chapter 2 above). Some legal challenges to pornography have therefore stressed that it is rather a “practice” than a mental construction, distinguishing it from expressions that do not require coercive circumstances to be produced. As will be illustrated more below, it is unlikely that any legal framework for regulating pornography can be effective enough without also recognizing the further empirical particularities of the social practice of pornography—including not only gender inequality, but also the additional and sometimes intersectional multiple disadvantages associated with vulnerability to consumption and production harms (e.g., 55–64, 72–75, 122–129). Due to their lack of fit with the facts of pornography and the harms it produces, when applying laws from other expressive areas that regulates “ideas” or “views,” or using outdated moral concepts such as obscenity, or using “content neutral” laws against “offensive” speech, it would also tend toward producing sweepingly overbroad or vague, or even possibly underinclusive legislation.

In another case exhibiting similar doctrinal problems as the cross-burning cases above, the Indianapolis civil rights ordinance discussed previously (pp. 43–44 above) was invalidated. As recalled, that ordinance defined pornography as “the graphic sexually explicit subordination of women” including, inter alia, “women presented as sexual objects who enjoy pain or humiliation.” Such materials are proven to produce sexual aggression and attitudes supporting violence against women among its consumers (pp. 101–109, 115–118 above), and are also likely produced by coercive and at times unspeakably abusive means (pp. 64–73 above; cf. 44–50). The Seventh Circuit Court of Appeal held this definition to be based on “content of particular works” as opposed to a “category of speech,” thus “created an approved point of view.” To support their holding, the Supreme Court’s decision in West Virginia Board of Education v. Barnette (1943) prohibiting the state to “prescribe”

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868 See, e.g., Indianapolis, Ind. Code Ch. 16 § 16-1(a)(2) (“Pornography is a discriminatory practice based on sex which denies women equal opportunities . . . . creating and maintaining sex as a basis for discrimination. . . . a systematic practice of exploitation and subordination based on sex which differentially harms women.”) (emphasis added), invalidated in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
870 American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985). This case is discussed more in depth, infra chapter 10, esp. pp. 321–348.
871 Hudnut, 771 F.2d at 324 (quoting Indianapolis, Ind. Code Ch. 16 § 16-3(q) (1984)).
872 Hudnut, 771 F.2d at 332.
children to salute the flag, including famous doctrinal First Amendment statements such as that “‘no official, high or petty, can prescribe what shall be orthodox in politics,’” were quoted. The Seventh Circuit here effectively made an analogy in their case between on one hand imposing civil liability for documented harm entailed by producing and distributing misogynist materials, on the other hand enforcing children to express nationalistic reverence. Treating similarly these two different social contexts of power turn social reality on its head: the ordinance’s intent was to make liable those who contribute to victimization—the impugned school policy did the victimizing itself, by forcing children to perform “symbolic speech” that subordinated them to authoritarian nationalism.

In applying the “viewpoint-neutrality” doctrine derived from cases concerning flag burning, espionage, enforced patriotism in schools, and similar politicized expression analogously to cross burning and pornography, one imposes a generalized symmetrical framework of abstract and essentially “competing ideas” to a particularly asymmetrical context of social dominance. Pornography and pornographers are here put on a par with virtually any legitimate oppositional political expression or “symbolic speech.” Thus political and legal theorist Ronald Dworkin—an advocate of this view—argues against stricter regulations of pornography while effectively equating the pornographers with political dissidents, or any “citizen” that from an underrgog position legitimately are involved in “informal public debate and argument [which] influences what responsible officials—and officials anxious for reelection—will do.” Such analogies ignore how pornography is typically produced by exploiting multiple and intersectional inequalities under circumstances that are coercive, sexually exploiting and victimizing populations by causing consumers to sexually aggress and adopting attitudes supporting violence against women (chapters 2-3 above) rather than inspiring social change or influencing elected representatives, as implied by Ronald Dworkin’s analogy.

The activities of pornographers lie very far from what most political dissidents or citizens tend to do while engaged with democratic policymaking. The latter category of expressive conduct normally does neither need to sexually exploit vulnerable and often multiply disadvantaged populations (pp. 55-64, 72-75 above), nor need to condition sexual responses in audiences that provably increase sexual aggression, and attitudes supporting violence against women that strongly discriminate against them by promoting bigoted attitudes (pp. 98-129 above). In light of its application to adult pornography, the viewpoint-neutrality doctrine appears more as a dogma that inaccurately and misleadingly equates pornographers with oppressed political minorities or other engaged citizens. The evidence surmised previously in chapters 2-3 suggests pornographers are part and parcel of the ruling class in a world of male supremacy. However, the current First Amendment doctrine is virtually blind to such social realities, with a possible exception of the alternative group libel law, as construed in the racial defamation case Beauharnais v. Illinois (1952) that will be further dealt with below (pp. 263-269).

873 Id. at 327 (quoting West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943)).
874 Id. at 327 (quoting Barnette, 319 U.S. at 642). In Barnette, the Supreme Court however further noted that “[i]f there are any circumstances which permit an exception, they do not now occur to us,” Barnette, 319 U.S. at 642 (emphasis added)—a statement the Seventh Circuit seems to have missed. Had it occurred to Barnette Court, who could not have anticipated the technological revolutions that have since popularized, expanded, and changed pornography (see chapter 1 above), that their opinion would be invoked forty-two years later to protect pornographers, pimps, and their consumers, such “circumstances which permit an exception” might very likely have occurred already then.
The viewpoint neutrality doctrine also adopts a particular insensitivity to empirical inequality regarding how it distinguishes those who are not producers of pornography. Generally, apart from exceptions such as obscenity law or child pornography law, both citizens and producers are perceived as equal participants in a marketplace of ideas, or in what appears to be its original wording, the “free trade in ideas.”\textsuperscript{877} Along these lines, Ronald Dworkin’s conceptualization of “equality” is further invoked to defend pornography, supposedly “because equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections.”\textsuperscript{878} Although he also notes that not “anyone’s opinion will triumph or even be represented in what government eventually does,”\textsuperscript{879} Dworkin does not further analyze the reasons for, or the consequences of, such a disparate impact to their equality of influence. When treating every expression as being so similarly situated in a democratic context, the substantively unequal relationship between the participants in this “marketplace” obviously might produce unequal results. It is not unreasonable to presume such results will be systematically divided along the lines of those already disadvantage vis-à-vis the privileged, such as in terms of amount of access to media outlets or other channels for influencing the public, executive, legislative, as well as judicial opinions.

Put otherwise, those who have power often control media, “speech,” and politics. Prostituted or abused women and children who suffer most from adult pornography’s harms (chapters 2–3 above) are not equally or similarly situated to pornographers and their consumers; consumers as such do not systematically suffer from multiple or intersecting social disadvantages.\textsuperscript{880} Hence, the former cannot equally exert such influence as the latter without support. These empirical asymmetries of power presumably influence politics unequally, violating the equality purportedly cherished by Ronald Dworkin and others in the defense for keeping pornography largely unregulated. On basis of evidence reviewed in chapters 1–3, rather than being a legitimate part of a vibrant marketplace of ideas guaranteeing individual self-development among equal citizens, the market for pornography appears to be an unequal social practice of exploitation both in its production and in its consumption, which also silences many women’s genuine public voices (and within the larger group of women, particularly those voices who are especially vulnerable to the harms of pornography, e.g., prostituted or abused persons).\textsuperscript{881} Indeed, the psychological research shows how exposure to pornography leads to attitudes supporting violence against women, including reduced sympathy and respect for those victimized by sexual abuse and for women as a group generally (pp. 115–122 above; cf. 93–98). Such attitudes effectively devalue women’s worth as a group in comparison with men, and likely affect their impact in politics.\textsuperscript{882}

\textsuperscript{877} Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes J., dissenting) (“. . . the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market”).


\textsuperscript{879} Ibid.

\textsuperscript{880} Compare the data showing that a majority of young adult men consume pornography, pp. 33-37 above, thus a widespread consumer population that includes privileged as well as underprivileged groups of men, with the conditions of multiple or intersecting disadvantages among the minority populations that are generally prostituted for pornography, pp. 55-64, 72-75.

\textsuperscript{881} For an analysis of how pornography silences women in society, see MacKinnon, “Francis Biddle’s Sister,” supra chap. 4, n. 589, at 192–97.

\textsuperscript{882} Not surprisingly, a recent study using panel data from 2006, 2008, and 2010 with a sample of 190 adults (age 19 to 88 at baseline) found that self-reported pornography consumption predicted lower support for affirmative action policies for women in hiring or promotion. See Wright and Funk, “Pornography & Affirmative Action,” supra p. 9 n.39. The results were significant even after controlling for a
Obscenity (and child pornography) laws did not originate to such a large extent in the Red Scare (1920s) and McCarthy-eras (1950s) as did the liberal viewpoint-neutrality doctrines.\textsuperscript{883} Many speech-cases involving criminal convictions of socialists, communists, and other leftists were decided in those periods. Some became infamous, while others became doctrinal.\textsuperscript{884} However, as one scholar argued, to equate pornographers with communist or socialist dissidents “requires placing, by analogy, sexually abused women relative to their abusers, in a position of power comparable to that of the U.S. government relative to those who advocated its overthrow. This is bizarre . . . . Women are far more likely to be harmed through pornography than the U.S. government is to be overthrown by communists.”\textsuperscript{885}

The viewpoint-neutrality doctrine also share significant features with the concept of negative rights encountered in early liberal modern thought, where authors such as Locke, Montesquieu, Madison, consistent with Mill’s later politics of “tolerance,” stressed a restricted legislative mandate and a separation of democratic powers on the assumption that the worst abuses of power were public, effectively ignoring abuses of power at the hands of private and non-state actors (cf. pp. 143–148 above). Under the intermediate standards of review, the First Amendment often effectively also ignore underlying social power akin to how the negative rights concept have done, as well as how to the equal protection law’s “similarly situated test” have been criticized for doing under the Fourteenth Amendment.\textsuperscript{886} The common denominator

range of alternative factors and potential interactions between them; e.g., prior attitudes to affirmative action, age, education, ethnicity, gender, political orientation, religiosity, traditional labor attitudes, and after controlling for whether or not prior affirmative action attitudes predicted subsequent pornography consumption. Ibid., 214–15. Although being far from as well-corroborated as the literature on pornography exposure, sexual aggression, and attitudes supporting violence against women, supra chapter 3, the result nonetheless indicate that pornography consumption “undercuts” support for affirmative action for women and “inform opinions about social issues that extend beyond the specific interaction dynamics portrayed.” Wright and Funk, “Pornography & Affirmative Action,” 218.


\textsuperscript{884} See, e.g., Schenck v. United States, 249 U.S. 47, 51, 52 (1919) (convicting socialists for posing a “clear and present danger” by disseminating leaflets against World War 1 draft arguing, inter alia, that “conspiration was despotism in its worst form and a monstrous wrong against humanity in the interest of Wall Street’s chosen few.”); see also Dennis v. United States, 341 U.S. 494, 511 (1951) (6-2) (convicting 50 leaders of the American Communist Party for “conspiracy to advocate, as distinguished from advocacy itself,” of the overthrow of government by force and violence); Whitney v. California, 274 U.S. 357(1927) (convicting Ms. Whitney, on a “clear and present danger” doctrine, who joined and assisted in the organization of a Communist Labor Party in California, thus contravening a State Criminal Syndicalism Act), overruled by Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (equating Whitney’s communist speech with Klan-Speech, holding both constitutionally protected as consisting of “mere advocacy” and not “incitement to imminent lawless action”); Gitlow v. New York, 268 U.S. 652, 654–55 (1925) (affirming Benjamin Gitlow’s conviction, a member of the “Left Wing Section of the Socialist Party,” under a statute criminalizing, inter alia, advocating “the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, . . . or by any unlawful means”); Abrams v. United States, 250 U.S. 616 (1919) (8-1) (convicting leftists under an espionage act for circulars allegedly intending to provoke and encourage resistance to the war with Germany, including a general workers strike in ammunition factories).

\textsuperscript{885} MacKinnon, Only Words, 38–39.

\textsuperscript{886} See Catharine A. MacKinnon, “Sex Equality: On Difference and Dominance,” in Toward Feminist Theory, supra chap. 4, n. 580, at 233–34 (“Those who most need equal treatment will be the least similar, socially, to those whose situation sets the standard against which their entitlement to equal treatment is measured. The deepest problems of sex inequality do not find women ‘similarly situated’ to men.”); ibid., 225 (“[t]he women that gender neutrality benefits . . . are mostly women who have achieved a biography that somewhat approximates the male norm . . . the least of sex discrimination’s victims. When they are denied a man’s chance, it looks the most like sex bias.”); Crenshaw, “Demarginalizing Intersec-
of these three approaches is that by positing all non-public actors as supposedly equal participants—either in a “marketplace of ideas,” or as insignificant “pole-cats” relative a powerful state, or as generally similarly situated (or otherwise “different,” hence deserving unequal treatment)—they ignore substantive inequality and how such social dominance is reinforced by non-state actors. In essence, the viewpoint neutrality doctrine is power-blind, treating every expression and group similarly regardless of social power and context in which they act. Such a “formal equality” framework have imposed a number of conceptual problems even where they appear to be successfully applied, as can be seen when analyzing the secondary effects doctrine below.

Secondary Effects and Public Display Doctrines

For instance, in Renton v. Playtime Theatres (1986), a zoning ordinance was held not to violate the First Amendment when prohibiting adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or schools; the Supreme Court took the position that this regulation “aimed not at the content of the films shown at ‘adult motion picture theatres,’ but rather at the secondary effects of such theaters on the surrounding community.” Notably, two dissenters preferred to invalidate the provision as being an impermissible viewpoint-based regulation in disguise, only sustainable under strict scrutiny. Courteously, these dissenters exemplified secondary effects that could provide an interest “compelling” enough to sustain the ordinance, even if allegedly content- or viewpoint based. For instance, it was mentioned that “location of adult entertainment . . . may lead to increased levels of criminal activities, including prostitution, rape, incest and assaults in the vicinity.” However, the dissenters thought evidence of such harmful effects in their case were “very thin,” thus not compelling enough to sustain strict scrutiny for the city of Renton.
Contrary to the Renton dissenters’ assessment, it has generally been established with a variety of social science methods surmised in chapter 3 how common pornography consumption promote sexual aggression that could include such acts as enumerated by the dissenters—that is, rape, sexual harassment or sexual assault (pp. 98–115 above), and prostitution or incest (pp. 122–129). Furthermore, this evidence shows beyond reasonable doubt that consumption promotes attitudes supporting violence against women such as rape-myths or trivialization of sexual abuse (pp. 115–122), which in turn has been shown to cause increased behavioral sexual aggression among the exposed subjects (cf. 93–98). Similarly, the power imbalance between pornographers and prostituted persons often facilitate similar abusive treatment in the course of production, even under ostensibly “legal” conditions (pp. 64–75). Thus, it appears more consistent with reality not to pretend, as the Renton-majority did, that the particular content of the films shown was not the very reason for the secondary effects thought important or substantial enough to save the ordinance. In this respect, the dissenters got it right. Nonetheless, doctrinally such an interpretation might have invalidated the ordinance if effects were not seen as “compelling” enough under present law. An exception might be found under group libel law as construed in Beauharnais v. Illinois (1952), further to be discussed below (pp. 263–269).

The secondary effects doctrine, regardless of its success among the Supreme Court majorities, is empirically quite tepid if assuming its intent is to reach documented consumption and production harms. First, it is not applied to distribution or production of pornography. Second, it only applies to harmful effects flowing from public exposure, as opposed to those flowing from private consumption. The latter are untouched, regardless of whether or not it is the more harmful of the two. This public/private distinction is quite apparent in successful cases establishing the state’s right to zone, disperse, or regulate the time, place, and manner of sale/exposure of sexually explicit material.896 Again, what we see in the most liberal legal architectures, such as the U.S. system, is the similar concept of negative rights rooted in early modern philosophy such as those of Locke, Montesquieu, Madison, and Mill that has been criticized thoroughly for separating public harms from private harms, often neglecting the latter (pp. 143–148 above).

Other consequences from the secondary-effects doctrine have been proven potentially harmful by themselves, particularly zoning regulations. Zoning laws have historically provided a means for rich neighborhoods to displace unwanted adult businesses such as strip clubs, or pornography stores, into poor neighborhoods who have less political or social power.897 Secondary effects doctrines appear as easily result-

896 See, e.g., City of Erie v. Pap’s A.M., 529 U.S. 277, 296–97 (2000) (asserting that “interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects associated with nude dancing are undeniably important”); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63 (1976) (holding that “the fact that the classification” of a zoning regulation “is predicated on the content of material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment.”); F.C.C. v. Pacifica Foundation, 438 U.S. 726, 748–51 (1978) (holding that even if broadcast was not obscene, since broadcast media has an uniquely pervasive presence to children order to suppress prerecorded monologue in early afternoon on radio because of indecency prohibited by statute did not violate the First Amendment); California v. LaRue, 409 U.S. 109, 111 (1972) (holding that, in context of licensing sale of intoxicating liquors to bars and nightclubs where “[p]rostitution occurred in and around such licensed premises, and . . . attempted rape, rape itself, and assaults on police officers” the state may proscribe non-obscene acts within First and Fourteenth Amendments limits), abrogated in part by 44 Liquormart, Inc. et al. v. Rhode Island and R.I. Liquour Stores Ass’n, 517 U.S. 484, 515–16 (1996) (“We are now persuaded that the Court’s analysis in LaRue would have led to precisely the same result . . . . [but we] disavow its reasoning insofar as it relied on the [scope of liquor regulation permitted under the] Twenty-first Amendment”).

897 See infra notes 898–900 and accompanying text for examples of this political dynamic.
ing in asymmetrical zoning laws where the political power is asymmetrically distributed. Hence, they can be particularly counterproductive in combating the harms of pornography and inequality. In order to illustrate these problems a short summary of such a situation in one jurisdiction were notable legal challenges to pornography were later made may be instructive.

According to various accounts, in 1983 the elites in the twin cities of Minneapolis and St. Paul, Minneapolis, had successfully fought so pornography businesses were not present in their own areas, using zoning laws among other things to this end. At the same time, they invoked civil liberties and other rights to protect the availability of pornography stores and live pornography (stripping etc.), particularly in other areas frequently visited by wealthier residents. Visitors could return to their protected zones where they lived, while populations living in the exposed areas could not. These latter areas contained a high number of Black, Native American, Southeast Asian, and poor people. Patrons were thus drawn from the greater city-area, sexually harassing women and children on a daily basis and soliciting pedestrians for prostitution while women, animated by higher crime rates, reported constant fears for them and their children to be harmed while outside their home. Perhaps it is unsurprising that adverse effects experienced by poor neighborhoods under zoning policies were a factor that ignited the possibly most powerful legal challenge to pornography in the United States hereto, beginning in Minneapolis and taking the view that pornography violates principles of sex equality and promotes sexual abuse and exploitation. Indeed, the theory of “consciousness raising” discussed previously suggests that particular groups who are subjected to a shared form of oppression will, when they organize themselves against it, eventually develop an “oppositional consciousness” with priorities, perspectives, and interests that may differ from the surrounding society.

As suggested in chapter 4 by theorists Iris Marion Young, Ian Shapiro, and Kimberle Crenshaw, and by empirical researchers such as Laurel Weldon and Jane Mansbridge, to successfully challenge the social dominance facing these distinct groups their autonomous organization and representation in politics should be supported. Similarly, laws should account for their perspectives and interests, for example by legislative or judicial procedures that compel decision-makers to account for them or to account for how potential consequences of policies would affect these groups. In the case of Minneapolis, it is particularly useful to study the implications of their perspectives in the form of their legal challenge, as it was evidently based on the social reality of groups who, because of the particular zoning laws in their city, were more exposed to the harmful effects of consumption and production harms of pornography.

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898 For this paragraph, see, e.g., Brief of the Neighborhood Pornography Task Force, Amicus Curiae, in Support of Appellant Hudnut v. American Booksellers Ass’n, 771 F.2d 323 (7th Cir. 1985), reprinted in Harm’s Way, supra chap. 1, n. 126, at 324, 327; see also Downs, New Politics, supra chap. 4, n. 557, at 25 (noting that studies at the time suggested “community leaders” and especially “legal elites” were more in favor of protecting pornography than the “mass public”); Brest and Vandenberg, “Anti-Pornography Movement in Minneapolis,” supra chap. 6, n. 697, passim.
899 See particularly Brief of Neighborhood Task Force, 322–23; Brest and Vandenberg, “Anti-Pornography Movement in Minneapolis,” 609.
900 These legal challenges are further discussed in detail infra chap. 10, esp. pp. 300-348.
901 See, e.g., Young, “Polity & Group Difference,” supra chap. 4, n. 571, at 124.
A Legislatively Dominated System (Sweden)

By contrast to liberal regulations such as those in the United States that are governed largely by case law, Sweden has a regulatory system for pornography that is governed more by codified constitutional rules, amendments, and procedures for judicial adjudication. Nonetheless, when analyzing the Swedish system it will be evident that many underlying rationales for these conditions share the same liberal ideological foundations as those underlying U.S. regulations. The laws may nonetheless have developed with substantive differences in some areas. For instance, Sweden has a law against violent pornography that is not an obscenity law, which is the predominant U.S. regulatory framework, but a gender-equality law. Yet Sweden’s law contains procedural obstacles that arguably make it more difficult to apply; again, not for the same reasons as why obscenity law is difficult to apply (cf. 194–202 above), but for peculiar reasons related to Sweden’s liberal constitutional regulations (more below).

Sweden’s General Framework in Comparative Perspective

Sweden’s written constitutional system with respect to expression is divided into three codes; all are fundamental laws—a constitutional statute that is generally superior to other laws. For a fundamental law to be amended there must be two majority parliamentary decisions with one election in between, as well as some other legislative requirements. The general expressive framework is found in the Instrument of Government (Regeringsformen) (the “Instrument”), where various rights, obligations, and aspirational imperatives can be found. For instance, the Instrument guarantees everyone “freedom to communicate information and express thoughts, opinions and sentiments, whether orally, pictorially, in writing, or in any other way . . . [and] freedom to procure and receive information and otherwise acquaint oneself with the utterances of others.” It further sets forth a number of general principles similar to other liberal democracies that permit limitations to these freedoms. For instance, restrictions may be imposed, inter alia, “with regard to national security . . . individual reputation, privacy, or the prevention and prosecution of crime,” and freedom of expression may “be limited in business activities” or otherwise “where particularly important grounds so warrant.”

U.S. law similarly permits restrictions as Sweden if there are particularly important grounds (here called “a compelling state interest”), assuming the regulation sustains strict scrutiny review. The U.S. “intermediate” standard of scrutiny that requires a proportionality assessment with respect to the government interests at stake, as enunciated in United States v. O’Brien (1968), so that “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,” also has a similar codification in the Swedish Instrument: The Instrument thus holds that limitations “may be imposed only to satisfy a purpose acceptable in a democratic society . . . [and] never go beyond what is necessary with regard to the purpose that occasioned it, nor . . . constitute a threat to the free formation of opinion as one of the fundaments of democracy.”

902 Regeringsformen [RF] [Constitution] 8:14 (Swed.) (as amended 2011).
903 RF [Const.] 2:1(1) (Swed.).
904 RF [Const.] 2:23(1) (Swed.) (emphasis added).
905 See supra note 839 and accompanying text.
907 RF [Const.] 2:21 (Swed.).
tive purposes, it should be noted that while this provision shares similarities with U.S. law, it is less similar to the corresponding Canadian Charter’s section 1 that “guarantees the rights and freedoms . . . only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In Canada it is the rights and freedoms that have reasonable limits and must be demonstrably justified; in Sweden it is the limitations that must be reasonable and democratically justifiable. Hence, the permissible limitations under the Swedish Instrument seem to resemble the First Amendment (“no law”) more than the Canadian Charter (“reasonable limits”).

Corresponding further with the O’Brien doctrine, the Swedish Instrument of Government provides that no limitation of expressive or other rights “may be imposed solely on grounds of a political, religious, cultural or other such opinion.” As recalled, O’Brien held that regulations of expressive activity may be constitutionally sustained if, inter alia, the underlying governmental interest was “unrelated to the suppression of free expression.”

The underlying philosophy behind the Swedish Instrument’s provision seems to be the same as the viewpoint-neutrality doctrine following after O’Brien, which is ostensibly to prevent the state from suppressing unpopular views from dissidents while legally privileging the views of the orthodoxy or the mainstream. Similarly with the U.S. law’s content/viewpoint distinctions, time-place-and-manner, and “secondary effects” doctrines, the Swedish Instrument also provides that detailed regulations of “a particular manner of disseminating or receiving information, without regard to its content, shall not be deemed a limitation of the freedom of expression or the freedom of information.” This provision raises potential interpretive problems that have arisen in American and Canadian jurisprudence regarding problems of colorable attempts to suppress particular “content” or “viewpoints” by targeting certain media venues under ostensibly “neutral” pretenses.

By contrast to O’Brien and the Swedish “viewpoint neutrality” standards, under the Canadian balancing approach the “message” for instance of hate propaganda was held to deny “members of identifiable groups . . . equal standing in society,” hence denying that they are “human beings equally deserving of concern, respect and consideration”; such types of content were permissible to regulate because they “run directly counter to the values central to a free and democratic society.” Put otherwise, while the government in Canada does not need to be “viewpoint neutral” when regulating expression so far as regulation is firmly grounded in democratic values, the United States and Sweden cast a stronger presumption against such action unless “particularly important grounds” or “compelling interests” so warrant.

909 RF [Const.] 2:21 (Swed.).
911 RF [Const.] 2:23(3) (Swed.) (emphasis added).
912 The Canadian Supreme Court, for instance, noted that “rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning.” Irwin Toy Ltd. v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927, 975, CarswellQue 115 ¶ 50 (Can.). American dissenting justices have often argued similarly in pornography cases, although without necessarily favoring less regulation per se. See supra pp. 224–227. Their line of critique is not, however, restricted to pornography, but covers other types of regulations that impact on expressive activity. See, e.g., supra note 859.
Detailed Statutory Regulation and Unprotected Expression

The statutory regulations of expressive activity do not end in the Instrument. The Instrument delegates, in its second chapter, the further detailed specification to a couple of additional fundamental laws on the freedoms and regulations of printed, visual, and other enumerated media there.914 These two codes are also fundamental laws, hence subject to the same procedural regulations for legislative amendments as the Instrument is. The Freedom of the Press Act (Tryckfrihetsförordningen) accordingly includes numerous regulations and rules for printed media, while the more contemporaneous Freedom of Expression Act (Yttrandefrihetsgrundlagen) regulates a number of non-printed media in a corresponding fashion.915 Certain media are not covered by these two codes, such as theatres, demonstrations, public meetings, and much Internet media (unless certain requirements or actions on behalf of a formally responsible online publisher are fulfilled).916 These excluded media are only regulated by the Instrument. The general assumption is that the two detailed Swedish additional fundamental laws take “exclusive” precedent over general law, unless the fundamental laws themselves or other established doctrines suggest otherwise (more below); that is, they regulate activity that is associated with the rights of expressive freedoms in printed or other specified protected media according to the delegation from the Instrument. In section 3 of Sweden’s Freedom of the Press Act, the most explicit expression of this “principle of exclusivity” is found: “On account of an abuse of the freedom of the press or complicity therein no person may, other than as prescribed or in other cases than this Act determines, be charged or held criminally liable, or held liable for civil damages, nor may the publication be confiscated or impounded.”

However, legislative history, case law, and other doctrine holds that the two fundamental laws do not subject every imaginable proscribed activity to the exclusive jurisdiction of the fundamental laws simply because the conduct, at some point, made use of protected expressive media. For instance, fraud, blackmailing, unfair competition (e.g., by misleading advertising), forgery of banknotes, dishonest conduct, misleading information, or illicit printing of money, have since long been recognized as not being protected by freedom of expression, even though they are not explicitly enumerated in the fundamental laws.918 Such unprotected use of printed media was already recognized during the 19th century when, around 1880–1890, Swedish legal scholars suggested that a distinction be made between legitimate expressive activity protected by the principle of exclusivity, as opposed to unprotected illegitimate expressive activity directly governed by general law; accordingly, fraudulent activity conducted by “‘disseminating false information [and] making oneself...”

914 RF [Const.] 2:1(2) (Swed.).
915 See Tryckfrihetsförordningen [TF] [Constitution] (Swed.); Yttrandefrihetsgrundlagen [YGL] [Constitution] (Swed.).
916 See Konstitutionsutskottets betänkande [Bet.] 2001/02:KU21 Yttrandefrihetsgrundlagen och Internet, m.m. [parliamentary committee report/proposal] 22–32 (Swed.) (passed) (distinguishing various levels of expressive protection among different Internet media actors); see also Statens Offentliga Utredningar [SOU] 2010:68 Ny yttrandefrihetsgrundlag? Yttrandefrihetskommittén presenterar tre modeller [government report series] 50–53 (summarizing existing regulations).
917 TF [Const.] 1:3 (Swed.). A similar provision exists in the Act on Freedom of Expression, see YGL [Const.] 1:4 (Swed.).
liable to a deceitful behavior’’ was contrasted against expressive activity that contained more substantial value, such as ‘‘authoring, that is, to scrutinize and critically illuminate public or private circumstances.’’

Similar ideas distinguishing protected from unprotected expression were emphasized when, in 1900 and in 1905, the Swedish Supreme Court convicted persons for fraud on basis of newspaper advertisements. Late Swedish legal scholar Gunnar Persson suggests that these two decisions have more than anything else molded the perspective on the Freedom of the Press Act’s principle of exclusivity. The Supreme Court is said to have focused entirely on the problem of assessing the number of fraudulent advertisements in these cases, leaving the assessment of the applicability of the Freedom of the Press Act completely unremarked; but if the Court would have literally followed the formal views expressed in the legislative history and scholarly doctrine at the time, the charges would have been dismissed. In 1907, the fraud decisions seemingly sparked the attention of legal scholar Nils Alexanderson, who provided an interpretive account of what legal rationales implicitly supported these decisions:

[I]t is completely clear—although the contrary occasionally is professed in misguided fervor regarding what freedom of the press is considered to be—that the Freedom of the Press Act’s chapter 1, section 1 by no means entails that every indicted activity, which made use of the printed word to bring about the accomplishment of its intent, would fall under the freedom of the press’s procedural regulations. The error herein is easily found through a justified comparison between freedom of expression and freedom of the press. If an impostor makes use of a printed advertisement in order to accomplish their objective, this is just as little a freedom of the press offense as it would appear to us to describe the verbal fraudulent account as a criminal violation of the boundaries of freedom of expression. The criminalization has in both cases apparently been made from an entirely different perspective. It is, however, a prerogative of criminal law to examine more closely when a crime, brought about through print, is an offence against freedom of the press or not—in other words, to determine the scope of the cases to that the above quoted Freedom of the Press Act’s clause, and other existing proclamations on the mentioned law’s position as exclusive criminal law norm, are applicable.

Put otherwise, Alexanderson seems to say that when criminalization of an activity had not been made with the intention to restrict the cultural, social, and political freedom of expression, such laws could be regarded as being outside the purview of the fundamental laws even if impacting on the (technical) use of expressive media. Although Alexanderson did also recognize that a more dogmatic textual approach to

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920 The first case concerned advertisements that appeared as seeking applicants for two positions of employment, with a request for two stamps to be mailed together with potential applications if the applicants wanted a response. A number of responses with stamps attached had thus been received, and the advertiser had admitted his/her fraudulent intent; i.e., the advertiser was only concerned with collecting the stamps for their market value, and had no intentions to offer any employment. These cases are further described and analyzed in Persson, Exklusivitetsfrågan, 63 et seq.

921 Persson, Exklusivitetsfrågan, 63.

922 Persson, Exklusivitetsfrågan, 64.

the statutory wordings would conflict with his more contextual reading.\textsuperscript{924} His account has offered an appealing formula how to resolve such conflicts. The purposes of both the fundamental laws and potentially colliding general law seems central to Alexanderson’s view, though it is not technically a balancing application as under the Canadian Charter (see chapter 8 below) since the attempt is to distinguish one primary objective rather than to actually acknowledge a constitutional conflict. When it comes to criminal law, Alexanderson even appears to emphasize its purposes above the Freedom of the Press Act (“a prerogative of criminal law”) to determine whether the fundamental laws are applicable at all. Nonetheless, the intentions of the latter need to be delineated as well in order to determine whether a criminalization was made from (in Alexanderson’s words) an “entirely different perspective” than to prescribe an abuse of the freedom of the press.

The Freedom of the Press Act spells out its legislative objective in its first section, and the Instrument also contains similar wordings,\textsuperscript{925} the former holding that “universal freedom of the press for all” is related to the purpose “of securing a free exchange of opinion and availability of comprehensive information”; hence, the individual’s right to “express his or her thoughts and opinions in print, to publish official documents and to communicate information and intelligence on any subject whatsoever.”\textsuperscript{926} Following Alexanderson, terms such as “opinion” or “information” are not self-explanatory. One should therefore consider the political, social, and cultural purposes of freedom of expression, as opposed to doing a mere textual reading. When an act had been criminalized, or otherwise regulated with legislative intentions unrelated to freedom of expression, the freedom of the press would not release the liability simply because the culprit made use of printed or other media during the course of his activity. Such an interpretation was also made in the legislative history of the most comprehensive amendments to the Freedom of the Press Act passed by Parliament in 1949; here, a government commissioned expert report explicitly referred to Alexanderson, stating that the “meaning and purpose” of freedom of the press is determining for the principle of exclusivity, and that freedom of the press “primarily” intends to secure a “free dissemination of news and an unrestrained political debate” and as such had “not taken as its task to regulate in every aspect the use of printed matters.”\textsuperscript{927} (In Sweden, these reports have substantial legal weight, unless they're explicitly dismissed by the legislators.) The report further enumerated many practical examples of criminalized activity that could be carried out by expressive means that nonetheless were seen as lying outside the boundaries of the Freedom of the Press Act: these were illicit invitation to lotteries, dishonest conduct, blackmailing, fraud, unfair competition, illicit printing of money, misleading information, among others.\textsuperscript{928}

Assuming Alexanderson and the 1949 government report’s common view above, the interpretation of the “principle of exclusivity” must be made in light of the general purposes of freedom of expression. Hence, when the Act on the Freedom of the Press’s section 3 mentions that “an abuse of the freedom of the press” may only be

\begin{footnotes}
\footnote{\textsuperscript{924} See ibid., 9–11; cf. Persson, \textit{Exklusivitetsfrågan}, 65–69 (discussing Alexanderson’s work and the context of his writings).}
\footnote{\textsuperscript{925} See supra note 903 and accompanying quotations from \textit{Regeringsformen [RF] [Const.]} 2:1(1) (Swed.).}
\footnote{\textsuperscript{926} TF [Constitution] 1:1(2) (as amended 2011). See also Persson, \textit{Exklusivitetsfrågan}, 33, who notes that at the time of Alexanderson’s writings, the phrase “communicate information and intelligence on any subject whatsoever” did not exist in the Freedom of the Press Act.}
\footnote{\textsuperscript{927} SOU 1947:60 [gov’t report series], supra note 918, at 120 (Swed.).}
\footnote{\textsuperscript{928} \textit{Id.} at 250–51.}
\end{footnotes}
legally proscribed under the fundamental law, its wording does not necessarily imply that legal action against every use of the printed word per se must be regulated under the Act—only those uses of “freedom of the press” that might either contribute to or abuse the free exchange of opinion and information that freedom of expression intended to protect in order to further development of progressive liberal societies. Such an interpretation appears very similar to how so-called low-value speech has been excluded from expressive protections in the United States. As recalled above, Chaplinsky v. New Hampshire (1942) held that “certain well-defined and narrowly limited classes of speech” do not “raise any Constitutional problems” because they provide “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

The Swedish provision prohibiting censorship and prior restraint found in chapter 1, section 2 of the Freedom of the Press Act also appears to be subject to a similarly non-absolute determination of the principle of exclusivity that focuses on the societal objectives with freedom of expression. For instance legal action, including seizure of private possession, may be taken already during the stages of attempts, preparation, and conspiracy in cases of counterfeit offenses, such as illicit printing of money, and without any explicit rule of delegation in the fundamental laws. Moreover, copyright law allows similar actions under general law, albeit with the support of an explicit rule of delegation in the fundamental laws. One Swedish legal scholar, Hans Gunnar Axberger, stated in 1984 that there are no exceptions to the censorship and prior restraint prohibition, even for materials falling outside the purview of the principle of exclusivity. Persson has responded to this claim saying that existing law shows Axberger was incorrect. Not surprisingly, recent cases against sexual offenders who filmed their offenses clearly support Persson’s view, as there was no bar against prior restraint when law enforcement and courts confiscated the media prior to securing convictions; in one case they even forfeited defendant’s media after his acquittal of the sexual offense (see 460–463 below). No objection to such prior restraint (or censorship) was ever voiced by any lawyer in these cases (ibid.).

**Freedom of Expression Offenses, Delegations, and Procedures**

One reason why it has been so important to carve out exceptions from the written fundamental laws along the Alexanderson doctrine is that whenever the legislature has regarded an activity an “abuse of,” rather than being unrelated to “freedom of expression,” it has been codified in the “freedom of expression offenses” catalogue of the fundamental laws; these include traditional offenses such as recklessness with secret information, defamation, and unlawful threats, as well as more modern offenses like distribution of violent pornography or agitation against a population

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929 TF [Const.] 1:3 (Swed.) (emphasis added).
932 Ibid., 309–10.
933 Ibid., 308–09.
group. \(^{936}\)

However, the catalogue entails a host of procedural restraints and obstacles to apply such laws when compared to applying general law.

For example, the former usually ties liability to an editor-in-chief or the next responsible person (deputy editor, owner, printer, disseminator, etc.), rather than to the de facto culprit (e.g., the author, informant, or photographer). \(^{937}\)

Presumably, an effect of the system is to make editors more careful in not abusing their freedoms of expression, while simultaneously making authors and informants less vulnerable to direct legal sanction—that is, not unduly chilling their freedom of expression. \(^{938}\)

Yet a result of the liability under this framework is that pornographers and pimps who exploit people in pornography are legally untouchable, while only editors can be prosecuted. \(^{939}\)

Such features raise the issue whether other laws should be used in Sweden against sexual exploitation in \textit{production} of pornography—for example, trafficking or prostitution laws. Applications of that sort might be possible under the Alexanderson doctrine when impacting directly on dissemination of media. But it might also be possible to charge pornographers for pimp-related offenses without taking action against their distribution of the materials, in which case the Alexanderson doctrine may even be unnecessary to invoke. A more elaborate discussion of these legal challenges to pornography production is found in chapters 9 and 12 below.

Further obstacles exist in the catalogue of freedom of expression offenses when compared with general law. For instance, the consent of the Chancellor of Justice is needed, with few exceptions, to bring any charges except in purely civil cases (e.g., defamation). \(^{940}\)

The underlying philosophy of this procedural obstacle seems to be that individual actors in the judicial system should not as easily be able to abuse the powers of the criminal law to further a particular political agenda. Such an objective is furthered if initiating prosecutions against freedom of expression offenses are restricted to the highest authority. Moreover, if one party demands a special \textit{Freedom-of-the-Press Jury} in the court of first instance, nine jurors must be appointed and a \textit{majority of six} is needed for a successful conviction. \(^{941}\)

This jury’s sentencing can only be mitigated downwards by the court’s judge; and only the defendant can appeal its decision. Higher courts can then merely affirm, acquit, or reduce previously imposed penalties—not impose new ones. \(^{942}\)

This particular procedure puts much power in the jury majority—a fact evident in 1969 when Sweden repealed most of its obscenity laws because, apart from the obscenity concept’s inherent vagueness (cf. chapter 6 above), these regulations made it close to impossible to develop any predictable case law as the bar for raising penalty in higher instances enabled local juries to set the ceiling unbound by national standards. \(^{943}\)

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\(^{936}\) TF [Const.] 7:4–5 (Swed.).
\(^{937}\) These general rules for liability are found in chapter 8 of the Freedom of the Press Act, see TF [Const.] chap. 8 (Swed.), and in chapter 6 of the Freedom of Expression Act, see YGL [Const.] ch. 6 (Swed.).
\(^{938}\) The latter’s identities are also often protected under the fundamental laws. See TF [Const.] chapter 3 (Swed.).
\(^{939}\) For further analysis of the historical context, the benefits, and the general problems with the system of editorial liability, see Persson, \textit{Exklusivitetsfrågan}, 378–416.
\(^{940}\) TF [Const.] 9:2 & 4 (Swed.).
\(^{941}\) TF [Const.] 12:2 (Swed.).
\(^{942}\) Id.
\(^{943}\) Proposition [Prop.] 1970:125 Kungl. Maj:ts proposition nr 125 med förslag till ändring i tryckfrihetsförordningen m.m. [government bill] p. 69 (Swed.) (noting additionally that “the lack of uniformity in case law in part is explained by the fact that an acquittal by a jury cannot be appealed”).
The various statutory “restraints” on the application of offenses against freedom of expression may appear consistent with the liberalism and “negative rights” concepts of the early democratic theorist Madison and Montesquieu, who desired to keep the judicial as well as legislative powers checked (see 143–148 above). Nonetheless, such a concept of democratic liberty circumscribes the possibilities for public intervention in abusive social relationships and prevents public acts against social dominance by casting a presumption of tolerance in favor of pornography and pornographers (cf. ibid.). Considering that consumption in itself causes and predicts a significant increase in attitudes supporting violence against women such as trivialization of sexual abuse (pp. 115–122), when placing the power to apply pornography laws in hands of a “freedom-of-press jury” that sets the ceiling unbound by national standards, and without specific competence to assess harmful pornography materials, it might lead to trivialization or arbitrary penalties just as it did under obscenity laws.\footnote{Democratic theories with an emphasis on social dominance, particularly “hierarchy theory,” suggest rather that the groups who are adversely affected by the harms of pornography should be represented in any such juries, as they should in other public bodies entrusted with constructing or making decisions on policy affecting them (pp. 153–168). This theory holds for the office of the Chancellor of Justice as well, which is a public body not particularly well represented by the groups affected by pornography’s harm—that is, prostituted persons, prostitution survivors, or people otherwise victimized by sexual aggression who have been surveyed in various studies (e.g., pp. 55–75, 109–115, 122–129). In total, hierarchy theory suggests that the procedural restraints and limited institutional designs accordingly affect the legal framework of “offenses against freedom of expression” to the point of becoming ill-suited to address the problem of pornography.}

In addition to the enumeration of offenses against freedom of expression, however, there exist a number of more comprehensive rules exempting activity from being exclusively regulated by the two fundamental laws when being conducted through media. These are often referred to as rules of delegation—statutory provisions that delegate the authority over certain expressive activity to general law. Under such explicit rules for delegation, among other practices child pornography has been completely exempted from the protections afforded under the fundamental laws on expression (more below).\footnote{This provision was inserted in 1949, and appears to codify Alexanderson’s doctrine with respect to unprotected} Thus, legal proceedings against producers, disseminators, and those possessing it, do not have to follow the elaborate procedures spelled out in the fundamental laws. Other such explicit rules of delegation exempt gross unauthorized trafficking in secret information or deliberate disregard of confidentiality; thus, such activity may also be governed entirely by general law, with liability being tied to the actual culprit rather than the publisher or disseminator, and without the other procedural regulations.\footnote{There are also variations to how the specific delegation is conceived. For instance, although chapter 7, section 2, in its first sentence holds that statements expressed in advertisements or similar “communication” are not to be regarded as offenses against the freedom of the press unless “it is not readily apparent” from their “content,” in a second sentence provides a waiver of the fundamental law’s regulation when a “communication is punishable under law, having regard also to circumstances that are not readily apparent from its content.” This provision was inserted in 1949, and appears to codify Alexanderson’s doctrine with respect to unprotected}

\footnote{Cf. id.}
\footnote{TF [Const.] 1:10 (Swed.); YGL [Const.] 1:13 (Swed.).}
\footnote{TF [Const.] 1:13 (Swed.).}
\footnote{TF [Const.] 7:3 (Swed.).}
\footnote{TF [Const.] 7:2 (Swed.) (emphasis added).}
activity such as fraud, illicit printing of money, unfair competition, and blackmail—these offenses may precisely not be “readily apparent” by their explicit content. An interesting parallel is that coercive circumstances in the production of pornography are also “not readily apparent from its content.” Other examples of rules of delegation outside the purview of the fundamental laws cover copyrights for authors, artists, photographers, and similar originators, regulations of commercial advertising and marketing associated with “alcoholic beverages or tobacco products,” regulations of commercial advertising intended to protect health or environment according to Sweden’s obligations in the European Community, regulations of professional credit information activities, and regulations of criminal and civil liability for damages incurred when procuring information or intelligence.

In light of the structure of the two fundamental laws, including the obstacles to amend them, it appears unreasonable to subject every imaginable criminal activity to the fundamental laws simply because the conduct, at some point, made use of protected expressive media. However, from a more dogmatic ideological position emphasizing “negative rights,” it follows that even if such regulations may sometimes unwittingly reach democratic freedom of expression, without a constitutionally amended rule of delegation the balancing should favor freedom of the press over equality, non-exploitation, dignity, or humanity. As will be shown below, this ideological position—extreme as it appear—may nonetheless have influenced the legislative history of Sweden’s child pornography prohibition.

Child and Adult Materials

Complicating legal challenges to pornography, the dissemination of child and adult pornography (and possession) have by Swedish legislatures not been regarded as covered by the exemptions recognized under the Alexanderson doctrine. Accordingly, production with intent to disseminate violent adult pornography has been proscribed since 1987 not by judicial interpretation, but by an amendment to the freedom of expression offenses catalogue as “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.” In the legislative history to this act, the purview of the Freedom of the Press Act’s protection was outlined as follows:

The provisions in the Freedom of the Press Act primarily protect the free debate and the free flow of information regarding various social issues. But the protection is not limited to this area. The freedom to express oneself in printed matter holds for ‘any subject whatsoever.’ This means that, for example, religious, artistic, or scientific presentations are covered by the protection as well as presentations characterized as pure entertainment.

A similar phrase was expressed in dicta by the Supreme Court in 1979 when it summarized the scope of application for constitutional protection, with the addition of

948 TF [Const.] 1:8 (Swed.).
949 TF [Const.] 1:9 (Swed.).
950 Cf. Persson, Exklusivitetsfrågan, 151–54 (discussing this position with respect to the collision between copyright law and the fundamental laws on expression, where a rule of delegation exists in TF [Const.] 1:8 (Swed.)).
951 TF [Const.] 7:4 ¶ 13 (Swed.).
952 Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] p. 21 (Swed.) (emphasis added). Further citations in text.
the term “pornography” among others: “The Freedom of the Press Act . . . . further protects presentations characterized as pure entertainment and without cultural value, even pornography and depictions of violence.\(^{953}\) However, since the government proscribed violent pornography and “depictions of violence” in 1987, these two are not protected anymore per se, though their prohibition is subject to the procedural constraints of the fundamental laws governing offenses against freedom of expression (see 230–233 above). The older obscenity statutes in Sweden were also regulated in the Freedom of the Press Act as “offences against freedom of expression” before 1970.\(^{954}\) These explicit regulations in the fundamental laws suggest that the Alexanderson doctrine has not been deemed applicable to the dissemination of pornography; however, whether the production is covered by trafficking and prostitution laws pose different questions that will be discussed in chapters 9 and 12 below.

As a matter of comparison with the Canadian law against dehumanizing and degrading adult pornography that was motivated in part by concerns for sex inequality,\(^{955}\) the Swedish government bill also rationalized the law against violent pornography in similar terms; the bill stated that women are “commonly depicted” in a “grossly offensive and dehumanizing way” in violent pornography (Prop. 1986/87:151 p. 102). The government concluded that it “had to be obvious” that such depictions would negatively affect boys and adult men’s view of women (id.), having previously noted support from social science evidence showing that exposure promotes behavioral aggression and that the research methods available at the time likely could not capture the whole complexity of these associations (id. at 91–92). Furthermore, the bill stated that “society’s efforts in various ways to promote equality between the sexes are countered by the fact that these materials may be freely disseminated,” and that there was “no reasonable rationale—regarding such products in particular—for retaining the present and significantly generous freedom to publish pornographic images” (id. at 102). The government also rejected other rationales than sex equality or empirically observable harm for defending such laws, for example, invoking moral or ethical values or other attitudes, however widespread public support they may (id. at 101). Thus, a community standards argument (as under obscenity law, pp. 194–202 above) was rebutted in favor of a sex equality standard for legislating against violent pornography.

Since producing and disseminating pornography per se were not enumerated as unprotected by the government bill in 1987—only violent materials—an assumption can be made that even such dehumanizing and degrading materials proscribed under Canadian law are still protected in Sweden. Such an interpretation is consistent with later constitutional amendments, where Parliament codified an explicit rule of delegation that put all regulations of child pornography in general law,\(^{956}\) taking effect on January 1, 1999 after two parliamentary decisions.\(^{957}\) The parliamentary decision on child pornography was heavily debated in Sweden, with newspaper and journalists’ organizations arguing against their complete delegation to general law that removed the procedural regulations generally used for offences against freedom of expres-

\(^{953}\) Nytt Juridiskt Arv [NJA] [Supreme Court] 1979-09-28 pp. 602, 608 (Swed.) (emphasis added).

\(^{954}\) See, e.g., Prop. 1970:125 [gov’t bill], supra note 750, at 17 (Swed.) (summarizing law).


\(^{956}\) For this rule of delegation in the Freedom of the Press Act, see TF [Const.] 1:10 (Swed.).

A contrary view had also been raised in public that the Alexanderson doctrine was an easier route to bypass child pornography regulation from the constitution (Prop. 1997/98:43 p. 67). These conflicting views probably contributed to that the government felt a need to state clearly its views on the issue in the bill. Nonetheless, as seen in this statement below, the doctrine is complicated and in certain aspects even the government cannot seem to give a technically correct account of existing law (e.g., with respect to prior restraint).

Without doubt, the legal interest of freedom of the press and expression carries a very substantial weight. Not that child pornography per se merits constitutional protection; the offense is [was] already included among offenses against freedom of the press and free expression. The problem is that taking legal action against possession of printed matters and other constitutionally protected materials is something that is inconsistent with important legal principles of freedom of the press, among which some are completely absolute today. It appears particularly questionable to encroach—apart from movies subject to public screening—the absolute prohibition against censorship and similar action that preempts publishing the material. The censorship prohibition is one of the true pillars of freedom of the press law, possibly the most important in the whole system of regulations.

The government’s starting point is, however, that the interest of protecting children has to be put first. . . . To the extent that it is called for to talk about a collision between the two interests, of defending the system of regulations of legal freedom of the press and expression and to provide as good a protection for children as possible, the children’s interests must always be put first.

. . . . In the debate on the child pornography issue, it has been suggested that child pornography . . . falls outside the purview of the Freedom of the Press and Expression Acts. The fundamental idea behind this view seems to be that dealings with images and movies that have been produced through a sexual offense against children is not criminalized as a violation of the boundaries of freedom of the press or freedom of expression, but as a means in the sexual offense against the children. Just as little as, for example, counterfeit money is about freedom of the press, child pornography would be regarded as making use of the freedom of the press.

The government here wants to establish that regardless of what may be claimed to be read into the fundamental law’s objectives or derived from their purposes or from legislative history, it is a fact that the child pornography offense is covered by the regulation in the Freedom of the Press Act since 1980 . . . . Child pornography, thus, are presentations considered to be an abuse of the freedom of expression in the same way as, for example, unlawful depiction of violence or agitation against a population group. (Prop. 1997/98:43 pp. 66–67; emphasis added)

The government in 1997 rather categorically concluded that because child pornography was covered by an explicit regulation in the fundamental laws before they amended the law, child pornography was “legally” an abuse of freedom of the press rather than unlawful expressive activity unprotected by the fundamental laws, such as forgery or counterfeit. However, its claim that prior restraint and confiscation of private possession are “absolute” principles that, by themselves, require an explicit delegation to general law does not appear correct. As mentioned previously, legal action including confiscation of private possession may be taken already during the stages of attempts, preparation, and conspiracy in cases of counterfeit offenses, such as illicit printing of money, and without any explicit rule of delegation in the fundamental laws; moreover, copyright law allows similar actions under general law,

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958 Prop. 1997/98:43 Tryckfrihetsförordningens och yttrandefrihetsgrundlagens tillämpningsområden: Barnpornografifrågan m.m. [government bill] at 71 (Swed.). Further citations in text.
though supported by an explicit rule of delegation.\textsuperscript{959} Similarly, a reading of a number of more recent Swedish criminal cases where sexual offenses had also been filmed by the defendants and stored on computer hard drives, video recorders, or on cell phones, shows that prosecutors could confiscate these medias before their cases had been resolved—even forfeit them though one defendant had ultimately been acquitted of the sexual offense (\textit{see} 460–463 below). Although such action could be regarded as a prior restraint on potentially lawful use of expressive media (or even censorship), it raised no objections of that kind by defendants. The impugned materials also contained constitutionally protected non-violent pornography according to current law (ibid.), but neither was an objection made on such grounds. Hence, contrary to what is said in the quoted government bill on child pornography above, there are no “absolute” principles prohibiting prior restraint or confiscation of private media possession.\textsuperscript{960}

Swedish legislators have nonetheless deemed that interests related to freedom of expression are involved to some extent with regard to pornography. This assessment matters more in a liberal regulatory system such as Sweden’s or the United States’ that prioritize expression over other constitutional interest and requires exceptional reasons not to do so, whereas in a balancing system such as Canada it is of less importance if the expressive interests are not as substantial as in the former (\textit{cf.} chapter 8 below). Nevertheless, this assessment has only been made by the government with respect to possession or (by implication) its dissemination: “The problem is that taking legal action against possession of printed matters and other constitutionally protected materials is . . . inconsistent with important legal principles of freedom of the press” (Prop. 1997/98:43 p. 66). Such action primarily targets the \textit{consumption harms}. By contrast, \textit{production harms} raise completely different issues, where laws targeting pimping-related (or trick-related) activity could be applied to the conditions of production with no direct legal consequences regarding the possession or dissemination of the materials themselves (see further chapters 9 and 12).

It may also be noted that the view that dissemination of pornography is covered by the purposes of freedom of the press is not without its legal critics. Persson highlighted the paradox in that Sweden on one hand legislates against sexual offenses with the law developing in the direction of “protecting” children and youth against all forms of child sexual abuses, while on the other hand the government submits that presentations of such abuse is an activity consistent with the purposes of the fundamental law’s protections of freedom of expression; his account implies that a more appropriate rationale for exempting child pornography from constitutional protection would be Alexanderson’s formula.\textsuperscript{961} The government bill on child pornography did directly address Persson’s view though, and categorically dismissed it on the rationale that since existing child pornography offenses were already inserted in the two fundamental laws, even child pornography must be considered expressive activity falling under their purview though as an “abuse” of the freedom granted (Prop. 1997/98:43 pp. 66–67).


\textsuperscript{960} A similar “absolute” argument made by a legal scholar was also rebutted in Persson’s treatise. Persson criticized Axberger who had effectively stated that there are no exceptions to the prohibition against prior restraint or censorship, even for materials falling outside the purview of the principle of exclusivity. \textit{See} Axberger, \textit{Tryckfrihetens gränser}, 77 (“the right to disseminate printed matters is not, whether according to 1:2 [censorship/prior restraint regulation] nor according to 6:1 [on dissemination], limited to printed matters whose content fall under the Freedom of the Press Act’s exclusive purview, but holds for printed matter in the sense of the concept’s formal meaning.”). According to Persson, “existing law shows, with clear examples, that this view is simply factually wrong.” Persson, \textit{Exklusivitetsfrågan}, 315.

\textsuperscript{961} Persson, \textit{Exklusivitetsfrågan}, 348–50.
Yet Alexanderson’s formula makes sense if considering that proscribing presentations promoting child sexual abuse was not proscribed on a rationale intending to restrict freedom of expression and information per se. For instance, the government itself rationalized the legislation on the grounds that child pornography images “may be shown for a child in order to induce the child to participate in such acts that are depicted on the image” (id. at 65). Similarly, the government held that “every . . . child pornography image entails a violation of the depicted child, but also of children in general, worth sanctioning. Even a possession of such an image entails a recurring violation of integrity” (id.). The legislative intent was thus rather to protect against “violations of integrity,” not to infringe a free discussion about child sexuality or other dissident or deviant speech. Whatever merit the Alexanderson legacy previously had in emphasizing the legislative intent of the general law over the purpose of freedom of expression (see 227–230 above), the 1997 government nonetheless held the contrary; without more a constitutional amendment, dissemination or possession of pornography merited protection by the fundamental laws.

Equality and Democracy

Both the American and Swedish doctrine for regulating adult pornography seem ideologically to be exemplary classic liberal regulations—one largely determined by judicial review, the other more by legislative history, both being restrained by various procedural obstacles. They contain typical doctrinal distinctions, such as viewpoint-based vs. viewpoint-neutral regulations, public exposure vs. private consumption, or requirements for a “clear and present danger” in other cases. There are certain exceptions, such as obscenity (United States), child pornography (United States and Sweden), or violent pornography (Sweden). With regards to such exceptions, the intermediate viewpoint-neutrality doctrine is typically not invoked to scrutinize whether or not they too are a form of viewpoint discrimination. Nevertheless, obscenity is largely defined as a form of majority “viewpoint” according to a community standards test of what is an inappropriate appeal to “prurient interest”; for example, an inappropriate, shameful, unhealthy sexual interest as opposed to “normal, healthy sexual desires.”\(^962\) Obscenity law therefore suggests that the viewpoint-neutrality doctrine is rather a consensus test within the liberal architecture. That is, only such expressions deemed unprotected by sustainable legislative majorities (e.g., via constitutional amendment, as in Sweden’s law against violent pornography), or by other powerful decision makers (e.g., judicial institutions, particularly in the United States), will be exempted from its reach even if in themselves amounting to “viewpoint discrimination.”

By contrast, minorities or less sustainable majorities who wish to similarly regulate cross burning or pornography on the “view” that they amount to social acts and practices that produce discrimination, abuse, or worse, thus a “particularly important ground” or a “compelling interest” for the state to regulate, face more obstacles. From this point of view, the liberal regulations can easily suppress minorities or less influential groups. Had James Madison known how a liberal constitution can protect pornographers, sexual exploitation, and engender violence against women, thus pursue interests “adverse to the rights of other citizens or the permanent and aggregate interests of the community,” he might have refined his thoughts on how “factions”

abuse democratic power.\textsuperscript{963} The imperatives of substantive equality for historically disadvantaged groups—as distinguished from the formal equality in concepts such as a “marketplace of ideas”—is relatively absent in liberal frameworks.

For instance, although the standard of \textit{strict scrutiny review} on its face appears to harbor significant potential to challenge the production and consumption harms flowing from adult pornography, it has yet not been so assessed. As shown above (pp. 211–214), the same logic of reasoning that supported not protecting child pornography under the First Amendment would apply to adult materials (as much of the Swedish rationale for their child pornography prohibition would)—but only given that the harms are considered a “compelling state interest” (or a “particularly important ground”). Here, it is notable that the United States regards otherwise completely lawful speech, such as teaching human rights law, a permissible subject to criminal sanctions under strict scrutiny review if directed to members of terrorist organizations so designated by Congress (one such group is the Kurdistan Workers’ Party (PKK), which seeks national independence for Kurds in Turkey).\textsuperscript{964} The U.S. Supreme Court has noted that such otherwise harmless human rights advocacy in certain contexts “frees up other resources within the organization that may be put to violent ends. . . . [or] helps lend legitimacy . . . that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”\textsuperscript{965}

By contrast to the “speech” of teaching human rights law to dangerous recipients, thus indirectly\textsuperscript{966} causing potentially severe dangers, the “speech” of pornography is often directly produced by harmful acts such as multiple entry gang rape, sexual abuse, coercion, and exploitation tantamount to legal slavery; acts that are openly communicated in its expressive forms (pp. 44–50, 55–75 above), as well as they are imitated in social reality due to the consumption of pornography (pp. 98–129). The fact that child pornography and terrorism have been regarded compelling interests is not criticized here—far from. But the relative trivialization of legal challenges to adult pornography as a form “viewpoint discrimination,” unless they are couched in the ambiguous terms of obscenity, or regulated under tepid frameworks against public display, or (as in Sweden) obstructed by construing them as “offenses against freedom of expression” attached with a host of procedural hurdles, is criticized. These liberal categorical distinctions seem to align with the concept of \textit{negative rights}. As recalled, the latter favors limited government intervention on the assumption that public abuse of power is the predominant cause for oppression (pp. 143–148 above). However, government toleration of abuse in and because of pornography may simply mean toleration of “privatized terror” by non-state actors. It may appear inconsistent to tolerate one form of terror but not another. Unfortunately, the fact that the categorical distinctions in liberal regulations produce such an outcome is not surprising.


\textsuperscript{964} Holder \textit{v.} Humanitarian Law Project, 130 S. Ct. 2705, 2713, 2717, 2720 (2010).

\textsuperscript{965} \textit{Id.} at 2725.

\textsuperscript{966} The law seems to have been implicitly upheld on a clear and present danger standard, though one might ponder whether it is rather targeting indirect effects of speech (e.g., secondary effects). \textit{Compare id.} at 2728 (“The Government, when seeking to prevent imminent harms in the context of international affairs and national security, is not required to conclusively link all the pieces in the puzzle before we grant weight to its empirical conclusions.”) (citation omitted), \textit{with} Brandenburg \textit{v.} Ohio, 395 U.S. 444, 447–49 (1969) (requiring a showing of “incitement to imminent lawless action” as distinguished from “mere advocacy”).
Recalling that Robert Dahl said in 1956 that “in the absence of certain social prerequisites, no constitutional arrangements can produce a nontyrannical republic,” it should be considered that political theory worked within a limited concept of constitutional law in 1956. The observation that liberal regulations produce discriminatory outcomes does not mean that “no constitutional arrangement” can do otherwise. As shown in chapter 4, numerous improvements and alternative theories to those considered by Dahl have been invented since, suggesting how to rethink democracy so it can further legal challenges to gender-based violence. These theories can also be applied to the harms associated with pornography. As previously mentioned, Young, Shapiro, Crenshaw, Mansbridge, and Weldon among others have all stressed the necessity of political recognition of the groups that are particularly affected by practices of social dominance, including their perspectives and interests (pp. 153–168). The problem with liberal regulations are that this is exactly the opposite of what they do; rather, to recognize such groups is often thought of in terms of “viewpoint discrimination” (see above). In this sense, liberal regulations have much more in common with the postmodern theory of legal challenges.

As recalled above (pp. 168–175), political scientist Wendy Brown rhetorically asks whether or not legal “rights” should “figure freedom and incite the desire for it only to the degree that they are void of content, empty signifiers without corresponding entitlements.” She further implies that such “empty” rights “discursively deny the working of the substantive social power limiting freedom,” thus “encourage possibility through discursive denial of historically layered and institutionally secured bounds, by denying with words the effects of relatively wordless, politically invisible, yet potent material constraints.” Her concept of rights “void of content” and ”without entitlements” appears, if anything, to deny political recognition of groups, their particularities, and their specific perspectives and interests. Assuming such a legal challenge, there would seemingly be no problem of viewpoint-neutrality, or even content discrimination; such rights are indeed “void” of viewpoints, contents, entitlements, and any critique of (using Brown’s terminology) ”substantive social power.” Postmodernism emerges here as the ultimate defense of liberalism—a social critique that invariably reinforces the denial of substantive inequality that liberal frameworks are shown above to protect. In the words of Crenshaw, this “vulgar constructionism” challenges only the “categorization,” but not the “power to cause that categorization to have social and material consequences,” thus leaves no “room for identity politics” among disadvantaged groups who attempt to challenge economic, social, political, and legal conditions that reinforce their shared history of subordination.

Liberal frameworks effectively prohibit, even as they ostensibly tolerate a free and equal “marketplace of ideas,” oppressed viewpoints from influencing politics through laws that would regulate expressive practices that tend to subordinate. The favoring of majoritarian consensus by requirements of “strict scrutiny,” or the imposition of burdensome requirements for constitutional amendments for any novel idea, tend to raise a wall of silence in the history of legal challenges of the oppressed. It will be left to see what potential exist under such liberal regimes to legally challenge any aspect of the harms of pornography. In spite of the dominance of the liberal approaches described so far, alternative regulative frameworks that balance freedom of expression against equality concerns have developed in some other

967 Dahl, Preface to Democratic Theory, supra chap. 4, n. 539, at 83.
968 Brown, States of Injury, supra p. 16 n.50, at 134.
969 Id.
liberal democracies such as Canada. American law also contains a balancing approach in a Supreme Court case of group defamation—a framework that could be applied to pornography regulation, hence further analyzed in Part II (pp. 263–269 below). To the extent prostitution and trafficking laws address the substantive inequality of the sex industry, as in Sweden’s laws against sexual exploitation, there exist alternative legal venues to address production harms in pornography (see chapter 9). Some engaged attempts to use obscenity laws effectively have also resurfaced in the United States during the first decade of the new millennium. Those challenges will be studies more in Part III (see 355–363).

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8. Balancing Approaches

The . . . legislation . . . seeks to enhance respect for all members of society, and non-violence and equality in their relations . . . the restriction on freedom of expression does not outweigh the importance of the legislative objective.972
—Justice Sopinka, Supreme Court of Canada (1992)

This chapter analyzes obstacles and potential within balancing constitutional approaches to address pornography’s harms—for example, addressing its effect on gender-based violence, sexual exploitation, and inequality as documented in chapters 1–3 above. The democratic theories on legal challenges to social dominance in chapter 4 are used to evaluate the balancing constitutional approach. I begin by analyzing and comparing the Canadian constitutional system to liberal systems such as the United States and Sweden, focusing on how Canada’s constitutional approach facilitates a relatively stronger recognition of substantive equality rights when balancing regulations of expressive freedoms against other interests. I map the Canadian framework’s potential for legal challenges that represents the perspectives and interests of those harmed by social practices that use expressive forms. I also explore a separate American Supreme Court case regarding group libel, which shares surprisingly similar features as the Canadian balancing approach despite that it operates within a more liberal constitutional framework. The analysis in this chapter explores these balancing approaches’ limits in legislative, judicial, and constitutional terms. As recalled, to know where these legal boundaries are drawn facilitates understanding to what extent or not the obstacles to legal challenges to pornography’s harms in balancing systems are based on enforceable rules laid down in law, as opposed to being based on ideologies that rely on rhetorical persuasion (see 178–179 above).

Substantive Equality as Constitutional Equality

The Canadian Charter of Rights and Freedoms (the “Charter”) was passed in 1982.973 The Charter has been approached differently than its American counterpart, which at times is interpreted in a way deferring to prior ages’ imperatives (e.g., the “framers’ intent”).974 For instance, the idea not to make a mechanical interpretation according to philosophical postulates of past centuries, but rather look at present democratic contexts, took root among influential Canadian justices such as former Chief Justice Brian Dickson and Justice Bertha Wilson already in the early days of the Charter. In a public address, Wilson accordingly asked why the legal views of a group of men in the 18th Century—a period long before women could vote—should

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prevail over women’s lives in the 20th century. Moreover, already in section 1 the Charter “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” (s. 1; emphasis added). It is hence explicitly recognized (as opposed to being a result of interpretation) that no particular right or freedom is absolute. Such a presumption enables a balancing approach between different constitutional imperatives (cf. 246–263 below) rather than, as typical in Sweden or the United States, giving primacy to expression over equality (cf. 210–237 above).

With respect to equality, many key sections of the Canadian Charter emphasize equality and group rights to a stronger extent than particularly the American Constitution seems to do for populations with a shared history of economic, social, cultural, and political disadvantage. The Canadian Charter’s section 15, subsection 1 reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (s. 15(1)). By contrast, the U.S. Fourteenth Amendment’s Equal Protection Clause that is frequently invoked in equality and anti-discrimination law simply states that “No State shall . . . deny to any person . . . the equal protection of the laws.” No grounds for discriminations, such as gender, race, or ethnicity, are explicitly spelled out there. In Canada, however, legal gender or race classifications appear as necessary epistemological tools for promoting equality in a world marred by substantial inequality that tend to mirror those very grounds in a systematic fashion. In this vein, subsection 2 of the Charter’s section 15 expresses a recognition of the need for affirmative substantive equality law, as opposed to elevating gender-blind classifications as the equality standard and gender as a “categorical” exception to be scrutinized: “Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (s. 15(2)). Sweden’s legal equality guarantees are relatively closer to Canada’s than U.S. guarantees, but not as affirmative in promoting equality via its constitution as Canada is (see 245–247 below).

In Canada, judicial decisions has since at least 1989 held that the meaning of discriminatory distinctions under section 15 is not restricted to facial discrimination (de jure), but also covers disparate impact under facially neutral laws (de facto discrimination; e.g., discriminatory “effects”) whether or not they are intentional. The Supreme Court of Canada thus guarantees not only nondiscrimination in the formal sense, but equality through the operation of law in the social, political, or cultural sense: as expressed in the seminal case Andrews v. Law Society of British Co-

975 Ibid.
976 U.S. Const, amend. XIV, § 1.
977 See Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 at 171, 56 D.L.R. (4th) 1 (Can.) (McIntyre J., dissenting only in the results as to the application of § 1 of the Canadian Charter) (“§ 15 has a much more specific goal than the mere elimination of distinctions”). Lamer J., concurring) (Can.); cf. id. 151 (Wilson J., concurring as to the interpretation of § 15(1)) (Dickson, C.J., L’Heureux-Dubé J, concurring); id. 193 (La Forest J., concurring) (“I am in substantial agreement with the views of my colleague” as to the “meaning of § 15(1)).
978 Id. at 173 (McIntyre J.) (recognizing “adverse effect” discrimination and that “intent” is not a required element of it); cf. id. 174 (McIntyre J.) (“discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.”) (emphasis added).
“Every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.”

The Canadian approach is therefore often termed **substantive equality**, which is to be distinguished from **formal equality**, with “substantive equality” necessitating a more searching inquiry into the consequences of a challenged law in its social, political, economic, and historical context.

Given that the objective is to end discrimination against groups disadvantaged because of, for example, their race or their sex, or other multiple grounds such as is the case for prostituted persons in pornography or those particularly vulnerable to its harms, substantive equality principles, codified most clearly in section 15(2) of the Charter, makes clear that Canada does not cast a presumption against legal gender or race-based classifications per se.

In the United States by contrast, though substantive grounds for discrimination have been added in case law at least since the seminal statements about “discrete and insular minorities” in *United States v. Carolene Products* (1938), the law is replete with a suspicion to racial “classifications” subjecting them to strict scrutiny even when the intent is to promote substantive equality and nondiscrimination. Similar to some extent, gender “classifications” are subjected to a heightened intermediate scrutiny regardless of whether they discriminate against women or discriminate against men. As shown in chapter 7 on liberal regulations above, the law of expression in America also implicitly harbors a presumption against promoting substantive equality through racial classifications, even when the intent of such classifications is to prevent social discrimination by combating hate speech on racial grounds. For instance, cross burning was permissibly prohibit-

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979 *Id.* at 164 (McIntyre, J.).


981 Id. at 289-304 (McIntyre, J.).

982 See, e.g., *Kapp,* 2008 SCC 41 ¶ 3, 25, 28, 37, 40, 48–49 (Can.) (stating in response to a discrimination challenge to affirmative fishing license program that laws, programs, or activities making distinctions on the grounds enumerated under § 15(1) or analogous grounds in order to ameliorate the conditions of disadvantaged groups, hence to promote equality and further s. 15’s guarantee of substantive equality, are generally constitutional under § 15(2) of the Charter).

983 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (holding that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [under the Fourteenth Amendment].”)

984 See, e.g., *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) (holding that “strict scrutiny” applies when governmental racial classifications are involved in federal agency contracting affirmative action program; classifications must serve a compelling governmental interest and be narrowly tailored to further that interest).

985 See, e.g., *Craig v. Boren,* 429 U.S. 190, 197 (1976) (holding that prohibiting males under age 21 but not women age 18 and over from purchasing 3.2% beer is impermissible under Fourteenth Amendment Equal Protection Clause, requiring “intermediate scrutiny” for gender-based classifications showing that they serve “important” governmental objectives and that they are “substantially” related to achievement of those objectives); United States v. Virginia, 518 U.S. 515, 533 (1996) (holding unconstitutional male-only admissions to publicly funded military university, finding that state failed to sustain gender “classification” under intermediate scrutiny); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980) (holding unconstitutional gender differential rights to entitlement of death benefits that discriminated against widowers relative widows); see also MacKinnon, “Substantive Equality,” *supra* p. 15 n.45 (analyzing equality doctrines in the U.S.).
ed when using race-neutral terms such as prohibiting “intent to intimidate,”985 but not when the grounds were explicitly being recognized, such as prohibiting certain expressions that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”986

In addition to section 15, several other sections under the Canadian Charter constitute a backdrop to a more balancing constitutional approach emphasizing substantive equality in addition to the traditional concept of formal equality through “negative rights”987 such as freedom of expression. Particularly important for pornography and gender inequality in the context of constitutional balancing, section 28 guarantees that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons” (Canadian Charter, s. 28). “Anything” in the Charter could potentially be the expressive freedoms provided in section 2(b), which states that “[e]veryone has the . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” (s. 2(b)). As shown in chapter 2, pornography made with real persons generally exploits these persons’ inequality or otherwise vulnerable position in prostitution in the course of producing the materials (e.g., 55–75 above)—a position of inequality that women relative men are disproportionally found in. Furthermore, through its consumption common pornography intensifies gender inequality by promoting sexual aggression against women in particular (pp. 98–115), and causing attitudes supporting violence against women such as rape myths and trivialization of sexual abuse (pp. 88–96). Similarly, pornography consumption predicts what kind of men buy women for sex in prostitution and what kind of men do not, thus predicting sexual exploitation of women’s inequality (pp. 126–129). The result is that some persons are treated as inferiors because of their sex. Treating certain groups as inferiors tends to restrict their equal access to speech and other forms of public expression. Thus, when pornography’s social harms promote gender inequality, it impedes women from enjoining such rights on an equal basis with men.988 In response, section 28 could be invoked to support pornography regulations against challenges under section 2(b). Put otherwise, if the Charter guarantees all freedoms “equally to male and female persons” under section 28, and pornography regulations promote women’s enjoyment of freedom of expression on an equal basis with men, such regulations should be protected under section 28.989

987 For an explanation of the concept of negative and positive rights, including the related concept of negative and positive “freedoms” as developed from Immanuel Kant to Isaiah Berlin and beyond, with examples from domestic abuse case law on obligations for the public to intervene, see supra notes 542–546, the footnote explanation and accompanying text.
988 For early scholarly articulations of this particular argument, see Andrea Dworkin, “Against the Male Flood: Censorship, Pornography, and Equality,” in Letters from a War Zone (Brooklyn, New York: Lawrence Hill Books, 1993) (1988), 268–270 (discussing the silencing effects of pornography on women while presenting, inter alia, masochism as their genuine “speech”); Dworkin, Pornography: Men Possessing Women, supra chap. 1., n. 91, at 9 (“The question . . . is not whether the First Amendment protects pornography or should, but whether pornography keeps women from exercising the rights protected by the First Amendment”); MacKinnon, “Francis Biddle’s Sister,” chap. 4, n. 589, at 192–97 (discussing pornography as a practice silencing women in society).
989 Basically, this approach was taken by the Canadian Women’s Legal Education and Action Fund in a case they intervened. See Factum of the Intervener LEAF ¶¶ 35–55, in R. v. Butler, [1992] 1 S.C.R. 452 (Can.), supra chap. 4, n. 563, at 201–217 [hereinafter Factum of LEAF in Butler]. Although the section
Furthermore, the Charter’s section 26 could be invoked to strengthen international human rights law that may provide stronger protection against pornography’s harms than available under domestic legislation in Canada. It explicitly states that the “guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”

Two other sections in the Charter may be invoked in support for pornography regulations. Section 27 holds that the “Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

Group and racial defamation, including through pornography with racist overtones, may damage different cultural groups’ social standing, as pornography generally is argued in this dissertation to damage women’s standing in society. From this point of view, pornography may be contrary to the enhancement of some Canadians cultural heritage as well as being contrary to their equality as Canadians. Given this reading, section 27 seems on its face to support tighter regulations of pornography. Moreover, section 33 allows for provinces to retain legislation notwithstanding section 2 (including expression), or sections 7 to 15, assuming their parliament/legislature enacts a specific act to that end. Section 33 also appears on its face as being able to support more extensive pornography regulation provincially, relative a more restrictive national standard.

As a further comparison to Canada, Sweden’s Instrument of Government (its main written constitution) guarantees freedoms of expression and information in section 1 of chapter 2, while section 13 of the same chapter explicitly addresses sex equality, specifying that “[n]o act of law or other provision may entail the unfavorable treatment of anyone on grounds of their gender, unless the provision forms part of efforts to promote equality between men and women or relates to compulsory military service or other equivalent official duties.” The recognition that sex discrimination is prohibited by law unless the provision “forms part of efforts to promote equality” seems conceptually similar as that guaranteed by Canada’s affirmative substantive equality approach under section 15(2) (see above). Although Sweden has a similar section prohibiting “the unfavorable treatment of anyone because he or she belongs to a minority with respect to ethnic heritage, color, or other similar condition or with respect to sexuality,” that provision does not include a similar affirmative action component as in the gender equality provision that shields it from

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28 argument most likely influenced the Court’s final decision, it was not openly affirmed. The Court instead choose to uphold the challenged regulations on a section 1 rationale, viewing it as a violation of free expression nonetheless demonstrably justified in a democratic and free society and reasonably limited by law. 

990 Canadian Charter, supra note 973, s. 26.

991 Canadian Charter, s. 27.


993 “(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.” Canadian Charter, s. 33 (1). See also the subsections on a five year limitation and the re-enactments provisions for consecutive periods. Id., ss. 33(3)(4)(5).

994 Regeringsformen [RF] [Constitution] 2:1(1)(2) (Swed.) (as amended 2011) (expression and information).

995 RF [Const.] 2:13 (Swed.).
challenges of so-called reversed discrimination. Sweden’s gender equality guarantees are thus more consistent than their protections against other discrimination are with the Canadian Charter’s approach to equality; by contrast to both Canada and Sweden, the U.S. Fourteenth Amendment’s Equal Protection Clause lacks an explicit recognition of discriminatory grounds as well as any explicit defense of proactive measures. This situation possibly underlies the different approaches to equality in Canadian and American case law, for example, where a stronger principled suspicion of gender and racial classifications can be seen in U.S. law when compared to Canada’s substantive approach.

In chapter 1 of the Swedish Instrument there are other provisions expressing a similar proactive substantive equality approach as does the Canadian Charter, but these are generally regarded only as aspirational by contrast to the rights provided in chapter 2; hence, chapter 1 address public officials and decision makers rather than providing individuals with judicially enforceable rights and entitlements. Nonetheless, even such individually nonbinding statements are thought to provide interpretive guidance how to apply other provisions under Swedish law. Chapter 1 holds that “public institutions shall promote the opportunity for all to attain participation and equality in society,” and that “public institutions shall combat discrimination against persons on grounds of gender, color, national or ethnic origin, linguistic or religious affiliation, functional disability, sexual orientation, age or other circumstance.” Substantive equality is here evident by the ambition to promote equality and in making the grounds for discrimination explicit. These statements may lend support to using the Swedish prostitution and trafficking laws to combat an unequal and exploitative practice that is based on gender and other social grounds of disadvantage—as pornography production is shown to be in chapter 2 above. In addition, an amendment in chapter 1 of the Instrument was made in 2011 that recognizes Sweden’s international cooperation and obligations, particularly its membership in the European Union, the United Nations, and the Council of Europe. When international law on pornography and freedom of expression provides more explicit support for legal challenges to pornography distribution, these recognitions are important.

Balancing Equality and Expression

A balancing approach between free expression and equality rights does not seem impossible under either the Swedish Constitution or the American Constitution’s First
and Fourteenth amendments, although these two contains no codified equivalent of Canada’s “reasonable limits” clause in section 1 of the Charter that makes the balancing approach part of the written constitution in a similar way (see 241–246 above). For instance, the different tiers of scrutiny under U.S. law can already be seen as a form of “balancing” between competing state interests under various presumptions in favor or against the government (pp. 210–225 above). It is thus possible to invoke a competing democratic right or freedom (e.g., equality, safety, or due process) against the First Amendment imperative. The vision of equality embodied in Fourteenth Amendment law has not often been expressly used to this end though, despite the existence of some more substantive equality considerations, for example, the concept of disparate impact or “discrimination in effect,” as opposed to facial discrimination, which exist in other case law.\textsuperscript{1003} The judicial reviews in the United States have so far been made primarily from the perspective of the First Amendment, rather than from a more balanced consideration of both the equality and the expressive imperatives. U.S. case law virtually implies that any sexually explicit expression resembling a “viewpoint” will be given an elevated status in the review, with only few exceptions such as child pornography, obscenity, or group libel\textsuperscript{1004} (pp. 210–225 above). Similarly, Sweden also treats freedom of expression as it is treated in the United States—that is, as the predominant right to which equality imperatives are regarded as deferential; for instance, exceptions that withdraw expressive protection from certain materials (e.g., violent pornography) must in many cases be codified through constitutional amendments though not exclusively so (pp. 225–237 above). This state of affairs lends support to the assumption that the different constitutional conditions in these countries, rather than case law adjudication per se, have impacted on the result, although the degree it has is debatable and further open for inquiry.

Another aspect that may have impacted Canada’s different legal framework is that substantive equality, by contrast to the United States and Sweden, seems to be a more central constitutional principle, even so before the days of the 1982 Charter; for instance, although section 15 was exempted from taking effect in any litigation started until 3 years after the Charter’s adoption in 1982,\textsuperscript{1005} the Chief Justice already opined in a 1985-case where section 15 was thus not in effect that “[a] free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon section 15 of the Charter.”\textsuperscript{1006} Similarly in 1986, although the Court could still not technically consider section 15, among the “values and principles essential to a free and democratic society” the Court enumerated the “commitment to equality and social justice” second only to human dignity.\textsuperscript{1007} In 1989 when finally considering section 15, the Court strongly affirmed the centrality of equality in a democratic society by concluding that section 15 “is the broadest of all guarantees. It applies to and supports all other rights guar-

\textsuperscript{1003} For a critical discussion of the Fourteenth Amendment’s Equal Protection Clause in terms of concepts such as disparate impact and facial discrimination in case law, see, e.g., MacKinnon, “Substantive Equality,” supra p. 15 n.45, passim.

\textsuperscript{1004} Group libel seems still to be an exception, see Beauharnais v. Illinois, 343 U.S. 250 (1952), even though some commentators doubt its precedential value today. See infra pp. 265–271, for further analysis of Beauharnais and its implication on pornography regulation.

\textsuperscript{1005} Canadian Charter, supra note 973, s. 32(2).

\textsuperscript{1006} R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 336, CarswellAlta 316 ¶ 94 (WL) (Dickson, C.J.C.) [Big M Drug Mart cited to CarswellAlta].

anteded by the Charter.” Statements such as these suggest that expressive rights must be interpreted through the lens of the equality imperative in Canada. Thus if particular expressive activity, such as pornography, contradicts equality by producing sex discrimination, section 15 should apply as a counter-balance to all rights protecting such expression.

Furthermore, the Supreme Court of Canada has stated that discrimination under section 15 is to be interpreted in light of, inter alia, “stereotyping, historical disadvantage or vulnerability to political and social prejudice.” Hence, section 15 does not apply for every distinction, such as whether criminal laws discriminate on grounds of provincial residence; the latter form of unequal treatment could be subject to inquiry under other Charter provisions, such as whether provincial differences in these regards violate principles of fundamental justice under section 7. The purpose of section 15 is rather to prevent “discrimination against groups suffering social, political and legal disadvantage in our society.” A corollary question is thus to what extent section 15 is intended to protect those groups that the evidence suggests are discriminated against because of pornography; that is, those who suffer disadvantage, including vulnerability to prejudice and stereotyping, caused by pornography.

It is well-documented that pornography not only produces sexual aggression against women in particular (pp. 69–88 above), but also causes attitudes supporting violence against women that in turn incites “stereotyping” and “prejudice” toward them. For instance, numerous studies show that pornography consumption amplifies myths such as “only bad girls get raped,” “women ask for it,” or that women who “initiate a sexual encounter will probably have sex with anybody” (pp. 115–122). Such “rape myths” can aptly be described as an “historical disadvantage” of “social prejudice” that discriminate against women’s opportunities and lowers their status in society. To exemplify, one psychological experiment found that exposure to almost five hours common nonviolent pornography over the course of six weeks caused a significant reduction of the recommended penalty for a fictional hitchhiking rape case when compared to a non-exposure control group (on average from roughly 10 years imprisonment to 5 years). In another experiment, one case of short term ex-

1011 Turpin, 1 S.C.R. at 134–35, CarswellOnt 76 ¶¶ 55–57 (holding that different provincial requirements in terms of trial by jury or judge in murder cases did not infringe or deny the equality rights and freedoms guaranteed by s. 15 of the Charter, though section 7 could be invoked to challenge violations of fundamental justice during such murder trials). Section 7 reads “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Canadian Charter, supra note 973, s. 7.
1012 Turpin, 1 S.C.R. at 1333; CarswellOnt 76 ¶ 52. Cf. Andrews v. Law Soc’y of B.C., [1989] 1 S.C.R. 143 at 154, CarswellBC 16 ¶ 56 (Wilson, J.) (Can.) (stating that “the position that every distinction drawn by law constitutes discrimination is rejected . . . . s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society”).
1013 See also Burt, “Cultural Supports for Rape,” supra chap. 3, n. 368, at 217–18, 222 (defining how to measure rape myths).
1014 Zillmann and Bryant, “Trivialization of Rape,” supra p. 3 n.13, at 17 tbl.3.
posure to nonviolent “female-instigated sex” (as opposed from more violent materials) also caused significant reduction of recommended penalty for both genders from 846 months to 515 months (in fact, it was a slightly larger reduction than any other common popular category showed, such as violent materials, though they also produced similar and significant results).\(^{1015}\)

Additionally, prostituted persons who are drawn into pornography (see 55–57 above) also fit the subset of Canada’s population that should merit solicitude under Section 15, as they have historically been vulnerable to multiple disadvantages such as extreme poverty, childhood abuse and neglect, sexism, and racial discrimination (pp. 26–35, 41–46). For example, prostituted women in Canada are often disproportionately of First Nations Aboriginal descent.\(^{1016}\) There is even statistical evidence suggesting that prostitution in pornography causes more damages in the form of mental disorders or trauma (e.g., PTSD and traumatic flashbacks) than other forms of prostitution (pp. 38–41 above). The disadvantages for these prostituted people that pre-exist the operation of law are either specifically enumerated in section 15, are directly related to them, or are analogous to the grounds enumerated in section 15.\(^{1017}\) The overwhelming majority of them wish to escape the sex industry.\(^{1018}\) However, because of criminal fines, public stigmatization and victim-blaming that come with being regarded as criminals under many of Canada’s laws that addressed prostitution before Bedford, prostituted persons are stigmatized sometimes just as severely as the pimps and profiteers who exploited them were.\(^{1019}\) Such legal treatment victimizes them further by imposing fines, criminal records, and other troubles that can prevent them from getting jobs, acquiring housing, or gaining access to women’s shelters, thus obstructs their opportunities to escape prostitution.\(^{1020}\) In this light, “stereotyping” and “political and social prejudice,” proscribed under Section 15,\(^{1021}\) would be appropriate words to describe the situation facing these prostituted persons.

Given the empirical evidence and the Canadian Charter’s commitment to equality surmised above, it is beyond doubt that women who are affected by pornography’s consumption harms (which possibly a majority may be at some point in their lives), and persons who are affected by production harms (e.g., prostituted persons), merit particular constitutional protection. A balancing approach when adjudicating conflicts between expressive or other rights and this equality imperative is further strengthened by section 1 of the Charter, which by codification (as opposed to case

\(^{1015}\) Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 118–119 & tbl.4.3. For a more detailed analysis of these two experiments in the context of other conceptual studies, see supra pp. 102–106.

\(^{1016}\) See supra note 214 (citing sources on overrepresentation of First National Aboriginal women in Canadian prostitution).

\(^{1017}\) See Canadian Charter, supra note 973, s. 15(1) (enumerations in accompanying text).

\(^{1018}\) See, e.g., Farley et al., “Nine Countries,” supra chap. 1, n. 115, at 48, 51, 56 (finding that 89% of 854 prostituted persons in nine countries said they wanted to escape prostitution); cf. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 27 tbl.1 (81% of the 45 respondents in legal brothels said they wished to leave prostitution during interviews, while many were subject to surveillance by listening devices and respondents whispered, see id. at 23). For further evidence and discussion, see supra pp. 57–59.

\(^{1019}\) See, e.g., Criminal Code, R.S.C. 1985, c. C-46, s. 210(2)(a) (Can.) (criminalizing anyone who “is an inmate of a common bawdy-house”), s. 213(1)(c) (criminalizing anyone who “stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution”), invalidated in Canada (Att’y Gen.) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 ¶ 164, 366 D.L.R. (4th) 237 (Can.).

\(^{1020}\) Cf. supra notes 192–194 and accompanying text.

law interpretation) explicitly rejects the notion of certain rights being supreme or absolute over others, instead delineating their reach within such “reasonable limits” that can be “demonstrably justified” in a “free and democratic society.” Even pre-Charter decisions in Canada did stress that constitutional interpretation is always an act of balancing between different interests. For instance, in a typical “freedom of speech case” originating from the period before the Charter, the Chief Justice declared unanimously for the Supreme Court:

All important values must be qualified, and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of ‘freedom of speech’ as it is for other values. . . . Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one.

Since the adoption of the Charter, the Court still regards its rights and freedoms as subject to limitations and balancing even before a section 1 analysis needs to be invoked. Perspicuously expressed by Justice Wilson, “[t]he rights under the Charter not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under section 1.”

Thus, in one sense section 1 creates a two-tier level of Charter-analysis where, initially, a balancing inquiry examines whether the challenged law or act may sustain under the Charter regardless of section 1 (see 251–257 below). If not, an additional tier of tests and interpretations has been developed, with its specific jurisprudence, distinguishing such cases from those where the balancing is resolved under other sections (see 257–263).

After the Charter’s adoption in 1982, judicial balancing of freedom of expression against equality imperatives was first articulated in hate propaganda cases before a similar analysis was undertaken in pornography cases. According to a scholar on comparative constitutional law, the relative success by legal challenges to pornography in Canada would have been “inconceivable” without the racial defamation challenges. Such a conclusion must however also take into account how the Charter

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1022 Canadian Charter, s. 1. See also supra pp. 243–248 and accompanying text. Further explanation of how section 1 is interpreted in cases concerning conflicts between expression and equality rights, see infra pp. 259–265.
1023 See Fraser v. Public Service Staff Relations Board, [1985] CarswellNat 145 ¶ 23–24 (WL), sub nom. Fraser v. Canada, [1985] 2 S.C.R. 455 [Fraser cited to CarswellNat] (noting that although the case did not invoke either the Charter or other similar constitutional documents, “‘freedom of speech’ was a founding principle of the Canadian “democratic system of government” and its common law).
1024 Fraser, [1985] CarswellNat 145 ¶¶ 25, 40.
1025 See, e.g., R. v. Jones, [1986] CarswellAlta 181 ¶ 1 (WL), 2 S.C.R. 284 (McIntyre, J.) [Jones cited to CarswellAlta], where it was stated that “the effect of [the compulsory education legislation] is to foster religious freedom rather than rather than to curtail it. Adopting this view, I need not deal with the application of s. 1 of the Canadian Charter.” Cf. Id. ¶¶ 38–88 (La Forest, J.) (finding that legislation had a “compelling interest,” that teaching certification requirement did not violate parent’s freedom of conscience and religion (s. 2(a)) to educate child according to his/her own belief, and that criminal penalties did not violate parent’s liberty or fundamental principles of justice (s. 7), thus without any inquiry under section 1 legislation was nonetheless categorically found “demonstrably justified in a free and democratic society”); cf. Operation Dismantle Inc. et al. v. R. et al., [1985] CarswellNat 664 ¶ 102 & 106, 1 S.C.R. 441 (Wilson, J., concurring) (stating that in “order to protect the community against . . . threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security,” thus s. 1 is not “called into operation” just because cruise missile tests impact the right to life, liberty and security of the person under s. 7 of the Charter).
1027 LaSelva, “‘I know it when I see it,’” supra p. 24 n.72, at 140.
in itself appears conducive to such challenges. Moreover, other developments already underway in Canadian obscenity law provided additional support, along with the public and political pressures at the time (more dealt with in chapters ahead). Nonetheless, compared to the U.S. doctrines on cross burning and racial classifications, the Canadian hate propaganda case mentioned by this scholar does indeed stand out, though not necessarily when compared to group defamation on racial grounds that may have a more balancing standard even in the United States.

Similarly, in R. v. Keegstra (1990) and a couple of parallel decisions at the time, the Supreme Court of Canada had to consider, as shown below, how to counter virulent forms of prejudice and bigotry in order to promote equality among all social groups. Such considerations were to be balanced against the democratic interest of securing an environment where the cultural, social, and political development does not become excessively burdened by regulations on expressive activity. Keegstra illustrates well the prospects for legal challenges against expression harmful to equality under Canadian law generally. Due in part to political failures to reform pornography laws in Canada during the 1980s (see further in Part III), the legal challenges to pornography had to be based on a modified obscenity law that was still partly interpreted through the relativistic concept of a contemporary community standard. A comparison of the legal challenges to racial defamation and the legal challenges to pornography should therefore consider that pornography regulation was rooted in an older and more archaic concept than the relatively more recent provisions considered in Keegstra. In this sense Keegstra rather illustrates the potential that renewed legislative attempt would have, given that the legislature could succeed in moving away from the obscenity approach if making reforms to the pornography regulations.

Within Section 2(b) of the Canadian Charter

Keegstra involved criminal charges against an Alberta high school teacher who taught and communicated anti-Semitic statements and Holocaust revisionism to his students (Keegstra, 713–14; ¶ 1–2). His students’ grades were dependent on their ability to reproduce his teachings (id. at 714; ¶ 3). The Supreme Court described how he “attributed various evil qualities to Jews,” including them being “‘sadistic,’” and “‘child killers’” (id. at 714; ¶ 3). Subsequently, he was convicted under the Canadian Criminal Code for “willfully” promoting “hatred” against an “identifiable group.” Consistent with democratic theories stressing the need to identify disadvantaged groups to combat social dominance (pp. 153–168 above), an identifiable group was here defined as “any section of the public distinguished by colour, race, religion or ethnic origin.” In upholding the law challenged in Keegstra, the Canadian Supreme Court made use of section 1 to balance what they perceived were

1028 See supra notes 981–986 and accompanying text.
1032 See infra p. 190 et seq., on obscenity laws. For the statutory language of the provision being challenged in Keegstra, see Canada Criminal Code, R.S.C. 1985, c. C-46, ss. 318(4), 319(2–7) (Can.); quoted in Keegstra, 3 S.C.R. at 715–17.
1033 R.S.C. 1985, c. C-46, s. 319(2).
the conflicting rationales of free expression and, inter alia, various equality provisions under the Charter. However, in resolving the case under section 1, an alternative route had first been rejected by the Court where the question was whether the protection afforded for expression covered under section 2(b) of the Charter extends at all to “the public and wilful promotion of hatred against an identifiable group” (*Keegstra*, 725; ¶ 26).

The Women’s Legal and Education Action Fund (LEAF)\(^{1035}\) emphasized that Canadian law already harbored the concept that free expression “must be interpreted in a manner consistent with the equality rights of others”\(^{1036}\) due to the centrality of equality as embodied in the Charter, particularly in section 15. The interveners further asserted that “wilful public promotion of group hatred contradicts and erodes the multicultural heritage of all Canadians”\(^{1037}\) that is protected under section 27.\(^{1038}\) An Alberta judge in the trial court had taken virtually the same position as LEAF in 1984, citing section 15 on equality as well as 27 on the multi-cultural heritage in support of their position, noting that even though section 15 was not yet in force, the law did not infringe section 2(b) and a section 1 analysis was thus preferably not needed.\(^{1039}\) The trial court argued that prohibiting wilful public promotion of hatred could not rationally be conceived as “an infringement” of expression but rather “a safeguard which promotes it” because the challenged law protected “certain” groups in society to be inhibited by hatred that would otherwise silence them “from freely expressing themselves upon . . . social, economic, scientific, political, religious, or spiritual” topics.\(^{1040}\) The court concluded that the “unfettered right to express divergent opinions on these topics is the kind of freedom of expression the Charter protects,”\(^{1041}\) rather than protecting wilful hatred.

The Alberta Court of Appeal reversed, not saving the hate propaganda provision even under section 1 of the Charter.\(^{1042}\) When on appeal to the Supreme Court, the trial court’s position was considered anew; here, the view that the new Charter was more liberal in its outlook had taken root, thus the “reach” of s. 2(b) was said to be “potentially very wide” (*Keegstra*, 727; ¶ 30). A newer decision, *Ford v. Quebec (Att’y Gen.*) (1988), was quoted in support of this new approach: “‘political expression . . . related to the maintenance and operation of the institutions of democratic government . . . is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society.’”\(^{1043}\) Another decision, *Irwin Toy Ltd. v. Quebec (Att’y General)* (1989),\(^{1044}\) had subsequently with *Ford* attempted to articulate more precisely the broader expressive protections under section 2(b) and how section 1 of the Char-

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\(^{1035}\) It is not far-fetched to assume that the intervention by LEAF, while driven by an interest in fighting racial defamation on behalf of their constituencies, was also animated by a concern for how the decision in *Keegstra* would impact on similar challenge against pornography regulation under Charter law.

\(^{1036}\) Factum of LEAF in *Keegstra*, supra note 1009, ¶ 18.

\(^{1037}\) *Id.* ¶ 20.

\(^{1038}\) For the wordings in *Canadian Charter*, s. 27, see supra note 991 and accompanying text.

\(^{1039}\) R. v. *Keegstra*, [1984] 87 A.R. 200 at 209, CarswellAlta 428 ¶ 62, (Q.B.) (Can.) (holding “if I have erred in my view and prima facie s. 281.2(2) does infringe the guaranteed fundamental right of freedom, it is appropriate to determine in that circumstance, whether the denial or limit is a reasonable one demonstrably justified in a free and democratic society.”).

\(^{1040}\) *Keegstra*, 87 A.R. at 209, CarswellAlta 428 ¶ 60.

\(^{1041}\) *Keegstra*, 87 A.R. at 209, CarswellAlta 428 ¶ 60;


ter impacted on them with a two-level test. It is worth looking closely at this test to understand the relationship between the two sections in order to understand how legal challenges to pornography are conceived under the Charter.

“Meaning” and “Form”: Liberal Categorical Distinctions under s. 2(b)

First, Irwin Toy distinguished “activity” that did not express or attempt to express “meaning” as being without protection under section 2(b) since it allegedly had no “content” (Irwin Toy, ¶ 56). Similarly in this first level, violent activity that did express meaning was not protected because of its impermissible “form” of expression (id.). In defining the line between acceptable and non-acceptable forms of expression, the Court argued that it was unnecessary to specify exactly in what contexts and on what grounds a particular form of expression that convey meaning would be without protection under section 2(b), but remarked that a murderer or rapist undoubtedly could not justify their actions with reference to expressive freedom, quoting a previous case that stated freedom of expression would not protect threats of violence, nor violence itself.1045 These distinctions between violence and threat and other expression share some similarities with the concepts of direct and indirect harm implicit in John Stuart Mill’s and early American First Amendment cases. However, in addition the concept of direct harm can also include ostensibly nonviolent or non-threatening expression that by the context surrounding their expression nonetheless would reasonably cause direct harm (see 206–210 above).

Second, Irwin Toy held that even if conduct would fall into any of the two unprotected categories above (i.e., no content or impermissible form), it nonetheless had to be determined whether it was the purpose or the effect of the government action otherwise to restrict freedom of expression (Irwin Toy, ¶ 56; see also id. ¶¶ 46–54). If its purpose was found “to restrict attempts to convey a meaning,” the activity was clearly protected by section 2(b) and only a section 1 analysis could then save the government action (id. ¶ 48). In case it was not the purpose of the law, but the effects that restricted attempts to express meaningful content, the law could be saved even without a section 1 analysis if certain requisites were fulfilled, but if so the Court warned that “rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning” (id. ¶ 50). Irwin Toy here reiterates a familiar critique voiced in American case law regarding viewpoint/content neutrality and secondary effects doctrines.1046 Thus, the Supreme Court

1045 Id. ¶ 43 (quoting Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580, [1986] CarswellBC 411 ¶ 27, sub nom. R.W.D.S.U. v. Dolphin Delivery Ltd.) [1986] 2 S.C.R. 573). Threats might be differently conceived based on context, of course. By invoking the historical narrative of persecution and social vulnerability on some level—including the well-known history of racial and religious persecution, pogroms, and genocide—group defamation and racial hate propaganda in a sense invariably harbors an element of threat to its targets. This should be particularly evident for those belonging to those historically vulnerable groups who have experienced the worst effects of hate propaganda. Much of the same could be said with respect to pornography, as it graphically dehumanizes women (or other minorities) by presenting them as sexually subordinate. Such messages undeniably also have an element of threat to them, as they remind the women and others of the narratives of sexual subordination, abuse, including persecution, through history.

1046 See, e.g., Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 3001 (U.S. 2010) (5–4) (Alito J., dissenting) (“the accept-all-comers policy is not viewpoint neutral because it was announced as a pretext to justify viewpoint discrimination. . . . [T]he Court arms public educational institutions with a handy weapon for suppressing the speech of unpopular groups”); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (invalidating a law redistributing income from books or other works describing actual crime to the crime’s victims in part because “the government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 57 (1986) (Brennan J., dissenting) (“The fact that adult movie theaters
of Canada held that it was imperative to distinguish the genuine purpose behind alleged neutral purposes in part by looking at the effects of a government action. In identifying permissible government action that “aims only to control the physical consequences of particular conduct” (Irwin Toy, ¶ 50) as opposed to attempts to disseminate meaning, the judiciary was to ask whether “the mischief consist[s] in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity” (id. ¶ 52). Even if a “direct physical result” was found to be the genuine objective of a government action, the effects of the action could still impinge on a plaintiff’s right under section 2(b). Nevertheless, in such a case a presumption was cast in favor of the government, and the plaintiff had to show how his or her activity promoted at least one of the underlying principles and values of section 2(b) that the Irwin Toy Court identified, which were:

(1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. (Id. ¶ 54)

At this point the test in Irwin Toy is revisiting familiar liberal terrain: violent or threatening expression is frowned upon by the Court, who emphasizes expressive rights as means for promoting autonomous and informed value judgments and making a diversity of views available so that (in the words of one of their southern colleagues) “the deliberative forces should prevail over the arbitrary.”

When considering the virulent anti-Semitic hate propaganda and Holocaust denial taught to high school students in the case of Keegstra, it is questionable whether it falls within the realm of protected speech under section 2(b) even without taking consideration to section 1 of the Charter. Here, the Court took another view than that of the trial court, and especially intervener LEAF. The latter argued that even if hate propaganda has content—as conceded in their factum (i.e., legal brief), “‘Colour, race, religion or national origin’ is content”—such expression lies closer to a violent form when being willfully and publicly promoted.

LEAF’s argument builds on the general ambivalence expressed in Irwin Toy, as well as the Court’s refusal to enumerate more exhaustively what forms of expression would fall outside the ambit of section 2(b) apart from exemplifying “threats” and “violence.” LEAF thus submitted that Irwin Toy’s “content/form of distinction” was “more properly viewed as a continuum, with pure regulation of content at one end and violent forms of expression at the other” (Factum of LEAF, ¶ 32). Such an interpretation would be more “sensible . . . nuanced, and practical than the doctrinal morass resulting from the American speech/action distinction” (id.) allegedly invoked by defendants in parallel cases to Keegstra. Indeed, viewing the Irwin Toy test as a continuum might alleviate some of the problems identified above in chapter 7 regarding the American “clear and present danger” tests that make distinctions between “mere advocacy” and “in-

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1048 Factum of LEAF in Keegstra, supra note 1009, ¶ 23. Further citations in text where appropriate.
1049 See supra note 1045 and accompanying text.
citement to imminent lawless action” (pp. 206–210), as well as the distinctions between viewpoint-discrimination and content-neutral regulations that tend to treat all regulations of “viewpoints” (which most expression arguably has, even pornography) as being produced by marginalized political dissidents rather than by exploitative, sexist, and economically thriving pornographers (pp. 214–222).

To support their interpretation of *Irwin Toy*, LEAF stressed that “willful promotion of group hatred is a violent form of expression because it is an integral link in systemic discrimination that keeps target groups in subordinated positions through the promotion of fear, intolerance, segregation, exclusion, disparagement, vilification, degradation, violence, and genocide” (Factum of LEAF ¶ 28). Such expression, as interpreted in a parallel appeals opinion to the *Keegstra* case, “lays the foundation for the mistreatment of members of the victimized group.”

In light of history, one may add, such expression also tends to promote violence against them (cf. pp. 208–210 above). LEAF further noted case law that permitted regulation of harassment as a form of discrimination and inequality unprotected by section 2(b), even though harassment is expression conveying or attempting to convey meaning. LEAF additionally submitted that the legislation’s purpose was not to “restrict freedom of expression but to promote equality” (Factum of LEAF, ¶ 33; emphasis added)—a purpose embodied in section 15 of the Charter, which the Supreme Court already regarded as “the broadest of all guarantees,” applicable to and supporting “all other rights guaranteed by the Charter.” As discussed above, countering stereotyping, historical disadvantages, or vulnerability to prejudice has been stated primary objectives of the protection afforded under section 15. Arguably, a law against racial defamation that is narrowly tailored to the “wilful” and “public” promotion of hatred against historically vulnerable groups, as distinguished from unintentional or private speech, is consistent with these very objectives under section 15. Furthermore according to LEAF’s Factum (¶ 34), *Keegstra* had not met the burden of identifying how (in *Irwin Toy*’s words) “the meaning being conveyed” in hate propaganda “relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing” that underpins the liberal values promoted by section 2(b) of the Charter. Truth, accordingly, is obstructed by group hatred because disadvantaged and vulnerable groups are intimidated “from asserting the truth” (Factum of LEAF, ¶ 36).

The Court rejected LEAF’s interpretation of *Irwin Toy*, emphasizing that *Ford v. Quebec (Att’y Gen.*) (1988) had changed the doctrine so “that the weighing of competing values ‘in most instances’ [would] take place in section 1.” Further was argued that *Irwin Toy* generally reaffirmed and strengthened the “large and liberal” framework adopted in *Ford (Keegstra, 728; ¶ 31)*. The Court quoted a passage from *Irwin Toy* reiterating familiar liberal conceptualizations of freedom of expression:

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1053 R. v. Turpin et al., [1989] CarswellOnt 76 ¶ 52 (WL), 1 S.C.R. 1296 (Can.).
1055 Actually, under the challenged criminal provision “truth” was also a defense to the defendant, which caused some disagreement in the courts with respect to its relevance as well as what party should have the burden to prove/disprove truth. *Compare* R. v. Keegstra, [1990] 3 S.C.R. 697 at 788–95, CarswellAlta 192 ¶¶ 143–55 (4-3) (Dickson, J.), with *Keegstra, 3 S.C.R. at 843–44, 865–68,* CarswellAlta 192 ¶¶ 287–94, 353–56 (McLachlin J., dissenting).
“‘however unpopular, distasteful or contrary to the mainstream . . . . in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.’”1057 By this move, the Court situated Irwin Toy’s two-step test in a typical American liberal framework with a corresponding presumption that “[i]t is enough that those who publicly and willingly promote hatred . . . attempt to convey a meaning” (p. 730; ¶ 35) to be protected according to the test’s first step. LEAF’s argument that the distinction of violence and threats as being unprotected in Irwin Toy would better be seen as a continuum, referring to the Court’s own statements in previous cases, was addressed with the fact that the Court had expressed similar ideas in more than one case (pp. 731–32; ¶¶ 38–40). However, the Court claimed that “no decision of this Court has rested on the notion that expressive conduct is excluded from s. 2(b) where it involves violence” (pp. 731–32; ¶ 39). Nonetheless, with respect to less grave offenses such as “threats of violence” or otherwise violent expressive conduct (Keegstra 731–32; ¶ 39), they have repeatedly suggested that precise notion in several different cases over a period of time.1058

The Court further stated that “a reading of Irwin Toy . . . refer to expression communicated directly through physical harm” (p. 732; ¶ 40). Considering that “incitement to imminent lawless action” in itself does not constitute physical harm, this is a more limited distinction than under the most stringent First Amendment tests (see 206–210 above). Accordingly, the Court did not find hate propaganda “to be analogous to violence” (p. 732; ¶ 40). It was thus reiterated that all activities conveying or attempting to convey meaning were protected under Irwin Toy except possibly for “physical violence” (id.). On its face, such a restricted definition applies to violent pornography where the abuse is not simulated, which unfortunately is a frequent occurrence in popularly consumed materials (see 44–50, 64–72 above). The court drew the line at threats of violence, however, because threats could only be categorized “by reference to the content of their meaning”; on this rationale, suppressing threats can only be sustained under section 1 of the Charter (p. 733; ¶ 41). An additional route for saving the hate propaganda law without retorting to section 1 was to balance domestic expressive guarantees against international instruments that Canada had signed along with the competing values embodied in section 15 (equality) and 27 (multiculturalism) (p. 733; ¶ 42). The Court declined such a balancing within section 2(b), taking instead the position that the liberal test in Irwin Toy indicated such balancing was preferably made under section 1 (p. 734; ¶ 43).

In sum, one might conclude that the balancing afforded competing values to freedom of expression within section 2(b) by the Canadian Supreme Court in Keegstra became even less permissive than under American law (see chapter 7). However, when considering the balancing that is always available under section 1 such issues are less important. Politically speaking, it is also not implausible that the Court’s four justices in the majority wanted to appease the vocal liberal opposition to ex-


1058 See Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580, [1986] CarswellBC 411 ¶ 27 (WL), (sub nom. R.W.D.S.U. v. Dolphin Delivery Ltd.) 2 S.C.R. 573 (“Charter protection for freedom of expression . . . of course, would not extend to protect threats of violence or acts of violence”); Rocket v. Royal College of Dental Surgeons (Ontario), [1990] CarswellOnt 1014 ¶ 24 (WL), sub nom. Royal College of Dental Surgeons (Ontario) v. Rocket 2 S.C.R. 232 (citing Dolphin Delivery, supra) (“a law prohibiting violence or threats of violence might be held not to be protected by s. 2(b) because of the expression’s offensive form”) (citation omitted); see also Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada), [1990] CarswellMan 206 ¶ 78 (WL), 1 S.C.R. 1123 (Lamer, J.) (stating that “threats of violence,” inter alia, “have not received protection under s. 2(b),” although noting that “the mere fact that Parliament has decided to criminalize an activity does not render it beyond the scope of s. 2(b) of the Charter”).
pressive regulation—for example, as represented by the three dissenters in *Keegstra* (pp. 796–869; ¶¶ 165–362)—hence considered it negligible to move the balancing to section 1 if the outcome nonetheless would be similar.

**Within Section 1 of the Canadian Charter**

Section 1 of the Canadian Charter of Rights and Freedoms (1982) states that it “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.”

At the time *Keegstra* was decided in 1990, the principles guiding an application of section 1 had been specified in *R. v. Oakes* (1986), which created a two-step test for justifying a limitation of a Charter right or freedom under section 1.

First, the “objective” of a limitation had to be “of sufficient importance,” and “at a minimum,” relate to an objective of “pressing and substantial” importance. Second, the chosen legal means had to be “reasonable and demonstrably justified.” That is, (a) the adopted measures must not be “arbitrary, unfair,” or “irrational,” but had to be “rationally connected to the objective”; (b) the means should “impair ‘as little as possible’ the right or freedom in question” even when rational, and (c) a “proportionality” had to exist between the limiting measures’ effects and their objective’s importance.

When the Court in *Keegstra* applied the *Oakes-test*, first it had to be determined whether the objective behind the challenged hate propaganda provision was of sufficient importance (i.e., pressing and substantial). The Court canvassed various public inquiries on the issue, assessing the evidence of harm associated with group defamation. It was concluded, inter alia, that “[e]ven if the message of hate propaganda is outwardly rejected, there is evidence that its premise of racial or religious inferiority may persist in a recipient’s mind as an idea that holds some truth . . . with the attendant result of discrimination, and perhaps even violence, against minority groups in Canadian society” (*Keegstra*, 747–48 ¶ 66–67; citation omitted). For instance, the Court mentioned a previous government committee that in 1966 had made clear how “the presence of hate propaganda existed as a baleful and pernicious element, and hence a serious problem, in Canada” (p. 748; ¶ 67). The Court quoted from the committee’s report, concluding among other things that the problem was serious “‘given a certain set of socio-economic circumstances, such as a deepening of the emotional tensions or the setting in of a severe business recession.'”

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1059 *Canadian Charter, supra* note 973, s. 1.
1061 Initially it can be noted that *Oakes* held that a party who seeks to uphold a limitation, say, to the freedom to distribute pornography under the Charter, has the onus of proving that such a limit is reasonable and demonstrably justified. *Oakes*, 1 S.C.R. at 136–37, CarswellOnt 95 ¶¶ 70–71. The standard of proof deemed appropriate was “by a preponderance of probability.” 1 S.C.R. at 137, CarswellOnt 95 ¶ 71. Although considering that the review concerns the justification of a constitutional violation, the Court noted that this civil standard should be “applied rigorously” and that a “very high probability” would be “commensurate with the occasion.” 1 S.C.R. at 137–38, CarswellOnt 95 ¶ 71–72 (internal quotation from Bater v. Bater, [1950] 2 All E.R. 458, (1950) 66 T.L.R. (Pt. 2) 589 (U.K. C.A.) (Denning L.J.)).
1063 *Oakes*, 1 S.C.R. at 139, CarswellOnt 95 ¶ 74 (paraphrasing the *Canadian Charter*).
1064 *Oakes*, 1 S.C.R. at 139, CarswellOnt 95 ¶ 74 (internal quotation to *Big M Drug Mart*, 1 S.C.R. at 352, [1985] CarswellAlta 316 ¶ 140).
1065 *Keegstra*, 3 S.C.R. at 748, CarswellAlta 192 ¶ 67 (quoting Special Committee on Hate Propaganda in Canada, *Report of the Special Committee on Hate Propaganda in Canada*. (Ottawa: Queen’s Printer, 1966), 59).
of these statements is notable considering a more recent committee under the House of Commons in 1984, quoted at an earlier point in the Court’s opinion, precisely observing “that increased immigration and periods of economic difficulties” was accompanied at the time by “a recent upsurge in hate propaganda” all over Canada that targeted numerous racial, national, linguistic, and religious minorities.\textsuperscript{1066}

In \textit{Keegstra} the Court took seriously the empirical harm that could be caused by group hatred. It was concluded that a feeling of “humiliation and degradation” in the human target of hate propaganda was “to be expected” (\textit{Keegstra}, 746; ¶ 65). Furthermore, it was argued that “[t]he derision, hostility and abuse encouraged . . . may cause target group members to take drastic measures in reaction,” such as avoiding non-group members, or try “blending in with the majority” (\textit{id.}). Such “consequences” were in strong discord it was concluded, with ideals of “a nation that prides itself on tolerance and the fostering of human dignity through, among other things, respect for the many racial, religious and cultural groups in our society” (\textit{id.}). The insights expressed by this court stand out, perhaps not so much in terms of their recognition of reality as in the judicial outcome, when contrasted to their American counterparts. In American racial hate-propaganda cases that were contemporaneous with \textit{Keegstra}, laws regulating hateful expression have often had to be formulated, as discussed above, in a “viewpoint-neutral” manner to sustain constitutional challenge, albeit with notable exceptions.\textsuperscript{1067} American statutes that were applied to expressive acts that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender”\textsuperscript{1068} have been regarded as impermissible “actual viewpoint discrimination” against “disfavored topics.”\textsuperscript{1069} By contrast, in \textit{Keegstra} the law was not “neutral” with respect to willful promotion of “hated against . . . any section of the public distinguished by colour, race, religion or ethnic origin.”\textsuperscript{1070} Note, however, that \textit{gender} was not included in the latter provision.

Rather than deferring to well-known liberal excuses for the state not to interfere in the realm of expression, the Canadian Supreme Court took an explicit stand against many fundamental assumptions often invoked (whether accurately or not) under American First Amendment law.\textsuperscript{1071} Notable is their effective rejection of the concept of a \textit{marketplace of ideas} as being too simplistic in face of a complex reality.\textsuperscript{1072} In elaborating their stance the Court sided with the 1966 government committee on hate propaganda, quoting the latter:

\textsuperscript{1066} \textit{Keegstra}, 3 S.C.R. at 745, CarswellAlta 192 ¶ 63 (internal quotation from House of Commons, Special Committee on the Participation of Visible Minorities in Canadian Society, \textit{Equality Now!} (Ottawa: Supply and Services, 1984), p. 69.).

\textsuperscript{1067} A possible exception is provided by Beauharnais v. Illinois, 343 U.S. 250 (1952). For further analysis, see \textit{infra} pp. 265–271.


\textsuperscript{1070} R.S.C. 1985, c. C-46, ss. 319(2), 318(4) (emphasis added).

\textsuperscript{1071} \textit{Keegstra}, 3 S.C.R. at 738, CarswellAlta 192 ¶ 52 (4-3) (Dickson, J.) (“Those who attack the constitutionality of s. 319(2) draw heavily on the tenor of First Amendment jurisprudence in weighing the competing freedoms and interests in this appeal”). The dissent delivered by Justice McLachlin appears to confirm to Justice Dickson’s remark. \textit{See} 3 S.C.R. at 796 et seq., CarswellAlta 192 ¶ 165 et seq. (McLachlin, J., dissenting).

\textsuperscript{1072} The concept “marketplace of ideas” had actually been explicitly referred to before the case was appealed to the Supreme Court by the Alberta Court of Appeal. \textit{See} R. v. Keegstra, [1988] CarswellAlta 280 ¶ 38, 5 W.W.R. 211 (C.A.) (Can.), \textit{rev’d} [1990], 3. S.C.R. 697, CarswellAlta 192. The Court of Appeal
In the 18th and 19th centuries, there was a widespread belief that man was a rational creature, and that if his mind was trained and liberated from superstition by education, he would always distinguish truth from falsehood, good from evil. So Milton, who said ‘let truth and falsehood grapple: who ever knew truth put to the worse in a free and open encounter.’

We cannot share this faith today in such a simple form. While holding that over the long run, the human mind is repelled by blatant falsehood and seeks the good, it is too often true, in the short run, that emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know. The successes of modern advertising, the triumphs of imprudent propaganda such as Hitler’s, have qualified sharply our belief in the rationality of man... We act irresponsibly if we ignore the way in which emotion can drive reason from the field.

Indeed, the extent to which common nonviolent as well as violent pornography “can drive reason from the field” has been amply shown in experimental studies where “rape myths” and similar attitudes supporting violence against women (albeit being unconscious biases rather than “emotions”) are significantly and substantially increased among those exposed to it (pp. 115–118 above); for example, individual experiments showed a reduction of recommended penalty for rape by roughly half when comparing exposure and control groups (pp. 104–105).

The constitutional approach taken under section 1 appears sensitive to empirical realities and social evidence when balancing competing Charter imperatives. Considering the evidence of pornography’s harm canvassed in chapters 1–3, such an approach arguably is favorable to legally recognize the production and consumption harms of pornography; the exploitation of inequality (chapter 2) and the promotion of gender-based violence and attitudes supporting violence against women (chapter 3). This approach is also consistent with the democratic theories that stress the need for recognition and representation of the perspectives and interests of the disadvantaged groups that are harmed by pornography (pp. 153–168 above), in the constitutional sense of being sensitive to the empirical reality and the documentation of their harms. The Canadian approach to empirical realities is, however, not consistent with a postmodern approach to legal challenges that refrain from recognizing vulnerable or subordinated groups because such recognition allegedly will “abet” rather than “contest” their situation and “discursively renaturalize” their subordination (pp. 168–175). Such a postmodern legal approach is however, as recalled (pp. 239–240), more consistent with the First Amendment “viewpoint neutrality” doctrine.

After the Supreme Court of Canada positioned itself differently than those invoking American First Amendment case law, while surveying the findings in support of Parliament’s enactment of the hate propaganda provision (see generally Keegstra, 735–49; ¶¶ 46–68), it moved to analyze international law under the Charter’s section 26. Here, the Court concluded that the “the international community” collectively condemned hate propaganda, and had put obligations on State Parties under two core international human rights instruments to prohibit such expression, which accordingly emphasized “the importance of the objective” of the challenged laws (p. 754; ¶ 77). The first part of the Oakes test (a “pressing and substantial” objective) was thus supported by international legal sources along with the domestic legislative findings.

did strike down the hate propaganda provision as a violation of s. 2(b) that could not be saved under s. 1 of the Charter.

1073 Keegstra, [1990] 3 S.C.R. at 747, CarswellAlta 192 ¶ 66 (quoting Special Comm., Hate Propaganda in Canada, p. 8).

1074 Canadian Charter, supra note 973, s. 26 (“The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.”)
Furthermore, additional provisions of the Charter were taken into the balancing review when judging whether the legislative objective was pressing and substantial. Here, particularly important for the purpose of reviewing pornography regulations, the Court stated that “the effects of entrenching a guarantee of equality in the Charter are not confined to those instances where it can be invoked by an individual against the state” (p. 755, ¶ 79).

Indeed, the harms from pornography are more directly attributable to other parties than the state, such as producers, distributors, or individuals committing abuse in part inspired by consuming pornography (see chapters 2–3). This more extensive concept of constitutional equality affirms regulations against discriminatory practices such as pornography and racial defamation when committed by non-state actors—a clear departure from the public/private distinction associated with early liberal concepts of “negative rights” (cf. pp. 143–148 above). The Court, following this line of thought, concluded that section 15 was relevant for assessing the objectives of the hate propaganda law, quoting from their previous decision in Andrews v. Law Society of British Columbia (1989) and R. v. Big M. Drug Mart Ltd. (1985), stressing the “promotion” of equality as “essential” to the Canadian society.1075

Additionally, Keegstra affirmatively quoted LEAF when applying section 1, repeating their arguments with their own words as well: “in the framework of section 1, the objective of the impugned legislation is enhanced in so far as it seeks to ensure the equality of all individuals in Canadian society” (Keegstra, 756; ¶ 80). The Court concluded that the “message” of hate propaganda, as defined by the challenged provision, is to deny “members of identifiable groups . . . equal standing in society,” hence denying that they are “human beings equally deserving of concern, respect and consideration” (id.). The harm caused by such expression was said to “run directly counter to the values central to a free and democratic society” (id.). Additionally, a similar analysis was made in relation to section 27 (preservation and enhancement of multicultural heritage of Canadians), with brief reference to other group rights in the Charter based on languages, aboriginal status, gender equality, and denominational schools.1076 The Court approvingly quoted a lower court judge stating that “‘[m]ulticulturalism cannot be preserved let alone enhanced if free rein is given to the promotion of hatred against identifiable groups.’”1077 The opinion in Keegstra is consistent with democratic theories that emphasize recognition of perspectives and interests of socially disadvantaged groups in the form of group rights (cf. pp. 153–168 above), but not with a postmodern approach to legal challenges that refrain from recognizing such historically subordinated groups on the allegation that it will “abet” rather than “contest” their situation, and “discursively renaturalize” their subordination (cf. pp. 168–175).

In conclusion, the Keegstra Court found that the first part of the Oakes test under section 1 of the Charter was “easily satisfied and that a powerfully convincing legislative objective exists such as to justify some limit on freedom of expression” (Keegstra, 758; ¶ 86). Contrasting with existing pornography regulations under the U.S. First Amendment (cf. pp. 210–225 above), a significant number of competing


1076 Keegstra, 3 S.C.R. at 757, CarswellAlta 192 ¶ 82 (mentioning that “the sense that an individual can be affected by treatment of a group to which he or she belongs is clearly evident in a number of other Charter provisions not yet mentioned, including ss. 16 to 23 (language rights), s. 25 (aboriginal rights), s. 28 (gender equality) and s. 29 (denominational schools)”).

constitutional imperatives were given substantial emphasis in the balancing assessment in *Keegstra*. The second part of the *Oakes* test concerns the proportionality test of the limitation, inquiring into whether the means chosen are “reasonable and demonstrably justified.”

*Keegstra* held at the outset that although limiting hate propaganda “undeniably muzzles the participation of a few individuals in the democratic process,” such a limitation is not “substantial,” nor should it be given the “greatest weight in the section 1 analysis” (*Keegstra*, 764–65; ¶¶ 95, 97). When assessing if the law was rationally connected to its purpose according to *Oakes*, the position that hate propaganda laws could be counterproductive was rejected. For instance, the idea that the criminalization of racial defamation would lend an aura of martyrdom or cast hatemongering as a practice of dissident underdogs to the extent of making the law irrational was not persuasive to the Court; noting that the effects of “many laws, criminal or otherwise” were “impossible to define with exact precision,” it was nonetheless stressed that the law would remind the community of “the value of equality and the worth and dignity” of every person (pp. 768–69; ¶ 104–05). Similarly, it was argued that “government disapproval of hate propaganda” does not per se “result in dignifying the suppressed ideology” (p. 769; ¶ 106). This stance would presumably hold for pornography regulations as well; that is, a regulation must not in every instance be effective in order to be seen as a rational response to a pressing and substantial objective. Interestingly, pornographers have also often been analogously equated with dissident political underdogs in the political theories and jurisprudence of the First Amendment, if not exactly giving them an aura of martyrdom (*cf.* pp. 219–221 above). By comparison, such analogies did not hold sway in the Supreme Court of Canada for racial hate propaganda.

When assessing whether the means impaired as little as possible the free expression according to *Oakes*, the position that the hate propaganda provision was overbroad or unduly vague was also rejected. In sum, the Court found that the terms of the provision had created a “narrowly confined offence” because it contained “a stringent mens rea requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such” (*Keegstra*, 786; ¶ 137). Furthermore, the term “‘hatred’” was seen to be confined to the “most severe and deeply-felt form of opprobrium” (*id*.). Moreover, the provision had a minimal impairment of free expression since (a) private conversation (even if accidentally carried out in public) was excluded (pp. 772–73; ¶ 112), (b) hate propaganda had to focus on an “identifiable group” (not just anyone), (c) the Attorney General’s consent was needed for taking legal action, (d) a religious-subjects exemption existed, and (e) good-faith intentions were exempt such as “criticizing” hatred, beneficial public discussions, or a reasonable belief that the hateful statements were true. The availability of other legislative tools to combat group hatred did not per se exclude criminal law, given that the justifications for it were sufficient accordingly (*Keegstra*, 786; ¶ 137). Finally, in assessing whether the effects of the limitations were proportional to their objective, the Court in *Keegstra* noted that the “narrowly drawn terms” and defenses prevented that expression outside the constricted category under the provision would be affected (pp. 786–87; ¶ 139–40). The Court further took notice that the legislation’s objective had an “enormous importance . . . of such magnitude as to support even the severe response of criminal prohibition,” which would outweigh the restriction of expression that was outside the “heart of free expression values” (p. 787;

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1079 R.S.C. 1985, c. C-46, s. 319(3) (enumerating defenses); *Keegstra*, 3 S.C.R. at 786, CarswellAlta 192 ¶ 137.
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¶ 141). In essence, a balance had been struck in favor for substantive equality, and against expressing hateful propagation of group enmity.

Deeming from the constitutional framework adopted to regulate expression in *Keegstra*, the approach taken seems equally valid to be tried for pornography regulation. So far as the law would be narrowly tailored to accurately remedy a substantial and pressing harm, its architecture for regulating harmful expression appears hospitable to other regulations as well. When comparing the First Amendment with Canada’s balancing framework under section 1 of the Charter, perhaps the most important aspect is that latter has no bar against regulating expression on basis of its *views* or *content*. By contrast, in the United States many laws of that kind would be struck down as impermissible content or “viewpoint” discrimination that only a compelling interest could save; it must then sustains *strict scrutiny* review where the presumption initially is cast against the regulation, government being required to show it employs “narrowly tailored” means to further “a compelling interest” for such regulation to sustain.1080 By contrast, in Canada a contextual assessment of the empirical harms and benefit of particular expression is made under section 1 of the Charter, always in light of the balancing constitutional imperatives and values that are relevant in its social context. It is thus not necessary for Canadian legislatures to hide or reframe their positions in order to appear “neutral” with respect to the viewpoints or content associated with pornography or hate speech, as American legislatures must do under the intermediate scrutiny review that was originally developed in draft burning, flag burning, picketing, or other political or symbolic speech cases (*see* 214–219 above). The American framework provides less surface plausibility as it denies the empirical particularities of pornography—particularities that could be recognized under Canada’s contextually more sensitive section 1 Charter approach; by contrast, U.S. law implicitly regulate pornography as if it were dissident or otherwise politically relevant “speech” (*see* 214–222 above). Canada would not, for instance, have to construe a law against cross burning at Ku Klux Klan rallies or on the lawns of black families by white neighbors with race-neutral and possibly overbroad or vague terms such as prohibiting an “intent to intimidate”1081 in order to for it to sustain charges for being impermissibly regulating “actual viewpoint discrimination” against “disfavored topics.”1082

The empirical harms of pornography can all be argued to violate women’s equality, which as shown above is a central imperative under Canada’s Charter of Rights and Freedoms: pornography exploits preexisting inequality, which typically includes subjecting a population of prostituted persons involved in its production to numerous forms of additional abuse and mental health problems (pp. 55–75 above); additionally, its consumption causes sexual aggression and attitudes supporting violence against women (pp. 98–122), and predicts increased sexual exploitation of people in prostitution.1083 The comparatively stronger emphasis on equality under the Canadian

1080 *See supra* note 839 (citing case law with explanations).
Charter than under the U.S. Constitution facilitates a more conducive approach to pornography regulation, particularly considering the American demand for “neutrality” with respect to content and viewpoint. By contrast, when pornography has been legally defined by using more “viewpoint neutral” terms (e.g., “intent to intimidate” or “offending”), rather than being defined with specific examples based on the “viewpoint” that subordination and exploitation violates equality or other human rights (see, e.g., 43–44 above), laws are likely to be challenged as vague, inarticulate, over-broad, or without surface plausibility, hence without a rational relationship to a legitimate state interest. This is how obscenity has systematically been challenged during its history due to its conceptual ambiguity, vagueness, and subjective relativism (see chapter 6).

In America, an important exception is the Supreme Court’s decision in Beauharnais v. Illinois (1952) on a group libel/defamation law. Albeit not being as influential as the coexisting viewpoint-neutrality doctrines, Beauharnais appears more equivalent to the Canadian approach to regulate hate propaganda (more below). Certainly, some regard this law as having been effectively superseded by later developments, particularly the Supreme Court decision in New York Times Co. v. Sullivan (1964) regarding defamation of public individuals, even though later Supreme Court decisions regarding defamation of private individuals could suggest otherwise with respect to groups. Similarly, the Supreme Court’s decision to deny an appeal in Collin v. Smith (7th Cir. 1978), thus letting a lower court’s decision stand that invalidated an ordinance enacted with the intent to prevent a Nazi march in Skokie, Illinois, which had used similar language as the group defamation law upheld in Beauharnais used, may also put Beauharnais into doubt. Yet Beauharnais itself has never been overruled by the Supreme Court; the Court keeps citing it, albeit in a cursory fashion, as when enumerating various recognized categories of unprotected expression. Not surprisingly, opinions among legal scholars has differed since long as to whether or not Beauharnais is still valid, in turn suggesting that a group libel analogy might be applied to future pornography regulation in the United States.

Balancing in Beauharnais v. Illinois

In Beauharnais v. Illinois (1952), a similar statute to the one upheld in Canada in R. v. Keegstra (1990) above was sustained by the U.S. Supreme Court, regulating materials on basis of racial and similar content that expressed virulent animosity against social groups. The Illinois criminal code essentially stated it was prohibited to distribute or exhibit any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of

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any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.\textsuperscript{1091}

The defendant was a leader of a group called the White Circle League of America, Inc., responsible for the distribution of leaflets petitioning to the mayor and city council of Chicago arguing for segregation measures by fear-mongering, for instance implying that “[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will” (Beauharnais, 252; quoting petition, original ellipsis). In this vein, the petition urged the city “to halt” an alleged “encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro,” subsequently calling for “[o]ne million self respecting white people in Chicago to unite” (id.). The defendant was convicted under the Illinois code above, fined $200 in the trial court, and the Supreme Court affirmed.

\textit{Beauharnais} has appeared to coexist with the more dogmatic clear-and-present-danger and viewpoint-neutrality doctrines discussed previously, in part because it extended the exception of traditional libel law to cover defamation of groups. As recalled, libel has traditionally been regarded an unprotected category of expression under the First Amendment, with regulations being reviewed under lower standards of review.\textsuperscript{1092} This status usually entailed an exemption from the “clear and present danger” and “viewpoint neutrality” standards, since libel already was regarded “low value speech” that belonged to the categorical exceptions enumerated in \textit{Chaplinsky v. New Hampshire} (1942)\textsuperscript{1093} and elsewhere (see, e.g., \textit{Beauharnais}, 254–58, 266). As stated in the majority opinion delivered by Justice Felix Frankfurter, the Court saw itself as being “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” (Beauharnais, 263). Other expressive regulations that have not been able to be perceived as or couched in the terms of libel laws (e.g., adult pornography regulations, or laws against cross burning) have had more troubles sustaining constitutional challenges in the U.S (see 206–241 above).

In defending his opinion, Justice Frankfurter rebutted allegations that a group libel law might not “help matters,” that such laws could not effectively affect the underlying causes of “tensions and on occasion violence between racial and religious groups,” by responding that “[o]nly those lacking responsible humility will have a confident solution for problems as intractable as the frictions attributable to differences of race, color or religion” (Beauharnais, 261–62). Given this position, he argued the judiciary was not justified in denying the legislature of Illinois their choice of policy, as far as it would not be “unrelated to the problem” (id. at 262) or being “a wilful and purposeless restriction” (id. at 258). Although Justice Frankfurter seems to cast his assessment of the Illinois law in terms of a rational review,\textsuperscript{1094} in some instances he also alludes vividly to a compelling interest justifying such a more re-

\textsuperscript{1092} See Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942); see also supra pp. 212–213 (explaining application of rational review to unprotected expression).
\textsuperscript{1093} For enumerations in \textit{Chaplinsky}, 315 U.S. at 571–572, see supra note 832 and accompanying text.
\textsuperscript{1094} Indeed, a rational review generally does not require law to “be in every respect logically consistent with its aims to be constitutional.” Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487–488 (1955). For further formulations of this standard in various settings, see supra notes 833–834.
laxed standard of review in words just as strong as in the Canadian Keegstra Court’s opinion, which had noted that the “dissipation of racism” was of “enormous importance”—an “objective of such magnitude as to support even the severe response of criminal prohibition.” For instance, Justice Frankfurter alluded to the contemporaneous experience of extreme religious and racial violence in Europe that had been played out maliciously less than 10 years before his Court wrote their opinion, arguing that Illinois did not need to “await the tragic experience of the last three decades to conclude that wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community” (Beauharnais, 258–59).

It is notable that the Beauharnais Court’s recognition of multiple cultures, races, and religions as signifying values to be balanced against the freedom to express group libel might as well have been made by the Keegstra Court in reference to multiculturalism and other group rights under the Canadian Charter. Furthermore, consistent with Keegstra’s analysis under section 1 of the Canadian Charter (pp. 257–263 above), Beauharnais did not base its review on a dogmatic doctrine of expressive categorizations along the lines of content/form, but clearly interpreted group libel in light of centuries of “exacerbated tension between races, often flaring into violence and destruction” (Beauharnais, 259; citations omitted) that had taken place in Illinois. The race riots in East St. Louis in 1917 previously mentioned in context of analyzing doctrinal distinctions between direct and indirect harm (pp. 208–210 above)—that is, the “American pogrom” where white men and women, including representatives of law enforcement, looted, assaulted, burned, and willfully killed children and adults to amuse themselves—was noted by the Court to have happened during the same year the challenged law was enacted (Beauharnais, 260). Such evidence made the Court conclude that “[i]n the face of this history and its frequent obligato of extreme racial and religious propaganda, we would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups,” additionally quoting an earlier decision of the Court were similar expression was implicated to “‘deprive others of their equal right to the exercise of their liberties.’”

Equality considerations—as inherent in the concept of “equal rights”—appear to animate the Court’s opinion even if it did not explicitly invoke the Fourteenth Amendment’s Equal Protection Clause. The Court, for instance, noted that individual economic rights had long been recognized to depend upon memberships in groups, and that the rationale underlying trade unions and similar forms of “group protection” were not confined to economic matters (Beauharnais, 262–63). In this context the Court noted that group defamation accordingly affects the status of individuals along the same group-rationale, thus in extension impacting on their equality with others in society.

It would, however, be arrant dogmatism . . . to deny that the Illinois Legislature may warrantably believe that a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits. (I.d. at 263)

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1096 See, e.g., Keegstra, [1990] 3 S.C.R. at 757–58, CarswellAlta 192 ¶ 81–84 (Can.).
1097 Lumpkins, American Pogrom, supra chap. 7, n. 826, at 1.
In essence, the Court here recognizes that any basic sense of justice, fairness, dignity, and arguably equality, must take account of how individuals are affected by their memberships in groups; thus not only how their group is being treated or mistreated in the arena of public expression, but also the impact such expression has on social discrimination, bigotry, and contempt for the particular group. Put otherwise, Justice Frankfurter’s majority opinion effectively equates group defamation with discrimination, suggesting that group libel may cause discrimination against disadvantaged or otherwise vulnerable groups.1099

The impact of denying communities to legislate against group libel under purportedly viewpoint-neutral First Amendment standards, without consideration of the social consequences for vulnerable groups, will arguably lead to discrimination against those groups—a position squarely rejected by Beauharnais. As recalled, the critique against the classic liberal concept of “negative rights” similarly held that for those subjected to domestic abuse or abuse by other non-state actors, public toleration of their plight may simply entail privatized terror (pp. 143–148 above). This is the same reason why pornography is problem of democracy; it negatively affects the status of groups, particularly women (pp. 98–122 above), and among them especially prostituted and other vulnerable persons (pp. 55–75, 122–129). The social practice of pornography impacts on how these groups are treated in terms of justice, fairness, dignity and equality—values with which no genuine democracy could exist without. In reassessing the decision in Beauharnais, it is particularly notable that it managed to carve out this group rationale under the concept of libel. Potentially, it may harbor a legal challenge against pornography under a similar equality theory that animated Keegstra,1100 based on the documented and (with Justice Frankfurter’s word) “frequent obligato” (Beauharnais, 261) of sexual aggression and abuse, attitudes supporting violence against women (e.g., rape-myths, prejudice, and trivialization of rape), exploitation and coercion, and sex discrimination that evidently flows from pornography consumption and animates its production (see chapters 1–3 above).

As is evident in the statute challenged in Beauharnais above as well as in Keegstra,1101 both regulate hate propaganda or group defamation directed at persons on basis of racial, ethnic, or religious grounds; hence, the laws are “content based” and arguably regulates virulent “viewpoints” expressed by a disseminator of such expression. If not having been categorized as libel and exempted from strict scrutiny along the lines of Chaplinsky, Beauharnais would appear to contradict the opinion in R.A.V. v. City of St. Paul, Minn. (1992) that invalidated ordinances criminalizing symbolic expression, such as erecting Nazi swastikas or burning crosses that “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”1102 The grounds for making a different decision in R.A.V. were said to reside in the ordinances’ allegedly impermissible “actual viewpoint discrimination” against

1099 Although Catharine A. MacKinnon notes that the concept of group defamation generally does not cover all relevant aspects of race or sex discrimination, suggesting instead a stronger balancing focus on equality for legislation targeting expressive social practices that subordinate, see “Pornography as Defamation and Discrimination,” in Women’s Lives, Men’s Laws, supra p. 15 n.45, at 316–26 (first published, 71 B.U.L. Rev. 793 (1991)), my reading of the majority opinion in Beauharnais suggests that such a balancing approach to equality is already implied although the Fourteenth Amendment’s Equal Protection Clause was never explicitly invoked (see also further below).

1100 For the analysis of Keegstra, see infra pp. 253–265 passim.

1101 In Keegstra, the hate propaganda provision of the Canadian criminal code was challenged: R.S.C. 1985, c. C-46, ss. 319(2), 318(4).

“disfavored topics” regarding race, color, creed, religion or gender. Another decision seemingly contradicting Beauharnais is Brandenburg v. Ohio (1969), which held that Klan Speech that was “mere advocacy” and not “incitement to imminent lawless action” would also be protected. Certainly, contempt, derision, or “obloquy”—even if “productive” of riots as held in Beauharnais—might not qualify as “imminent incitement” in Brandenburg terms; put otherwise, such expression may not incite or result in a riot tomorrow, next month, or even in the foreseeable future, but may nonetheless substantively contribute to a social climate conducive to discrimination, bigotry, pogroms, or worse.

It is notable that Beauharnais has never been overruled, but has rather been affirmatively quoted by the Supreme Court in spite of its apparent tension with the viewpoint-neutrality doctrine. For instance, when the Court decided a case concerning depictions of animal cruelty in 2010, it enumerated the “‘historic and traditional categories long familiar to the bar’” that were outside the protections generally afforded under the First Amendment, exemplifying defamation solely by citing Beauharnais. Similarly, the Court’s decision in Ferber v. New York (1982) on child pornography approvingly cited Beauharnais as a case of libel. Ferber was in fact decided only four years after the Court’s decision to deny an appeal in Collin v. Smith (7th Cir. 1978), where the lower court’s decision had invalidated an ordinance enacted with the intent to prevent a Nazi march in Skokie, Illinois, which used similar language as the group defamation law upheld in Beauharnais had used. In clarifying its stance on child pornography, Ferber stated 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.” Furthermore, Ferber had distinguished Beauharnais from cases of libel brought against expression targeting “public officials”—a special libel category with a higher burden of proof that Beauharnais was thus not to be seen as included under.

According to New York Times Co. v. Sullivan (1964), which is the doctrinal case on libel actions brought by public officials (as distinguished from private persons), such public figures must prove that the libelous statement “was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” Converging with this view, the Court noted ten years later in Gertz v. Robert Welch, Inc. (1974) that public persons “usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals

1103 R.A.V., 505 U.S. at 391.
1105 See, e.g., O’Callaghan, “Pornography & Group Libel,” at 367, 369–70.
1107 Stevens, 130 S. Ct. at 1584 (enumerating obscenity, defamation (citing Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952)), fraud, incitement, and speech integral to criminal conduct, as being without First Amendment protection) (other citations omitted).
1110 Ferber, 458 U.S. at 763–764.
1111 Ferber, 458 U.S. at 763 (“Leaving aside the special considerations when public officials are the target, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a libelous publication is not protected by the Constitution. Beauharnais v. Illinois, 343 U.S. 250 (1952).”).
normally enjoy.” The latter category was therefore said to be “more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” It is therefore important that Ferber noted that group defamation as adjudicated under Beauharnais was not to be subject to same strict standard of First Amendment review as defamation of public persons. Indeed, when considering the exploitation in the sex industry and the sexual aggression and attitudes supporting violence against women caused by its consumption previously reviewed (chapters 2–3), the particular social groups that are vulnerable to these harms (pp. 55–75, 122–129 above) can hardly be equated with public officials who have resources and positions in the community that likely grant them ample opportunities to rebut defamation. A suggestion to the contrary rather appears as an inversion of reality in the sense described by Marx and Engels’ analogy of the “camera obscura,” where the dominant ideology represents an “upside-down” image of the material reality.

In light of the distinctions between private and public individuals as well as how Beauharnais suggests that certain groups can be more vulnerable to libel than others, one may more explicitly draw upon other existing constitutional protections of such groups in applying the group libel analogy to the harms of pornography. Historically vulnerable groups, such as those intended to be protected under the Canadian Charter’s equality clause due to their exposure to social prejudice or other disadvantages, do not appear to have equal resources or power to rebut defamation as more privileged social groups have, or otherwise equal access to media and other channels for public influence. Just as the Canadian Charter’s section 15 has been interpreted with these disadvantaged groups in mind, a similar position is implied under the U.S. Fourteenth Amendment Equal Protection Clause, and particularly since the decision in United States v. Carolene Products Co (1938), where it was recognized that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [under the Fourteenth Amendment].”

The empirical evidence of the harms reviewed in chapters 2–3 above overwhelmingly show that pornography creates (in Carolene terms) prejudice that seriously curtails the “operation” of democratic processes ordinarily relied upon to protect women in particular from sexual abuse, discrimination, and from being denied enjoyment of equal rights, respect, and dignity with men. For example, the consumption effects by themselves cause sexual aggression (pp. 98–115 above) and predicts sexual exploitation and abuse by tricks in prostitution (pp. 123–129), as well as desensitizing societies to such practices by promoting attitudes supporting violence against women such as “rape myths” and trivialization of sexual abuse (pp. 115–122). The discriminatory effects of such trivialization was vividly shown in a couple

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1114 Gertz, 418 U.S. at 344.

1115 Marx and Engels, German Ideology, supra chap. 5, n. 661, at 68.

1116 R. v. Turpin et al., [1989] CarswellOnt 76 ¶ 52 (WL), 1 S.C.R. 1296. (stating that purpose of s. 15 is to provide remedy or prevent “discrimination against groups suffering social, political and legal disadvantage in our society,” by, inter alia, searching “for indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political and social prejudice”); Cf. Andrews v. Law Soc’y of B.C., [1989] 1 S.C.R. at 154, [1989] CarswellBC 16 ¶ 56 (Wilson, J.) (stating that “the position that every distinction drawn by law constitutes discrimination is rejected . . . s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society”).

of psychological experiments where recommendations for penalty was handed out in a fictional jury trial: one experiment with prolonged period of exposure to common nonviolent materials caused a significant reduction of the penalty from roughly 10 years to 5 years when comparing those who were most exposed with unexposed controls. Another short-term experiment found that nonviolent “female-instigated sex” caused the largest significant effect for both genders (from 846 months to 515 months recommended penalty) when being compared with other commonly popular categories that included violent materials, though the latter produced significant effects at almost similar levels.

Particularly a subset of women—that is, those already vulnerable through intersecting factors such as poverty, childhood abuse and neglect, racism and other forms of discrimination—appears to be the group most affected by pornography consumption harms when being exploited in prostitution (pp. 123–129). Hence, as implied by Carolene Products, prostituted persons, if anyone, is a “discrete and insular minority” living under special conditions calling for a more searching judicial inquiry. Women in general who are unfortunate to having been sexually assaulted seem also to be discriminated by pornography as a group. Although the Carolene decision and its equality considerations under the Fourteenth Amendment’s Equal Protection Clause were never explicitly mentioned in Beauharnais, they could be considered under a constitutional review that more explicitly uses a balancing method, as in Canada. Along principles introduced by other scholars, when scrutinizing a claim to protect particular expression such as pornography under the First Amendment, the more searching judicial inquiry under Carolene arguably implies taking into account whether the equality rights of discrete and insular groups are undermined. Under U.S. group defamation law, as in Beauharnais, the inequality among different actors might be more effectively recognized than under any existing adult pornography laws, or under laws against racially or other bias-motivated hate speech that are adjudicated under the “viewpoint neutrality” doctrines. The latter doctrine posits pornographers, the Klan, and people vulnerable to sexual exploitation or abuse or racism as equal and similarly situated participants in a market place of ideas. By contrast, Beauharnais is not so neutral to speech that threatens the equality of historically vulnerable groups in society.

Equality and Democracy

Squarely facing the historical record of pogroms, genocides, and deeply entrenched prejudice and discrimination played out even in purportedly liberal democracies before their eyes, the opinion in Beauharnais rejected claims that nothing could be done legally to prevent such atrocity and injustice. The alternatives were effectively

1118 Zillmann and Bryant, “Trivialization of Rape,” supra p. 3 n.13, at 17 tbl.3.
1119 Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 118–119 & tbl.4.3.
1120 For a more detailed analysis of these two experiments in the context of other conceptual studies, see supra pp. 102–106.
1121 See, e.g., MacKinnon, Only Words, supra chap. 7, n. 819, at 71–110 passim (arguing that pornography regulation should be reviewed on a balancing rationale accounting for equality rights and imperatives as well as expressive freedoms in light of empirical evidence of harm); Janine Benedet, “Pornography at Work: Sexual Harassment, Sex Equality and Freedom of Expression” (SJD Diss., Univ. of Mich. Law School, Ann Arbor, MI: UMI Microform/ProQuest, 2003), viii (arguing for a contextual constitutional interpretation accounting for how different expressive activities impacts on equality rights in an unequal society).
1121 For further explanation of this analysis, see supra pp. 216–224.
rejected, as in comfortably invoking the liberal marketplace of idea metaphor (pp. 214–222 above), or in invoking postmodern rejections of particular legal rights for vulnerable groups (pp. 168–175). The basic foundation of the case is thus a belief in human reason to develop legal tools to stop group-based harms; for instance, that law should be rationally connected to empirical realities rather than being abstractly dogmatic. The decision is surprisingly similar to rulings on hate propaganda in Canada that were made more than 35 years later in *Keegstra*, and under a very different explicit constitutional framework (pp. 257–263).

Both *Beauharnais* and *Keegstra* ask of us to answer whether anyone credibly may deny that the social status of individuals may be affected as much by the public’s perceived status of the group to which they “willy-nilly belongs” as it is affected by their own accomplishments (*Beauharnais*, 263). Their answer to this question seems consistent with much human experience and history, even in highly liberal and individualized meritocracies. Nonetheless, it is an arbitrary condition that is fiercely denounced in ideological, political, and legal discourse, for good reasons. The prejudice and injustice in our society that the opinions in *Beauharnais* and *Keegstra* squarely acknowledged should resonate with our sense of justice constructively, as people often acknowledge that racism patently undermines the basic concept of a modern democracy where everyone should have equal opportunities, rights, and freedoms, and not be systematically discriminated against on basis of race, gender, or other arbitrary social categories. Given this position, it would therefore seem to endanger principles of equality if we were to capitulate to the “vulgar constructionism” of postmodernity that, following the critique of Kimberle Crenshaw, conflates “the power exercised simply through the process of categorization” with the “power to cause that categorization to have social and material consequences.”

When following Crenshaw, Iris Marion Young and others, it is not descriptive race or gender “classifications” in law per se that cause the material consequences of discrimination. Rather, it is the refusal to acknowledge the experiences and represent and support the perspectives and interests of those “categories” of groups so classified, who have historically been subjected to such adverse effects from discrimination (pp. 153–168 above).

In Crenshaw’s and Weldon’s terms respectively, if denying the political organization and legal challenges of an “identity politics” based on the “oppositional consciousness” of these socially subordinated group’s lived experiences, decisions such as *Beauharnais* and *Keegstra* would likely not be possible at all. By contrast to other First Amendment decisions that generally emphasized negative liberal rights entailing nonintervention under “viewpoint neutral” and similar doctrines (e.g., pp. 214–222 above), in 1952 the U.S. Court took a position that recognizes and attempts to counter inequality and discrimination as it plays out in social reality. The Court’s approach can accurately be termed *substantive equality*, and is applied more systematically by the Court in Canada since at least 1989, necessitating a more searching inquiry into the consequences of a challenged law in its social, political, economic, and historical context.

It is worth pondering how substantive equality managed to be embraced by a majority in the U.S. Supreme Court in 1952, when so many First Amendment cases have since failed (see, e.g., 225–241). Possibly the case in *Beauharnais* was animated by the more contemporaneous experiences of the Holocaust

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1122 Crenshaw, “Mapping Intersectionality,” *supra* p. 6 n.24, at 1297; *cf. supra* pp. 170–177 (discussing postmodern legal challenges).
1125 *See supra* notes 977–981 and accompanying text.
and the local pogroms, hence forming a necessary political backdrop to establish the empathy and reason among a majority of justices in face of almost inquisitorial doctrinal dogmas that would have tolerated racial bigotry and defamation to be disseminated without legal consequences accordingly.\(^{1126}\) If seriously considering the empirical evidence of pornography and its production and consumption harms previously accounted for in chapters 2–3, a similar legal position favoring substantive equality in that area should arguably be reached. Even with regards to the potential existence of virtual materials produced without real persons, the discrimination that the consumption harms of most commercial pornography produces in the form of sexual aggression and attitudes supporting violence against women is compelling (pp. 98–129 above). The documented harms show that whatever worth an individual may be capable of, would her human potential be recognized but for the condition that she was born a woman—and particularly if being prostituted, raised under poverty, or living under coercive or abusive conditions otherwise (pp. 122–129)—her life will expose her to indefensible injustice because pornography is tolerated by society. These conditions should violate fundamental notions of equality, dignity, and humanity.

The ability to acknowledge social dominance in a judicial opinion—an effort otherwise rarely accomplished without supporting jurisprudence and more substantial constitutional foundations, as in the case of Keegstra in Canada—might also have contributed to that Beauharnais has survived over 60 years in spite of frequent attempts to discredit it. Certainly, lower courts occasionally attempt to cast it in doubt—sometimes merely by summarily dismissing its contemporary relevance, and sometimes by alleging that it appears to rest on reasons seemingly weakened by subsequent Supreme Court actions or inactions (e.g., the holdings on defamation of public officials in New York Times, or the denial of appeal in Collins—a circuit court case similar to Beauharnais but differently decided in lower courts).\(^{1127}\) Yet defamation of private individuals is regulated under a more relaxed standard than New York Times since at least 1974,\(^{1128}\) and Collins was subsequently denied an appeal, thus neither subject to a Supreme Court hearing, nor a decision.\(^{1129}\) Such conditions do not appear to entitle lower courts to overrule Beauharnais, if following the Supreme Court’s statements that other courts should not “conclude” that the Court’s more recent cases “have, by implication, overruled an earlier precedent,”\(^{1130}\) but leave the Supreme Court with “the prerogative of overruling its own decisions.”\(^{1131}\) Indeed, the fact that Beauharnais has continued to be cited in Supreme Court opinions, albeit admittedly in a cursory fashion, suggests that it is premature to assume that it is su-

\(^{1126}\) In the four dissenters’ opinions, the familiar First Amendment concepts appear in the predictable ways with a seeming lack of vision compared to the majority’s opinion. See Beauharnais, 343 U.S. at 267–305 (Black, Reed, Douglas, Jackson, JJ., dissenting individually).

\(^{1127}\) See, e.g., Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. #204, 523 F.3d 668, 672 (7th Cir. 2008); Dworkin v. Hustler Magazine Inc., 867 F.2d 1188, 1200 (9th Cir. 1989); American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 332 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1204–05 (7th Cir. 1978); Tollett v. United States, 485 F.2d 1087, 1094 n.14 (8th Cir. 1973); Anti-Defamation League of B’Nai B’Rith, Pac. Southwest Regional Office v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968).


\(^{1129}\) Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978) (7-2).


\(^{1131}\) Rodriguez de Quijas v. Shearsen/American Exp., Inc. 490 U.S. 477, 484 (1989) (holding that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”).
perseded. The opinion of *Beauharnais* is firmly grounded in the realities of racism, intra-communal violence, and social dominance, attempting to address these unacceptable practices with a concrete law against group subordination. Following Young and others (pp. 153–168 above), *Beauharnais* shows that law can sometimes recognize, represent, and support the perspectives and interests of the oppressed—not just work to erase them from legal doctrine. That is why its logic supports legal challenges to pornography, which this dissertation is showing also to be a social practice of group subordination.

**Summary of Chapter.** The Canadian Charter recognizes more unambiguously than does the American or Swedish written constitutions that sex is a legal ground for discrimination, as well as recognizing multiple other grounds for discrimination, prejudice, and disadvantage linked to the production and consumption harms of pornography. Such a foundation seems to provide a stronger support for legal challenges to pornography than concepts less sensitive to the recognition of groups and substantive equality, particularly as in the “viewpoint neutrality” doctrines applied under U.S. expressive regulations. The exception of group libel under *Beauharnais* in particular suggests, however, that a substantive equality approach might also be applied in the U.S. legal architecture. Some legislatively mandated unprotected expressions in the Swedish regulatory framework are also explicitly based on a substantive equality rationale, such as its law against violent pornography, albeit its impact may be limited due to the procedural obstacles to apply the law (pp. 233–234; cf. 225–237). Democratic theory suggests that the “viewpoint neutrality” doctrine resembles classic liberalism’s concept of “negative rights” that has been criticized for favoring status quo (see 143–148), thus reinforcing privilege and social dominance. The hypothesis that substantive equality is a more conducive concept for challenging the production and consumption harms of pornography is consistent with hierarchy theory, which held that representation of the perspectives and interests of those who are particularly affected by a practice of social dominance is imperative to challenge it (see 153–168). Accordingly, democracy and law need to be sensitive to existing social inequality in order to change it—a condition seemingly promoted by a more substantive contextual approach to equality than the relatively categorical and formalistic approach of “viewpoint neutrality.”

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9. Production Harm Challenges

I don’t tell you how to write your column. Don’t tell me how to treat my broads.\footnote{Quoted in Gloria Steinem, “The Real Linda Lovelace,” in \textit{Outrageous Acts and Everyday Rebellions} (London, UK: Jonathan Cape, 1983), 252.}  

—Pimp Chuck Traynor

This chapter analyzes the obstacles and potential to address pornography’s production harms separately from its consumption harms, as documented in chapters 1–3 above. I focus here on the applicability of \textit{prostitution laws}, including such laws that target sexual exploitation, recognize substantive inequality, and represents the perspective and interests of those harmed in pornography production \textit{(see also chapter 4, on hierarchy theory)}. Prostitution is usually understood as a social practice where money is paid for sex. Given this understanding, it appears inconsistent that prostitution with persons who are paid for sex in front of a camera is not legally or politically seen as prostitution, while almost any other prostitution is. Perhaps most relevantly when treating pornography production as prostitution legally would be that laws such as those against purchase of sex or against third party profiting (e.g., procuring or sex trafficking) do not address the resulting pornography materials. Laws against the production conditions do not therefore invoke similar freedom of expression concerns as laws do that target distribution or possession directly—laws previously discussed in chapters 6–8.

Production and Dissemination as Different Legal Subjects

The evidence analyzed in chapter 2 suggested that the sex in pornography is typically supplied by the same populations in prostitution \textit{(see, e.g., 55–57 above)}, who typically share a socially vulnerable precondition of multiple disadvantages, including for instance poverty, childhood sexual abuse and neglect, homelessness, and racism or other forms of social discrimination (pp. 55–64, 72–75). As a consequence of their generally disempowered positions in economic and social terms, it is easy for pornographers to make them accept unwanted or dangerous sexual acts. Production of pornography is thus generally inherently exploitative and unequal. In addition, it is not rarely coercive, abusive, and violent in addition to being exploitative, with well-documented and severely harmful mental and physical consequences (pp. 64–75). Evidence even suggests that prostitution in front of a camera (i.e., pornography) predicts worse mental consequences, such as PTSD, than prostitution without a camera does.\footnote{See Farley, “‘Renting an Organ,’” \textit{supra} chap. 1, n. 113, at 146 (finding that 49% of 802 prostituted women in nine countries reported being used by pimps or tricks to make pornography—a group diagnosed with statistically “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography without reaching the statistical ceiling effect reported for alternative factors such as childhood abuse or assault in prostitution); \textit{cf.} Farley, “Legal Brothel Prostitution in Nevada,” \textit{supra} chap. 2, n. 196, at 37 (when events in their lives triggered reminders of past trauma, the group who had pornography made of them reported statistically significant symptoms).} Much abusive conditions in the production are evident by simply
looking at the resulting materials (pp. 44–50 above). Nonetheless, considering that experiments and social surveys have shown how consumption “causes” and “predicts,” respectively, trivialization of sexual abuse and other attitudes supporting violence against women (pp. 115–129), the materials may not appear as harmful as they actually are for untrained eyes.

Given that the conditions of production are at least as harmful in pornography as in prostitution generally, there appears to be no reason why the pornography industry should not be subjected to the same legal scrutiny as prostitution per se. To subject the pornography industry to the same laws governing its production as those that govern off-camera prostitution could have extremely important implications for the majority population in them, who are exploited in the industry. This holds regardless of how the law subsequently treats any resulting materials from the point of freedom of expression. Put otherwise, just as publishers, newspapers, or printing activities are not given a carte blanche to violate applicable criminal, labor, and human rights laws in their production of expressive materials, one may argue that pornography production should not be allowed to either. Taking this approach to regulation does not “target” any expressive materials directly, whatever the merits of the individual material in terms of its contribution to a free and democratic society. This chapter will thus ask what the obstacles are to address the production harms of pornography as such.

Today, almost any form of pornography content can be made with virtual media techniques, whether violent, dehumanizing, degrading, unequal, or not. Therefore it is also unpersuasive to assume that pornographers need to purchase real persons to perform sex to enjoy their freedom of expression (as recalled in previous chapters, a common way of defending pornography is to invoke expressive freedoms), especially when the purchase takes place under exploitative and coercive circumstances. The necessity for a continued sexual exploitation in the name of freedom of expression hence appears exceedingly questionable. Thus, even assuming there are expressive protections for the pornography materials themselves under the law, there seems to be a lack of convincing reasons why its production should not be judged according to standards imposed on activities related to prostitution, such as trafficking, recruiting, or the purchase of sex.

For instance, the U.S. Supreme Court has, in cases ranging from subjects such as animal cruelty to child pornography and picketing, said that “[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.”\footnote{United States v. Stevens, 559 U.S. 460, 471 (2010) (quoting New York v. Ferber, 458 U.S. 747, 761–62 (1982) (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949))) (internal quotation marks omitted).} Even though this statement appears plain and simple, it has obviously not been adhered to—a fact particularly evident when looking at the decades of litigation on obscenity in the United States, where virtually no one ever has raised the possibility that such material may depict actual rapes or other offenses.\footnote{For recent federal decisions, see United States v. Ira Isaacs, No. 13-50036 (9th Cir., March 5, 2014), archived at http://perma.cc/BB6T-WVA2; United States v. Little, 365 Fed. App’x 159 (11th Cir. 2010); United States v. Extreme Assocs, 431 F.3d 150 (3rd Cir. 2005), rev’d and remanding 352 F. Supp. 2d 578 (W.D. Pa., 2005), cert. denied 547 U.S. 1143 (2006). The couple behind Extreme Associates, Inc., Rob Zicari and his wife, Janet Romano, were convicted after plea-bargain, July 1, 2009. See Ward, “Producer, Wife get 1-year Jail,” supra chap. 4, n. 562.} Furthermore, there are state court decisions in the United States on the issue of whether higher levels of emotional distress than prostituted persons who had not reported being used for pornography).
or not pornography production should be regarded as prostitution suggesting that it should. For instance, *People v. Kovner* held in 1978 that New York City’s prostitution statute could be applied to pornography, and has not been overruled since:

This court is not unmindful of the fact that a literal interpretation of the prostitution laws, and their vigorous enforcement may create potentially a chilling effect on the exercise of First Amendment freedoms . . . . However, when a State undertakes to regulate a social evil such as prostitution, or pornography, it has a greater power to regulate the nonverbal physical conduct which may occur than to suppress depictions or descriptions of the same. (United States v. O’Brien, 391 U.S. 367, reh den 393 U.S. 900.) While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act.1137

Similarly as in the *Kovner* holding, in *United States v. Roeder* (1975) the Tenth Circuit Court of Appeals held that transporting women across state lines for the purpose of participating in various sexual acts for hire to produce a movie depicting those acts violated the federal Mann Act, and was found unprotected by the First Amendment.1138 However, there is apparently yet no controlling federal case in the United States with respect to applicability of traditional adult prostitution offenses to pornography production.1139 A California state case, *People v. Freeman* (1988),1140 sometimes cited by legal scholars as an indication of the contrary,1141 was eventually determined under a state law, without support from the First Amendment. The California Supreme Court, basing their holding on a naive assumption that there was no “purpose of sexual arousal or gratification” behind the paying of “acting fees” (a purpose required according to relevant state statutes), did not view pornography production as prostitution under the particular statutes existing in California at the time.1142 Even though the opinion in *Freeman* contained speculative remarks on the issue, and attempted to distinguish itself from *Roeder*,1143 it has little precedential First Amendment merit.1144 For instance, following California’s application for review to the U.S. Supreme Court, Justice O’Connor, acting as Circuit Justice, recognized “that the State has a strong interest in controlling prostitution within its jurisdiction and, at some point, it must certainly be true that otherwise illegal conduct is

1138 United States v. Roeder, 526 F.2d. 736, 739 (10th Cir. 1975) (stating that “The First Amendment does not constitute a license to violate the law”) (citations omitted).
1139 MacKinnon, *Sex Equality, supra* p. 6 n.23, at 1352 (“The larger question of whether sex acts that customers pay to watch are prostitution is unsettled in law”).
1140 People v. Freeman, 758 P.2d 1128 (Cal. Sup. Ct., 1988).
1143 Freeman, 758 P.2d at 1134–35 (“[In] Roeder . . . the defendant film producer actually participated in the sexual conduct in the film, for which he transported the woman across state lines.”).
1144 See Freeman, 758 P.2d at 1130–33 (making various remarks about potential First Amendment issues).
not made legal by being filmed.” 1145 Hence, O’Connor’s opinion lends no support to the contention that prostitution related offences are protected per se during the course of pornography production. Certiorari was consequently denied for lack of jurisdiction, on the observation “that the state court’s statutory holding is independent from its discussion of the First Amendment and was not driven by that discussion.” 1146 The case has by legal scholars since been cited among those exemplifying the current doctrine on the limits of federal jurisdiction, 1147 and notably not among First Amendment cases.

The notion that crimes do not become free from liability by default when they are integral to the production of expressive materials is repeatedly voiced in other countries’ jurisprudence as well. In Canada, even without resorting to the Charter’s section 1 “reasonable limits” doctrine, it has been stated under the higher standard developed under section 2(b) that it is “clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification.” 1148 With respect to less grave offenses such as “threats of violence” or violent expressive conduct, it is notable that although the Supreme Court of Canada in 1990 observed that none of their decisions solely “had rested on the notion” that such conduct would be unprotected unless resorting to the section 1 reasonable limits doctrine, 1149 they nevertheless repeatedly suggested such a very notion in a number of cases. 1150 Similarly, the Alexanderson doctrine in Sweden analyzed previously (pp. 227–230 above) entails that when the criminalization of an activity had not been made with the intention to restrict the cultural, social, and political freedom of expression, even such laws that directly impacted on the technical use of expressive media could be regarded as being outside the purview of constitutional protection—as distinguished from those laws merely impacting production, not dissemination or possession.

Apparently, all three national legal systems studied in this dissertation support the notion that criminal offences are sanctionable also when conducted as integral means for producing pornography, an allegedly expressive activity, even when the dissemination or private possession of expressive materials itself might be constitutionally protected. When reviewing cases such as Kovner, Roeder, and Freeman above, it is clear that a law governing production does not directly target the resulting materials, whether or not those are dehumanizing, violent, or otherwise reprehensible; thus, it would seem as if little substantial expressive interests would be raised if using prostitution laws to regulate the production of pornography. As Sweden is the only jurisdiction among the three nations discussed above that has a sub-

1146 Id. at 1314–1315
1148 Irwin Toy Ltd. v. Quebec (Att’y Gen.), [1989] CarswellQue 115 ¶ 43 (Westlaw), 1 S.C.R. 927. For further explanation of the two standards of review when balancing equality against freedom of expression in Canada, see supra pp. 248–265.
1150 See Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580, [1986] CarswellBC 411 ¶ 27 (WL), (sub nom. R.W.D.S.U. v. Dolphin Delivery Ltd.) 2 S.C.R. 573 (“Charter protection for freedom of expression … of course, would not extend to protect threats of violence or acts of violence”); Rocket v. Royal College of Dental Surgeons (Ontario), [1990] CarswellOnt 1014 ¶ 24 (WL), (sub nom. Royal College of Dental Surgeons (Ontario) v. Rocket) 2 S.C.R. 232 (citing Dolphin Delivery, supra) (“a law prohibiting violence or threats of violence might be held not to be protected by s. 2(b) because of the expression’s offensive form”) (citation omitted); see also Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada), [1990] CarswellMan 206 ¶ 78 (WL), 1 S.C.R. 1123 (Lamer, J.) (stating that “threats of violence,” inter alia, “have not received protection under s. 2(b),” although noting that “the mere fact that Parliament has decided to criminalize an activity does not render it beyond the scope of s. 2(b) of the Charter.”).
stantive equality approach to prostitution (more below), and was the first nation in the world to legislate on this rationale, further inquiry will look at Sweden as the most receptive democracy for applying the notion of pornography production as a distinct legal subject separate from distribution or possession.

**Prostitution and the Law**

Most jurisdictions probably have some laws regulating prostitution. However, as will be shown further below, their laws differ in their rationales and impact vis-à-vis the ones who are prostituted, the pimps, and the tricks (purchasers). Many nations have also signed international agreements to combat sex trafficking between as well as within their borders. The internationally and widely ratified definition of “trafficking” is found in the United Nation’s Protocol to Prevent, Suppress and Punish Trafficking in Persons (“Palermo Protocol”), which entered into force on December 25, 2003. There are currently 166 countries, including Canada, Sweden, the United States, as well as China, the Russian Federation, and Nigeria among others, who have adopted this definition. The definition includes, among other things, “the abuse of power or of a position of vulnerability . . . for the purpose of exploitation” by any third party. In the legislative history (travaux préparatoires), “position of vulnerability” has been further defined as “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.” According to the protocol, consent is irrelevant in all such situations.

In light of the empirical evidence accounted for in chapter 2, which suggested that an overwhelming majority of prostituted persons, from which persons in pornography are drawn, want to escape it but cannot, the Palermo Protocol definition of trafficking includes such prostitution where third parties are involved, even in purportedly legalized settings such as pornography. This position has been taken by the U.N.’s Trafficking Rapporteur in 2006, who noted that “prostitution as actually practised in the world usually does satisfy the elements of trafficking.” The Rapporteur also took the view that the “abuse of power” and a position of vulnera-

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1153 Palermo Protocol, supra note 1151, art. 3(a).


1155 Palermo Protocol, supra note 1151, art. 3(b).

1156 See, e.g., Farley et al., “Nine Countries,” supra chap. 1, n. 115, at 44, 56 (finding among 854 prostituted persons in nine countries that 89% of all respondents, of which 49% reported being used in pornography, explicitly said they wished to leave).

1157 Cf. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 27 tbl.1, who addressed this issue in legal brothels by asking prostituted women there whether they wanted to escape prostitution, and found that 81% of the 45 respondents wished to leave, despite that many respondents were subject to surveillance by listening devices and responded in whispers. Id. at 23.

bility in the trafficking context “must be understood to include power disparities based on gender, race, ethnicity and poverty.” Indeed, as discussed above (pp. 57–64), gender, race, ethnicity, and poverty intersect in prostitution so that women, particularly poor women, minorities, or those of color, are overrepresented. In line with the U.N.’s Rapporteur, those who “traffic” persons for sexual purposes are abusing the power they gain relative the pre-existing vulnerabilities of the trafficked persons that usually includes multiple disadvantages. Exploiting such vulnerable people for sex seems just to be another name for pimping; hence, similarly to what was first pointed out by lawyer and writer Catharine MacKinnon, trafficking under international law (e.g., the Palermo Protocol) and pimping are the same.

The key insights of international trafficking law, its history, and its evolving doctrine as informed by all the empirical investigations of the last half century do not seem to be applied in practice, even in ratifying countries such as Canada, Sweden, and the United States One legal scholar argued in 2005 that the empirical evidence as well as a number of applicable human rights instruments and other legal sources already supports recognizing most adult pornography as trafficking under international law, outweighing freedom of expression concerns. According to this analysis, not only do pornographers “traffic” in sex, but the materials themselves usually promote the demand for sex trafficking as well, inspiring consumers to perform various unwanted or even dangerous acts with prostituted persons, as suggested in previous chapters (pp. 123–129 above). International anti-trafficking instruments such as the Palermo Protocol and other jurisprudence already put obligations on numerous democratic nations to reduce prostitution and the demand for it. These conditions, it is thus argued, create a legal foundation to craft sound legislation, with adequate and (where needed) narrowly tailored means to sustain freedom of expression concerns, as well as suitable remedies for those victimized that may also curb

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1159 2006 U.N. Trafficking Report, supra note 1158, ¶ 42.
1161 Id. at 299; see also Schwartz, Williams, and Farley, “Pimp Subjugation by Mind Control,” supra chap. 1, n. 128, at 49–84, for an illuminating account of pimping based on three different cases, where men pimped women into prostitution with different amounts and forms of coercion along a continuum—overt force on one end, ibid., 75–80, exploitation of persons’ inequality and lack of equal alternatives due to racism, sexism, or social class on the other end. Ibid., 70–75. One potentially wide legal definition of a pimp that would apply to all these conditions was until recently found in Canadian criminal law, which defined it as “the person who lives parasitically off a prostitute’s earnings.” R. v. Downey, [1992] 2 S.C.R. 10 at 32, 90 D.L.R. (4th) 449 (Can.). A parasite was further defined as those whose occupation “would not exist if his customers were not prostitutes,” Shaw v. Dir. of Pub. Prosecutions, [1962] A.C. 220 at 270, [1961] 2 W.L.R. 897 (H.L.) (appeal taken from Eng.), Reid L.J., concurring (WL); cf. Downey, supra, at 32, Cory J. (citing Shaw) (Can.), as opposed to others who provide general services to prostituted people that are not directly related to the prostitution, such as the “grocer who supplies groceries, the doctor or lawyer.” Shaw; [1962] A.C. at 263, Simonds J., Viscount; cf. id. at 270, Reid L.J., concurring. This applicability of this definition has been undermined by the decisions in Canada (Att’y Gen.) v. Bedford 2013 SCC 72, [2013] 3 S.C.R. 1101, 366 D.L.R. (4th) 237 (Can.) (invalidating laws against “bawdy-houses” and “living on the avails” of prostitution).
1162 See generally MacKinnon, “Pornography as Trafficking,” supra chap. 1, n. 91.
1163 Id. at 999, & passim.
the activity of pornographers and the dissemination of their materials. Nonetheless, as yet no democratic nation has taken on this challenge to adult pornography.

A particularly good jurisdiction with potential for success in challenging the production side of pornography on basis of prostitution or trafficking laws accordingly appears to be Sweden. As shown below, in 1999 prostitution per se (not just sex trafficking) for the first time in the world was legally recognized to be a form of sex inequality related to gender-based violence, typically exploiting and harming the prostituted person. Hence, contrary to many other jurisdictions in the world where regulations of prostitution (as distinguished from trafficking) are situated in relation to crimes against morality, decency, or the public order, often with a resulting criminalization of both the prostituted person and the trick, the Swedish statute passed in 1999 only criminalized those who buy prostituted persons, not those being bought: “A person who . . . obtains themselves a casual sexual relation in return for payment, shall be sentenced for purchase of sexual service to a fine or imprisonment for at most one year.” From January 1999 to July 1, 2011, the maximum penalty was imprisonment for at most six months. Other countries are starting to adopt aspects of the Swedish model, including Iceland in 2010, Norway in 2009, Canada on November 6, 2014 (passed in Parliament), and, to some extent, South Korea in 2004 and the United Kingdom in 2009. A similar law was also proposed by the Government of India in 2005, has more recently been proposed by the Northern Ireland Legislative Assembly in October, 2014 (votes 81-10), by the French National Assembly (awaiting confirmation in the upper chamber), and was proposed in a resolution (non-binding) by the European Parliament in February.

1165 MacKinnon, “Pornography as Trafficking,” at 1006–12.
1167 Brottsbalken [BrB] [Criminal Code] 6:11 (Swed.). In the legislative history it was explicitly stated that although purchase of sex necessitates “involvement from the one who offers the service, not just the one who obtains themselves a casual sexual relation . . . liability for complicity . . . may . . . not accrue with respect to the ‘seller.’” Prop. 1997/98:55 Kvinnofrid [Women’s Sanctuary] [government bill] 137 (Swed.).
1169 See Comm. on CEDAW, “Response to State Party (Iceland),” supra p. 25 n.73.
1171 Bill C-36, Protection of Communities and Exploited Persons Act, 2nd Sess., 41st Parl., 2014 (Royal Assent, Nov. 6, 2014) (Can.).
1175 Kilpatrick, “Stormont Bans Paying for Sex,” supra p. 25 n.73, at 8.
1176 Editorial Board (N.Y. Times), “France’s Approach to Prostitution,” supra p. 25 n.73, at A32.
2014.\textsuperscript{1177} The focus will be on Sweden since its legal view on prostitution in general and its concomitant potential for application on pornography production has existed there relatively longest.

Converging with the evidence of the harm from commercial sex presented in chapter 2, the rationale underlying Sweden’s Sex Purchase Law is to penalize those who exploit others while decriminalizing those who generally are victimized by such exploitation. This stance is evident in the legislative history further analyzed below. Additionally, in 2011 the law was further clarified by the legislature; Parliament followed the executive government’s report and subsequent bill, acknowledging that prostituted persons may be recognized as the “injured party” under the Code of Judicial Procedure, which makes possible entitlements to damage awards directly from the tricks for their violation of the prostituted person’s equality and dignity.\textsuperscript{1178} However, these clarifications might not have been needed if the judicial system already from 1999 had been more attentive to the original legislative history and the social evidence on prostitution described therein and in this dissertation.\textsuperscript{1179}

This chapter will focus on the potential venue for applying the Swedish regulation against prostitution that are based on a \textit{substantive equality} approach to prostitution, including laws other than the Sex Purchase Act such as the trafficking and procuring laws that are used primarily against pimps,\textsuperscript{1180} in the setting of pornogra-

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\item \textsuperscript{1177} “Resolution on Prostitution,” Eur. Parl. Doc. A7-0071 (Feb. 26, 2014), supra p. 25 n.73 (urging governments in those Member States who deal with prostitution in other ways to review legislation in the light of success achieved by Sweden’s type of laws).
\item \textsuperscript{1178} Bet. 2010/11:JuU22 Skärpt straff [parliamentary comm.], supra note 1168, at 11–12; \textit{see also} Prop. 2010/11:77 Skärpt straff [gov’t bill], supra note 1168, at 14–15; \textit{see also} Rättegångsbalken [RB] [Code of Civil Procedure] 20:8(4) (Swed.), \textit{unofficial translation archived at} http://perma.cc/G6GD-WJJL (as amended 1999) (“The injured party is the party against whom the offence was committed or who was affronted or harmed by it.”); SOU 2010:49 Förbud mot köp, supra note 1168, at 250 (noting that the one who was harmed by the crime according to RB 20:8(4) is entitled to damage awards).
\item \textsuperscript{1180} Procuring laws in Sweden are used against pimps, although the two terms are not synonymous: procuring is not legally regarded as necessarily exploitative per se, while pimping is commonly perceived to involve exploitation. Normal procuring may, for example, entail either a “person who promotes” or a person who “in an improper way financially is exploiting a person who has casual sexual relations in return for payment,” with a maximum imprisonment of four years. BrB 6:12(1) (Swed.). According to existing case law no party is considered injured, except the public order, if the procuring only entailed a normal “promotion” of prostitution. Christian Diesen, “Målsägande?” [Injured Party?], in \textit{Festskrift till Lars Heuman}, ed. Jan Kleimenan, Peter Westberg, and Stephan Carlsson (Stockholm: Jure Förlag, 2008), 140. In addition to normal procuring, there is \textit{gross procuring}, with a maximum penalty of eight years. When assessing whether the procuring is gross, “special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person.” BrB 6:12(3) (Swed.). As has been described elsewhere, courts are inconsistently applying these distinctions, substituting even normal procuring for what appears to be trafficking under the Palermo Protocol. \textit{See, e.g.}, Waltman, “Ending Trafficking,” 143 & nn.44–45. The Palermo Protocol is ratified and located in BrB 4:1a, with a maximum penalty of ten years imprisonment. Several members of parliament have thus repeatedly proposed instead to treat all instances of procuring, which they regard as an outmoded legal concept, as trafficking. \textit{See} Motion till riksdagen 2008/2009:Ju379 Bekämpa den grova kriminaliteten och brottens orsaker [parliamentary motion] at 36 (Oct. 1, 2008) (Swed.) (Mona Sahlin et al.; Social Democrats, 21) (“[I]t is time to toughen the assessment of procuring by replacing it with human trafficking for sexual purposes. The procuring offense’s foundation is that there would be voluntariness between the seller and purchaser. This voluntariness is completely false. Every purchase of someone’s body is built upon an exploitation of vulnerability.”). \textit{See also} Motion till riksdagen 2010/2011:Ju293 Trygghet mot brott [parliamentary motion] at 6 (Oct. 25, 2010) (Swed.) (Morgan Johansson et al.; Social Democrats, 7) (proposing to remake the procuring offense into trafficking in order to raise the penalty and increase the protection for the person victimized); \textit{cf.} Motion 2008/2009:Ju4 med anledning av skr. 2007/2008:167 Handlingsplan mot prostitution och
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Substantive equality in law is a concept described in detail in chapter 8 (see, e.g., 241–246) and necessitates an intent to promote equality in social, economic, political, legal, and other tangible terms; it is thus distinguished from concepts such as “formal equality” or equality of “opportunity” (as opposed to equality in “outcome”). For instance, in Canada discriminatory distinctions are not restricted to facial discrimination (de jure), but also cover disparate impact under facially neutral laws (de facto discrimination; e.g., discriminatory “effects”) whether or not they are intentional. Canada thus guarantees not only non-discrimination in the formal sense, but equality through the operation of law in the social, political, or cultural sense. As expressed in a leading case: “every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.” The Canadian approach is explicitly referred to as “substantive equality” in case law, and by contrast to formal equality it necessitates a more searching inquiry into the consequences of a challenged law in its social, political, economic, and historical context.

Sweden has, as will be shown below, effectively applied this concept by asymmetrical legislation that criminalizes those who exploit the inequality of people in prostitution, and decriminalize and support those whose inequality is taken advantage of. The Sex Purchase Law has been shown particularly effective in its impact so far as reducing the number of persons in prostitution, reducing the number of Swedish tricks, and deterring cross-jurisdictional trafficking. By these empirical effects, it has promoted substantive equality by reducing exploitation of inequality in prostitution. This development as well as the existing obstacles, critique, and misinformation about the law, will be commented more on in Part III on democratic challenges, chapter 12.

With respect to pornography and substantive equality, in 1999 there also already existed a statutory law against depictions of sexual violence or coercion, which was motivated in the legislative history by a substantive gender equality rationale: a government bill stated, inter alia, that “it must be obvious” that pornography produces...
senting grossly degrading sexual violence and coercion by men against women had a detrimental effect on attitudes to women’s equality.\textsuperscript{1187} Thus, by proscribing materials that promoted inequality, gender discrimination, and bigotry, the government promotes substantive equality between men and women. As recalled, this law is enshrined in the fundamental laws on freedom of press and freedom of expression in the Swedish constitution under the framework of “offenses against freedom of expression” (pp. 233–234 above).

In sum, not only was the purchase of sex criminalized and prostituted persons de-criminalized in 1999 in Sweden on a substantive equality rationale, but substantive equality had also been invoked to proscribe some adult pornography through constitutional amendment. Although not yet going as far as the Canadian law, where not only violent or coercive but also non-violent degrading and dehumanizing materials were constitutionally circumscribed on a gender equality rationale in the 1990s,\textsuperscript{1188} Sweden’s prostitution regulations appear to offer additional effective potential if applied to pornography production. The further questions to be inquired into in this chapter concerns the legal conditions for challenging pornography with prostitution laws in Sweden. Some brief discussion will situate the Swedish examples in a comparative and international context. However, the primary focus is the national legal framework to facilitate a consequent analysis in chapter 12 of the democratic obstacles to legal challenges to the production harms in Sweden.

\section*{Legislative History in Swedish Prostitution Law}

The Swedish Act prohibiting purchase of sex was passed after more than two decades of public debate and government commissions, deliberating on the right legal response to prostitution after prostitution increasingly was framed as a problem of sex inequality at the national government and parliament levels.\textsuperscript{1189} Before this law was passed neither the purchase of sex from adults, nor being prostituted was criminalized, but procuring sex was. Tangential laws prohibiting the public performance of pornography, as well as regulations concerning communicable diseases, legal aliens, or the compulsory care of young or addicted persons, could at that time be used in the context of prostitution.\textsuperscript{1190}

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\item Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] 102 (Swed.).
\item See SOU 1995:15 Könshandeln [gov’t report series], supra chap 2, n. 190, at 55–70 (Swed.). For instance, Lag om vård av missbrukare i vissa fall [Care of Abusive Persons (Special Provisions) Act] (Svensk författningssamling [SFS] 1988:870) (Swed.), could be used to force compulsory care in an institutionalized setting, among other places, on an addicted adult prostituted person, even against the person’s will, if there was “an extraordinarily severe situation, where the addiction patently endangers, i.e., next to thwarting the substance abuser’s possibilities to live a humanly dignified life during a long time ahead.” SOU 1995:15 Könshandeln, supra, at 67 (citing legislative history). Similarly, the Legal Aliens Act at the time, Utlänningslag (Svensk författningssamling [SFS] 1989:529) (Swed.), was said, inter alia, to enable the state to refuse entrance to a noncitizen who is presumed to conduct a “dishonest living” (in statutory terms), or revoke the individual’s residence permit after having conducted it, which according to this provision’s legislative history would include “procuring” and “prostitution” (the latter, presumably, meant being prostituted). SOU 1995:15 Könshandeln, supra, at 67–68 (citing statute and legislative history). When this 1995 report was written, laws on legal aliens appear not to have considered prostitution as exploitation of vulnerable persons or as acts of inequality, but rather as immoral; hence the expression “dishonest living” was interpreted as a de facto criminalization of legal aliens who were prostituted. Such views, as will be shown, are not officially expressed in the current Swedish law prohibiting the purchase of sex.
\end{enumerate}
\end{footnotesize}
Since the end of the 1970s some relatively obscure efforts to criminalize tricks, based partly on a gender-equality rationale understanding that buying women for sex was exploitive, started to emerge in the legislature and elsewhere that did not bear fruit. Responses submitted to a 1981 government report, for example, effectively argued that prostitution would “disappear if there was not a demand” and that a law against tricks would “improve equality between the sexes and prevent undue exploitation of socially deprived women.” These ideas went no further until American lawyer Catharine A. MacKinnon in 1990, during a speech together with writer Andrea Dworkin, organized by the umbrella association Swedish Organization for Women’s and Girls’ Shelters (ROKS) under its first chair Eben Kram, independently of this history argued publicly that gender inequality and sexual subordination could not be fought effectively by assuming a gender symmetry that empirically does not exist. Thus, in an unequal world, she argued, a law against men purchasing women is called for, together with no law against the people, mainly women, being bought for sexual use; hence, “ending prostitution by ending the demand for it is what sex equality under law would look like.”

ROKS held regular yearly meetings with members of the Swedish Parliament, where the criminalization of tricks was an agenda item in 1992, 1994, and 1995. After years of concerted effort pursuant to this theory, pushed forward in the legislature mainly by female politicians, in 1998 the Swedish Parliament passed an omnibus bill (the *Kvinnofrid* bill) on men’s violence against women that situated prostitution and the new law in the context of sex inequality. The connection between gender-based violence and prostitution was elaborated in the government bill, inter alia, by noting the relationships between the two commissions that had inquired into these issues:

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

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1191 See, e.g., Svanström, “Criminalising the John,” 233 (mentioning that from 1983 to 1993 some fifty parliamentary minorities submitted party or member bills (“motions”) that were never passed, of which approximately thirty proposed criminalizing the trick or both the trick and prostituted person).
1193 For MacKinnon’s speech in 1990 as it was translated then, see Catharine A. MacKinnon, “Pornografi och jämställdhet” [Pornography and Gender Equality], in *Pornografi: Verklighet eller Fantasi?*, trans. Amanda Golert and Pia Laskar, ed. ROKS [Swedish Organization for Women’s and Girls’ Shelters] (Stockholm: ROKS, 1991), 69.
1195 Svanström, “Criminalizing the John,” 236.
1196 Ibid.
In addition to these statements, recognitions of exploitation and abusive conditions in prostitution related to sex inequality—that is, how girls and women are socially subordinated thus made particularly vulnerable to exploitation and abuse—were expressed in the law’s legislative history.\textsuperscript{1199} Taken together, these views suggest prostitution to be a form of sex inequality related to gender-based violence, exploiting and harming the prostituted person. The legislative findings also emphasized that prostituted women were persons who often had deprived childhoods, were neglected, and early on were deprived of a sense of self-worth (Prop. 1997/98:55 pp. 102–03). Additionally, a strong association between prostitution and sexual abuse during childhood was noted (\textit{id.} at 103). Thus, social inequality and other coercive preconditions, such as being sexually abused and traumatized when vulnerable as a child, were understood to propel women and girls into prostitution. These findings are consistent with the research and evidence reviewed previously in chapter 2.

The 1993 Prostitution Inquiry had also emphasized that any effective strategy against prostitution was linked to promoting sex equality on all levels in society, for example, by equal treatment of boys and girls in kindergarten, and by providing gender-equal parental role models.\textsuperscript{1200} Furthermore, the final 1998 omnibus bill related prostitution to similar broader gender equality imperatives that animated the legal framework combatting men’s violence against women (see above). By having recognized that if prostitution stems from as well as causes inequality, it would be as contrary to equality imperatives to endorse it by decriminalization as it would be to criminalize those already subordinated by the phenomenon itself; hence, the Swedish government in 1998 clearly understood that in order to buy sex, tricks exploit prostituted persons’ coercive circumstances, and that the prostitution transaction consequently is asymmetrical and unequal. This was also the explicit reason why Parliament in 1998 rejected a proposal that had been raised by the government’s 1993 Prostitution Inquiry’s majority, suggesting prostituted persons should be criminalized along with the tricks. The 1993 Inquiry’s majority thought such double criminalization would, inter alia, deter persons from entering or continuing prostitution (SOU 1995:15 p. 221). Nonetheless, the Parliament accepted the executive government’s conclusion to the contrary, the latter having stated:

\begin{quote}
[I]t is not reasonable also to criminalize the one who, at least in most cases, is the weaker part who is exploited by others who want to satisfy their own sexual drive. It is also important in order to encourage the prostituted persons to seek assistance to get away from prostitution, that they do not feel they risk any form of sanction because they have been active as prostituted persons.\textsuperscript{1201}
\end{quote}

Despite that the 1993 Prostitution Inquiry itself had amassed overwhelming evidence of harms in prostitution and also recognized the prostituted person as the most harmed “party,” nonetheless its majority proposed criminalizing both parties in part on the alleged rationale that men (tricks) were also “victims, in some senses” (SOU 1995:15 p. 227). Moreover, the majority claimed the prostituted woman’s difficult situation was not sufficient to “exempt her from liability for her actions” (\textit{id.} at 228).

\textsuperscript{1199} Some of these Swedish findings are reported above in chapter 2, passim, and particularly those vivid descriptive recognitions of abusive and exploitative conditions in prostitution found in the Swedish government report that preceded the omnibus bill on violence against women. \textit{See} SOU 1995:15 Könshandel\textsuperscript{en} [gov’t report series], \textit{supra} chap 2, n. 190, passim.

\textsuperscript{1200} SOU 1995:15 Könshandel\textsuperscript{en}, \textit{supra} chap 2, n. 190, at 16, 29 (Swed.). Further citations in text.

thus effectively blaming the victim. In retrospect, these recommendations seem inconsistent. The only substantive harms against tricks that were actually presented in the report, allegedly indicating they would also be “victims,” were dealt with in a single paragraph. There, violence against the tricks was mentioned without any specification of who exercised this violence (e.g., pimps, police, or prostituted women) (id. at 147). Furthermore, harms from the tricks’ childhoods (abuse and vulnerability) were said to be reinforced when they participated in prostitution, but this was not further discussed or explained. Moreover, harms that in a gender unequal society arguably affect women more, and in a disproportionate way, were mentioned: “the view on women and sexuality in the sex trade in the long run makes impossible normal sexual relations with mutual emotions and responsibility between the parties” (id.). The suggestion that, among other things, such harms to men were proportional to what prostituted women were subjected to by tricks for purposes of liability, or that these harms otherwise would support not exempting prostituted persons from liability, was effectively rejected by the legislature above. A similar rejection had already been strongly voiced by a dissenting expert in the Inquiry.1202

Moreover, and important in the sense of presuming the tricks’ liability, the government approvingly referred to their inquiry’s conclusion “that ‘ordinary men’ who are often married or cohabiting, participate in an activity that they should be aware is destructive . . . particularly for the women they are buying sexual services from” (Prop. 1997/98:55 p. 22). As recalled from chapter 2, more recent international prostitution research repeatedly confirms that tricks tend to know that prostituted persons usually are economically strapped, subjected to violence and other grave hardships, pimped/trafficked, and abused or neglected as children (pp. 63–63 above). In sum, Sweden has thus criminalized tricks and decriminalized prostituted persons on the rationale that buying a person for sex was contrary to the imperative of equality. Furthermore, and perhaps most important for the purpose of future legal remedies, a thorough assessment of the preconditions for entry to prostitution and the conditions while there had been made, which identified the trick typically as sexually exploiting other less fortunate people. Many jurisdictions in the United States and in Canada appear to hold a view to the contrary. Prostituted persons are often criminalized along with the trick in the United States, with the exception of for instance Nevada, where purchase of sex and third party profiteering is legal in a number of counties.1203 By criminalizing both “parties,” U.S. jurisdictions appear to endorse a view

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1202 The dissenter in 1995 explained that although she approved the 1993 Prostitution Inquiry’s findings of harm, these suggested a completely different legal proposal than criminalizing both parties to deter them from prostitution. She wanted to criminalize only the trick, not the prostituted person, precisely on the rationale rejected by the Principal Investigator. The dissenter thus stated that “extremely few prostituted persons . . . have control of their lives,” and consistently recognized that the “sex trade is not a business deal between equal parties” (id. at 241; Ekström, Comm. Member, dissenting). Her argument recognizes that the parties are not merely slightly unequal in their bargaining power, and otherwise similarly situated and in control of their lives. She concluded that the Inquiry’s own findings already had established that “the physical and mental harms the sex trade entails for the women reach far beyond the limits of cognition” (id.). The legal response should hence “unambiguously and clearly side with the vulnerable women in the fight against an undignified and inhumane sex trade. Not by continuing the punishment of women that has occurred through history, but by designating the liability to those who have the upper hand socially speaking, namely the male buyers . . . who are the foundation for the sex trade’s existence” (id.). The dissenting expert further made an analogy with usury, where only one party is criminalized, although two persons are needed for that criminal act to take place (id.). This substantive dissent, as events unfolded, became Sweden’s official position in 1998 when the parliament passed the Women’s Sanctuary bill.

1203 Under a Nevada statute, Nev. Rev. Stat. § 244.345 (2011), counties with populations under 700,000 can enable third parties, through a county licensing board process, to profit from businesses that use “natural persons” (as long as they are not minors) for the purpose of prostitution, though unlicensed pros-
more similar to that of the majority opinion in the Swedish 1995 Prostitution Inquiry, who were later overrun by the government and Parliamentary majority; this view, inter alia, submitted that criminalizing prostituted people would deter them from prostitution (SOU 1995:15 p. 221), and that their difficult situation was not sufficient to exempt them from liability (id. at 228). By contrast, in Canada third party profiteers such as brothel owners, escort agencies, and “managers” will be able to operate legally from 2015 unless Parliament intervenes with new legislation during 2014.  

Applying Prostitution Laws to Pornography Production

Empirical evidence of the harmful conditions of exploitation in prostitution suggests that the production of pornography is made under similar conditions as in prostitution generally, if not worse. Sweden found similar evidence compelling enough to support their substantive equality law that criminalized tricks and third parties and decriminalized prostituted persons in 1998 (pp. 282–286 above). Hence, as shown in chapter 2, when someone purchases a sexual act from another person to make pornography, the person bought most likely is adversely affected by multiple disadvantages such as poverty, severe childhood abuse and neglect, homelessness, racism, sex discrimination, or other forms of prejudice and bigotry; as a result, the person lacks other real or acceptable alternatives to prostitution. Sweden already has held that prostitution and gender-based violence (violence against women) are “related with each other,” and that in a gender-unequal society neither one is acceptable.

These statements from the legislative history are reflected in the codification of the Sex Purchase Law and the procuring provisions, which are inserted in Sweden’s Criminal Code’s Chapter 6 on sexual crimes, of which most are gender-based, such as rape, sexual coercion, and various provisions on child sexual abuse.

The Sex Purchase Law provides fines or imprisonment to “[a] person who . . . obtains themselves a casual sexual relation in return for payment.” Legislative history also makes clear that the person who is bought for sex may be regarded the “injured party,” thus an assessment on a case-by-case basis may entitle them to civil compensation from the purchaser for their violation of the prostituted person’s equality and dignity as well as other forms of crime victim’s support. Similarly, the procuring provision provides imprisonment to “[a] person who promotes or improperly financially exploits a person’s engagement in casual sexual relations in return for payment.” It is thus the obtaining of casual sex through payment, its promotion, and exploitation, which is criminally proscribed. Moreover, the provisions are immaterial to whether another person than the one paying is having the sex. With respect to the Sex Purchase Law, the statute explicitly states that it “also

1205 See supra pp. 55–75; see also supra note 1134 and accompanying text.
1207 BrB [Criminal Code] 6:11(1) (Swed.).
1208 See infra note 1243.
1209 BrB 6:12(1) (Swed.).
[will] apply if the payment was promised or given by another person." In later legislative history to this law it has been implied that a person who pays for another person to obtain casual sex should be liable as an accomplice rather than as a purchaser, but liable nevertheless: “When concerning the person who provides compensation for the sexual service, general rules for complicity would entail that also this person is punished.” Even though pornography production may include two or more persons being paid by a producer to have sex with each other, the legislative history to the Sex Purchase Law is very clear that, in part because of the typical imbalance in power characterizing prostitution, the ones who are paid are not to be criminalized; that is, even a male counterpart who is compensated may be free from liability.

In addition to the purchase and procuring provisions, the Palermo Protocol on human trafficking could also be considered as it is ratified and inserted in Sweden’s criminal code. However, trafficking entails higher penalties and require more proof to be applicable in the context of prostitution (e.g., a “position of vulnerability” must be proved in each individual case) — a situation common in other countries, where laws similar to the Swedish procuring laws have often been used instead of trafficking laws due to their less cumbersome requirements, hence more efficient application.

Interpreting Wordings, Legislative History, and other Sources

Two hypothetical objections to applying the prostitution provisions in the Swedish criminal code on pornography production will be addressed in the following: one concerns the lack of discussion of pornography in their legislative history, and the other concerns how to interpret “purchaser” under the Sex Purchase Law. According to the first objection, it might be considered that legislative history did not explicitly mention a pornography context for the procuring provisions and the Sex Purchase Law. Notably though, similar objections against extending the procuring provisions to areas never mentioned in legislative history, such as newspaper prostitution advertisements, were already dismissed by the Swedish Supreme Court in 1979 in a decision not yet overruled. Swedish courts had convicted a newspaper editor for “procuring” since he had approved the publication of advertisements that contained con-

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1210 BrB 6:11(2) (Swed.).
1211 Prop. 2004/05:45 En ny sexualbrottslagstiftning [government bill] p. 106 (Swed.).
1212 Prop. 1997/98:55 Kvinnofrid [government bill] p. 104 (Swed.) (“it is not reasonable also to criminalize the one who, at least in most cases, is the weaker part who is exploited by others who want to satisfy their own sexual drive.”)
1213 Prop. 1997/98:55 [gov’t bill] p. 137 (Swed.) (“Purchase of sexual services generally necessitates some form of involvement from the one who offers the casual sexual relation, although it is only the one who obtains themselves the sexual relation against payment who shall be punished. Any liability for complicity according to chapter 23, section 4 of the criminal code may therefore not accrue with respect to the ‘seller.’”)
1214 The Palermo Protocol is ratified and located in BrB 4:1a, with a maximum penalty of ten years imprisonment.
1215 See, e.g., RCMP, Human Trafficking in Canada, supra chap. 2, n. 233, at 37 (noting that trafficking charges are “sometimes omitted as other associated charges are believed to have greater odds of a successful prosecution,” even in cases with “strong elements of human trafficking” due for instance to difficulties “in ‘measuring’ exploitation”); cf. Waltman, “Assessing Evidence in Bedford v. Canada,” supra chap. 2, n. 311, at IILA-C (2014) (discussing the relative difficulties of applying trafficking laws in Canada compared with the bawdy-house and living on the avails provisions).
1216 All three courts’ opinions are reported in Nytt Juridiskt Arkiv [NJA] 1979-09-28 pp. 602–10 (Swed.). Further citations in text where appropriate.
tact information to prostituted women. Publishing such information was contrary to voluntary agreements that many publishers abided by at the time (NJA 1979-09-28 pp. 603–04 (Dist. Ct.)), but the newspaper editor objected; he contended that since prostitution advertisements were never discussed in the legislative history, it was impermissible to apply procuring provisions on newspapers (id. at 606 (Sup. Ct.)). The defendant reportedly submitted to the Supreme Court that it was “offensive to the public sense of justice to interpret something from an old legislation that was not anticipated, namely advertisements in the daily press” (id.). In the court of appeals, the editor had also attempted to distinguish prostitution advertisements from the activities of pimps and brothel owners:

The procuring provision was introduced in 1918 and intended to counter completely different activities than those subject to the present case, primarily brothel- and souteneur activity. The legislator had not conceived themselves a case as the one charged at present . . . The Sexual Offences Commission, who extensively considered procuring in their final report SOU 1976:9, did not deal with the newspapers’ role. (Id. at 605 (Ct. App.) (summarizing defendant’s argument))

The courts basically took an opposing position to the defendant’s, finding that the government had not made an impermissible shifting of purpose accordingly, but rather made a permissible application according to original legislative intent. Such a rationale appears relevant for an application to pornography production as well. In the 1979 case, it was thus found that the advertisements had to be viewed “in light of society’s view of prostitution” (id. at 605). The procuring provision from 1918 was said to “fulfill several functions and is applied on fairly heterogeneous situations,” and though the “social conditions in the country since then has changed in substantial ways, the society’s fundamental view on prostitution as a social phenomenon and related conditions accordingly, which the procuring provision is intended to counter, should be fairly unchanged” (id.). Furthermore, since supplying prostituted people’s addresses to potential tricks was mentioned in the legislative history as an example of promoting prostitution, the court reasoned that even though this example did not directly aim at advertising in the daily news it was “well comparable to advertising” (id. at 606). One can object that legislators may have intended not to include newspaper advertisements (assuming newspapers were frequent already in the 1800s), perhaps due to freedom of expression concerns. However, this position did not strike the court as plausible. By contrast, it was held that “with consideration to that advertising has a much stronger effect than such conduct that the legislative history directly aimed at it is generally important, as a means in the fight against prostitution, to counter such advertising at issue in this case” (id.).

If, according to the interpretive rationale above, a conduct does not have to be mentioned in legislative history to be covered by its purview when its harms against the protected interest are stronger than conduct so mentioned, there appears to be no bar against applying prostitution laws on pornography production just because it was not expressly considered in the legislative history. The harms to prostituted people appear also to be enhanced by circulation of the materials, them being sold and distributed forever publicly as and for sex, reportedly creating more stigma that may obstruct their escape from the sex industry.1217 Moreover, pornography production is just as unequal with respect to gender as is prostitution; thus, the additional legislative purposes of the Sex Purchase Law as a means to counter gender inequality

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1217 For instance, women in Nevada brothels reported that pornography made there with them made them feel stigmatized and defined by it, making escape from prostitution more difficult. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 37.
would be similarly furthered by countering prostitution in front of the camera as prostitution without a camera. Furthermore, when legal action on pornographers only targets production that use real people, hence does not interfere with their right to disseminate other pornography (e.g., virtual or old materials), a commercial marketing doctrine that was invoked in the Supreme Court alongside Alexanderson’s distinction of unprotected materials to show that the prostitution advertisements had no relationship to the constitutional purpose of freedom expression seems superfluous in this case.\footnote{Cf. NJA [Supreme Court] 1979-09-28 pp. 602, 606–10 (Swed.) (holding that the prostitution advertisements “are to be regarded as advertisements of purely commercial nature and has not been possible to perceive as submissions in the debate about prostitution or otherwise as formations of opinion or viewpoints. Any bar against applying general law in trying the publication of the advertisements does not exist,” at 609–10).} Nothing consistent or otherwise explicit in the legislative history of either the Sex Purchase Law or the procuring provisions seems to state that applying these provisions to a pornography setting would be beyond their purview.

The second objection could be that the Sex Purchase Law, as distinguished from the procuring provision, emphasized an offense where a person obtains “\textit{themselves} a casual sexual relation for payment.”\footnote{BrB [Criminal Code] 6:11(1) (Swed.) (emphasis added).} Put otherwise, the statutory wordings, particularly “themselves,” could imply that legislators imagined a sexual encounter between a trick and a prostituted person. The procuring provision, however, only speaks of “casual sexual relations in return for payment,” which does not necessitate a trick per se, as casual sex can be performed with another prostituted person in return for payment by a pornography producer (see further below). In the pornography setting there may thus be no one who has obtained “themselves” the casual sex, except where one person in the sexual act is actually paying to perform in the materials, as opposed to being paid by the producer. This type of pornography production was actually documented in legislative history to the Sex Purchase Act.\footnote{See SOU 1995:15 Kônshandeln [gov’t report series], supra chap 2, n. 190, at 96–97 (Swed.).} Yet it may be noted that the legislative history also contains remarks that supports a broader interpretation of casual sex than this potential objection implies, analogously with how the 1979 Supreme Court decision above interpreted the protected interests when applying the procuring provision to newspaper advertisements.

For instance, although a 2004 government bill amended the Sex Purchase law with an explicit liability clause for tricks where their sex had been paid by someone else in part because the wordings “obtains themselves” were thought slightly ambivalent, in order to support extending the provision’s application the government stated that “moreover, it can be emphasized that the law is intended to be used to fight prostitution as a social phenomena.”\footnote{Prop. 2004/05:45 En ny sexualbrottslagstiftning [gov’t bill] p. 106 (Swed.).} Such a broader interpretation of the procuring provision were taken by the courts in the 1979 advertisement decision above, when holding that even though certain applications had not been explicitly mentioned in legislative history, nor stated in any statutory wordings, they would nonetheless be permissible. As the 2004 government recognized that the Sex Purchase Law intended to fight prostitution as a “social phenomenon,” this position supports additional judicial applications than those restricted to traditional brothels, escort, or street prostitution settings. Although the typical “trick” in such prostitution may not exist in the pornography setting, as documented in chapter 2 the production harms are otherwise similar, perhaps even worse in pornography than in off-camera prostitution.\footnote{See supra pp. 55–75; see also supra note 1134 and accompanying text.} Hence, fighting prostitution as a “social phenomena” would be more effectively accomplished by applying prostitution laws to pornography production. The
effectiveness is also apparent when considering the associated behaviors of consumption documented in chapter 3 (see 123–129 above), as well as in the legislative history to the Sex Purchase Law itself, suggesting that pornography consumption inspires and predicts tricks in acting out harmful activity on prostituted people who are more vulnerable than other persons to resist such attempts. If such exploitation would be countered by applying the Sex Purchase Law to pornography production, the “social phenomena” of prostitution would also be fought more effectively.

In addition, it can be observed that neither the term “purchaser,” nor the term “obtains themselves” are defined in the statute, nor have been further defined in conjunction with subsequent amendments. The 2004 government bill, for example, said that the Sex Purchase Law “can be said to be directed against the person who uses persons in prostitution,” which was typically envisaged as the purchaser who pays, but also those who “otherwise acted as purchasers of the sexual service” even when someone else paid. Directly in conjunction to the remarks in 2004 it was stated (as mentioned above) that “the person who provides compensation for the sexual service” would be liable according to the Criminal Code’s general provisions for complicity. Even if a pornographer paying for sexual acts would not be seen as a typical purchaser in the sense of the traditional “trick,” such a pornographer is patently providing compensation for similar sexual services, thus at a minimum appear liable as an accomplice.

In the case of the procuring provision the definitional problems relating to the purchaser does not exist. It is readily apparent in the statutory wordings that the “promotion” or undue “exploitation” of the prostitution of another person is prescribed—not the obtaining of a sexual relation per se. Various third parties may thus be liable to procuring. Apart from the most patently applicable cases of pimping (e.g., on the streets, in escort prostitution, or clandestine brothels), the statute explicitly subjects landlords or any “person holding the right to the use of premises” that are “wholly or to a substantial extent used for casual sexual relations in return for payment” to liability. Furthermore, case law has (as mentioned) established other applications, for example, newspapers advertising for prostitution, where personal liability is imposed on editors-in-chief or similar persons (NJA 1979-09-28 pp. 609–10 (Sup. Ct.)). Regardless of any potential conflict with freedom of expression when considering the resulting materials, the pornography producer, and potentially the distributors and sellers, are evidently “promoting” or “unduly exploiting” prostituted people’s prostitution in pornography by profiting from and promoting the growth of a market for such prostitution. It is worth pointing out again that something that is otherwise criminal to do does not simply become legally protected by dint of being photographed or filmed (cf. 273–277 above; cf. 458–463 below).

Existing case law under the procuring provisions has not fully accounted for the empirical evidence of prostitution previously surmised in this dissertation, which showed that prostitution typically entails an exploitative condition for those who are prostituted. Case law has deemed much pimping activity as a mere “promotion” of prostitution (as opposed to “improper exploitation,” or the more severely graded sex “trafficking” offense), which is a cause for much criticism among minority legislators in the Swedish parliament. However, for the purpose of liability, it may be noted that distributors and sellers also offer payment to a producer in order to share

1224 Prop. 2004/05:45 En ny sexualbrottslagstiftning p. 106.
1225 Id.
1226 BrB 6:12(2) (Swed.).
1227 See supra note 1180.
the potential profits derived from obtaining a sexual service; thus, they are arguably “exploiting” prostituted people’s “engagement in casual sexual relations in return for payment,” as the statute defines the procuring offense.1228 Following existing case law though, their liability might be limited to the “promotion” of prostitution, as were the newspaper editor who published advertisements for prostitution and were given a conditional sentence in the leading case (NJA 1979-09-28 pp. 609–10 (Sup. Ct.)). That said, a more serious assessment might still be made, would social evidence of the exploitative and harmful conditions in prostitution for pornography (e.g., 55–75 above) be more thoroughly considered by the judiciary. Moreover, virtually all parties mentioned hereto at a minimum appear liable for complicity to either purchase of sex or procuring of prostitution in pornography. The Criminal Code holds that “liability . . . shall be imposed not only on the person who committed the act, but also on anyone who furthered it by advice or deed. . . . A person who is not regarded as the perpetrator shall, if he induced another to commit the act, be sentenced for instigation of the crime and otherwise for aiding the crime.”1229 Similarly, publishers, distributors, and sellers have by their financial “deed” demonstrably “furthered” the obtaining of casual sex in return for payment.

Others who either “promote” or “exploit” the same sexual acts performed in pornography for gain could also be liable. For instance, consumers who pay for pornography materials, thus provide a financial incentive for the pornographers to continue to exploit prostituted persons, might be seen as liable to promotion as a consequence of their “deed.”1230 Alternatively, they could be regarded as accomplices to exploitation in pornography production considering the knowledge that now exists about the actual conditions of exploration and abuse in the sex industry (see 55–75 above), to which at least a negligence standard could apply. An empirical association to “promotion” (or, perhaps more debatable, “exploitation”) of prostitution exists even for such consumers who view or possess the materials although they do not pay directly for it; that is, by browsing or downloading free pornography on the Internet, their activity likely contribute to advertisement revenues to online publishers of such materials, hence creating further profits and demand for prostitution in pornography.

As a comparison, the seminal decision on child pornography distribution in Ferber has enabled the criminalization of possession (apart from distribution); for instance, relying on Ferber and Congressional findings, the United States Court of Appeals for the Fifth Circuit held that “the consumer . . . instigates the original production of child pornography by providing an economic motive for creating and distributing the materials,” that “consumers . . . therefore victimize the children depicted in child pornography by enabling and supporting the continued production of child pornography, which entails continuous direct abuse and victimization of child subjects,” and that “the victimization of a child depicted in pornographic materials flows just as directly from the crime of knowingly receiving child pornography as it does from the arguably more culpable offenses of producing or distributing child pornography.”1231 In the United States, children exploited in child pornography are now regarded as entitled to damage awards from consumers of their images—the contested issue having been not whether or not those consumers are liable for dam-

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1228 BrB 6:12(1) (Swed.).
1229 See, e.g., BrB 23:4, paras. 1–2.
1230 BrB 23:4, paras. 1–2.
1231 United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998) (citations omitted); cf. New York v. Ferber, 458 U.S. 747, 759 (1982) (stating that “distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children,” and that “the materials” are “a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation”).
ages, but rather how much each individual would be liable for. By contrast to those exploited for prostitution in adult pornography, they can collect something. But just as children who were exploited in pornography report mental problems due to feelings of being haunted by the continuing circulation of their images and not knowing who had seen them, adult women in legal brothels in Nevada also report that documentation of their prostitution via pornography there caused them to feel stigmatized and defined by it, as it is a similar permanent record circulating in society and making escape from prostitution more difficult for them. Similar reports were made by a number of pornography survivors in testimony to the 1985 U.S. Attorney General’s Commission on Pornography.

As recalled previously in chapter 7, the legal distinction between child pornography and adult pornography often appear too rigid, causing intersectional problems detrimental to most children victimized by commercial sexual exploitation as they grow up into adulthood under multiply disadvantaged conditions (pp. 211–214 above). A majority of prostituted adult persons, from which those who are used in pornography are drawn (e.g., 55–57), were sexually abused as children (pp. 59–62). However, when passing the legal age of adulthood an overwhelming majority of these prostituted persons are effectively in a condition of slavery where they lack real or acceptable alternatives to prostitution (pp. 57–59). Thus, many preconditions are the same among persons who were exploited in child pornography as for those exploited in adult pornography. In fact, often they are the same people, only found at different points in time in their lives. Many adults in pornography production were unable to escape sexual exploitation before they became adults, effectively becoming stuck in a vicious cycle of abuse under coercive circumstances that is now more than well-documented (pp. 55–75 above). Unless the rights of adults are strengthened and enforced, it appears as children will not either receive adequate protection from sexual exploitation; reality unfortunately shows that society tends to fail in protecting them on their way to adulthood. Precisely for such reasons, if law began addressing the multiple disadvantages in sexual exploitation by an intersectional approach that includes adults, children whose disadvantage is more easily identifiable would benefit in the long run just as much, if not more.

To distinguish dichotomously between children and adults, as in assigning liability for damages to child pornography consumers but not to consumers of adult pornography, appears rather to protect the continuing sexual exploitation of adults. Consistent with the interpretation of Sweden’s prostitution laws, just as a newspaper editor was liable to promoting prostitution by profiting from its advertising and con-

1232 Compare 18 U.S.C. § 2259(b)(1) (2014) (directing defendant “to pay . . . the full amount of the victim’s losses” due to child pornography), with Paroline v. United States, 134 S. Ct. 1710, 1727 (2014) (5-4) (holding that consumers are liable under 18 U.S.C. § 2259 to “an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses. The amount would not be severe . . . given the nature of the causal connection between the conduct of a possessor . . . and the entirety of the victim’s general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount”).


1236 See, e.g., Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 864–65 (among 200 prostituted women and girls sampled in San Francisco through informal recruitment and advertising in order to avoid “arrestable” or “service oriented” respondents, many made spontaneous unsolicited comments during open-ended questions how they had been used to make pornography before age 13); cf. Ms. P., “Statement,” Minneapolis Press Conference, July 25, 1984, supra chap. 2, n. 228, at 265–68 (survivor’s account describing intrinsic links between childhood and adult sexual exploitation).

tributing to its growth (NJA 1979-09-28 pp. 609–10 (Sup. Ct.)), hence contributing to sexual exploitation, virtually everyone else who consumes, distributes, or profit from the adult pornography are intrinsically involved in reinforcing and keeping prostituted persons exploited and harmed in the course of the production of adult pornography. Although no one could reasonably contest this social fact given the overwhelming documentation of coercion and exploitation in adult pornography (see chapter 2 above), just as in the U.S. child pornography case reviewed in their Supreme Court the contested issue seems rather to be how much (or how little) each individual consumer should be liable for.\textsuperscript{1238}

Another objection might be that by applying Sweden’s prostitution laws on pornography production one indirectly impacts on the dissemination of expressive materials—for example, by creating a “chilling” effect on the expression for some persons who wish to express themselves through pornography. Whether or not one regards these persons as common pimps or expressive artists, it is nonetheless consistent with the Swedish “Alexanderson doctrine” discussed in chapter 7 (pp. 227–230 above) that prostitution has been legally proscribed “from an entirely different perspective”\textsuperscript{1239} than to infringe activity that merits protection under the fundamental laws on expression. According to Alexanderson’s original formula, it is then the “prerogative of criminal law to examine more closely when a crime, brought about through print, is an offence against freedom of the press or not”—that is, to “determine” whether the fundamental laws are “applicable.”\textsuperscript{1240} Sweden’s prostitution laws’ legislative history entails that the protected interests are related to promoting sex equality, fighting exploitation, and to combat other harms of prostitution (pp. 282–286 above)—not to infringe freedom of expression in the sense of stifling substantial public discourse or limit potential use of expressive communication in furthering the development of progressive liberal societies.

Promoting sex equality is an explicit constitutional imperative in the Swedish Instrument of Government.\textsuperscript{1241} According to the Instrument’s legislative history, its concept of freedom of expression is also “principally” the same as under the Freedom of the Press Act.\textsuperscript{1242} In conjunction with the enactment of comprehensive amendments to the Instrument, it was stated that “several kinds of expressions by definition falls outside the constitutional protection and may therefore be subject to sanctions without particular constitutional support” (Prop. 1975/76:209 p. 141)—a position seemingly consistent with the Alexanderson doctrine. An enumeration of examples of such unprotected and criminal expressions was also made in the legislative history, among others unlawful coercion, unlawful threat, unlawful discrimination, unlawful threat to public official, bribery, counterfeit, molestation, and interference in a judicial matter (\textit{id.} at 142). Moreover, since an application of the prostitution provisions would \textit{not} target the resulting materials, by contrast to most of the enumerated examples in this legislative history, the prostitution laws appear to fall outside the ambit of the Instrument’s expressive protection. From this point of view, it is debatable whether even the Alexanderson doctrine is necessary to invoke to sustain them under the Swedish constitution when applied to pornography production and not the resulting dissemination or possession of materials.

\textsuperscript{1238} Cf. supra note 1232 (citing case history and news reports).
\textsuperscript{1239} Alexanderson, Föreläsningar öfver tryckfrihetsprocessen, supra chap. 7, n. 923, at 8.
\textsuperscript{1240} \textit{Id.} (emphasis in original).
\textsuperscript{1241} RF [Const.] 1:2(1)(5) (Swed.).
The Swedish prostitution laws seem permissible to apply directly to pornography production with real persons insofar as compensation is paid for the sex. With the caveat that the unsuccessful democratic attempt in the beginning of the new millennium to explicitly recognize that the procuring provisions apply to pornography (further analyzed in chapter 12) may be an obstacle to direct judicial application today, the Sex Purchase Law would still seem to be applicable already under existing law. In light of these conclusions, the further question to be answered in Part III, chapter 12, is specifically what the political obstacles are to challenge the production of pornography with real persons in Sweden. How come, for instance, the legislature did not recognize that the procuring provisions should apply to pornography production? Was their resistance to such an application based more on law than on ideological perceptions, or vice versa?

Equality and Democracy

As shown above, Sweden recognizes that prostitution is not a symmetrical activity with equal parties, as under a legal approach of “formal equality,” but that the socially disadvantaged position of prostituted persons compels the state to promote equality by asymmetrical legislation. Thus, Sweden prevents exploitation in prostitution through criminalizing third parties and tricks, and by supporting escape from prostitution by recognizing, on a case-by-case basis, that prostituted persons may be the “injured party” under laws criminalizing tricks (and pimps), entailing potential entitlements to damage claims and related social support for prostituted persons.\footnote{See Bet. 2010/11:JuU22 Skärpt straff [parliamentary comm.], supra note 1168, at 11–12; cf. Prop. 2010/11:77 Skärpt straff, supra note 1168, at 14–15; see also Rättegångsbalken [RB] [Code of Civil Procedure] 20:8(4) (Swed.), unofficial translation available at http://perma.cc/G6GD-WJL (as amended 1999) (“The injured party is the party against whom the offence was committed or who was affronted or harmed by it.”). SOU 2010:49 Förbud mot köp, supra note 1168, at 250 (noting that the one who was harmed by the crime according to RB 20:8(4) is entitled to damage awards). For further explanation of the implications of these decisions, see Waltman, “Sweden’s Law’s Potential,” supra p. 26 n.75, at 463–68.}

By contrast, neither decriminalizing all parties or criminalizing prostituted persons along with their exploiters appear to rely on a substantive equality rationale, as that concept is otherwise understood under the Canadian Charter of Rights and Freedoms, the Swedish Instrument of Government, or the Fourteenth Amendment when so accurately identified (see 241–246 above), considering that such laws do not address the asymmetrical power-relationship and substantive inequality of the different actors in prostitution.

Sweden’s legal approach to prostitution is also consistent with hierarchy theory that stresses how in countering social dominance and inequality, democracies must recognize groups that are socially subordinated and actively promote their autonomous organization so their interests and perspectives will be adequately represented (pp. 153–168 above). Such recognition by itself entails that one recognizes substantive inequality in society—a recognition effectively made by Sweden when passing the asymmetrical law against buying persons for sex in prostitution, with potential entitlements to restitution for people so purchased. By contrast, a postmodern theory of legal challenges would propose the opposite; that is, "rights" should be limited to "figure freedom and incite the desire for it only to the degree that they are void of content, empty signifiers without corresponding entitlements."\footnote{Brown, States of Injury, supra p. 16 n.50, at 134.} The dangers, this perspective imply, is precisely to conceptualize concrete group rights against domi-
nation as Sweden has indirectly done by their recognition of substantive equality imperatives. Put otherwise, Sweden’s law is not “without corresponding entitlements”: it actively promotes prostituted persons’ rights to escape from prostitution by asymmetrical criminalization that grants them potential entitlements to support and damages, as well as it intends to promote social equality more generally. From a postmodern point of view, Sweden’s law will inevitably be misappropriated by the state, thus it suggests more abstract ideals and generic rights rather than substantive recognition of inequality (cf. pp. 168–175 above).

The so-called sex worker organizations who favors full decriminalization over the Swedish model law and who often includes third parties in their ranks appear ideologically close to Brown’s postmodern position; at least with respect to the outcome of their policy choices. Their position appears to seek a legal treatment akin to the “formal equality” approach by equating prostitution not with slavery, as abolitionists do, but with other legal occupations in general—a position recently seen litigated on their behalf in British Columbia. This “similarly-situated” approach to equality has since long been criticized by proponents of substantive equality, including the Supreme Court of Canada among others since at least 1989 (see 241–246 above). By contrast to a similarly-situated approach, survivor-led organizations tend to be abolitionist and as such address “demand” for prostitution by favoring criminalizing tricks and third parties, decriminalizing prostituted persons, and providing more economic alternatives and recovery services for the latter that enable their escape from prostitution (above pp. 83–86 et passim). Their substantive equality approach is more similar with Sweden’s law against third parties and tricks in prostitution. The documented associations between so-called sex worker organizations and third parties such as brothel owners, strip club owners, escort agencies, and people with prior pimping-related convictions make them less credible than survivor-led organizations (ibid.). This is a reason why democratic theories stressing representation of autonomous organizations composed of vulnerable groups seem less applicable to these organizations than to survivors. Given this analysis, the Swedish prostitution laws are consistent with democratic theories favoring recognition and representation of socially disadvantaged groups.

The comparative differences between Sweden, Canada, and the United States’ prostitution laws encourages asking whether the production of pornography, as dis-

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1245 Cf. Butler, “Sovereign Performatives,” supra p. 16 n.51, at 376 (implying that hate-speech legislation will “inevitably” be “misappropriated by the state” and that the state “will also reiterate and restage” hate-speech “as state-sanctioned speech”)

1246 See Downtown Eastside Sex Workers United Against Violence Soc’y v. Canada (Att’y Gen.), 2008 BCSC 1726, 305 D.L.R. (4th) 713 ¶ 26 (Can. B.C. Sup. Ct. 2008), where petitioners’ claimed that laws against living economically on the prostitution of others and laws against third-party involvement in indoor prostitution were discriminatory under Canada’s constitutional equality provisions on the professed rationale that women are overrepresented in prostitution, to distinguish prostitution from other occupations by asymmetrical criminalization that grants them potential entitlements to support and damages, as well as it intends to promote social equality more generally. From a postmodern point of view, Sweden’s law will inevitably be misappropriated by the state, thus it suggests more abstract ideals and generic rights rather than substantive recognition of inequality (cf. pp. 168–175 above).

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tinduced from off-camera prostitution, in which the same population of prostituted people nonetheless typically are used, could be treated legally different along the same lines. That is, would Sweden apply its substantive equality approach to prostitution per se on pornography production in particular? Thus, what are the possibilities to legally use the equality approach established with the passing of the Sex Purchase Law in the context of pornography production? How would the present constitutional regulation of pornography and other allegedly “expressive” activity become applied to such a legal challenge in Sweden? What potential does the Swedish prostitution law harbor as a legal challenge to pornography?

Sweden’s constitution, the Instrument of Government, provides lower protections against sex discrimination against women on its face than does the Canadian Charter (see 241–246 above; comments on Sweden at end). Nonetheless, Sweden is the only country among the two that explicitly recognized prostitution per se (not just sex trafficking) as a form of sex inequality related to gender-based violence, typically exploiting and harming the prostituted person (pp. 277–286 above)—that is, a substantive equality approach to prostitution. On the other hand, the Supreme Court of Canada made a unique and stronger gender equality analysis with respect to a broader category of adult pornography than in Sweden, holding that legally prohibiting pornography that is not only violent, but also degrading or dehumanizing though nonviolent, seeking “to enhance respect for all members of society, and non-violence and equality in their relations with each other,” would promote equality, a fundamental democratic value “that the restriction on freedom of expression does not outweigh.”

Yet neither Sweden nor Canada explicitly spelled out the constitutional grounds in these decisions; for example, even though concurring opinions in lower Canadian courts had explicitly cited the equality sections, the Supreme Court did not. Hence, just as the Swedish legislative history to the Sex Purchase Act referred explicitly to sex equality (see above) but without any constitutional citations when doing so, the Canadian case also relied on an equality rationale in its explicit argument but without any explicit citations to sections 15 or 28 of the Charter (its sex equality provisions). Although a proper and clear wording in the written constitution appears to provide a better foundation for legally challenging sexual exploitation as contrary to sex equality imperatives, the Swedish and Canadian examples apparently show that other non-legal factors must be taken into account as well.

When analyzing further the potential of applying the Swedish prostitution and trafficking laws to pornography production, it should be considered that even if no explicit equality provision has been cited clearly in the support of their prostitution laws, its legislative history is permeated with numerous and systematic references to the important democratic imperative of promoting sex equality, as well as recognitions that prostitution is a form of sex inequality related to gender-based violence (pp. 282–286 above). Similarly, the legislative history preceding its law against violent pornography contains systematic references to the imperative of promoting equality between the sexes (cf. 233–234), even rebutting other grounds, such as moral or ethical values or attitudes, however widespread support the latter may have

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Nothing so far suggests that the same legislative reasons could not support applying Swedish prostitution laws against pornography production. Perhaps most relevantly when charging the production is that the laws against purchase of sex, procuring, or sex trafficking for profit do not address any resulting materials. This observation is consistent with observation that other laws against rape, murder, or assault, and sometimes also prostitution or trafficking explicitly, would arguably not be set aside in any of the three countries simply because such activity was conducted in part as an expressive activity that was later disseminated in the form of media or expression (cf. pp. 273–277 above).

1249 Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [government bill] 101 (Swed.). A community standards argument as under obscenity law, see supra pp. 196–204, was thus de facto rebutted in favor of a sex equality standard for legislating against violent pornography.
Part III: Democratic Challenges

10. The United States

This chapter analyzes substantial legal challenges to pornography’s harms that have taken place in the United States from the early 1980s until now. The aim is to explain their successes and failures in order to understand what is in the way to address the harms. I analyze three distinguishable events. First, I look at legislative and judicial responses to the antipornography civil rights ordinances, which originated in a social movement in Minneapolis in 1983 but soon spread to other local and state jurisdictions. Second, I look at responses by the U.S. Congress and federal executive branches 1984–1992 that attempted to address the public policy concerns fueled by the antipornography civil rights movement. Third, I look at later federal initiatives 2002–2014 that addressed similar public concerns, but which were different than those before in terms of strategy; here, prosecutors used existing obscenity laws to target substantive harms. The chapter consistently corroborates hierarchy theory in showing how a stronger recognition of substantive inequality and a representation of perspectives and interests of those harmed lead to support for a corresponding civil rights approach to the harms of pornography. By contrast, when such imperatives were weakly recognized, it lead to support for traditional approaches such as obscenity law, criminal law (as opposed to civil law remedies), or to rejections of innovative challenges that would have addressed the harms of pornography. At closer inspection, such dismissals also often emerge as being based on ideology rather than being based on law.\footnote{For an analytical distinction between law and ideology, see supra pp. 180–181.}

The Civil Rights Approach

The rise of the movement in support of the antipornography civil rights ordinances took place at a time when, as previously discussed in chapter 4, the women’s movement had started to articulate their critique against pornography more strongly in the 1970s; organizations had been formed that took visible actions, such as picketing outside pornography stores, or organizing marches and rallies.\footnote{See supra notes 557–560 and accompanying text.} One of the events that ignited feminist opposition to pornography in both Canada and the United States was the release of the movie Snuff in 1976, which presented murder and dismemberment of a woman as erotic entertainment. Activists picketed, demonstrated, and committed civil disobedience against the film, with demonstrations occasionally being violent. Hence, legislatures and judiciaries around America were aware of this new critique against pornography, even though it had not yet been articulated as a
legal challenge. One of the people that was particularly involved and influential in the American women’s movement against pornography was radical feminist writer Andrea Dworkin. A couple of years into the 1980s, she and law professor Catharine A. MacKinnon would become involved in perhaps the most well-known effort to legally challenge pornography in America described more fully below. In 1983, the City of Minneapolis hired the two of them to draft ordinances that recognized pornography as a civil rights violation of women and a form of sex discrimination. The ordinances were subsequently proposed and passed in a number of jurisdictions, even though they were eventually defeated in federal courts.


The first version of the civil rights ordinance against pornography was passed by the Minneapolis city council twice: in 1983 and in 1984. Yet the mayor vetoed the ordinance to become law both times. Eventually, another version was adopted in Indianapolis in 1984, but before it could be used by anyone it was invalidated in the Seventh Circuit Court of Appeals. After Indianapolis, the ordinance resurfaced again as a voter-initiated law in Cambridge, Massachusetts, where political scientist Amy Elman (who was then a graduate student) and Barbara Findlen, together with others almost succeeded in passing the ordinance by placing it on a referendum. Nevertheless, first they had to sue the city who initially refused, clearly in contravention of existing law, to put the measure on the ballots. Eventually, the ordinance lost 42% to 58% in the ensuing referendum. A similar referendum tactic succeeded in 1988 with 62% support in Bellingham, Washington. However, after being challenged in courts again, the ordinance—still never used by anyone—was invalidated in a federal district court, citing the previous Seventh Circuit opinion from 1985. The ordinance was also proposed in other American jurisdictions, such as Los Angeles, California (1985), and in the state of Massachusetts (1991), but did not pass there. The antipornography civil rights ordinances have been analyzed and discussed in the literature before. No one has to my knowledge looked at these challenges from the angle of democratic theory and comparative case study methods (see 9–30 above), nor in a cross-national research design with both Sweden and Canada to understand what obstructs or enables legal challenges to pornography in democracies, and to what extent the ordinance represents a viable alternative.

1252 Brest and Vandenberg, “Movement in Minneapolis,” supra chap. 6, n. 697, at 644, 653.
1253 American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
1254 Brownmiller, In Our Time, supra chap. 4, n. 557, at 323–25.
1260 See, e.g., Downs, New Politics, supra chap. 4, n. 557; Brest and Vandenberg, “Movement in Minneapolis,” supra chap. 6, n. 697.
Different accounts converge on the following facts: in 1983, the elites in the twin cities of Minneapolis and St. Paul, Minneapolis, had managed to keep pornography businesses out of their own areas by the use of zoning laws or other means. By contrast, residents in Central and Powderhorn Park—poor, working class, neighborhoods largely comprised of people of color in the city of Minneapolis (e.g., Black, Native American, and Southeast Asian)—were disproportionately exposed to “adult establishments” such as pornography-theatres and stores. Patrons kept coming from the greater city-area, and were sexually harassing women and children on a daily basis, soliciting random pedestrians for prostitution while women, compelled by higher crime rates, reported continuous fears for them and their children to be hurt when going outside in the neighborhood. Local activists in these neighborhoods who had fought pornography since 1974, when the first stores and theaters were opened, noted how city elites vigorously supported civil liberties in defense of pornography generally, but fought so pornography businesses were not present in their own areas. In practice, visitors to what was effectively becoming a red light district could return to their protected zones where they lived, while populations living in the exposed areas could not. If using a climate-change analogy, this situation would amount to the wealthy elite “zoning” the global warming to the poor South, while staying comfortably in the North unless seeking a sunny vacation.

Due to a number of social and political trends and events that coalesced at the time in the city, law professor Catharine MacKinnon and writer Andrea Dworkin were invited to address the Minneapolis City Council’s Zoning and Planning Committee about the problems posed by pornography. Dworkin rejected the concept of zoning laws, arguing that it would simply move the problem onto someone else’s backyard. On this recognition, she concluded that zoning laws “permit the dissemination of materials that uphold the inferior status of women” and “permit the exploitation of live women” (Brest and Vandenberg, 615). Professor MacKinnon continued their presentation, suggesting that the city rather than zoning it should “take a ‘civil rights’ approach” to pornography as a form of subordination of women. She noted that the city had an existing ordinance against sex discrimination that could be extended to make pornography actionable (id.).

The Minneapolis City Council was mindful that previous attempts to challenge pornography in Minneapolis had failed. They thus agreed to hire MacKinnon and Dworkin to hold public hearings and to develop a civil rights approach to the harms of pornography (id. at 616–17). These events subsequently led to the proposal of the antipornography civil rights ordinances. Apart from neighborhood activists, the core group of people who worked most intensely to pass the ordinances, were city politicians engaged in the issue, and a larger group of antipornography activists of which some had attended a University of Minnesota course on pornography held by MacKinnon and Dworkin during the fall of 1983. Subsequently, during the legislative process calls went out to the Minneapolis network of community organizations.

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1262 See Brief of Minneapolis Neighborhood Task Force, 322–23; Brest and Vandenberg, “Movement in Minneapolis,” 609.
1263 Brief of the Neighborhood Pornography Task Force, 324 & 327; cf. Downs, New Politics, 25 (noting that studies at the time suggested “community leaders” and especially “legal elites” were more in favor of protecting pornography than the “mass public” were)
including women’s shelters, rape crisis centers, other neighborhood groups, social workers and other authorities. Similarly, individual survivors of pornography (e.g., prostituted persons who had been exploited or abused in its production) and other persons victimized by its consumption effects (i.e., gender-based violence or attitudes supporting violence against women) came to testify in support of the ordinances (id. at 620). The Minneapolis ordinance thus came into existence due to the experiences of people who were directly affected by the documented consumption and production harms of pornography. Opposition was also heard throughout the hearings.\textsuperscript{1265}

\textbf{Evidence, Substantive Equality, and Representation}

As outlined in chapter 4 (pp. 148–168 above), to successfully challenge the social dominance facing the many multiple and intersectionally disadvantaged groups that supported the ordinance (i.e., survivors of production and consumption-related harms), \textit{hierarchy theory} suggests that laws should be drafted with the \textit{perspectives} and \textit{interests} of such groups in mind. Put otherwise, in order to challenge social hierarchy—a phenomenon reinforced by the production and consumption of pornography, which promotes gender-based violence (chapters 1–3 above) and sex inequality more generally (cf. pp. 4–9)—law must not only aim to promote \textit{substantive equality} by recognizing groups that are socially disadvantaged (i.e., recognizing social as opposed from formal inequality), but also represent their perspective and interests. As will be shown further below, the anti-pornography ordinance conforms with hierarchy theory in all these three respects: its objective was to (1) promote substantive equality among populations who are disadvantaged and victimized by production and consumption of pornography; (2) represent their perspective; and (3) promote their interests.

\textbf{Legislative Findings as Recognition of Inequality}

First, with regards to equality the Minneapolis city council found pornography to be “central in creating and maintaining the civil inequality of the sexes,” as well as being “a systematic practice of exploitation and subordination based on sex which differentially harms women.”\textsuperscript{1266} These conclusions fit the evidence analyzed in chapters 1–3 above. In chapter 2, it was shown how pornography exploits multiply disadvantaged populations to produce its materials, such as women who have been subjected to child sexual abuse, poverty, homelessness, or gender/racial/ethnic discrimination—often under exploitative or abusive conditions that cause them severe mental and physical health consequences (see 55–75 above). For example, studies have shown that those who experienced prostitution for pornography report statistically higher symptoms of posttraumatic stress disorder (PTSD) than those experienced prostitution exclusively off-camera, even after controlling for other relevant factors, with two thirds of the combined group exhibiting symptoms on the same level as treatment seeking U.S. Vietnam veterans.\textsuperscript{1267} Not surprisingly, about nine in ten people in prostitution, from which those used in pornography are typically drawn

\textsuperscript{1265} The complete Minneapolis hearings are reprinted, along with ordinance-hearings from other jurisdictions, in \textit{In Harm’s Way}, ed. MacKinnon and Dworkin, supra chap. 1, n. 126.


\textsuperscript{1267} See supra notes 245–250 and accompanying text (citing and discussing studies).
(see, e.g., 55–57; cf. 73–75), explicitly say they want to escape it.\textsuperscript{1268} These and other exploitative and abusive conditions amount to “a systematic practice of exploitation and subordination based on sex which differentially harms women,” men overwhelmingly being consumers (pp. 33–37 above) and women being overrepresented in the exploitation needed to produce the materials.\textsuperscript{1269}

Furthermore, Minneapolis found that the “bigotry and contempt” that pornography “promotes,” including the “aggression it fosters, harm women’s opportunities for equality of rights” in a number of spheres (\textit{Minn. Ordinance} § 139.10(a)(1)). The evidence analyzed in chapter 3 corroborates such a finding: pornography promotes gender-based violence in society—a social practice that also differentially harms women (cf. 4–9 above). Consumption increases sexual aggression among normal men who consume it, and fuels attitudes that foster disbelief and minimization of those victimized (e.g., “rape myths”) (pp. 98–122 above). Correspondingly, Minneapolis found that pornography promotes “rape, battery and prostitution and inhibit just enforcement of laws against these acts” (§ 139.10(a)(1)). Indeed, psychological experiments with simulated rape trials showed that consumption of common nonviolent pornography obstructs justice for women, typically reducing recommended penalty with about half.\textsuperscript{1270} Moreover, violence against women is widespread in society, creating systematic fears and worries among a majority of women (cf. 4–7 above)—fears that, in the words of the Minneapolis legislature, “contribute significantly to restricting women from full exercise of citizenship and participation in public life, including in neighborhoods” (§ 139.10(a)(1)). A similar analysis of the association between gender-based violence and sex inequality in society as Minneapolis’ was made in the introduction to this dissertation (cf. 4–9 above). In other terms, the various effects of pornography noted by the Minneapolis city council impacts negatively on women’s \textit{substantive equality} to men because they promote social practices and attitudes that subordinate women to men: these include gender-based violence and prejudice about women (e.g., rape myths), in turn causing women to fear more for their safety and well-being, which further restricts their social activities relative to men. The Minneapolis legislature’s social analysis of the problems posed by pornography thus sets the terms for creating a law that promotes substantive equality—the first among the three elements of hierarchy theory enumerated above.

\textbf{Key Definitions as Representation of Perspective}

Second, to promote substantive equality, hierarchy theory suggests that law should \textit{represent} the perspectives and interests of disadvantaged groups who are affected by social dominance (pp. 153–168 above). Here, a “perspective” is slightly different from “interest.” According to Iris Marion Young, a \textit{perspective} implies a common starting point for a discussion, while an \textit{interest} implies common and specific goals.\textsuperscript{1271} We will begin by assessing how the Minneapolis antipornography ordinance represented such a perspective of the groups who are particularly disadvan-

\textsuperscript{1268} See supra notes 195–196 and accompanying text (citing and discussing studies).

\textsuperscript{1269} See, e.g., supra notes 285–289 and accompanying text (rebutter misinformation in Sweden alleging that boys or male youth are overrepresented relative females in prostitution).

\textsuperscript{1270} See Zillmann and Bryant, “Trivialization of Rape,” supra p. 3 n.13, at 17 tbl.3 (prolonged consumption experiment over six weeks). cf. Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 118–119 & tbl.4.3 (single exposure experiment with nonviolent “female-instigated sex” significantly reduced recommended penalty from 846 months to 515 months). These studies are corroborated by experiments on conceptually similar attitudinal measures and by surveys in social context. See supra pp. 115–122.

\textsuperscript{1271} See Young, \textit{Inclusion & Democracy}, supra chap. 4, n. 571, at 134–41, for a conceptualization distinguishing between “perspective” and “interest.”
taged and harmed by pornography in its legal definition of pornography, which reads as follows:

**Pornography** is a form of discrimination on the basis of sex. (1) Pornography is 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 de-humanized 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. (2) The use of men, children, or transsexuals in the place of women in (1) (i–ix) above is pornography [under this statute. (Minn. Ordinance §§ 139.20(gg)(1)–(2)]

The Minneapolis definition centers on graphic “explicit subordination of women”—a practice that by its terms is antithetical to substantive equality. Previously in chapter 1 the broader underlying assumptions of the definition in the later Indianapolis version of the Minneapolis ordinance were found consistent with the definitions used in social science research, for example, the distinction between violent, dehumanizing, and “erotic” materials (pp. 41–44 above). The ordinance was also shown to cover the diversity of categories that are documented to be demanded on the market—as distinguished from trivial demand, or hypothetical categories, and after definitional confusion in the literature had been unraveled (pp. 44–53). Furthermore, the triangulation of social science evidence from psychological experiments and social surveys on consumption effects in chapter 3 (pp. 98–122; cf. 89–98 on methods) shows that materials covered by the definition significantly increase sexually aggressive behavior and attitudes supporting violence against women (e.g., rape-myths or reduction of recommended penalty for rape). This conclusion holds true not only for violent, but also for nonviolent materials that are included in the definition (e.g., 102–109). Thus, the ordinance not only on its face targets the graphic “explicit subordination of women,” but would also do so de facto if it could be consistently applied in social reality.

To exemplify the potential impact of the ordinance, it is worth mentioning the psychological experiment that showed how nonviolent materials presenting women as purportedly consenting, active, and promiscuous while initiating sex indiscriminately with strangers produced the strongest trivialization of rape among both women and men. Zillmann and Weaver, “Pornography & Men’s Callousness,” 118–119 & tbl.4.3. These latter non-pornographic categories are not cov-

1272 Zillmann and Weaver, “Pornography & Men’s Callousness,” 118–119 & tbl.4.3.
1273 Evidence also indicates that exposure to plain nudity, e.g., in the form of Playboy-type centerfolds, would produce similar sexual aggression in male consumers under social circumstances where inhibitions to aggress are lowered. *See supra* pp. 106–109.
ered under the Minneapolis ordinance unless being further qualified as presenting “graphic” and “sexually explicit subordination,” but the other categories are. In other terms, the ordinance covers all the above-mentioned harmful categories of pornography and more, running the gamut from purportedly non-violent objectification (§§ (v–vii)), unambiguous dehumanization ((i) & (viii)), to more violent pornography ((ii–iv) & (ix)).

To exemplify the ordinance’s potential impact further, it is also worth recalling the harms of consumption explicitly alluded to in accounts by tricks’ themselves, who admitted to consuming pornography and then seeking out and “frequently” forcing prostituted women to “re-enact” the materials (for lack of other women willing) (see 126–129 above). Studies also found that consumption significantly predicted statistically which men would buy more women for sex. The tricks’ qualitative accounts are also corroborated by testimonies from prostituted women (pp. 123–126), who among other things described violent rapists that constantly referred to pornography they had seen to in order to justify their acts of violence and torture.

Similarly, accounts from nonprostituted survivors of gender-based violence describe having been forced by intimate partners or strangers to re-enact the same kind of acts, often with explicit allusions to pornography by the perpetrator, or having the acts inflicted upon themselves. Accounts of forcing women to accept gang-rape, anal sex, sadomasochism and domination—all frequent acts in popular categories on the market (pp. 44–53 above)—are corroborated by tricks (and prostituted women) from such different locations as Boston, MA, Cambodia, Chicago, IL, New York City, and Sweden (pp. 123–129). The chronology of these re-enactments of pornography indicates the operation of a causal mechanism when various methods and evidence are subject to triangulation (e.g., psychological experiments, social surveys, and qualitative accounts) of which some can control and hold constant alternative causal factors (cf. 89–92 on methods). Put otherwise, the trick consumes pornography (X), which causes him to further abuse women (Y). In “process tracing” terminology, one can see how “X” is “connected with Y in a plausible fashion”; they interact analogously to billiard balls that cross a table and cause a motion among other balls.

The acts and behaviors described in the Minneapolis definition are often literally the same that the prostitution survivors mentioned above were subjected to. For instance, sadomasochism, domination, rape, and gang-rape (pp. 123–129 above) are covered by the Minneapolis ordinance subpart (ii–iv) and (ix). There is, in other words, reciprocity between the definitions of pornography in the ordinance, the categories demanded by consumers, the acts of abuse or subordination inflicted on women who must produce them, and the acts of abuse or subordination inflicted on women as a result of its consumption. The definition is therefore consistent with social reality, and with the perspective of pornography survivors. In this sense, the ordinance was the first legal definition of pornography in the world that explicitly adopted the perspective of survivors, while simultaneously being corroborated by a triangulation of social science evidence and experiential accounts from its consumers. Its strong surface plausibility is contrasted by obscenity laws that prohibit of-

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1274 Minneapolis Proposed Ordinance, supra note 1266, §§ 139.20(gg)(1).
1276 For some of the more detailed accounts, see Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 863–65.
1277 See supra notes 465–469 and accompanying text.
fenses to community standards (chapter 6 above), or laws that only regulates the “secondary effects” or public display of pornography (pp. 222–225 above). Not coincidentally then, the United Nation’s Rapporteur on Violence Against Women in 1994 referred to the Minneapolis definition as a “major breakthrough” compared to approaches that “fail to address the issue that most pornography represents a form of violence against women and that the evidence shows that it is directly causative of further violence against women.”

Considering the cross-corroboration of perspectives and evidence above, it is not surprising that the Minneapolis definition was directly informed by the experiences of those victimized by pornography. MacKinnon has reported that a large portion of their conceptualization of the harms in the ordinance relates to women who had talked with Dworkin (often after her public speeches) about their own experiences of pornography. Dworkin’s book Woman Hating had been published already in 1974, and included a critique of pornography. She consequently writes that when she and MacKinnon were hired to draft the ordinance, she drew from her extensive experience of these first-accounts: “The years of listening to the private stories had been years of despair for me. It was hopeless. I could not help. . . . Now, all the years of listening were knowledge, real knowledge that could be mined: a resource, not a burden and a curse.” Furthermore, many accounts that corroborated the validity of the ordinance were revealed during its public hearings, where numerous survivors testified about intimate and traumatic experiences of sexual abuse despite risking their anonymity when coming out in support of the ordinance. The perspective of the ordinance thus builds on the perspective of people disadvantaged and harmed by pornography. The creation of the ordinances based on the experiences of those affected by the harms also converges with the classic feminist practice and theory of consciousness raising. In this sense, the results of the legislative deliberations were revolutionary as the “public” sided with the perspective of the “oppositional consciousness” that historically disadvantaged and typically marginalized groups, such as pornography survivors, tend to embrace in order to generate efficient knowledge and organizing that may challenge their oppression (cf. 155–156 above). The legislative history documented empirical conditions previously silenced in the public and academia, showing that what had been passing as objective reality for centuries (e.g., that pornography was at worst obscene, but not harmful) was rather a point of view from those with power, built upon the continuing trivialization of/or the invisibility of those with less social power. The Ordinance thus represented the realities and perspectives of those harmed by pornography seriously.

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1282 For accounts of hearings, see generally In Harm’s Way, ed. MacKinnon and Dworkin, supra chap. 1, n. 126; see also Final Report Att’y General’s Comm., ed. McManus, supra p. 27 n.78, at 197–245.
Civil Rights and the Interests of Disadvantaged Groups

Third, to promote substantive equality hierarchy theory suggests that law should represent the interests of disadvantaged groups oppressed by social dominance (pp. 153–168 above). Young implies that a social interest implies common and specific goals. This is where the concept of a civil rights law becomes important: the legacy of the American civil rights movement suggests that such a law share some common and specific political objectives to promote the social status of disadvantaged groups. In the context of legal challenges to pornography such objectives are implied already when recognizing the partiality behind the façade of gender-neutrality under obscenity laws, which cast pornography as an offense against contemporary community standards rather than against the survivors who testified in the Minneapolis hearings (cf. 199–202). Such recognitions suggest that survivors have relatively little power to influence the interpretation of obscenity law conceptually. By contrast, the Minneapolis ordinance was cast as a law against sex discrimination that gave the legal initiative to use it to the survivors rather than to the state, as under obscenity law (more below). The drafters’ intentions were that such an initiative should include empowering rights—hence, a “civil rights law” that made pornographers and perpetrators directly accountable to survivors via civil damages and injunctions, rather than via fines to the state or via imprisonment. With compensation in reach tangible incentives exist for shedding light on pornography’s harm in courts, to create some economic support for women (or men) who are exploited in the industry and who wish to escape it, and to provide some remedy for those otherwise affected by consumption harms by deterring further dissemination of similar materials (the “fear” of lawsuits). Given that it works as intended, this strategy promotes substantive equality for disadvantaged groups.

Furthermore, by using the civil rights approach as opposed to criminal law, one bypasses such sanctions that demand a higher burden of proof. That is, rather than requiring proof of harm “beyond reasonable doubt,” a “preponderance of evidence” standard reduces significant obstacles to effective legal action. By using civil law rather than criminal law measures, one also avoids being dependent on prosecutors or law enforcement within the criminal justice system. Actors such as publicly appointed victim’s legal advisers, “ombudsmen,” police officers, prosecutors, or a Chancellor of Justice (whose consent is typically required to use the Swedish law against violent pornography that is disseminated in protected media), may not only be overburdened by different priorities, but may also be uninformed about the survivors’ perspectives. Moreover, as pornography consumption has hereto been widespread among men in society (pp. 33–37), causing attitudes supporting violence against women such as trivialization of sexual abuse (pp. 115–122), authorities within the criminal justice system appear generally unreliable as representatives of pornography survivors’ perspectives and interests although exceptional individuals might exist.

Consistent with the focus in hierarchy theory that disadvantaged groups should represent their own interests, the criminal justice system would generally lack the necessary commitments to challenge pornography effectively. By contrast, a civil rights law would place the initiative in the hands of survivors. Such a law would also

1285 See Young, Inclusion & Democracy, supra chap. 4, n. 571, at 134–41, for a conceptualization distinguishing between “perspective” and “interest.”


1287 Tryckfrihetsordningen [TF] [Constitution] chap. 9, arts. 2 & 4 (Swed.).
provide a means for raising public consciousness about the problems when survivors could start testifying in courts and other judicial bodies when filing suits. Until such a law exists, there are few reasons why the survivors’ public silence about pornography-related harms will not continue. Without any monetary or injunctive incentive they have little incentives to testify publicly, as it exposes them to the prejudice and contempt that often attaches to persons who reveal personal sexual experiences in public. As will be shown further below, each of the four causes of action under the civil rights ordinance that would have granted them standing in court are consistent with hierarchy theory. Where these causes were proposed, they largely followed the outline in the first Minneapolis version although their internal order differed in new versions. Their common framework entailed that pornography was defined as sex discrimination, which grounded these further causes for action for plaintiffs who would seek damages and injunctive relief under it.

Causes of Action and Hierarchy Theory

(1) “Discrimination by trafficking in pornography. The production, sale, exhibition, or distribution of pornography is discrimination against women by means of trafficking in pornography” (Minn. Ordinance, § 139.40(l)). Any woman is granted a cause of action under this subsection “as a woman acting against the subordination of women” (§ 139.40(l)(3)). Men or transsexuals could also take action, given that they were injured “in the way women are injured by” pornography (id.). The provision provided exceptions for public libraries and private or public university or college libraries for purposes of study, although “special display presentations” were regarded as sex discrimination (§ 139.40(l)(1)).

The cause of action against “trafficking” in pornography was the more contentious (and potentially the most effective) part of the ordinance, as it empowered “any woman” or similarly subordinated person to file suit for being discriminated by the circulation of specific materials. Even if producers, distributors, sellers or exhibitors would only have to pay small amounts to each plaintiff, they faced a potential endless stream of similar lawsuits that could make them go bankrupt. The trafficking-subsection is consistent with hierarchy theory as a substantive equality approach representing the interest of survivors (pp. 153–168 above), in the sense that it equalizes the monetary powers of the disadvantaged groups of survivors, indeed “any women,” vis-à-vis pornographers and men in general. It reduces subordination of women by deterring distribution of materials for consumption as well as the production of pornography. As the evidence in chapters 1–3 shows, such an outcome would not only reduce sexual exploitation for pornography (chapter 2), but also reduce an important cause of sexual aggression and attitudes supporting violence against women (pp. 98–122), which indirectly affects women’s inequality to men on other social indices (cf. pp. 4–9). If working as intended, it would also indirectly reduce the exploitation and abuse of women in prostitution, as consumption has been showed in social surveys to predict the frequency with which tricks purchase people for sex, where they often force them to re-enact pornography (see, e.g., 123–129). So even if the provision primarily targets consumption harms (focusing on the discrimination against “any” woman), it also indirectly targets production harms, albeit without such specific compensation for those harmed there as the next cause of action provides.

(2) “Coercion into pornographic performances. Any person, including transsexual, who is coerced, intimidated, or fraudulently induced . . . into performing for pornography shall have a cause of action against the maker(s), seller(s), exhibitor(s) or distributor(s) of said pornography for damages and for the elimination of the products of the performance(s) from the public view” (Minn. Ordinance, § 139.40(m)).

The subsection of the ordinance on “coercion” is the most direct action against production harms, with compensation for those harmed in it that provides economic means supporting their escape. It is a law against sexual exploitation with similarities to Sweden’s substantive equality prostitution laws, albeit this cause of action was geared specifically toward the pornography industry (cf. chapter 9, on production harm challenges). The evidence shows that producers typically draw their “performers” from similar socially disadvantaged populations as exist in other forms of prostitution (pp. 55–64; cf. 73–75). As a specific production harm law then, but with similarities to other laws against sexual abuse, it took meticulous care in enumerating impermissible defenses that are similar to how some rape laws “shield” the plaintiffs from being questioned about prior sexual history, dress-code, or other attributes that may invoke discriminatory psychological schemata among jurors or judges. The objective of enumerating impermissible defenses was to prevent such dichotomous mental perceptions that unfortunately are common and divide women into categories either “deserving” or “undeserving” of aggression, “promiscuous” or “prudish,” “whores” or “madonnas,” and so on.\textsuperscript{1289}

The ordinance thus stated that proof of any of a number of “facts or conditions shall not, without more, negate a finding of coercion;[l] that the person is a woman . . . a prostitute . . . attained the age of majority . . . connected by blood or marriage to anyone involved . . . been thought to have had, sexual relations with anyone . . . has previously posed for sexually explicit pictures . . . anyone else . . . has given permission on the person’s behalf . . . the person actually consented . . . the person knew that the purpose . . . was to make pornography . . . showed no resistance or appeared to cooperate actively . . . signed a contract, or made statements affirming a willingness to cooperate . . . no physical force . . . were used . . . the person was paid or otherwise compensated” (Minn. Ordinance, §§ 139.40(m)(2)(i–xiii)). These regulations appear particularly important considering how the consumption of pornography produces an increase in such attitudes supporting violence against women that minimize and trivialize sexual abuse (see 115–122 above). For instance, psychological experiments with simulated rape trials showed that consumption of common nonviolent pornography obstructs justice for women, typically reducing recommended penalty with about half.\textsuperscript{1290}

Although a comprehensive list as the above may appear unnecessary, the facts (see chapter 2 above) show that many survivors have been exploited in pornography, not seldom even with a legal contract, despite that they wish to escape it and receive tremendous harms because of it. Such conditions attest to the necessity of these defenses. As put bluntly by prostituted people, from which performers typically are drawn, their experiences feel like “paid rape.”\textsuperscript{1291} The theory underlying these impermissible defenses is similar to the theory of \textit{intersectionality} advanced in chapter 4; legal challenges to pornography production are more complex than legal chal-

\textsuperscript{1289} Cf. supra pp. 102–106 (discussing research showing how dichotomous discriminatory gender-stereotypes interact with pornography consumption in producing more or less aggression or attitudes supporting violence against women).

\textsuperscript{1290} See supra note 1270.

\textsuperscript{1291} See supra chap. 5, nn. 674-680 and accompanying text for citations and discussion of problems to apply rape laws to prostitution.
lenges to rape or sexual harassment (pp. 162–166 above). Any effective legal challenge to the harms of pornography must account for the multiple disadvantages facing people harmed in its production—disadvantages that are evident in part from the enumerated defenses against common prejudice in the ordinance above (cf. ibid.). The cause for action for “coercion” into pornography production under the ordinance, including these impermissible defenses, are thus consistent with a substantive intersectional approach and the representation of the interest of survivors implied by hierarchy theory (pp. 153–168 above): it promotes the status of disadvantaged groups based on their variety of experiences of discrimination and oppression. The evidence needed to show coercion in an individual case would need to be consistent with the type of evidence of vulnerability and exploitation analyzed in chapter 2 above,1292 for example, evidence of PTSD, physical symptoms, childhood abuse and neglect, poverty, or a history of discrimination.

(3) “Forcing pornography on a person. Any woman, man, child, or transsexual who has pornography forced on him/her in any place of employment, in education, in a home, or in any public place has a cause of action against the perpetrator and/or institution” (Minn. Ordinance, § 139.40(n)).

The theory underlying this provision, which is directed not at the pornographers per se, but against those who force the materials on others, would hold that when women are forced to look at pornography, they are “graphically” and “explicitly” reminded that they belong to a social group that risks “sexual subordination” (§ 139.20(gg)(1)). Such acts remind women that they may be reduced to the stereotypes of subordination as defined under the ordinance. Forcing pornography on someone is thus a form of sexual harassment that amplifies the fear of men’s violence, including also rape, which most women feel to various extents.1293 In this sense, this subsection is a sexual harassment law that covers more spheres than the workplace. Although the ordinance has not yet been upheld in its entirety under any jurisdiction, federal cases already since 1991 recognizes a similar law against displaying pornography at the workplace under sexual harassment doctrine. Accordingly, when pornography was forced upon plaintiff Louis Robinson when she worked in a shipyard (predominantly nude or seminude Playboy-type images), a federal court found that it constituted “harassment . . . based upon her sex . . . behavior that . . . clearly has a disproportionately demeaning impact on the women now working at Jacksonville Shipyards, Inc.”1294 The employer was thus ordered to provide injunctive relief that the “First Amendment guarantee of freedom of speech does not impede” (Robinson, 1534). As a comparison to the United States, Sweden’s law against sexual harassment at work does not seem to recognize similar pornography categories at work as actionable as they are in the United States,1295 despite that Sweden has a more substantive equality prostitution law than the former (see chapter 9 above).

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1292 Such evidence was also documented in the legislative history of the ordinances, e.g., by testimony during the public hearings or submitted for the record (e.g., scholarly articles, evaluations, and affidavits). See In Harm’s Way, ed. MacKinnon and Dworkin, supra chap. 1, n. 126, passim (citing evidence submitted to legislatures considering the ordinances).

1293 See, e.g., Gordon and Riger, Female Fear, supra p. 7 n.25, at 21 (finding one third of women worried each month about being raped, many more than once per day; second third worried more occasionally, though sometimes intensely; last third said they did not worry but did nonetheless take precautions); Höjer, Rädslans politik [Politics of Fear], supra p. 7 n.26, at 8–11 (summarizing evidence suggesting gender-based violence is a common source of fear for many women).

1294 Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1523 (M.D. Fla. 1991) (settled before appeal). Further citations in text. For description of pornography materials found at Robinson’s workplace, see, e.g., id. at 1493–98.

1295 See Arbetsdomstolen (AD) [Labor Court] 2005-06-08, Dom nr 63/05, Mål nr A 64/04 (Swed.) (sexual harassment case against National Armed Forces). Decisions in the Swedish Labor Court cannot be
In *Robinson v. Jacksonville Shipyards*, the court cited earlier Supreme Court precedents that regarded it to be a “compelling governmental interest” to eliminate sex discrimination against women—not only at work, but also more broadly to remove “barriers to economic advancement and political and social integration that have historically plagued women.” This view included subjecting non-commercial voluntary associations to a similar equality standard, where the First Amendment freedoms of association were balanced against sex equality rights (*id.*). Hence, American sexual harassment law has a *balancing substantive equality approach* to competing constitutional equality rights and expressive freedoms. Notably, the sexual harassment cases concerned adult materials. As mentioned previously in chapter 7 with regards to the distinction between child and adult pornography (pp. 211–214 above), such a balancing approach that bypasses the First Amendment’s “viewpoint neutrality” doctrines (pp. 214–225) outside the confines of the workplace has so far only been made with regards to child materials. However, a similar logic of balancing the imperative for equality rights against expressive freedoms was made in a racial group defamation case by the U.S. Supreme Court (see 263–269 above). Technically the case was denoted as “group libel,” and the standard was cast as “rational review” since “libel” was traditionally designated as unprotected speech; a “legitimate” government interest to regulate group libel was thus constitutionally sustained if not being “a wilful and purposeless restriction” or “unrelated to the problem” of group defamation. Nevertheless, the outcome was the same as if it had sustained strict scrutiny: the “viewpoint neutrality” doctrine would have been set aside in both types of situation. Group defamation as such has not yet been applied to pornography.

Adult pornography forced on persons in their workplace, along with child pornography and group libel, are effectively (or potentially) regarded as unprotected categories of expression in America today. The formula for this outcome is a balancing of competing constitutional interests. In these specific areas, U.S. law now conforms to the balancing (ideal type) framework of pornography regulation (chapter 8 above) rather than the liberal framework (chapter 7)—a position more consistent with substantive equality and hierarchy theory than with liberal “negative rights” and postmodern approaches to social dominance (cf. 237–241, 269–273 above). Likewise, the cause of action against “forcing” pornography on someone under the Minneapolis definition is consistent with hierarchy theory, as it intends to promote substantive equality by preventing discrimination and providing disadvantaged and denigrated groups with economic compensation for their sufferings just as sexual harassment law. The cause of action against forcing pornography on someone thus represents and furthers the interest of pornography survivors, consistent with how U.S. sexual harassment law views pornography forced on persons at work. One question for further discussion is whether the legal changes in the “indirect units of analysis” in this comparative research design (sexual harassment, group libel, and

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appealed. The court accepted facts showing that “inside the camp, several instances featuring half-pornographic or at least sexual content occurred . . . and the magazines Café and Slitz [Playboy-type materials] were on display in public areas within the Camp.” *id.* at 14. The court further found “circumstances suggesting that harassment in fact occurred,” *id.* at 17, but did not hold anyone (employer or otherwise) liable.

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child pornography laws) could influence the development within the “formal units” of legal challenges to adult pornography and its harms.1299

(4) “Assault or physical attack due to pornography. Any woman, man, child, or transsexual who is assaulted, physically attacked or injured in a way that is directly caused by specific pornography has a claim for damages against the perpetrator, the maker(s), distributor(s), seller(s), and/or exhibitor(s), and for an injunction against the specific pornography’s further exhibition, distribution, or sale” (Minn. Ordinance, § 139.40(o)).

The ordinance’s “assault” provision has the most stringent evidentiary standard to sustain a challenge compared to the other three. However, a number of qualitative studies for instance contain accounts from tricks (pp. 126–129) revealing that they can pinpoint precisely such specific materials they consume that inspire them to commit abuses, including gang-rape, anal sex, violent rape, and physical assault. The causal mechanisms suggested in these tricks’ accounts are corroborated by prostituted women’s experiences—for instance during assaults where their abuser referred to specific materials, or during other situations where an abusive man alluded to particular pornography (pp. 123–126). Not surprisingly, a rape case discussed at a U.S. national women’s judge conference in 1986 involved six adolescent boys who had gang-raped a juvenile while reenacting a specific pornography magazine’s outlay.1300 Similarly, specialized agencies attest to have met an increasing number of survivors of throat-rape, sometimes reporting that the perpetrator explicitly referred to the term “deep throat” (coined by the pornography movie Deep Throat) prior to their assault.1301 Likewise at the public hearing for the Minneapolis ordinance, a survivor testified that “most of the scenes” her former husband made her re-enact “where the exact scenes that he had read in the [pornography] magazines”—materials that he read “like a textbook.”1302 In these cases above, given that the material fit the definition of pornography the only additional proof needed would be reasonable evidence that the assailant had consumed the specific material before the assault, and behavioral consistency between presentations and the attack. On a preponderance of evidence standard, such evidence would be possible to obtain. The cause of action against “assault or physical attack” is consistent with hierarchy theory in that it represents the interests of survivors’ in providing them recompense for abuses caused in part by pornography. Furthermore, it equalizes substantive inequalities of power between them and their assailants (e.g., economic). Lastly, it deters production and dissemination of pornography generally by the threat of future potential lawsuits, hence promotes substantive equality among men and women by reducing sexual aggression and attitudes supporting violence against women (cf. 98–122 above), in turn promoting sex equality in general (cf. 4–9). This deterrence can be assumed to reduce sexual exploitation for pornography as well (chapter 2).

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1299 See supra pp. 17–18 for case study methodology discussion of various types of “units of analysis” (i.e., formal and indirect); supra pp. 22–29 (selection of the dissertation’s formal units of analysis).
Summary of Analysis

If the ordinance had been passed successfully and sustained judicial review, according to the analysis above hierarchy theory suggests that it would have codified into law a survivor perspective and promoted their interests accordingly. The advantage of this civil rights law against pornography’s harms is here evident in light of political scientist Jane Mansbridge’s view that political representation of women’s perspectives promotes equality in contexts of conflicting interests and “mistrust” between the sexes, and where women’s interest historically have been unarticulated. Pornography poses such a conflict of interests and mistrust between the sexes. The ones victimized have never adequately been represented in the process of making obscenity laws but many men who are not victimized have (chapter 6). Obscenity law is still the predominant U.S. legal regulation of pornography, apart from “secondary effects,” or time, place, and manner regulations of adult pornography display, which do not reach any substantive consumption or production harms (pp. 214–225). The ordinance would have changed this situation consistent with Mansbridge’s view, and codified women’s perspectives and interests, particularly those harmed by the social practice of pornography, into an actionable legal claim. One such tangible element of the ordinance that exists today is the federal sexual harassment law at work. That law has literally adopted the ordinance’ concept of providing people a cause of action for being “forced” pornography upon themselves.

In terms of representing survivors and people who might be affected, the causes of actions covers the variety of the intersectionally disadvantaged groups that are often most harmed by pornography—for example, those who are exploited in its production due to preexisting disadvantages such as poverty, race and gender discrimination, as well as childhood sexual abuse and neglect (cf. 159–168 above). Following Kimberle Crenshaw’s suggestion for recognizing the complexity and intersection of multiple disadvantages, the persons who would have a cause of action under the ordinance would not need to be “singularly” disadvantaged (e.g., being a child or being physically forced into pornography as in a case of “forcible rape”) to use the ordinance. For instance, the ordinance took great extent in codifying impermissible defenses to the causes for action against production harm (“coercion”) that made certain that multiple sources of disadvantage apart from gender, such as poverty, racial discrimination, and prior experience of prostitution related to such factors (“was paid,” “signed a contract,” “has previously posed,” “is a prostitute”), would not bar an action by a plaintiff (Minn. Ordinance, §§ 139.40(m)(2)(i–xiii)). The ordinance would effectively create an opportunity for those subordinated by pornography to seriously deter, possibly wipe out, the circulation of materials documented to be harmful.

A Clash of Democratic Ideals: Public Responses

During the Minneapolis City Council Hearings on the ordinance, many sides were presented during legislative deliberations, if a sense of emergency about the harms presented prevailed. A critic to the hearings, political scientist Donald Alexander Downs has alleged—although he did not attend the hearings, and did not have com-

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1306 For a transcription of the Minneapolis hearings, see In Harm’s Way, ed. MacKinnon and Dworkin, 39–202.
plete transcripts—that “one-sidedness” was present and that hearings were orchestrated by antipornography activists. Down’s interpretation of the hearings appears misinformed. Most importantly, it ignores that critics spoke against the ordinances repeatedly, and in numbers. At the first session of hearings on the ordinance on December 12, 1983, two critics spoke directly after those invited by the council were finished; the second session started off with no less than seven people criticizing the Ordinance, one after the other (five from the city’s own Civil Rights Commission, and two gay rights activists). Moreover, the final third session was open for any comments, and concluded with a written note that no more speakers had requested time. Considering that Downs himself recognizes American politics to be “notoriously beset by special interests and pressure groups,” and that it is therefore naïve to criticize Minneapolis as being unbalanced—not the least since “widespread” judicial review “encourages” legislatures to take constitutional risks (Downs, 66)—his critique appears misplaced.

Downs also claims that “[m]any knowledgeable leaders expressed strong reservations about the lack of deliberation, the one-sidedness, and the surreal sense of moral emergency that prevailed” when the antipornography ordinances were on the agenda in Minneapolis (p. 66). Considering that many more leaders within the city council actually voted for the ordinance—not against it—the importance of the leaders he may have spoken to appears exaggerated. Would it not have been for the mayor’s veto that was used twice, the Ordinance would have become law. Furthermore, as shown above, the deliberations were not, as Downs claims, one-sided. In addition, by using terms like “moral emergency” in describing the cross-partisan support for the ordinance, Downs make a significant change in the terms of how the Ordinance’s perception of harm was conceptualized by its supporters and sponsors. The latter, whether feminists, liberals, or conservatives, generally converged in framing pornography as a problem of sex discrimination against women.

For instance, in conservatively dominated Indianapolis, where the next attempt to pass the ordinance took place after Minneapolis, the news cited Republican sponsor Beulah Coughenour and a public prosecutor in March 1984, saying they were planning “a municipal ordinance that would define pornography as a form of sexual discrimination” and that “aimed towards protecting the civil rights of women.” Further, the same article quoted the prosecutor who said that “[a]s long as it is a question of morality, there will never be a limit [of sexual violence]. The question is one of harm.” These supporters did thus not see the ordinance as a matter of “moral discrimination against women.

1307 See MacKinnon, “Roar of Silence,” supra chap. 1, n. 126, at 9 n.24, who notes that Downs’ accounts does not cite transcripts, but rather what seems to be incomplete notes from the hearings (“Administration Committee Notes”). When asked to provide the source documents he cited seven years after public
1310 “Session III: Tuesday, December 13, 1983, 5:00 P.M.” (statements by Chairman White and MacKinnon), in In Harm’s Way, ed. MacKinnon and Dworkin, 201.
1311 Brest and Vandenberg, “Movement in Minneapolis,” supra chap. 6, n. 697, at 644, 653.
1313 Ibid (emphasis added).
“moral emergency,” as Downs (p. 66) does, may at best be referred to as “conceptual stretching” (i.e., “vague, amorphous conceptualizations”), and at worst deliberately misleading. This apparent misappropriation of meaning suggests that critics, like Downs, do not yet correctly understand the ordinance.

Granted the above corrections, Downs is certainly entitled to express his opinion that the Minneapolis legislature’s majority acted in a manner of “irresponsibility,” that it lacked “respect for competing legitimate values,” and that the “complexity of the issues surrounding pornography especially calls for . . . consensus politics” (Downs, 65). Likewise, he may express the viewpoint that “major modifications of free speech law like the ordinance should be approached with caution and care,” and that “[w]ithout responsible leadership, the larger society does not always exhibit the political maturity envisioned by the modern doctrine of free speech” (p. 67). Indeed, such negative opinions of the Ordinance were probably typical among politicians, civil servants, and others who were critical toward it, which Downs’ interviews with such persons within Minneapolis and Indianapolis suggest they were. In this sense, they are a useful point of departure for further theoretical analysis of the obstacles to legal challenges that address the harms of pornography.

One question that is possible to explore as a means for understanding the obstacles to legal challenges is what the differences in democratic ideals held among the ordinance’s supporters and its critics entail. For example, Downs contend that complex problems such as pornography requires democratic “deliberation” that follows the ideal of practicing “consensus politics”—a decision-making tradition that he claims would otherwise “have been typical of Minneapolis” (Downs, 65). However, such a deliberative theory is at odds with other authorities within democratic theory, especially hierarchy theory. Following Ian Shapiro—one of hierarchy theory’s proponents—deliberation is not appropriate in every social conflict of interest. In conflicts with substantive inequality a demand for consensus will effectively create a right for the privileged to “delay, appeal, or veto” the disadvantaged group’s proposal (Shapiro, 44), thus create a serious obstacle to challenge social dominance. He further explains:

So long as all have equally strong interests at stake . . . then no one has power over anyone else by virtue of the decision-making procedure, and there is no reason for outsiders to second-guess it.

In reflecting on when it is appropriate to require deliberation, we should attend to the kind of interest at stake . . . . To fix intuitions, think of South Africa’s white minority before the democratic transition. They stood to lose vastly more than nonwhites (who in fact stood to gain) from the planned transition, because they had vastly more resources, status, and power than nonwhites. For the whites the costs of leaving were in this sense greater, but it does not follow that they should have been entitled to rights of delay, appeal, or veto in virtue of that fact. (p. 44)

The politics of pornography can be seen as precisely such an issue with opposing and unequally powerful interests at stake, as there were under the Apartheid-era. That is, men (who are the overwhelming consumers of pornography, pp. 33–37 above), have power over women (who are disproportionately exposed to its harms, chapters 1–3), “by virtue of the decision-making procedure” (Shapiro, 44). One may therefore ask what Downs’ requirement for deliberation and “consensus politics” would lead to in a situation where, as this dissertation has asserted throughout, women in general and pornography survivors in particular have so much to win, and

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1314 Giovanni Sartori, “Concept Misformation in Comparative Politics,” supra p. 22 n.66, at 1034.
1315 Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 44. Further citations in text.
consumers and men in general may have very much to lose? In such a hierarchical situation between two (or more) groups that have opposing interests in protecting or dismantling that same hierarchy, it seems reasonable to assume that a consensus politics would not counter social dominance but rather protect status quo.

The analysis of the democratic process preferred by these critics of the ordinance suggests that their political ideals, valuing deliberation and consensus in decision making, will obstruct political change by privileging more detachment from substantive issues of inequality. Legal challenges to global warming suggest the same conclusion. According to the New York Times, who received first-hand information from “several people who were in the room” during climate negotiations, countries were in disagreement over the wordings in a 48-pages executive summary to a report by the U.N.’s Intergovernmental Panel on Climate Change (IPCC). The Times reports that “several rich countries,” including the United States and other unidentified entities, successfully requested the removal of an $100 billion annual estimate by the World Bank that had previously been cited in the summary of the 2,500-page main report for offsetting the effects from climate change on poor countries who “had virtually nothing to do with causing global warming” compared to rich countries, but who “will be high on the list of victims as climatic disruptions intensify.” Such negotiations, where rich countries can suppress estimations by a recognized intergovernmental authority that challenges substantive inequality on a global scale, seem to put the power in the hands of rich countries simply “by virtue of the decision-making procedure” (Shapiro, 44). This problem of substantive inequality is what a deliberative democratic ideal of restraint, compromise, and consensus produces when it comes to legal challenges to global warming, pornography, and apartheid.

Reflecting the contemporary critics of the ordinance, Downs’ further implied that the American legislatures’ engagement with antipornography activists—many of whom had been raped and tortured—risked threatening the “perspective and civility required by healthy public life” (Downs, 68). As a contrast, he introduced a concept of “public virtues” defined in terms of “self-restraint, reasonable tolerance, and perspective” (p. 91; citations omitted). Accordingly, such a supposedly virtuous politics prefers “democratic elitism,” where elites protect “civil liberty” from infringement by mass politics “when people at large fail to exhibit the virtues of a tolerant society” (p. 142). This democratic ideal is reminiscent of the liberal ideals of “negative rights,” as conceived by Charles de Montesquieu, James Madison, and John Stuart Mill. Those theorists largely invented a number of legislative and judicial checks and balances on democratic decision making, outlined the hierarchy of “negative rights” (e.g., unrestricted speech) over “positive rights” (e.g., substantive equality), limiting the sphere for democratic intervention against non-state actors’ abuse of power (e.g., gender-based violence) as opposed to state-abuses of power (e.g., police corruption) (see 143–148, 206–210 above).

As with a politics of deliberative consensus in decision making, the concept of “public virtue,” that is, elites who protect “liberties” from infringement under intolerance, appears to restrain public discourse to privilege negative rights rather than positive rights for intervention. Such “virtues” seem to limit the options of disadvantaged groups who have less access to established decision-making than “elites,” thus indirectly amplifying the latter’s perspectives and interest. The concept of “public virtue” does not seem to contain any mechanisms that would counter existing systematic social domination, as those suggested by hierarchy theory and that were ap-

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1316 See, e.g., Gillis, “Panel’s Warning on Climate,” supra p. 12 n.42, at A1
1317 See testimonies during public hearings in In Harm’s Way, ed. MacKinnon and Dworkin, supra chap. 1, n. 126, passim.
plied in the civil rights approach to pornography by promoting the interests of disadvantaged groups (e.g., through the four causes of action under the Minneapolis ordinance; cf. 307–312). Public “virtue” and democratic “elitism” are less responsive to the exigency facing disadvantaged groups. The latter includes people with no alternatives for survival but prostitution, and who are gang-raped by consumers that are demonstrably inspired by pornography (pp. 123–129), or exploited to produce the materials that present similar or other degrading and unsafe acts (e.g., unprotected ass-to-mouth sex or sadomasochism) (pp. 44–50). By contrast, the civil rights politics of the ordinances were responsive to their plight, recognizing and representing the “perspective” and “interests” of such disadvantaged groups to better promote substantive sex equality in society (pp. 301–312).

A related critique of a lack of “restraint” concerned the antipornography activists’ forms of political expression during the Minneapolis deliberations. For instance, critics complained about their booing and hissing at hearings, or were critical with regard to other unorthodox lobbying tactics such as approaching politicians in public restrooms.1318 Other consciousness-raising but similarly unorthodox tactics involved dumping piles of pornography outside the city hall to raise consciousness about the “reality of pornography” and “its harms to women.”1319 Eventually, twenty-four women were arrested and convicted of “disturbing the peace” at a public city council session; one woman also set herself on fire, pouring gasoline over her head in a bookstore reminiscent of Buddhist monks and Norman Morrison—the man who committed suicide outside Pentagon during a similar protest against the Vietnam War in 1965.1320 However, to criticize these activists for being disorderly or “beyond civility” does not seem to appreciate the fact that pornography survivors’ interests have been systematically silenced under law, in political processes, and in media.1321 The personal risks these activists in Minneapolis took also illustrate their substantive exclusion from established politics. For instance, after testifying about being raped, abused in prostitution, or sexually harassed in a context permeated by pornography, many were stigmatized in their communities and terrorized, having to leave their homes. For instance, one woman’s testimony was published as pornography in Penthouse Forum without her consent, and several were sexually harassed by mail and telephone calls.1322 It is not a coincidence that these women, many of whom had been raped and tortured, employed an uncompromising attitude in their lobbying tactics. Their destitute social position does not offer other means for influence than such revolutionary ones, or at least compared to more powerful interests, so they are perceived as illegitimate.

1318 Brest and Vandenberg, “Movement in Minneapolis,” supra chap. 6, n. 697, at 641–43. According to Brest and Vandenberg, council member Barbara Carlson, who voted to oppose the proposed Ordinance in Minneapolis, said that the hearings “brought back long-suppressed feelings about being raped as a young woman . . . . ‘I just looked at those women. I remembered their booing and hissing. They have become fanatical, and there’s another side to this.’ Referring to her freedom to choose what to read, Carlson said: ‘This ordinance is a stronger violation of me and my rights than that rape.’” Ibid., 643.


1321 Cf. Young, Inclusion & Democracy, supra chap. 4, n. 571, at 47–51.

The Minneapolis City Council were similarly criticized by opponents among the politicians, civil servants, staff, and the American Civil-Liberties Union (ACLU), for having bypassed the standard informal procedures of making lengthy deliberations with government offices and other officials (Downs, 77–81). The mayor rationalized his veto in part by referring to this argument. But after this first veto, such a more elitist and detached legislative process, less influenced by activists, was actually deployed. As even noted by Downs, a new “task force” was set up in order to “reinstitute the search for consensus that normally prevailed in Minneapolis” (Downs, 63). Unsurprisingly, the leading sponsor of the original ordinance, councilwoman Charlee Hoyt, reports that she was opposed to the new task force’s creation; she anticipated that it was a tactic to diffuse interest from the issue, to co-opt the Ordinance’s supporters, and to water down the legislative response. Not unlike what Hoyt may have expected, the task force proposed zoning and opaque cover laws in line with existing obscenity doctrine (also changing “women” to “persons” to confirm to Miller), narrowing the pornography definition to depictions of violence, while taking away the trafficking provision that had previously made disseminators liable to the harms (Downs, 63–65).

The more watered-down proposal notwithstanding, after public elections had been held in the interim, a new thirteen-member council, acting democratically with regard to procedure, rejected the task force’s proposal in favor of a reworked MacKinnon/Dworkin ordinance with seven votes against six. Eventually, the Ordinance was vetoed once again by the mayor, despite the lengthy deliberations, and the council failed to muster enough votes to override the veto. These decisions and the vetoes in Minneapolis suggest that issues such as pornography (or apartheid and climate change) are too pressing and too unequal for Downs’ ideals of deliberative consensus or public restraint to work in producing a fair outcome. As Shapiro’s critical analysis of deliberative politics already suggested above, when there is a hierarchy between different groups that are in a reciprocal relationship of oppression, the theory suggests that requirements of consensus decision making will simply obstruct any substantive social change.

Much of the criticism against the antipornography civil rights movement among the contemporaries often expressed itself in the form of a proceduralism purportedly unrelated to substantive issues at stake. However, on further analysis it has been revealed to be ideological, as in the democratic ideals of consensus-making (or negative rights) discussed above. Another example of such proceduralism is Down’s factually inaccurate critique leveled against the legislative proceedings as having represented the issue in a “one-sided” manner. Even in disregard of its empirical inaccuracy, the underlying assumption here seems to be that there are always more than “one side” that are equally relevant for decision-makers to consider. However, this assumption may simply be wrong, just as one side may actually be right. The critique against one-sidedness may in this light be perceived as an attempt to depoliticize the civil rights ordinances, rather than confronting the substantive choices of the legislature.

1323 Brest and Vandenberg, “Movement in Minneapolis,” 644–45.
1327 Downs, New Politics, 63–65; Brest and Vandenberg, “Movement in Minneapolis,” 653.
1328 Compare Downs, New Politics, 66 & 83 (alleging one-sidedness in deliberations), with supra notes 1306–1311 and accompanying text (showing diversity of views in deliberations).
Critique of alleged one-sidedness was also expressed by Canadian scholar Dany Lacombe, who took the view that the “rigidity” of antipornography feminists “cannot allow for the plurality of subject positions that women occupy,” nor recognize “differences” and the “fluidity of political identities.”\(^{1329}\) Her argument implies, inter alia, that a nontrivial number of women enjoy being used in pornography—a position unsupported by empirical data (chapters 1–2 above). However, her dismissal of the antipornography feminists legitimate political views as “rigid” and lacking subtle accounts of “differences” also reveals her own unwillingness to situate herself in the “position” of those victimized in its production or due to its consumption. By contrast to Lacombe’s contention, pornography could be seen precisely as a practice that circumscribes social and cultural fluidity and difference among women, ascribing their role as sexual objects for men’s use by promoting hierarchical gendered stereotypes. The popular demand for and predominance of graphic explicit dehumanizing and aggressive materials that subordinate women (see 44–53 above) support such a conclusion. Both Lacombe and Downs appear to avoid substantive issues in the social practice of pornography, such as which group is situated in a power relationship over whom; that is, the inequality that the ideal of substantive equality opposes. Although they do not deny gender as a systematic structure subordinating women to men, the forms of decision making implicitly favored in their critique contain no institutional mechanisms to counter this hierarchy. Their proceduralism and demands for consensus in decision making rejects those core values of hierarchy theory—that in order to promote substantive equality, democracies should recognize disadvantaged groups and promote their perspectives and interest (pp. 153–168 above)—which the ordinance developed further by its concrete applications. Simply put, Lacombe and Downs do not understand hierarchy.

**Summary of Analysis**

When considering the public response and the criticism against the civil rights approach to pornography as accounted for above, there are some similarities and some differences to what has been previously identified as the typical liberal approach to protect “negative rights.” For instance, to protect negative rights as a liberal democratic ideal would disfavor public intervention in putatively private spheres and view with suspicion any legislatively mandated regulations that target non-state actors’ abuses of power per se (pp. 143–148 above). By contrast, the ideals of public “restraint,” compromise, and consensus democracy among critics to the civil rights approach do not necessarily exclude such democratic intervention. However, the forms and procedures such democratic ideals require seriously obstruct any legislative challenge where there are opposed and vested interest involved, especially where one is at a socially disadvantage position and the other is at an advantaged position. The analogy between pornography, apartheid, and global warming made above, though equating a practice of inequality *de jure* (apartheid) with practices of substantive inequality *de facto* (pornography and global warming), nevertheless illustrates the democratic problems with a politics that do not recognize and represent the perspectives and interests of social groups that are subordinated by others. While a politics of “public virtue,” as defined Downs and others above, does not explicitly reject public intervention against non-state actors abuse of power, as would a liberal politics protecting “negative rights,” the practical implications in social context do.

With regards to postmodern approaches to legal challenges, Downs and his informants among politicians and civil servants in Minneapolis and Indianapolis did

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\(^{1329}\) Lacombe, *Blue Politics*, supra chap. 4, n. 557, at 152–53.
not primarily seem to apply such arguments against the civil rights approach. For instance, they did not criticize the ordinance and its supporters for attempting to legislate on basis of a recognition and representation of disadvantaged groups per se—that is, they did not (in the words of Crenshaw) dismiss “room for identity pol
itics” by default. However, the forms of such identity (or group) politics would be severely circumscribed by their requirements for “toleration,” “restraint,” “compromise,” and “respect for competing values.” An exception was Lacombe, who lambasted the civil rights approach for failing to account for an alleged “plurality of subject positions that women occupy.”

Lacombe’s assumption seems to be that there is an infinite variety of gendered “subject positions” that women occupy, making a civil rights approach to pornography meaningless for women as a group. However, when considering the overwhelming empirical evidence in chapters 1–3 above showing that women are typically exploited to produce pornography, and consumers (overwhelmingly men) are typically becoming more sexually aggressive and adopting attitudes supporting violence and injustice against women, such a dismissal of the civil rights approach appears similar to the “vulgar constructionism” criticized by Crenshaw. Accordingly, apart from being factually questionable, Lacombe’s position shows similarities to such line of thoughts that allege “that since all categories are socially constructed, there is no such thing as, say, Blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.”

Lacombe’s postmodern legal theory joins in the conclusions of liberal protections of “negative rights” and the politics of “public virtue” in obstructing affirmative legal challenges to substantive inequality, even when pursued with liberal democratic means.

A Clash of Legal Arguments: Judicial Responses

Standing, Parties, and Context: The Terms for Judicial Review

The civil rights approach to pornography, as conceived in the antipornography ordinances in Minneapolis, was accepted and passed as law in Indianapolis in a largely similar version. When passed, the Indianapolis ordinance was immediately challenged in federal court in the case of *American Booksellers Ass’n v. Hudnut* by a group of publishers, book distributors, trade associations, and non-profit organizations. Their challenge came before anyone with standing under the ordinance could use any of its causes of action. On May 9, 1984, the district court issued a temporary injunction barring the ordinance from being used until the case was decided. This order was not contested by the parties since the Indianapolis mayor had already ordered his administration to await the outcome of the case before enforcing the ordinance. In effect, these decisions meant that the litigation was framed by parties of whom none were more than indirectly affected by the ordinance.

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1331 Lacombe, *Blue Politics*, 152.
The terms set for the Indianapolis litigation has been cast as an attempt to vindicate hypothetical freedom of expression infringements, as distinguished from actual infringements. In another district court, who faced a challenge in 1989 to a similar civil rights ordinance passed by voter initiative in Bellingham, WA, sex industry survivors urged the court in their amicus brief to consider that “prostitution” for pornography “is not an hypothesized condition,” by contrast to “pondering whether ‘Leda and The Swan’ might be considered pornography under the ordinance.”\textsuperscript{1336} As had literally been done in \textit{Hudnut} four years earlier.\textsuperscript{1337} The \textit{Hudnut} decision was rhetorically criticized by these amici as a “fantasized future law suit, brought by some unidentified party, before an as-yet nameless judge.”\textsuperscript{1338} A pornography seller and exhibitor (I.S.S.I. Theater, Inc.) had, however, initially attempted to intervene as a plaintiff in the case during the judicial proceedings, submitting that “[n]one of the plaintiffs . . . alleges that it sells or exhibits materials dealing with sex, much less specializes in the sale or exhibition of such materials as do intervenors. Consequently, intervenors have a greater and more immediate interest in the litigation . . . .”\textsuperscript{1339}

Perhaps unsurprisingly, they disappeared from the proceedings shortly thereafter, suggesting a strategic move among the other plaintiffs to purge themselves from being associated with the commercial sex industry. Indeed, in the aftermath of the litigation, their lawyers unsuccessfully filed a motion seeking $7,903 in attorney fees from the City of Indianapolis for what the court regarded as primarily being a review of other parties’ filings “and discussing strategy—all to ensure that their clients’ interests were being protected.”\textsuperscript{1340} Observers note that these pornographers had no troubles in defining pornography, as they argued they were “specializing” in the materials targeted by the ordinance, lending doubts to charges by others that the ordinance was overbroad or vague in its definitions.\textsuperscript{1341}

The challenge to the Indianapolis ordinance was eventually appealed and settled in the Seventh Circuit, but denied a hearing in the Supreme Court.\textsuperscript{1342} The Supreme Court summarily affirmed the case without hearing arguments or offering an opinion—a now generally impermissible route since congressional legislation was passed in 1988—meaning that \textit{Hudnut} is only technically binding in the Seventh Circuit Court of Appeals.\textsuperscript{1343} Chief Justice Burger, joined by Rehnquist and O’Connor, dissenting to the majority’s summary affirmance, saying they wanted to

\begin{footnotes}
\footnote{1336}{Brief of Trudee Able-Peterson et al., \textit{Village Books v. City of Bellingham}, supra note 1257, at 137.}
\footnote{1337}{American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985) ("Collectively the plaintiffs . . . make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats’s poem “Leda and the Swan” (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland").}
\footnote{1338}{Brief of Trudee Able-Peterson et al., \textit{supra} note 1257, at 137}
\footnote{1340}{American Booksellers Ass’n v. Hudnut, 650 F. Supp. 324, 331 (S.D. Ind. 1986). The attorneys admitted having “known many of Plaintiffs’ counsel for many years and felt confident that they would do a competent and professional job . . . . [We] reviewed all of their pleadings to confirm that . . . no arguments inimical to my clients’ positions had been advanced.” \textit{Id.} at 332 (quoting affidavit by John H. Weston, Brown, Weston & Sarno, counsel for I.S.S.I. Theatre, Inc., and 4266 West 38th Street Corporation).}
\footnote{1341}{E.g., Editors’ Note, “Appendix,” 463.}
\end{footnotes}
hear arguments, indicating that they would have made a different review than below. The Hudnut opinion has nevertheless not been challenged in the other twelve circuits, though it could be.

The invalidation of the antipornography civil rights ordinances in the United States have so far been decided without ever granting any plaintiff an opportunity to use its causes of actions, and so testify about the harms of pornography in a courtroom in conjunction with a judicial challenge of the ordinance’s constitutionality. In this sense, the judiciary (as opposed to the legislatures or voters that passed the ordinance) was prevented from being confronted with realities of production and consumption harms in pornography. The Seventh Circuit defended this decision not to “abstain,” even though the challenge might not have been “ripe” for adjudication without the parties who were more directly affected by it:

A case is not ripe if the issues are still poorly formed or the application of the statute is uncertain. A challenge may be ripe, however, even when the statute is not yet effective. Deferred adjudication would produce tempered speech without assisting in resolution of the controversy. Abstention is appropriate when state courts may clarify the meaning of a statute, thus sharpening the constitutional dispute and perhaps preventing an unnecessary constitutional adjudication. This statute, however, is all too clear.1345

Put otherwise, the court viewed the “statute” as sufficiently clear to them, and clear to the parties who admittedly were not the most affected, the assumption being that they might need to “temper” their speech unless the “controversy” (of theirs) was immediately decided.

When considering other ideological dimensions of how these terms were set, a requirement for “consensus”—as envisioned by Downs and his informants (pp. 312–319 above)—would also entail that the community at large, indeed even less affected interest, have a say in formulating official policy on pornography. Although by widening this circle of parties, one provides more actors the possibilities to exercise influence and opportunities that can effectively “delay, appeal, or veto” democratic decisions.1346 Given an outcome that obstructs change, non-abstention is consistent with the concept of liberal “negative rights,” which by its very nature is suspicious to democratic processes that expand spheres for government action. This concept harbors a strong assumption of the dangers (sometimes referred to as the “slippery slope”) that may come when granting future decision-makers more powers, the question being whether they will be able to distinguish principles applied consistently and legitimately in the past.1347 The slippery-slope argument sometimes appears in postmodern legal discourse. For instance, Judith Butler discourages hate-speech legislation on a presumption that “the very intentions that animate the legislation are inevitably misappropriated by the state. To give the task of adjudicating hate speech to the state is to give that task of misappropriation to the state.”1348 Nonetheless, a general suspicion to the expansion of democratic decision making does not per se support the decision not to abstain from deciding constitutional matters without the

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1344 Hudnut, 475 U.S. at 1001 (6-3) (reporting summary affirmance but noting that Burger CJ., Rehnquist J. and O’Connor, “would note probable jurisdiction and set the case for oral argument”).
1345 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 327 (7th Cir. 1985) (citations omitted).
1346 Cf. Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 44. Further citations in text.
most affected parties present, unless the view is also that abstaining “would produce tempered speech.” Less affected parties might hypothetically favor more government regulation rather than less, depending on the substantive issue at bar.

By contrast, hierarchy theory suggest that including a wider circle of interest in deliberating and challenging democratic decision making may create a situation where disadvantaged and oppressed groups become hostage to their oppressors “by virtue of the decision-making procedure” (Shapiro, 44). In the legal challenges to the antipornography ordinances, such a dynamic seems visible to the extent that other parties that likely included consumers (cf. 33–37 above), rather than survivors and those whom they challenged (e.g., producers and distributors), were potentially given opportunities to “delay, appeal, or veto” (Shapiro, 44) the ordinance. This adjudicative situation can reinforce hierarchy. An analogy can be made to the deliberations on democratic transition in apartheid South Africa. What if whites had been given privileged status as “plaintiffs,” while Blacks would have been relegated to “intervenor” status? Another analogy can be made to global warming. What if rich countries were provided “front seats” at the climate negotiation table while poor countries were relegated to the “back seats”? Rich countries have disproportionately caused global warming. Although poor countries have contributed virtually nothing to it, they have most to lose from it. A constitutional challenge that so extends and distorts access to deliberation reinforces social hierarchy, contrary to the ordinance’s objective to represent and promote the perspectives and interest of disadvantaged groups (pp. 301–312 above). From this point of view American courts amplified social hierarchy when judging the civil rights ordinance as being “ripe” for constitutional challenge, despite that the affected disadvantaged groups had not yet used it, nor had anyone been sued under it.

“Direct” and “Indirect” Harm: John Stuart Mill’s Distinctions

In brief, the Seventh Circuit accepted that pornography is a practice of sex discrimination that contributes to gender-based violence and attitudes supporting violence, discrimination, and sexual exploitation of women. Nonetheless, it took the position that freedom of expression prevents governments from legislating in the way Indianapolis did. The court thus accepted the legislative findings of harm, seemingly at times Indianapolis’ understanding that pornography is a social “practice,” and as such more than mere depictions or ideas: as stated by the court, “pornography is not an idea; pornography is the injury.” The court therefore appears to have accepted “the premises” of the Indianapolis ordinance (Hudnut, 329). In the further opinion, however, the court does not conclusively follow these premises, but keeps substituting them for a definition of pornography as “[d]epictions of subordination” (id.) rather than as subordination itself. As will be shown below, this substitution of “depictions” with “depictions” makes their argument appear more superficially logical when later casting pornography as “speech,” and the ordinance as a form of discrimination against viewpoints, thus an impermissible infringement of free speech.

Accordingly, the court concedes that “[d]epictions of subordination tend to perpetuate subordination,” which “leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets” (id.). The court further purports to
quote “the language of the legislature” approvingly, including that “‘pornography is central in creating and maintaining sex as a basis of discrimination,’” and “‘a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women’s opportunities for equality and rights [of all kinds]’” (id.; quoting Ind. Ordinance § 16-1(a)(2) (original brackets)). Nevertheless, despite these practices of discrimination, exploitation, and abuse, the court argues that the evidence of pornography’s “invidious” power as a practice of subordination—that is, if “pornography is what pornography does”—by itself suggests why it should be constitutionally protected:

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler’s orations affected how some Germans saw Jews... None is directly answerable by more speech, unless that speech too finds its place in the popular culture. 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. (Hudnut, 329–30)

The quote above is factually wrong. Speech, including depictions, cannot be subordination in the same sense as pornography, as subordination is generally not needed to produce depictions while it is demonstrably necessary to produce pornography.1353 The court’s analogy equating pornography with “orations” is thus erroneous: speech does not necessitate exploitation (sexual or other) even when hateful, racist, or anti-Semitic. For instance, Hitler’s “orations” did not have to exploit or abuse Jews to produce any of the results of the messages communicated, contrary to what most popular pornography need to do (cf. 44–50, 55–72 above).

The court does not appear to conceptualize the ordinance properly, accepting its definition of pornography as a practice while continuing to equate it with “other speech” (Hudnut, 329). Furthermore, the court turns on its head an accepted legal principle in First Amendment law when arguing that the harm “simply demonstrates the power of pornography as speech” (id.). The level of harm generally indicates whether there is a compelling or heightened government interest in regulating it or not. For example, the criminalization of child pornography was upheld in New York v. Ferber (1982) on the rationale that the harms were compelling. As stated by the Supreme Court, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.”1354 Ferber has later supported criminalization of possession of child pornography as a distinct offense, separate from its distribution.1355 Notably, Indianapolis did not target possession, only distribution, and did not use criminal means, only civil liability for damages (Ind. Ordinance, §§ 16-3(g)(4–7)). The Hudnut logic of harm, if becoming accepted as a general principle, would effectively invert the tier of scrutiny by holding that the more compelling or substantial the harm, the more

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1353 A necessary precondition for making pornography is coercion in one form or another, see supra pp. 55–75, which is not necessarily the case with racist hate-propaganda. Cf. Factum of the Intervener LEAF ¶ 30, in R. v. Butler, [1992] 1 S.C.R. 452, supra chap. 4, n. 563, at 210. Since racism isn’t explicitly sexual, an accurate analysis of its dynamic must also be made on its own terms.


1355 See, e.g., United States v. Norris, 159 F.3d 926, 930 (5th Cir. 1998).
protected such harmful expression becomes. Clearly, this is not the U.S. law of speech (cf. 210–225 above).

Hudnut further submitted that the “ideas of the Klan may be propagated,” that “Communists may speak freely and run for office,” and that the “Nazi Party may march through a city with a large Jewish population,” citing three well-known cases. One rationale common among these three cases is that Mill’s liberal distinction between direct and indirect harm were applied to some extent. For instance, Brandenburg v. Ohio (1969) permitted Klan-speech on a distinction between “mere advocacy” and “incitement to imminent lawless action,” developing the “clear and present danger” doctrine from previous cases. As discussed previously (pp. 206–210 above), Brandenburg protected televised Klan-speech that advocated lynching and other acts against specific vulnerable groups with 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.” Such expressions have precipitated genocides, pogroms, and the same type of acts advocated in Brandenburg—but not as directly as when someone is “falsely shouting fire in a theatre and causing a panic.”

One example of what the “indirect” outcome of prolonged dehumanization of racial groups may look like in a situation of racial inequality and white social dominance, in which Brandenburg-speech forms an integral part, are the pogroms that have euphemistically been labeled “race riots” in East St. Louis, Illinois, July, 1917. White mobs that included law enforcement officers and other officials killed Blacks, and to amuse themselves threw their children into a fire.

Yet First Amendment law has never adhered exclusively to the “clear and present danger” standard, but, as shown in chapter 7, developed numerous exceptions to balance competing government interest against expressive interest even when the harms are only “indirect” in the sense conceived by Mill and in Brandenburg. For instance, obscenity, fighting words, and potentially group libel are unprotected and can be regulated on a rational review standard (pp. 210–211 above). Similarly, regulations of child pornography, or regulations of human rights advocacy that support terrorism via its indirect organizational impact rather than via its direct communication, can sustain strict scrutiny review if the government employs “narrowly tailored” means to further “a compelling interest” (pp. 211–214, cf. 237–241). These conditions suggest that the Seventh Circuit, had it wanted it, could have carved out an exception for the Indianapolis ordinance under the First Amendment. It could also have severed some parts of the ordinance, for example, the “trafficking” that was more sweeping or the “assault” provision that would be more difficult to apply, while retaining others, such as the “coercion” or “forcing” provisions that were narrower in their reach (see 307–312). Indeed, the provision against “forcing” pornography on

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1356 Hudnut, 771 F.2d at 328 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969); DeJonge v. Oregon, 299 U.S. 353 (1937); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), cert. denied, 439 U.S. 916 (1978)).
1357 The court also manages to misspell Mill’s name as “Stewart,” Hudnut, 771 F.2d at 330, which should be “Stuart.”
1360 Brandenburg, 395 U.S. at 446, 449.
1361 Schenck, 249 U.S. at 52.
1362 Lumpkins, American Pogrom, supra chap. 7, n. 826, at 1.
1364 Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (U.S. 2010) (6-3) (upholding on a strict scrutiny standard a prohibition of human rights advocacy in contexts where it “frees up other resources” within terrorist organizations “which facilitate more terrorist attacks”).
someone already became federal law in the workplace, at least as early as in 1991 in *Robinson v. Jacksonville Shipyards*,¹³⁶⁵ which was not long after the Seventh Circuit’s decision in 1985.

**Strict Scrutiny: Equality as a Compelling Interest**

The first route to sustain the ordinance from the challenge would have been to consider whether the ordinance employed “narrowly tailored” means to further a “compelling interest” to prevent harm. Law students who participated in an experiment published in 1993 showed no major problems in applying the Indianapolis ordinance’s definition on real materials, thus did not perceive it as overbroad or vague; by contrast, existing U.S. obscenity law (the *Miller* definition) and an alternative definition by law professor Cass Sunstein performed significantly worse.¹³⁶⁶ As shown above with regards to the Minneapolis Ordinance, there is a reciprocity between its definitions and the categories demanded by consumers, the acts of abuse or subordination inflicted on women who must produce them, and the acts of abuse or subordination inflicted on women as a result of its consumption (pp. 302–306 above). Put otherwise, the definition is corroborated by social science evidence and experiential accounts, and therefore consistent with social reality. By contrast, the obscenity law under *Miller* is not consistent with the social subordination caused by pornography.¹³⁶⁷ Another example highlighting that the Indianapolis Ordinance was narrowly tailored can be seen in how child pornography is typically defined, which usually is without any comparable narrow precision. For instance, the law challenged in *Ferber* defined it merely as “sexual conduct” with children that included “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.”¹³⁶⁸ The Supreme Court did not view this definition as overbroad; by contrast, the law was a “paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.”¹³⁶⁹

Whereas the Minneapolis ordinance had nine sub-definations of pornography, of which at least one was required for further action, the Indianapolis ordinance limited itself to six sub-definations (*Ind. Ordinance* § 16-3(q)). From the previous version, Indianapolis omitted (a) “women are presented dehumanized as sexual objects, things or commodities”; (b) “women’s body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited, such that women are reduced to those parts”; and (c) “women are presented as whores by nature” (*Minn. Ordinance* §§ 139.20(gg)(1)(i)(vi)(vii)). It should be noted that even these three omitted categories significantly increase sexual aggression and attitudes supporting violence against women in psychological experiments—and so do materials that would not even fit the ordinance’s requirement that materials are “graphically sexually explicit.” For instance, presentations of women as sexually dehumanized, as sexually promiscuous (“whores by nature”), or as sexually objectifying advertisements or R-rated movies (“women are reduced to those body parts”) produce such effects (pp. 102–109 above). The only conceptually similar category left in the Indianapolis version to


¹³⁶⁶ See Lindgren, “Defining Pornography,” supra chap. 1, n. 145, at 1208–16. For the Indianapolis ordinance’s definition of pornography, see supra note 144 and accompanying text.

¹³⁶⁷ For the *Miller* definition, see supra note 782 and accompanying text; see also supra pp. 201–208 (discussing the conceptual problems of obscenity law related to sex discrimination and harm).


¹³⁶⁹ Id. at 773.
these three above was category (6): women are “presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, through postures or positions of servility or submission or display” (Ind. Ordinance § 16-3(q)(6)). A number of exceptions under the causes of action (see below) also limited the reach of this sixth category. That category is also less sweeping than Minneapolis’ “whores by nature” (where explicit promiscuity is enough) or “reduced to body parts” (which does not need Indianapolis’ “domination” or “display” to apply as “graphic sexually explicit subordination”).

The Indianapolis Ordinance’s sanctions were also narrowly tailored to the four causes of civil action permitted under it (pp. 307–312 above). It did not include any broader or more severe criminal sanctions that typically apply for child pornography offenses. Compared to the Minneapolis version, Indianapolis’ civil causes of actions also included a number of extra limitations: (i) a prohibition against applying the “trafficking” provision on “isolated passages or isolated parts” (Hudnut, 325); (ii) an exception making damages unavailable under the “trafficking” provision if respondents did not “knew or had reason to know” that materials were pornography (id. at 326); (iii) an exception under the “assault” provision when “a seller, exhibitor or distributor” would not be liable to damages unless a plaintiff proves that the respondent knew or had reason to know that the materials were pornography” (id. at 326); (iv) and a complete exemption under the “trafficking” provision for materials where women “are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display” (id. at 324, 326). This last limitation has been referred to as the “Playboy-exception” since it exempted the subcategory (6) with centerfold-type materials from the trafficking provision (cf. Downs, 132–33).

All in all the Indianapolis ordinance definitional limitations and permissible causes of actions were reasonably “narrowly tailored” to further a “compelling interest”1370 to prevent gender-based violence, attitudes supporting violence against women, and sexual exploitation in prostitution.1371 In order to further narrow the definition and avoid overbroad or vague applications, it even excluded pornography categories from the previous version in Minneapolis that produce such effects in consumers (see above).

To highlight how the Seventh Circuit viewed the gravity of the production and consumption harms associated with pornography—that is, to what extent they were “compelling” enough to sustain strict scrutiny—it is instructive to compare their decision with the approach taken in Ferber. In the latter case, the Supreme Court upheld a law against child pornography while noting that literary, artistic, political, or scientific value of such materials were “irrelevant to the child” who has been abused as a result of the production or consumption of pornography.1372 By contrast, the Seventh Circuit asked rhetorically why such “other value” should matter with regards to adult pornography, but without answering the question.

It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many amici point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offen-

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1370 Citizens United v. FEC, 130 S. Ct. 876, 898 (U.S. 2010) (5-4) (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” (quoting FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 464 (2007) (Roberts, C.J., plurality opinion)).
1371 For the empirical evidence of harm, see chapter 1-3.
1372 Ferber, 458 U.S. 747 at 761.
siveness. And as one of the principal drafters of the ordinance has asserted, “if a woman is subjected, why should it matter that the work has other value?”

The court’s ensuing silence implies it believed the answer to the question so obvious as to no need of response. It could apparently not be conceived that preventing thousands of women from being gang-raped by tricks who wish to imitate pornography (e.g., 123–129 above) is a more compelling interest than any potential artistic, literary, political, or scientific value such pornography might have. The Seventh Circuit did not either perceive any other compelling interest to sustain the ordinance against freedom of expression challenges. In part for these reasons, neither did the circuit majority nor the concurrence express an opinion whether the ordinance was overbroad or vague or not. As shown above, the Ordinance was certainly much more narrowly tailored than comparable regulations of obscenity or child pornography. Moreover, the Ordinance did not reach any materials that did not cause the harms it sought to combat, and had been successfully applied as such in experiments with law students.

Despite that *Ferber* was a prior decision from above and cited in *Hudnut*, the fact that children are just as exposed to the production and consumption harms of adult pornography as are adult women (cf. 212–214 above) is also absent from the Seventh Circuit’s discussion of “other value.” The sexual aggression and attitudes supporting violence against women produced by pornography (pp. 96–129), including incredulity toward accounts of sexual abuse, will likely affect children or adolescent populations just as much as it affects adults. Children are vulnerable to exploitation and abuse by adults because of the difference in age and positions of power between them. Moreover, children and adults are the same people, only found at different points in time. A majority of people used for sex in prostitution, of which pornography typically draws its performers, have experienced child sexual abuse, and more seriously so than other children who were victimized (pp. 59–62 above). Because it recruits performers from this vulnerable subset of the population, adult pornography production exploits (indirectly) child sexual abuse and neglect. When becoming older, many prejudices begin to operate against these persons, including well-documented consumption effects that cause rape-myths such as “only bad girls get raped” (pp. 115–122), further obstructing justice and making it difficult to escape sexual exploitation (cf. 57–59). Hence, only children who were not “left behind” are shielded from production harms or sexual exploitation—a more fortunate situation that a majority of prostituted persons did not seem to experience during their child-

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1373 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 325 (7th Cir. 1985).

1374 In federal district court, before being appealed to the Seventh Circuit, a judge invalidated the ordinance in part by arguing that adult “women generally have the capacity to protect themselves from participating in and being personally victimized by pornography,” American Booksellers Ass’n v. Hudnut, 598 F. Supp. 1316, 1334 (S.D. Ind. 1984). The evidence does not support this proposition at all, quite the contrary (see chapter 1-3 above). This statement from below was never addressed directly in the court of appeals, although the latter did recognize that “[m]en who see women depicted as subordinate are more likely to treat them so,” and that pornography therefore “leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets.” *Hudnut*, 771 F.2d at 329. These statements suggest that the court of appeals did not agree with the propositions to the contrary made by the district court.

1375 *Hudnut*, 771 F.2d at 332, 334.

1376 See supra notes 1366–1370 and accompanying text.

1377 Lindgren, “Defining Pornography,” supra chap. 1, n. 145, at 1208–16

1378 Indeed, many older prostituted women have stated that they were first exploited in pornography before age 13, and that child sexual abusers often showed it to them to persuade compliance. See, e.g., Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 865–66. See also supra pp. 123–130 (discussing relation between pornography consumption and abuse of prostituted women).
hood (pp. 59–62). Many children will therefore never receive any recompense for their childhood abuses if adults are not also efficiently addressed by the law. Precisely for such reasons, rather than addressing singular disadvantages one by one, if the law began by recognizing multiple disadvantages and using an intersectional approach that includes adults, the children whose disadvantage is more easily identifiable would benefit more as well.¹³⁷⁹

As the U.S. legal situation has slowly changed, children exploited in pornography are now entitled to damage awards, even from consumers—the contested issue being not about liability per se, but about how much each consumer is liable.¹³⁸⁰ The civil rights approach to the harms of pornography, championed for the first time in history in Minneapolis in 1983, have by this move literally become federal law with regards to children. One rationale submitted for consumer liability have been that children exploited in production report mental problems due feeling haunted by circulation of their images, unknowing who had seen them.¹³⁸¹ Not surprisingly though, the same symptoms were reported by adult pornography survivors in public hearing testimony to the 1985 U.S. Attorney General’s Commission on Pornography.¹³⁸² Similarly in a more recent study from Nevada, women who were currently prostituted in legal brothels felt that pornography made with them there “both defined and shamed them,” effectively circulating on the Internet and in pornography stores as a permanent record of their prostitution.¹³⁸³ Notably, the Ordinance had a significantly more narrow definition of pornography than Ferber’s child pornography definition, with many exceptions to the benefit of defendants. For instance, it contained no criminal sanctions, and had a far narrower sweep (consumers were never its targets, contrary to child pornography laws in the 21th century). Yet it was not upheld under strict scrutiny. The addition of consumer liability for child pornography harms enables a far greater sweep than was ever imagined in Minneapolis. Is this child pornography law “narrowly tailored”? The federal legislatures and the judiciary apparently think so.¹³⁸⁴

In light of the imperatives to promote substantive equality and provide remedies to intersectional disadvantages, it is notable that the Seventh Circuit provided very little reasoning for why sex discrimination could not be a compelling government interest. Apart from the rhetorical question implying that artistic values are worth more, one only finds a categorical summary echo from the lower courts that the ordinance “could be justified . . . only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established” (Hudnut, 326). Before Indianapolis, no one had ever conceived a pornography law as a law against sex discrimination. What existed apart from obscenity law were “secondary effects” doctrines, including zoning laws, or other prohibitions against various public exhibitions of sexual media (e.g., 222–225 above). The Indianapolis ordinance was a novel concept based on scientific research and legislative findings that, for the first time in

¹³⁸⁰ Compare 18 U.S.C. § 2259(b)(1) (2014) (directing defendant “to pay . . . the full amount of the victim’s losses” due to child pornography), with Paroline v. United States, 134 S. Ct. 1710, 1727 (2014) (5-4) (holding that consumers are liable under 18 U.S.C. § 2259 to “an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses. The amount would not be severe . . . given the nature of the causal connection between the conduct of a possessor . . . and the entirety of the victim’s general losses from the trade in her images, which are the product of the acts of thousands of offenders. It would not, however, be a token or nominal amount”).
¹³⁸¹ Bazelon, “Money Is No Cure,” supra chap. 9, n. 1233, at M22.
¹³⁸⁴ See supra note 1380.
history, took the perspectives and interest of survivors in account, consistent with hierarchy theory (pp. 301–312).

Just a few years after Hudnut, it was held in Robinson that sex discrimination was indeed a “compelling state interest” when pornography was forced upon a woman in her workplace—a practice now actionable as sexual harassment under federal law. Robinson cited two Supreme Court cases, of which one was decided prior to Hudnut, in support for their opinion that there is a “compelling governmental interest” to eliminate sex discrimination against women more broadly and to remove “barriers to economic advancement and political and social integration that have historically plagued women.” For instance, in the earlier case that should have been known to the Seventh Circuit, Roberts v. United States Jaycees (1984), an argument rejected by the Supreme Court had been that if a then all-male voluntary association would have to accept female members, as mandated under a Minnesota law, it might change the “preferred views” currently held by the organization, qua infringe the association’s freedom of expression. The Court admitted that this may empirically be the case, but balanced such potential effects against the compelling interest to promote sex equality:

As we have explained, acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit. Accordingly, like violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact, such practices are entitled to no constitutional protection. In prohibiting such practices, the Minnesota Act therefore ‘responds precisely to the substantive problem which legitimately concerns’ the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose.

Nowhere does Hudnut recognize these competing imperatives of sex discrimination as a compelling interest that could have sustained the Ordinance.

It is perhaps symptomatic that sex equality has so far trumped freedom of expression as a more compelling interest only in areas where the affected women are least socially disadvantaged, such as at the workplace in general or in voluntary associations. By joining male voluntary associations, perhaps these women already “have achieved a biography that somewhat approximates the male norm . . . . the least of sex discrimination’s victims. When they are denied a man’s chance, it looks the most like sex bias.” By contrast to women exploited in pornography or prostituted women generally, who are particularly exposed to the consumption harms (e.g., 123–129 above) and of whom about nine in ten wish to escape the sex industry, the women joining organizations such as the United States Jaycees are likely not multiply disadvantaged to the same extent by childhood abuse, extreme poverty, or race discrimination (cf. 55–64 above). Predictably, a non-substantive equality approach to pornography, as under U.S. law, would not promote the equality of those “least similar, socially, to those whose situation sets the standard against which their

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1386 Id. at 1535 (citing Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984); Rotary Int’l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987)).
1387 Roberts, 468 U.S. at 627–628; cf. id. generally at 622–28
1388 Roberts, 468 U.S. at 628–29 (multiple citations omitted).
1390 See supra notes 195–196 and accompanying text.
entitlement to equal treatment is measured,” such as prostituted women, but restrict itself to women who are more “‘similarly situated’” to men.\(^{1391}\)

The workplace and voluntary civic life are likely contexts where men have less troubles imagining how discrimination would impact negatively on a “person” of any gender, color, ethnicity, or sexuality. By contrast, men in general lack similar experiential frameworks for reflecting on discriminatory effects in other social contexts, such as being victimized, stigmatized, or discriminated because of pornography. Unfortunately, as has been pointed out by one of the drafters of the Indianapolis Ordinance, when “the lack of similarity of women’s condition to men is extreme because of sex inequality, the result is that the law of sex equality does not properly apply.”\(^{1392}\) This narrowness of existing equality law also relates to the problem of intersectional discrimination. Crenshaw has thus argued that equality law, already in the narrower context of work, needs more “‘bottom-up’ approaches, those which combine all discriminatees in order to challenge an entire employment system.”\(^{1393}\) However, such approaches “are foreclosed by the limited view of the wrong and the narrow scope of the available remedy,” she concludes (Crenshaw, 145). Her reasoning is just as applicable in non-work settings. One could hence concluded that the group of prostituted people “which, because of its intersectionality, is best able to challenge all forms of discrimination,” are unfortunately under existing equality law “essentially isolated and often required to fend for themselves” \(\text{id.}\). Her suggestion is that other women “might accept the possibility that there is more to gain by collectively challenging the hierarchy,” including the subordination caused by pornography, “rather than by each discriminatee individually seeking to protect her source of privilege within the hierarchy” \(\text{id.}\).

Crenshaw’s legal vision suggests a more meaningful and substantive equality than the impoverished, restricted, and narrow equality that currently exist under U.S. law. Indeed, the selectivity of how substantive equality is mandated in some spheres but not in others seems discriminatory by itself. Consequently, the law against pornography and sex discrimination is enforced only where women are least unequal to men—at the workplace or during childhood—rather than in contexts of sexual exploitation or domestic violence, where women arguably are often extremely unequal to men. However, if a more inclusive sex discrimination law against pornography such as the Indianapolis ordinance would be used to cover such situations where women are most unequal to men, it would (in Crenshaw’s terms) place “those who currently are marginalized in the center” \(\text{id.}\) at 167). Accordingly, such a strategy would be “the most effective way to resist efforts to compartmentalize experiences and undermine potential collective action” on behalf of women’s equality \(\text{id.}\). Perhaps unsurprisingly the 1985 Attorney General’s Commission on Pornography found, consistent with Crenshaw’s intersectional rationale, that a more expansive use of the sex discrimination law under Title VII of the Civil Rights Act of 1964 was already available. The commission noted that Title VII had protected workers “from having to prostitute themselves to supervisors or submit themselves to sexual intercourse or harassment to keep their jobs.”\(^{1394}\) Similarly, the commission noted that the law required such acts to be “unwelcome” for it to apply, which is easily satisfied

\(^{1391}\) MacKinnon, Toward Feminist Theory of State, 233–34.


\(^{1393}\) Crenshaw, “Demarginalizing Intersection,” supra chap. 4, n. 520, at 145. Further citations in text.

\(^{1394}\) Final Report Att’y General’s Comm., ed. McManus, supra p. 27 n.78, at 244 (citing Hensen v. City of Dundee, 682 F.2d 897, 908 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979); Tomkins v. Public: Service Electric & Gas, 568 F.2d 1044 (D.C. Cir. 1979) [corrected]; 29 C.F.R. § 1064.11a [corr.]).
considering that “the overwhelming factor motivating the sexual conduct of pornographic models is financial need, certainly not a desire to have sex with the partner assigned to him or her for the scene.”

(This last observation is indeed consistent with the many sources of evidence analyzed in this dissertation; see 55–75 above.) The commission concluded:

We therefore believe it likely that much of the commercial production of pornography runs afoul of Title VII, even considering the technical limitations on its reach. Further, we believe that Title VII embodies a principle that should not be strangled by technicalities: no one in this country should have to engage in actual sex to get or keep his or her job.

As a strategy to challenge the production harms of pornography, the commission’s suggestion to use Title VII is conceptually consistent with the civil cause of action for “coercion into pornographic performances” under the antipornography ordinance (cf. 308–309 above). Hence, Indianapolis’ “coercion” provision could have sustained in Hudnut with support from Title VII. This analysis was not made by the Seventh Circuit.

Additionally, as mentioned above, the Seventh Circuit implicitly took the position that “other” literary, artistic, political, or scientific “value” was more important than pornography’s harm against adults (Hudnut, 325)—a position implying in part why they did not find pornography’s harms a compelling interest to combat. A different version of the opinion that “other value” mattered more was expressed by one of the two amici curiae supporting the suit against Indianapolis, underwritten by the Women’s Legal Defense Fund (WLDF) and eighty individuals, mostly academics. The so-called Feminist Anti-Censorship Taskforce (FACT) accordingly feared that the civil rights ordinance might stop some women from appropriating “for themselves the robustness of what traditionally has been male language.”

It was argued that these women had a right to enjoy “a rape fantasy.” However, these so-called fantasies are often experienced as “paid rape” by prostituted persons—that is, by the women used in pornography to produce such materials (e.g., 55–57 above; cf. 73–75). Hence, the “fantasy” that FACT refers to is effectively produced by raping real women, but the fantasy is nevertheless deemed more important to protect than the women.

Furthermore, invoking a particular doctrine of the Fourteenth Amendment’s equal protection clause stressing how gender-based classifications are discriminatory per se, FACT argued that the ordinance “assumes and perpetuates classic sexist concepts of separate gender-defined roles which ‘carry the inherent risk of reinforcing stereotypes about the “proper place” of women and their need for special protection.’”

However, FACT here wrongly perceives the Ordinance as protecting women as a

\footnote{Final Report Att’y General’s Comm., ed. McManus, 244 (internal citations omitted).}

\footnote{Ibid., 245 (footnote omitted.).}


\footnote{FACT brief, \textit{supra} note 1397, at 33 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). Further citations in text.}

\footnote{See \textit{infra} notes 674–675 and accompanying text (survivors and tricks describing prostitution as “paid rape”).}

\footnote{FACT brief, \textit{supra} note 1397, at 33 (quoting Orr v. Orr, 440 U.S. 268, 283 (1979)). Further citations in text.}
class per se. The civil rights approach was construed as a remedy to those proven discriminated or abused by pornography. Certainly, it did contain a trafficking provision that “any woman” could try to use, but such a woman still needed to prove that materials fit the definitions in the Ordinance. If materials did fit the definition, evidence shows that all women unfortunately are negatively affected by such pornography to a more or less extent, for example, by rape-myths, sexual aggression, or other effects that discriminate women (see chapter 3).

FACT’s allegation that the Ordinance contributes to the perpetuation of gendered stereotypes implies a conflation of (in Crenshaw’s terms) “the power exercised simply through the process of categorization” in law with the “power to cause that categorization to have social and material consequences.” Elaborating with “stereotypical” categories in civil rights legislation may simply be necessary to identify the sex industry survivors or others who are discriminated by the social effects of categories of sexually explicit media—categories of pornography that indeed are “stereotypical,” which sadly is also a reason why they are documented to be highly consumed (pp. 33–37 above), demanded (pp. 44–50), and to produce harmful effects (chapters 2–3). When FACT suggests public education and support to female survivors of men’s violence they themselves recognize such gendered perpetrators and victims (FACT, 34–35), although they do not call these persons “stereotypical.” Yet FACT does not recognize how pornography reinforces precisely such gendered hierarchical categories. Canadian scholar Lacombe did not either recognize that pornography reinforce female stereotypes when criticizing the civil rights approach. How an abstract formal equality doctrine prohibiting any legal recognition of this gendered reality may change it still remains unanswered. The purportedly gender-neutral obscenity laws have not done so.

Considering FACT’s proposal for public education and support to female survivors of men’s violence (FACT, 34–35), the Supreme Court of Canada responded to a similar objection to consider alternatives to laws against pornography in 1992. That court was asked to substitute law with other non-mandatory measures, such as public education about pornography’s harms, “counselling rape victims to charge their assailants,” or “provision of shelter and assistance for battered women, campaigns for laws against discrimination on the grounds of sex, education to increase the sensitivity of law enforcement agencies and other governmental authorities.” The Supreme Court of Canada rejected these suggestions for substitution, finding it “noteworthy that many of the above suggested alternatives are in the form of responses to the harm engendered by negative attitudes against women. The role of the impugned provision is to control the dissemination of the very images that contribute to such attitudes” (Butler, 508). When being more concerned to apply abstract gender-equal laws neutrally than legally recognizing an unequal social reality, as in a substantive equality approach, the danger is rather that only women already protected from the worst harms of pornography are considered important. Perhaps these are the ones who “enjoy a rape fantasy” (cf. FACT, 22), and who are in little need for protection from rape? Following an intersectional approach to substantive inequality, rather than addressing singular disadvantages as those mentioned by FACT, such as lacking the “robustness of... male language” or missing “a rape fantasy,” one should

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1401 Crenshaw, “Mapping Intersectionality,” supra p. 6 n.24, at 1297.
1402 See supra note 1329 and accompanying text.
1405 FACT brief, supra note 1397, at 22 (quoting Willis, “Feminism, Moralism and Pornography,” 464).
begin by addressing multiple disadvantages among “those who are most disadvantaged,” and “others who are singularly disadvantaged would also benefit.”

In addition, FACT implied that the Ordinance’s anticipated chilling effects on pornography dissemination, as defined by the ordinance, were comparable to “restrictions” that silence the speech of sexual minorities (see FACT, 21). However, the Ordinance barred lawsuits under the “trafficking” provision against “isolated passages or isolated parts” (Ind. Ordinance § 16-3 (g)(4)(c)). That exception clearly permitted expression of irony, literary criticism, or other valuable political or cultural expressions by, for example, minorities who wish to highlight sexual or other oppression, even with similar expression as otherwise targeted by the Ordinance, such as women “presented as sexual objects who experience sexual pleasure in being raped” (Ind. Ordinance § 16-3(q)(2)). FACT did not notice that this opportunity for isolated use of pornography was offered under the Ordinance. Moreover, just as democratic ideals of deliberative consensus and “negative rights” may be criticized for being blind to whose interests such principles disempower (see 312–319 above), equating the restriction of a social practice of subordination such as pornography with restricting potential forms of expression from “sexual minorities” seems equally blind to power disparities. The analogy posits these two different practices, as were they formally equal, when arguably they are not: restricting minorities’ legitimate speech is not similar to restricting sexual exploitation of people, or restricting the freedom to produce materials that promote violence and discrimination against other minorities, such as prostituted persons. One is ideally an expression promoting equality—the other a social practice of subordination. This is especially true when considering that the pornographers and their consumers certainly know how to distinguish their material from such expression. As recalled, pornographers tried to intervene in the case against Indianapolis on the presumption that “[n]one of the [other] plaintiffs . . . alleges that it sells or exhibits materials dealing with sex, much less specializes in the sale or exhibition of such materials as do intervenors.” Put differently, pornographers know what they sell and what others do not sell. Similarly, consumers do not masturbate in large numbers to expression that critically scrutinizes the heteronormativity of postmodern industrialized societies; the popular demand is rather for presentations of “gang-rape,” “ass-to-mouth sex,” multiple entries, and verbal aggression against women (e.g., 44–50 above).

Intermediate Scrutiny and Viewpoint-Neutrality Doctrines

The Seventh Circuit dismissed the Indianapolis Ordinance as a compelling interest subject for strict scrutiny, which is surprising when considering the many possible sources and arguments in support for that route above. The court then, not so surprisingly, continues into the familiar land of First Amendment “viewpoint neutrality” doctrine. This law covers subjects that amount to “important or substantial governmental interest,” and applies an intermediate standard of review (see 214–225, 237–241 above). The viewpoint–neutrality doctrine attempts to distinguish regulations or applications according to whether or not they are content based, or (what is regarded as more suspect) viewpoint based, which is thought to indicate illegitimate suppression of free expression. The implicit underlying philosophy seems to be

1409 See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1219 (2011) (8-1); compare Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez, 130 S. Ct. 2971, 2978 (2010) (5-4) (“Hastings’ all-comers poli-
that the state should not restrict particular views to be expressed, such as those of dissident leftists, republicans in opposition to the monarchy, religious minorities, or gay and lesbian literature, while legally privileging the views of the orthodoxy or the mainstream and vice versa (see further 214–222 above). Here we find regulations of conduct and expression that are not defined according to the concept of “obscenity,” nor covered under unprotected categories such as “low-value” speech, fighting words, and group libel. By contrast, the latter categories are regulated under the lowest standard of review where a “legitimate interest” that is “rational,” hence not arbitrary, will sustain constitutional scrutiny (see 210–211; cf. 263–269, on group libel). As being expressed in Chaplinsky v. New Hampshire (1942), such expression form “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

As discussed previously, the Seventh Circuit superficially accepted that pornography “is a systematic practice of exploitation and subordination based on sex which differentially harms women,” and that “pornography is not an idea; pornography is the injury.” Yet the court later reverted to representing the ordinance as “thought control” because it supposedly “establishes an ‘approved’ view of women, of how they may react to sexual encounters, of how the sexes may relate to each other” (Hudnut, 328). Such a rendition equates pornography, as defined by the ordinance, with political protests and dissident columns in newspapers. Indeed, the Seventh Circuit constantly refers to the Ordinance as if it regulated “depictions” or “viewpoints.” This would be the case if the Ordinance had given a cause of action to sue people who disseminate the “viewpoint”—for example, in newspapers, speeches, or in motion pictures—that women are of less human worth than men, should be subordinated sexually, or that they enjoying being raped. Nevertheless, the Ordinance did not regulate or disapprove these things, how much people might have wanted it to. It simply did not regulate expression that was not graphic, explicit, or did not sexually subordinate as pornography provably does.

The fact that “other speech” also “does” things, as noted by the Seventh Circuit (id. at 329), will not change the fact that only pornography does what it does. Consequently, only materials that conformed to the Ordinance’ definition, which was scientifically and experientially consistent with social reality, including survivors’ as well as consumers’ accounts of it, would be actionable (see 302–306 above). Put otherwise, “thoughts” cannot sexually subordinate. Nor can an “‘approved’ view” dissuade people from sexually subordinate more than indirectly. By contrast, preventing production and consumption of pornography does prevent subordination directly. Regulating viewpoints is thus not the same as regulating a social practice of subordination. The Seventh Circuit’s argument to the contrary relies on the errone-

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1411 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 328–29 (7th Cir. 1985) (internal quotation citing Indianapolis, Ind. Code Ch. 16 § 16-1(a)(2)). Further citations in text.
ous equation of speech (e.g., Hitler’s orations) with a social practice of exploitation and subordination (pornography).\textsuperscript{1412} Nonetheless, even if the Ordinance could somehow implicate the dissemination of “viewpoints” on certain subjects, such as whether women should be sexually subordinated, it could still sustain under the viewpoint-neutrality doctrine. Under intermediate scrutiny, if the law’s “governmental interest” is to target an underlying conduct rather than to suppress free speech—that is, targeting the practice of subordinating women rather than targeting the viewpoint that they should be—the law can be regarded as “unrelated to the suppression of free expression.”\textsuperscript{1413} It is then, however, necessary that “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest” (\textit{O’Brien}, 377). As mentioned above, the Indianapolis Ordinance was narrowly tailored to its objectives, particularly when compared to related existing legislation against obscenity or child pornography.\textsuperscript{1414} As this intermediate doctrine has further developed through the years, it also appears to support the Indianapolis law to the extent that the viewpoint that women should be subordinated can be expressed in “alternative” expressive venues.\textsuperscript{1415} Indeed, in the age of global mass media and popular Internet, there are numerous receptive venues for expressing the most reactionary viewpoints on women’s rights, without the need to make pornography.

Notwithstanding \textit{O’Brien}, the Seventh Circuit kept equating pornography—an admitted “practice” of subordination by them—with political “viewpoints” about women. The problem with such an application of the First Amendment is particularly revealed when the court attempts to explain why the action for “coercion into pornographic performances” would not sustain. That provision did not target dissemination directly—far less did it target consumption.\textsuperscript{1416} The coercion provision is a substantive equality law similar to Sweden’s law against sexual exploitation in prostitution, asymmetrically targeting those who exploit and subordinate while providing relief and remedies to those who are exploited and subordinated (cf. chapter 9). Assuming, arguendo, that pornography is “speech,” this provision should nonetheless not raise First Amendment issues since pornographers can produce virtually the same materials without using real people. Following \textit{O’Brien}, the government may proscribe an underlying conduct of which the “governmental interest” to prevent sexual coercion “is unrelated to the suppression of free expression” (\textit{id.} at 377). Pornographers do not need to coerce real people to express viewpoints. As recalled, even “Hitler’s orations” (\textit{Hudnut}, 329) were possible to produce without abuse or exploitation of others. Restricting pornographers from using real persons to produce their media (as opposed to using virtual techniques) thus causes at most an “incidental restriction on alleged First Amendment freedoms . . . no greater than is essential to” (\textit{O’Brien}, 377) prevent sexual exploitation and abuse. Even if the un-

\textsuperscript{1412} See supra notes 1351–1354 and accompanying text.

\textsuperscript{1413} United States v. \textit{O’Brien}, 391 U.S. 367, 377 (1968). Further citations in text. The Supreme Court sustained a law that prohibited burning one’s draft card in \textit{O’Brien}; such “symbolic speech” would impact negatively on public administration regardless of the political viewpoint associated with this conduct.

\textsuperscript{1414} See supra notes 1366–1371 and accompanying text.

\textsuperscript{1415} \textit{Compare} Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 53 (1983) (upholding restrictions excluding rival union from inter-school mail system, noting that “the reasonableness of the limitations . . . is also supported by the substantial alternative channels that remain open for union-teacher communication to take place”), with \textit{City of Ladue} v. Gilleo, 512 U.S. 43, 57 (1994) (holding city ordinance prohibiting virtually all signs displayed on homeowner’s property was suppressing too much speech because, inter alia, for many people “a yard or window sign may have no practical substitute.” (citations omitted)).

\textsuperscript{1416} See Indianapolis, Ind. Code Ch. 16 § 16-3(g)(5)(1984); cf. supra pp. 310–311.
derlying conduct of such “symbolic speech” is prohibited, as mentioned above there are ample “alternative” deliberative venues for expressing the viewpoints suggesting that women should be sexually exploited, prostituted, and raped.\textsuperscript{1417}

In spite of the \textit{O’Brien} doctrine, the Seventh Circuit defended their decision to strike down the provision against coercion in production since the Ordinance allegedly was “not neutral with respect to viewpoint” (\textit{Hudnut}, 332). Again, they cast the Ordinance as proscribing people from expressing “viewpoints” about women. Yet the Ordinance did not prevent anyone from expressing the viewpoint that women enjoy being sexually degraded and tortured, any less than it prevented anyone from expressing the viewpoint that women are not fit for public office. The Ordinance only provided a civil cause of action for “graphic sexually explicit subordination of women,” and then one of the six sub-definitions had to be included at a minimum (\textit{Ind. Ordinance} § 16-3(q)).

The court also argued, in an attempt to circumvent the viewpoint-neutrality requirement, that “a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film” (\textit{id.} at 330). However, the court neglected the fact that “independent” laws against “injury” already exist in abundance (if not specifically geared to the film industry). Such laws are \textit{rarely} applied on adult pornography production though (e.g., sexual exploitation or rape laws).\textsuperscript{1418} There are several reasons why laws that do not recognize the particular conditions in pornography production, such as those hypothetically covering a broader segment of film or photography industries,\textsuperscript{1419} will not work.

As recalled, ordinary laws against sexual exploitation and abuse are often inapplicable in pornography because of the legal problems of intersectionality and the multiple disadvantages of those who are injured—a harmful situation that is hard to legally address, and exist nowhere else than in the sex industry (pp. 162–166 above).\textsuperscript{1420} For instance, nine out of ten prostituted women explicitly say they want to escape the sex industry,\textsuperscript{1421} and these are the persons from whom performers are typically drawn (e.g., 55–57). They are too poor, disadvantaged, or otherwise in a position of vulnerability, to have any real or acceptable alternative (pp. 55–64; \textit{cf.} supra notes 1293–1299, 1385–1396 and accompanying text. Yet \textit{Hudnut} decided not to save the Ordinance’s “forcing” provision. \textit{See American Booksellers Ass’n} v. \textit{Hudnut}, 771 F.2d 323, 333 (7th Cir. 1985).

\textsuperscript{1417} \textit{See supra} note 1415.
\textsuperscript{1419} The realities of these different segments are very different. For instance, if mainstream actors or photo models were in a similar position of vulnerability as pornography performers, it would not entail that they would be sexually exploited to produce the materials they are used in. They might potentially be exploited as “workers,” or subjected to sexual harassment. Sexual harassment at work, however, would also be prevented in part by a law against “forcing” pornography on someone. \textit{Cf. supra} notes 1293–1299, 1385-1396 and accompanying text. Yet \textit{Hudnut} decided not to save the Ordinance’s “forcing” provision. \textit{See American Booksellers Ass’n} v. \textit{Hudnut}, 771 F.2d 323, 333 (7th Cir. 1985).
\textsuperscript{1420} \textit{See supra} chap. 5, nn. 674-680 and accompanying text for a discussion of problems to apply rape laws to prostitution.
\textsuperscript{1421} \textit{See supra} notes 195–196 and accompanying text
\textsuperscript{1422} \textit{See supra} notes 245–250 and accompanying text.
tors apart from prostitution. Nonetheless, most of these persons are beyond civil remedies—especially if they were paid, as few civil laws are effectively applied against such abusive sexual exploitation in the pornography industry. By contrast, the Ordinance would effectively have provided them such a remedy. The court denied them this.

Moreover, the Ordinance was proposed in part because of such minimizing of sexual exploitation and abuse that is common in contemporary society, including widespread beliefs in rape-myths (“only bad girls get raped”). The presumption of the Ordinance was that such attitudes supporting violence against women would make it difficult for women who have been prostituted to use other laws against coercion and abuse in pornography retroactively. The extensive list of impermissible defenses in the coercion provision, such as alluding to the fact that those coerced had previously been prostituted or had sex with defendants, were inserted for such reasons (cf. 308–309 above). These regulations also appear particularly important considering how the consumption of pornography produces an increase in such attitudes supporting violence against women that minimize and trivialize sexual abuse (see 115–122 above). Only a law against pornography production or rape would thus require as exhaustive a list of impermissible defenses. These would indeed stand out as odd for a general law against “injury in the course of producing a film . . . independent of the viewpoint expressed in the film” (Hudnut, 330). Their existence is anything but independent of the particularity of such films. In fact, the “injury in the course of producing a [pornography] film” (Hudnut, 330) lie not only in the coercion at the moment, as that statement suggests, but is found in the surrounding circumstances of pornography production: the abusive and coercive exploitation of poverty, childhood abuse, and other inequalities, including discrimination based on sex, color, or other grounds, and the legal vacuum that provides no alternatives for redressing such coercive circumstances. As shown above, these conditions have to be addressed for any law to work properly.

The Seventh Circuit did not recognize the problems with applying other laws against coercion in pornography production. Instead, it shoehorned the civil rights law into a misplaced doctrine of viewpoint-neutrality. In supporting their analogous use of this doctrine, the court concluded that “a book about slavery is not itself slavery, or a book about death by poison a murder” (Hudnut, 330). But pornography is not like a “book about slavery.” In fact, rather than a “book” about it, evidence suggests that pornography production is a form of slavery (chapter 2 above). That is why hierarchy theory suggests a need for a specific civil rights law that recognizes this form of slavery from the perspective of those affected, and with the objective of promoting their interest in ending their slavery (cf. 301–312; see also 153–168).

As recalled from chapter 7, the viewpoint-neutrality doctrine is consistent with the concept of “negative rights” that often separates public from private harms, usually neglecting the latter (pp. 143–148). Furthermore, the doctrine derives from a body of law that, contrary to child pornography and sex discrimination laws, was largely carved out of cases arising during the Red Scare and McCarthy eras, or during the 1960s and 1970s anti-Vietnam war efforts and similar popular protests (cf. supra notes 245–247, 253–258 and accompanying text.

See supra notes 674–680, 1151–1161 and accompanying text.

E.g., Burt, “Cultural Supports for Rape,” supra chap. 3, n. 368, at 217–30; cf. supra pp. 93–98 (discussing triangulation of measurements in research, including prevalence of rape-myths and sexual aggression in various populations).

For instance, psychological experiments with simulated rape trials showed that consumption of common nonviolent pornography obstructs justice for women, typically reducing recommended penalty with about half. See supra note 1270.
The law thus came out of the litigation of political acts: for example, flag burning; draft card dodging; socialist advocacy; allegations of espionage; and allegations of libel against public officials (cf. 214–222). These acts had often been subject to criminal indictments or civil lawsuits by various government representatives. Put otherwise, they were often cases instigated by governments against social movements who protested them. Actors in these social movements invoked the First Amendment in order to protect them from being arbitrarily censored or otherwise persecuted. When courts sided with their perspective of the First Amendment, it was generally conceived as necessary in order to protect a liberal society where autonomous and informed value judgments are cherished. In such a liberal society, the ideal is to make different and marginalized views available—even those that are despicable to the majority—so that “the deliberative forces should prevail over the arbitrary.”

Considering the Seventh Circuit’s application of the viewpoint neutrality doctrine, it is worth also considering that the evidence shows that pornography is a social practice of subordination that includes sexual coercion, abuse, and exploitation of vulnerability. This is an empirically distinct and concrete practice, by contrast to the marginalized, oppositional, and dissident ideas that the First Amendment protected under the doctrine of “viewpoint neutrality.” The emphasis of the original First Amendment doctrine was also to promote reasoned public deliberation. To apply this doctrine on pornographers turns the law on its head. Such an application protects pornographers as were they marginalized oppressed groups or intellectual dissidents. Evidence rather suggest that they walk over dead women’s bodies to provide the majority of young adult men with new graphic explicit sexual subordination of women as masturbation materials (pp. 33–37, 44–50, 55–75 above). Such a law protects not the marginalized intellectuals and social movements as was originally envisioned, but rather the multi-billion (pp. 38–41) pornography industry that exploits (chapter 2) and promotes (chapter 3) gender-based violence, sex inequality, racism, poverty, and multiple social disadvantages as sexual entertainment for men (cf. 237–241). Although the original First Amendment doctrine at its best applied a substantive equality approach that recognized vulnerable social movements, including civil rights activists of the 1960s, its equality logic has become inverted when it is applied to pornography. A framework originally for protecting marginalized and “competing ideas” against illegitimate censorship by the powerful has now been put to use for protecting the exploitation and subordination of the marginalized (cf. 219–222).

### Rational Review: An Alternative Balancing Framework

An alternative route to sustain the ordinance exist under a lower standard of review, apart from arguing that it concerned a compelling interest that included combating sex discrimination. Pornography, as defined under the Ordinance, was argued to be analogous to “low value” speech, obscenity, or “group libel” (Hudnut, 331 & n.3). Such unprotected categories of expression have since long been regarded as not contributing to the vibrant and robust public discourse that the First Amendment was thought primarily to protect (cf. id.). Regulation of such expression only needs a “legitimate objective” to sustain (pp. 210–211 above). Under rational review, “the law need not be in every respect logically consistent” so long as “there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”

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held in 2005 under this standard in the Third Circuit Court of Appeals. That court followed previous Supreme Court decisions on obscenity that have held that “Congress could reasonably determine such regulation.”

Sustaining the Ordinance on rational review presents a legal argument distinct from that under intermediate and strict scrutiny, where the government must show a legislative objective that has an “important or substantial” or a “compelling interest” respectively. Yet all arguments rely on a balancing of First Amendment interest against equality interests.

Consequently, Indianapolis invoked the group libel decision in 

Beauharnais v. Illinois (1952) to suggest how to balance equality rights against expressive freedoms in order to sustain the Ordinance. As recalled (chapter 8, pp. 263–273 above), the Supreme Court sustained an Illinois statute that proscribed “any . . . publication or exhibition [that] portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion” that might expose people “to contempt, derision, or obloquy” among other things. The type of expression covered under the Illinois law could pertain to issues of public policy, such as crime or immigration regulations. Such expression arguably lie closer to the type of speech thought to be encouraged and protected by the constitution than pornography (as defined under the Ordinance) would. However, the Supreme Court upheld Illinois’ law against First Amendment challenges. It balanced the objectives of expressive freedoms against centuries of “exacerbated tension between races, often flaring into violence and destruction,” concluding that Illinois was not “without reason in seeking ways to curb false or malicious defamation of racial and religious groups” what would “‘deprive others of their equal right to the exercise of their liberties.’”

Substantive considerations of the relationship between groups and equality were present in 

Beauharnais’ reasoning, even if it did not explicitly invoke the Fourteenth Amendment’s Equal Protection Clause. For instance, the position was taken that “group-protection,” such as in trade unions, did not only concern economic matters (Beauharnais, 262–63). In this context the Court noted that group defamation accordingly affects the status of individuals relative their group association, thus in extension impacting on their equality with others in society: “a man’s job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits” (id. at 263). This opinion effectively equates group defamation with discrimination, suggesting that group libel may cause discrimination against disadvantaged or otherwise vulnerable groups (cf. 265–271 above). The Supreme Court hence upheld a law that criminalized speech on a balancing rationale, where equality rights outweighed expressive freedoms, including in public policy discourses on crime, religion, race, or immigration. The Court should therefore be able to uphold a law against pornography whose expression lies closer to obscenity rather than such public discourses, hence further from the core protections of the First Amendment.

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1429 United States v. Orito, 413 U.S. 139, 143–144 (1973); United States v. Extreme Assocs., 431 F.3d 150, 154 (3rd Cir. 2005) (rejecting argument that obscenity law does not apply to “transmissions over the Internet,” concluding “that Orito and the other key cases . . . are sufficiently similar to . . . govern it”), rev’g 352 F. Supp. 2d 578, 587 (W.D. Pa. 2005), cert. denied 547 U.S. 1143 (2006).


1434 Id. at 259 (citations omitted).

1435 Id. at 261 (quoting Cantwell v. Connecticut 310 U.S. 296, 310 (1940)). Further citations in text.
As recalled since Robinson, a balancing under strict scrutiny is made in sexual harassment law between equality and expressive rights to hold pornography at work to be actionable.\textsuperscript{1436} The Supreme Court’s holding in Roberts implies a similar balancing, where a voluntary association unsuccessfully challenged a Minnesota sex discrimination law as an infringement on their expressive and association freedoms under the First Amendment.\textsuperscript{1437} Consequently, the 1985 Attorney General’s Commission on Pornography suggested the same type of balancing in order to make pornography production actionable as sex discrimination under Title VII of the Civil Rights Act of 1964 (see 329–331 above). The main difference between these balancing approaches and the analogy to low-value, obscenity, and group libel cases seems only to be that they are made within different tiers of scrutiny: one suggests that pornography is a compelling interest to combat; the other suggests it is unprotected expression that does not contribute to the liberal values protected by the First Amendment. In terms of the level of scrutiny afforded to the government interest under rational review, the analogy to low-value speech and similar unprotected expression seems much easier to sustain than the sex discrimination route that requires a compelling interest and narrowly tailored legislation.

Moreover, the production and consumption harms of pornography impinge particularly severe on prostituted persons (pp. 55–75, 123–129 above). This group fit the description in United States v. Carolene Products Co (1938) of such “discrete and insular minorities” who face “prejudice” that “tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry [under the Fourteenth Amendment].”\textsuperscript{1438} Indeed, the impermissible defenses under the Ordinance’s cause of action for “coercion into pornographic performance” took special care to protect such groups from (in Carolene terms) the “prejudice” that “tends seriously to curtail” the processes of justice, retribution, and recompense for harm inflicted upon such “discrete and insular minorities” as prostituted persons. Such prejudice includes rape-myths and attitudes supporting violence against women (cf. 308–309 above). As recalled, pornography consumption produces attitudes that support violence against women, minimize, and trivialize sexual abuse (pp. 115–122). Prostituted persons are also particularly exposed to and targeted for sexual abuse, perhaps more than any other group (cf. 55–75, 123–129).

The Seventh Circuit’s only direct response to the argument that Beauharnais supported the Ordinance was provided in a footnote. Here it was claimed, without direct citation other than to the Circuit’s own decision in a similar case that was denied an appeal to the Supreme Court, that the latter case and others, “such as” the Supreme Court’s decision in a defamation suit brought by a public official against New York Times in 1964, by their implications had “washed away the foundations” of Beauharnais.\textsuperscript{1439} Certainly, the Supreme Court denied an appeal in Collin v. Smith (1978), which let the Circuit’s invalidation of an ordinance enacted with the intent to prevent a Nazi march in Skokie, Illinois stand—an ordinance that used similar language as the group defamation law upheld in Beauharnais used.\textsuperscript{1440} Yet this denial of certiorari is not enough to draw the implication that Beauharnais is superseded. For exam-

\textsuperscript{1438} United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
\textsuperscript{1439} American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985) (citing Collin v. Smith, 578 F.2d 1197, 1205 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978) (7-2)).
\textsuperscript{1440} Collin v. Smith, 578 F.2d 1197, 1199 n.3, 1204–05 (7th Cir. 1978), cert. denied 439 U.S. 916 (1978) (7-2).
ple, the Supreme Court have continued to distinguish *Beauharnais* as an example of unprotected categories of expression, admittedly usually in a string of citations, but yet without suggesting that it is superseded or otherwise infirm. For instance, the Court in 2010 distinguished *Beauharnais*’ group libel from more protected expression such as depictions of animal cruelty.¹⁴⁴¹ Moreover, and contrary to the allusions by the Seventh Circuit regarding *New York Times v. Sullivan* (1964), the Court has distinguished the holding on defamation of “public persons” from the holding in *Beauharnais* (1952) to support their decision on child pornography, regarding the two latter as less protected by the First Amendment than the defamation of public figures.¹⁴⁴² This interpretation is consistent with how the Court already in 1974 limited the reach of the *New York Times* libel standard to public figures, noting in *Gertz v. Robert Welch, Inc.* (1974) that “private individuals” are more vulnerable to the injury of defamation, and that “the state interest in protecting them is correspondingly greater.”¹⁴⁴³ Moreover, it strains a reasonable notion of rule of law that lower courts would make inferences that a precedent has been effectively overruled on basis of a similar lower court case decided differently that was denied an appeal, or due to cases decided on different subjects, facts, and contexts; this is especially so if the Court keeps citing its precedent, even in a cursory manner. As the Supreme Court has stated: “If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”¹⁴⁴⁴

Accordingly, the Seventh Circuit should have considered more seriously to what extent *Beauharnais* was relevant in a review of the Ordinance, as Indianapolis advanced a novel claim that there was no precedents that could be directly applied to. Rather than doing so, the Seventh Circuit claimed (again, without citation) that pornography “must be an insult or slur for its own sake to come within the ambit of *Beauharnais*” (*Hudnut*, 331–32 n.3). The wordings of the statute upheld in *Beauharnais* directly refute *Hudnut* on this point. Nowhere are there insults, slurs, or even expression analogous of that kind mentioned in the quoted statute, nor does the opinion itself suggest so. As recalled, the Illinois statute prohibited a publication or exhibition that “portrays depravity, criminality, unchastity, or lack of virtue of a specific group of citizens.”¹⁴⁴⁵ Such expression can take many forms, with insults and slurs likely being the least potent and persuasive in portraying “depravity” or “criminality” of a specific group of citizens. Not coincidentally, the Supreme Court did not sever parts of it, nor rewrite the Illinois’ statute due to overbreadth, vagueness, or otherwise for being unconstitutional. The statute was sustained it in its entirety.

As mentioned, an argument in support of sustaining the Indianapolis’ Ordinance on a rational review suggests that both pornography and group libel produce dis-

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criminatory effects against vulnerable groups, and that pornography is closer to obscenity, thus less protected than the speech targeted in Beauharnais. The Seventh Circuit admitted that the Supreme Court “sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. Indianapolis has created an approved point of view and so loses the support of these cases” (Hudnut, 331–32; citations to law reviews omitted). However, the Ordinance did not create “an approved point of view.” As mentioned previously, it regulated a practice of subordination—not viewpoints endorsing subordination. Nowhere does it prevent someone from expressing the viewpoint that women are secondary citizens and should be sexually subordinated.

Assuming, arguendo, that the Ordinance implicitly creates an “approved point of view” that sex discrimination is wrong, by the same token the statute upheld by the Supreme Court in Beauharnais implicitly creates the approved point of view that discrimination against groups, “of any race, color, creed or religion,” is wrong (Beauharnais, 251; quoting legislation). As recalled, Beauharnais suggests that group libel may cause discrimination against individuals on basis of their group membership (cf. pp. 265–271 above). By contrast to obscenity or pornography as defined under the Ordinance, the “approved viewpoint” allegedly taken in Beauharnais also targets a type of speech that may lie closer to protected public policy discourse, for example, regulation of crime, immigration, and religious practice. Nonetheless, rather than being abrogated because it “created an approved point of view” based on the “content of particular works” (Hudnut, 331–32) that it targeted (i.e., defamation of groups on basis of their race, color, creed, or religion), Beauharnais has continued to be enumerated by the Supreme Court in citations as an example of unprotected expression.1446 Certainly, Beauharnais has not yet received a more prominent role by the Court, as in being more directly invoked in support of an analogous law. Yet its recurrence in various opinions of the Court suggests that it is still “good law.”

Another inaccuracy in the Seventh Circuit’s opinion is how it rendered First Amendment law as more or less statically revolving around predefined “categories” of speech. For instance, Hudnut claimed that the Supreme Court “sometimes balances the value of speech,” but only “by category of speech and not by the content of particular works” (Hudnut, 331–32). Again, the case of Beauharnais itself disproves this point. Group libel was a new category of expression that did not previously exist in First Amendment doctrine until that decision. Its categorization thus had to be based on the “content of particular works,” contrary to the Seventh Circuit’s claim above. The fact that the category was literally created in 1952 is also demonstrably evident from the opinion. There it was conceded that although “[n]one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana,” the “precise question” was not clear whether such libelous statements could be proscribed when “directed at designated collectivities” as opposed to individuals (Beauharnais, 257–58). “We cannot say . . . that the question is concluded by history and practice” (id. at 258). Although there were “authorities” suggesting that libel against groups were “crimes at common law,” the Courts described them as “dubious.” In other terms, the Court recognized that group libel was not a preexisting category of unprotected speech in law. Nonetheless, they accepted Illinois’ analogous reasoning on the notion that members of social groups would be similarly discriminated by group libel as individuals would be by personal libel because the former’s status “depend as much on the reputation of the racial and religious group” to which they “willy-nilly” belong, as on their

1446 See supra notes 1105–1112 and accompanying text.
“own merits” (id. at 263). Hence, they invented a new unprotected category of speech based on its content.

Just as Beauharnais invented their group libel category by analogous reasoning, the Seventh Circuit could have done the same for Indianapolis, so sustaining the civil rights ordinance. Indianapolis had used analogous reasoning in a similar manner as was done in Beauharnais to support the proposition that pornography shared relevant characteristics with other forms of unprotected expression, including libel of groups and individuals. The Seventh Circuit’s dismissal of this argument, claiming that constitutional balancing of speech under rational review is only made “by category of speech and not by the content of particular works” (Hudnut, 331–32), is not consistent with Supreme Court practice. As shown above, it was precisely the content of particular works and their discriminatory impact on the status of groups that Illinois intended to proscribe. The Court subsequently balanced the legitimate interest in preventing such discrimination against First Amendment interests, sustaining their statute on rational review because it was not “a wilful and purposeless restriction” (Beauharnais, 258). If the creation of new categories of unprotected speech would be impossible as such under the First Amendment, the law would be impossible to change even in face of fundamental political challenges. The notion that the Ordinance is not viewpoint neutral because it does not conform to preexisting categories, and is therefore unconstitutional, fails to acknowledge that some preexisting unprotected categories were conceived in situations analogous to the antipornography movements in Minneapolis and Indianapolis.

Unprotected categories are ultimately based on politics, ideology, and “viewpoints.” For instance, obscenity is by law defined according to contemporary community standards. Its definition is by default not “neutral” to the diverse viewpoints of others, or otherwise there would be no controversy in need of an obscenity law. Indeed, the community standards test produces a form of majority viewpoint, if anything, thus by default not viewpoint neutral. The only difference from the Ordinance’s definition of pornography in this respect is that the concept of obscenity has been around for a significantly longer time. At some point in time, possibly as early as in King v. Sedley (1663) or R. v. Read (1707), the concept of obscenity gained a majority of decision-makers to support and accept it as a principle for legal adjudication (cf. 190–194 above). As suggested previously in chapter 7, obscenity law evidences that the viewpoint-neutrality doctrine is rather a “consensus test” within the liberal ideal type architectures: only expression deemed unprotected by sustainable legislative majorities or judicial institutions becomes exempted from constitutional protection, even if this also amounts to “viewpoint discrimination” (pp. 237–241). This is where the notion of “consensus” used by Downs’ informants to criticize the Minneapolis legislature (cf. 312–319 above) converges in part (but not fully) with the liberal concept of “negative rights.” Without a strong “consensus” among the public, there is no opportunity for democratic action against non-state abuses of power, hence the status quo preferred under the concept of negative rights relative to legislative activism will not be disturbed (cf. 143–148). Such a democratic “regime” causes serious obstacles to oppressed minorities who wish to change their situation—especially prostituted persons, which is a group who fit the description of those “discrete and insular” minorities that should be protected under the

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1447 Miller v. California, 413 U.S. 15, 24 (1973)
Fourteenth Amendment since the Supreme Court’s famous statements in *Carolene*.\(^{1450}\)

As shown above, the current democratic regime in the United States also substantially prevents majorities from taking action against non-state abuses of power, such as those in Minneapolis and Indianapolis who passed civil rights laws against the production and consumption harms of pornography. In light of such difficult conditions for legal challenges to sex discrimination, the Seventh Circuit’s concluding remark that “[f]ree speech has been on balance an ally of those seeking change,” and that “[w]ithout a strong guarantee of freedom of speech, there is no effective right to challenge what is” (*Hudnut*, 332) appears disingenuous. Certainly, free speech enabled advocates in Minneapolis and Indianapolis to persuade legislatures to pass laws that, consistent with hierarchy theory, would effectively have promoted substantive equality among specific groups of people. Yet the legislation was invalidated on the notion that the same expression and social practices that harmed those groups must be upheld to protect these people’s freedom. Rather than “an ally of those seeking change” this interpretation of freedom of speech is, apart from being legally wrong, an ally of those seeking stasis.

### Summary of Analysis
The Seventh Circuit Court of Appeals had numerous available routes to choose if they would have wanted to save the civil rights ordinance against pornography against the constitutional challenge. First, the Ordinance furthered a compelling interest to combat sex discrimination, sexual exploitation, and gender-based violence. It should survive *strict scrutiny* when considering a number of other Supreme Court cases permitting “infringements” of expressive freedoms on a balance against the admittedly compelling interest of preventing sex discrimination. Similarly, federal law proscribes pornography at work as a form of sexual harassment on the same rationale, balancing it as weightier than expressive freedoms. In addition, the Ordinance used much more narrowly tailored means than existing and related laws that regulates child pornography or obscenity. The ordinance had a definition of actionable materials that had been successfully applied by law students without overbroad results. It reached only those presentations that provably caused harm, converging with social science and experiential accounts. The definitions and causes of action were additionally limited by more restrictions on the broader sub-provisions, and had more requirements for knowledge on part of the defendant than the previous Minneapolis definition included. As a contrast, child pornography law sweeps against a much broader set of targets, including consumers and not just distributors, and with similar civil remedies as suggested by the Ordinance. Causes of actions under the Ordinance that were invalidated have since become law through other cases, such as forcing pornography on someone at work, which is proscribed under federal sexual harassment law. Hierarchy theory, and especially the theory of intersectionality, suggest a problem in the fact that pornography or other forms of sex discrimination has only been made actionable in social contexts where women are most equal to men, such as at work, in voluntary civic organizations, or during childhood. These theories supports the notion that law should start with a “bottom-up” approach, providing relief to those persons (women as well as men) who are most disadvantaged, such as prostituted people who are exploited and abused because of pornography. If so, the less disadvantaged women that are more equal to

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\(^{1450}\) United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). For a discussion of how prostituted persons fit the minorities enumerated in *Carolene, see supra* notes 1117–1120 and accompanying text.
men would also benefit, for instance by prevention of discriminatory attitudes or sexual aggression caused by pornography.

Second, the Indianapolis could have sustained parts or the entire ordinance under *intermediate scrutiny*, as it furthered a “substantial or important governmental interest”\(^{1451}\) to prevent sex discrimination and provide remedies to those victimized by pornography. The Ordinance did not proscribe “viewpoints” from being expressed about whether or not women should be sexually subordinated, exploited, or whether or not they enjoyed being raped. Hence, the civil rights ordinance only targeted an underlying conduct to subordinate women that was “unrelated to the suppression of free expression” (*O’Brien*, 377). Following this standard of review, if “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest,” a law sustains (*id.*). As mentioned above, the means of the Ordinance were narrowly tailored and there are also ample alternative venues for expressing the incidentally restricted views that women should be sexually subordinated. However, Seventh Circuit made a misplaced analogy to political or dissident speech, failing to appreciate that the Ordinance regulated a “practice” of subordination, not the “viewpoint” of subordination. The Court even suggested that suppressing “Hitler’s orations” or “a book about slavery” could be equated with regulating pornography. Such speech does not, as pornography typically do, need to exploit people in its production. Rather than being a book about slavery, pornography is slavery itself.

Third, the ordinance could also have survived *rational review*, only providing a “legitimate” interest to prevent sex discrimination. Here, the argument would have been that pornography, as defined by the Ordinance, is analogous to other unprotected categories of expression such as group libel, obscenity, insulting or “fighting” words. The Seventh Circuit erroneously dismissed this route on the presumption that the Supreme Court does not balance such expression against equality interest other than according to predefined categories that are not based on the “content” of particular expression. This dismissal was wrong. The Supreme Court, in their group libel case from 1952, in fact created an entirely new category while explicitly recognizing that neither “history” nor “practice” had previously regarded such expression to be without protection. Their assessment of what was to be included in the category had necessarily to be made on basis of the “content” of such expression. The legitimate interests in that case were also similar to Indianapolis, as both laws intended to prevent discrimination against members of social groups by proscribing certain expression. In the group libel case, it is also notable that it targeted a type of speech that the First Amendment originally was thought to protect, including policy discussions on crime, immigration, or religious practices. By contrast, the Indianapolis ordinance was more similar to obscenity, which is regarded as lying much more outside the type of expression originally protected under the First Amendment. Thus, if group libel could be created as a new unprotected category of expression by analogous reasoning, the Seventh Circuit should similarly have created a new category for Indianapolis on basis of the analogous laws with similar interests and purposes mentioned above. If courts could only sustain a new law with reference to predefined legal categories, little legal change would ever be possible.

Federal Responses


**Background, Objectives, and Scope of Inquiry**

By the year of 1985, the civil rights antipornography movements in Minneapolis and Indianapolis had amassed such a public momentum that there was widespread debate and responses nationally, including on the federal executive level. The Attorney General at the time was William French Smith, who had been appointed by then President-Elect Ronald Reagan in 1981. In 1985, he appointed the Attorney General’s Commission on Pornography (the “Commission”), which was given a charter of which the objectives were “to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations to the Attorney General concerning more effective ways in which the spread of pornography could be contained, consistent with constitutional guarantees.”

The scope of the Commission would among other things include “an examination of the means of production and distribution of pornographic materials, specifically including the role of organized crime in the pornography business” (Charter, li). It would also make a review of “empirical and scientific evidence on the relationship between exposure . . . and antisocial behavior,” and assess local, state, and federal efforts to “curb pornography” (p. li). The Commission was also to make recommendations of initiatives that these different levels of government could pursue (p. li). The Commission has probably produced the largest single investigation of the production and consumption harms in history. Not coincidentally, it has been cited at a number of places in this dissertation above because many of its sources are unique and of high quality. A common misconception among critics to the Commission is that it was the work Edwin Meese III, an Attorney General appointed later in 1985 by Reagan. However, French Smith selected the Commission’s members and defined the scope of inquiry (pp. li–lii). By contrast, Meese, if not even actively obstructing the Commission’s work, did nothing to support it (see 349–352 below).

The Commission’s Final Report was particularly critical toward the former Nixon-initiated Commission on Obscenity and Pornography (1970), the Williams Commission on Obscenity and Film Censorship in the U.K. (1979), and the Fraser Report on Pornography and Prostitution in Canada (1985). It noted that those previous national commissions had ignored to consider the interests of those who are abused in the pornography industry. The 1985 Attorney General’s Commission noted that while the Canadian Fraser Committee had “declared” that producers of violent pornography have “‘little or no respect for the rights and physical welfare of [the performers],’” they had not discussed any evidence of these practices or how to distinguish between simulation and actual harm. Thus, the Canadian Committee “did not devote even a paragraph to consideration of harms to performers other than those resulting from outright violence on the set.”

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By contrast to their British and Canadian counterparts, the U.S. Attorney General’s Commission devoted a whole chapter in their final report on “performers” (Att’y Gen. Comm., 224–45). It contained numerous interviews, systematic readings on the subject, including such varying sources as the industry’s own publications and interviews with performers and others in pornography or popular magazines. Similarly, a collection of numerous testimonies in public hearings by producers, performers, and law enforcement personnel were systematically collected (pp. 197–223). Important findings from both those chapters are reported at various places in this dissertation. The critical approach taken by the Commission to the “performers” is consistent with hierarchy theory (cf. 153–168 above). The position it took emphasized substantive equality, recognizing that certain groups are more disadvantaged. For instance, it recognized that the evidence “taken as a whole, supports the conclusion that the pornography industry systematically violates human rights with apparent impunity” (Att’y Gen. Comm., 189). It was further noted that the “most powerless citizens in society are singled out on the basis of their gender—often aggravated by their age, race, disability, or other vulnerability—for deprivations of liberty, property, labor, bodily and psychic security and integrity, privacy, reputation, and even life” (p. 189). Their findings are consistent with those made in Part I (chapters 1–3 above). The commission’s emphasis on those who are harmed by pornography suggests that it saw itself as a democratic facilitator that to some extent could represent and promote those groups’ interest (cf. 154–159 above). If not exactly equivalent to an autonomous social movement among those groups (cf. ibid.), the Commission’s perspective is at least more favorable to recognize, represent, and promote their interest.

Support for the Civil Rights Approach

Not surprising from the perspective of hierarchy theory, the Commission more or less openly questioned the Seventh Circuit Court of Appeal’s decision to invalidate the Indianapolis Antipornography Civil Rights Ordinance by proposing similar legislation themselves (Att’y Gen. Comm., 186–89). The Commission followed the lead from those who had supported the Ordinance previously on a local and state level (pp. 299–312 above). It was pointed out that the Supreme Court in groundbreaking decisions such as Brown v. Board of Education (1954), Muller v. Oregon (1908), which ended racial educational segregation, and Muller v. Oregon (1908), which sustained laws against excessive working hours, had relied on the kind of social science and empirical evidence that was used by the Indianapolis legislature to construe their ordinance (Att’y Gen. Comm., 187–88). The Commission noted that also in the case decided by the Seventh Circuit, “[m]ost of the evidence that establishes the fact that pornography subordinates women and undermines their status and opportunities for equality comes from extra-judicial sources, studies and individual accounts” (Att’y Gen. Comm., 187).

It is also instructive to compare the Seventh Circuit’s treatment of Beauharnais v. Illinois (1952) with the Supreme Court’s decision in Brown v. Board of Education (1954). As noted above, the Seventh Circuit neglected that the Supreme Court in fact created a new category of unprotected speech in Beauharnais. It had explicitly rec-
ognized that neither “history” nor “practice” provided any answer to whether or not group libel was unprotected expression. In Brown v. Board of Education, the Court did the same in an arguably even more fundamental legal challenge: the old doctrine was rejected despite that there were no preconceived categories to draw from in making that decision. As noted by the Commission, Brown was supported mainly by empirical evidence, not preexisting law. Brown would have been impossible if the Court had followed the approach suggested by the Seventh Circuit in Hudnut. The Seventh Circuit’s analysis and remarks, for example, that “’pornography’ is not low value speech within the meaning of these cases,” suggested it could only sustain laws that assumed preexisting doctrinal categories (cf. 325–344 above).

In fact, racial segregation in schools in the American South was perfectly consistent with the existing constitutional categories of “separate but equal” established under the Fourteenth Amendment’s Equal Protection Clause. Before May 17, 1954, Plessy v. Ferguson (1896) was still good law. Plessy had held that although the “object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.” Not until the civil rights movement successfully challenged the interpretation and the categorization made under the Fourteenth Amendment in Plessy did educational segregation formally end in Brown. As in Beauharnais two years earlier with regards to group libel, the Brown Court realized that although existing doctrines “cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”

To settle Brown, the Court went beyond the purview of categorical thinking and looked at relevant social evidence. It was noted that for African-American children, racial segregation in education “generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone” (Brown, 494). The Court even quoted a lower court that had upheld Plessy, despite that the lower court itself observed that “’the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn . . . [and] deprive them of some of the benefits they would receive in a racial[ly] integrated school system.’” Indeed, the Seventh Circuit in Hudnut also observed that pornography causes “affront and lower pay at work, insult and injury at home, battery and rape on the streets,” but choose to invalidate the ordinance nonetheless. In this respect, their decision is similar to the approach courts used to sustain Plessy before Brown, in spite of such courts knowing well that the empirical evidence showed significant harms and discrimination that flowed from racial educational segregation.

Just as in Hudnut, the reality did not fit preexisting legal categories in Brown. Therefore, the Supreme Court finally decided on the empirical evidence rather than legal doctrine: “Whatever may have been the extent of psychological knowledge at

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1461 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 331 (7th Cir. 1985).
1462 Plessy v. Ferguson, 163 U.S. 537, 544 (1896).
1464 Brown, 347 U.S. at 494 (quoting Kansas court without citation) (brackets in original).
1465 Hudnut, 771 F.2d at 329.
the time of *Plessy v. Ferguson*, this finding [that segregation is harmful and inherently unequal] is amply supported by modern authority [n.11]” (*Brown*, 494). The court then footnoted a number of scientific sources, including Kenneth Clark and a number of psychologists—even Swedish social scientist Gunnar Myrdal’s classic *An American Dilemma* (id. at 494 n.11). Consequently, *Plessy* was overruled and racial education segregation denoted as “inherently unequal” (id. at 495). The empirical evidence reviewed in this dissertation also shows overwhelmingly that pornography is an “inherently unequal” practice of subordination (chapters 1–3). This situation is not unlike how racial educational segregation was clearly recognized as a practice of subordination by courts, despite being treated as “separate but equal” under the law. Put otherwise, despite their knowledge of substantive equality, courts had used *Plessy*’s framework of formal equality to protect blatant racial discrimination. The approach taken by the Seventh Circuit, rejecting the civil rights ordinance because it did not conform to a preexisting category, would have made *Brown* impossible. *Plessy* would still be law.

Not surprisingly, the Attorney General’s Commission, which did engage themselves in the perspective and interest of those victimized by pornography, as is consistent with hierarchy theory (pp. 153–168 above), recommended the Minneapolis and Indianapolis civil rights ordinances:

> The civil rights approach, although controversial, is the only legal tool suggested to the Commission which is specifically designed to provide direct relief to the victims of the injuries so exhaustively documented in our hearings throughout the country. Most of the evidence that establishes the fact that pornography subordinates women and undermines their status and opportunities for equality comes from extra-judicial sources, studies and individual accounts. (*Att’y Gen. Comm.*, 187)

The Commission noted that the Indianapolis Ordinance had been declared unconstitutional in a summary affirmance by the Supreme Court (id. 188). Nonetheless, it recommended the ordinances, albeit with the caveat that “proponents . . . must attempt to fashion a definition of pornography which will pass constitutional muster” (id.). After this statement, the Commission only mentioned “affirmative defense of a knowing and voluntary consent to the acts”—that is, for “performers who choose to engage in the production . . . from seeking recovery” (id.). Otherwise, the Commission showed little to no deference to the judicial branch. In its concluding comment, it strongly repeated its support for the ordinances, asserting that “pornography . . . constitutes a practice of discrimination on the basis of sex. Any legal protections which currently exist for such practices are inconsistent with contemporary notions of individual equality” (id. at 189). A stronger rebuttal of judicial decisions coming from the executive branch is hard to imagine when considering that the courts have indeed protected pornography precisely in the way criticized by this commission.

**Public Response**

The response to the Commission’s final report was perhaps predictable in a country known for its powerful interest groups and their influence over media and public opinion. The press managed to dub the Commission the “Meese Commission,”

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isn’t.“ Chicago Tribune, July 13, 1986, C2 (Lexis); Robert Fulford, “Beware of Supposition: We’re Making a Lot of Judgments—and in Danger of Making Laws Before We have Needed Information,” Toronto Star, Sept. 27, 1986, M5 (Lexis).”


1470 See, e.g., ibid., xvii-xviii, xxiii.


Not only were the claims exaggerated that “all” rights were to be infringed, and that “religious extremists” where behind the Commission. They were also wrong. Contrary to what the PR-campaign said, the commissioners represented a broad spectrum of political views; among them were reportedly three liberals, four conservatives, and four “middle of the roaders.”\textsuperscript{1478} The commission’s members even had the courage to change their views significantly during the course of investigation, based on the empirical facts they confronted. Dr. Park Elliot Dietz, for instance, initially held a liberal position favorable to tolerate pornography, but later wrote a personal statement in the final report stating (including concurring members at various instances) saying, inter alia, that pornography “is used as an instrument of sexual abuse and sexual harassment.”\textsuperscript{1479} He considered the situation of performers and the effects of consumption on society. In this context, compelled the nation not to tolerate pornography, but to “strike the chains from America’s women and children, to free them from the bonds of pornography, to free them from the bonds of sexual slavery, to free them from the bonds of sexual abuse, to free them from the bonds of inner torment that entrap the second-class citizen in an otherwise free nation.”\textsuperscript{1480}

**Summary of Analysis**

All in all, the Attorney General’s Commission mounted an ideologically far-reaching challenge against pornography, including proposing the civil rights approach to its harms. It clearly contrasted with the federal judiciary’s approach, which invalidated the civil rights antipornography ordinances on the presumption that no preexisting doctrinal categories could fit its reality, alternatively that the interest in combating its harms were not compelling enough (see 325–344 above). The Commission’s analogy above with the groundbreaking decision in *Brown v. Board of Education* is conceptually consistent with the principles of substantive equality. The Commission understood the problem as a matter of empirical subordination, and that legal responses should challenge existing doctrines (e.g., preexisting First and Fourteenth Amendment categories) that obstructed the public from intervening or providing civil remedies. Their approach is also consistent with the set of claims made by hierarchy theory, including that democracies should recognize the perspectives and interests of those disadvantaged groups that are adversely affected by social dominance.

The recognitions made in the Commission’s final report did also include the observation that production and consumption harms multiply disadvantaged populations, including not only gender but also “age, race, disability, or other vulnerability” (Att’y Gen. Comm., 189). These instances showed consciousness of the necessity to apply what has later been termed an “intersectional” perspective to the harms of pornography—that is, to address not only singular factors of inequality, but the multiple burdens that may be present in social practices of subordination. Such a perspective scrutinizes whether law, through simplified and singular categories, may fail to recognize the multiple intersectional inequality, thus by a disparate impact amplify social inequality (cf. 162–166). The theory of intersectionality was not invented until at least four years later when Kimberle Crenshaw’s published her article

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\textsuperscript{1478} Ibid., xxxvi.
\textsuperscript{1480} Ibid, 492 (Personal statement by commissioner Elliot Dietz. Chairman Hudson and Commissioners Dobson, Lazar, Garcia and Cusack, concurring).
The empirical evidence analyzed in this dissertation (chapters 1–3 above) shows that pornography is a social practice of subordination that is consistent with an intersectional theory of power, hierarchy, and discrimination (cf. 162–166). It is therefore not surprising that the Commission also recognized such structures in their findings.


Despite the negative media response to the Attorney General’s Commission, and the obstacles to pass and defend civil rights legislation on a local and state level, the ideas kept raising interest among politicians in America. The ideas lingered on in the U.S. Congress for several years, specifically the civil rights ordinance approach. Similar legislation was introduced there in the form of two bills between 1984 and 1991, although eventually none was passed in either the House or the Senate.

The Pornography Victims Protection Act

The Pornography Victims Protection Act was introduced the first time in 1984 by Senator Arlen Specter, R-Pa., and later introduced in the House as well. This proposed bill focused on production harms, although its potential indirect effects might have affected distribution as well. It contained a civil ground for adult and child victims who had been coerced into making pornography to recover damages from producers. The bill defined actionable materials as “visual depiction” of “sexually explicit conduct.” It also offered shields against typical judicial gender bias that could not negate a finding of coercion, such as whether the plaintiff previously had been prostituted or had sex with defendant, had previously posed for pornography, had consented, had signed a contract, or was paid, and similar impermissible defenses. These resemble those impermissible defenses that were originally proposed in the Minneapolis Ordinance (cf. 308–309 above). Although this bill did not offer a subordination-based pornography definition of actionable material as did the antipornography ordinances in Minneapolis and Indianapolis, it was not limited to obscenity per se.

Moreover, the Pornography Victims Protection Act only targeted production harms directly—not the distribution (far less consumption). This meant that it should raise less First Amendment concerns, if any at all. As recalled, following O’Brien this law and its interest to combat sexual coercion in pornography production should sustain since “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” The broader definition of actionable materials compared with the Minneapolis and Indianapolis subordination-centered definitions might have been perceived as a strategy to avoid confusion about how to apply the viewpoint-neutrality doctrine. This is likely when considering the Seventh Circuit’s arguably erroneous invalidation of the coercion provision on such grounds (pp. 333–338 above). Despite being reintroduced in Congress

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1481 Crenshaw, “Demarginalizing Intersection of Race & Sex,” supra chap. 4, n. 520.
through 1987 in similar forms as the first versions, it failed to obtain enough legislative support to pass.\footnote{1487}

**The Pornography Victims’ Compensation Act**

In 1989, another attempt to pass civil rights laws against pornography was made by Senator Mitch McConnell, R-Ky. He introduced the *Pornography Victims’ Compensation Act*.\footnote{1488} 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 ordinance’s assault provision—that specific materials caused an assault or a murder (i.e., as a “proximate cause”).\footnote{1489} 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.\footnote{1490} However, as deliberations moved on in the Senate Judiciary Committee and the national media again became filled by the familiar high-pitched voices from pro-pornography quarters protesting it,\footnote{1491} the initially challenging approach of the bill was subsequently watered down. Negotiations led to the striking out of the references to research on pornography, replacing this key empirical foundation with a preamble referring to the imperatives of “Anglo-American jurisprudence” and “American tort law.”\footnote{1492} This moved the bill toward a position relying on abstract legal doctrines rather than on concrete empirical reality. Furthermore, the bill struck out a provision that permitted testimonies from the offender as admissible evidence.\footnote{1493} This provision was sometimes referred to as the “Bundy Bill,” usually by critics who hypothesized that it would cause more leniency toward the defendant relative to the disseminator.\footnote{1494} It was nicknamed after serial killer Theodore Bundy, who testified in his final interview before execution that he was “inspired by hardcore pornography” when he killed women.\footnote{1495}

Additionally, so many restrictions and exceptions were added during the ensuing legislative deliberations that the bill would have become a dead letter law, had it passed. Among others, Senator Howell Heflin, D-Ala., successfully added an


\footnote{1488} S. 1226, 101st Cong. (1989).

\footnote{1489} S. 1226, 101st Cong. (1989); cf. S. 983, 102d Cong. (1991); Minneapolis Proposed Ordinance, supra note 1266, § 139.40(o); see also supra pp. 309–314 under “(4)” (analyzing the assault provision).


\footnote{1491} See, e.g., Christopher M. Finan, From the Palmer Raids to the Patriot Act, (Boston: Beacon Press, 2007), 260–64. It should be considered that Mr. Finan’s accounts may be highly tendentious. This is not surprising when considering that he directed the Media Coalition, Inc., during the time of the events he describes. See Matthew L. Wald, “‘Adult’ Magazines Lose Sales as 8,000 Stores Forbid Them,” New York Times, June 16, 1986, A1 (Lexis); cf. Lewis Beale, “Porn Bill In Senate Fueling Debate,” Philadelphia Inquirer, April 12, 1992, archived at http://perma.cc/B2A4-LZKQ. The Coalition was reportedly funded substantially by Penthouse. See Susan B. Trento, The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington (New York: St. Martin’s Press, 1992), 192, 196–97. It also hired then largest Washington PR-firm Gray & Company to discredit the 1985 Attorney General’s Commission on Pornography. See McManus, “Introduction,” supra chap. 1, n. 126, at xlvi. For the PR-campaign, see supra pp. 351–353. Moreover, the Coalition sued the Attorney General’s Commission on Pornography “in an attempt to bar it from discouraging the retailing of magazines whose sales are protected by law,” Wald, “‘Adult Magazines Lose Sales.” The suit also included claims against its members individually. MacKinnon, “Roar of Silence,” supra chap. 1, n. 126, at 19 n.62. The case was dismissed as “baseless,” but not until it had reached appeal. Ibid.


\footnote{1493} S. 1521, 102d Cong., § 3(c) (1991).

\footnote{1494} Beale, “Porn Bill In Senate Fueling Debate.”

amendment requiring a criminal conviction of the offender before a civil suit could be filed against producers, distributors, or sellers.\textsuperscript{1496} Senator Specter also added an amendment requiring that defendants must first be convicted under criminal obscenity laws.\textsuperscript{1497} By contrast, the initial versions had defined pornography as that which is “sexually explicit,” and had also included various sub-definitions to specify sexual explicitness, and elements from the subordination approach that centered on explicitly violent and coercive materials that was similar to that of the civil rights approach.\textsuperscript{1498}

Yet Specter’s and Heflin’s restrictions did apparently not please other Committee members enough. An additional amendment provided by the chair of the Judiciary Committee Joseph R. Biden, D-Del (now U.S. Vice-President) went even further, only to be narrowly rejected (7-7), and would (if passed) have required proof that defendants knowingly had provided the public with obscene materials by the time of the assault or murder.\textsuperscript{1499} This meant that defendants first be convicted in a criminal obscenity proceeding before the assault or murder had even taken place, entailing only those being (in the words of Senator Strom Thurmond, R-Sc) “foolish enough to commit the identical criminal act twice”\textsuperscript{1500} to be civilly liable under the law. At this stage, although the bill was approved (7-6) by the Senate Judiciary Committee on June 25, 1992,\textsuperscript{1501} the supporters within and outside Congress seemed to have lost interest, with the result that the proposed legislation died before it made it out of the committees to the floor for a vote.

\textbf{Comparing Legislative and Executive Responses}

From the perspective of hierarchy theory, the outcome of the legislative deliberations in the federal legislature is inadequate in its representation and articulation of the interest of those victimized or discriminated by pornography. As shown above, the deliberations started from the premises of considering an inclusive civil remedy, for those subjected to sexual abuse to claim damages from producers or disseminators of pornography that could be proven to have incited or influenced the offenders’ actions. However, it resulted in a piece of legislation with so many restrictions and omissions that it appeared as extremely difficult to use for those whom it was thought to provide remedy. This process failed to promote substantive equality by


\textsuperscript{1498} See S. 983, 102d Cong., § 4 (1991) (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); cf. S. 1226, 101st Cong. § 4 (1989).


failing to provide a remedy to those subordinated groups. Within the public pressure, the media, and the various special interest groups who lobbied for or against the legislation, one also sees a similar dynamic as in the public and legal responses to the Minneapolis and Indianapolis ordinances (see 312–346 above). This includes pressures to make decisions that are based on a “consensus” rather than on the interests of disadvantaged groups—if making any decisions at all. Indeed, the liberal concept of “negative rights” prefers that democratic decision-makers should be prevented from enabling affirmative intervention against non-state actors’ abuse of social power (cf. 143–148). From this liberal perspective, the perceived risk of government abuse of power stands against the interest of subordinated groups, whom according to hierarchy theory would have been empowered by the legislation in its initial versions.

A more bold decision by Congress would have challenged social dominance similar to the groundbreaking cases, Brown v. Board of Education (1954) and Beauharnais v. Illinois (1952)—two Supreme Court decisions that went beyond what was then “consensus” or conventional wisdom within the legal community (see 347–349). Such a route was suggested as a legislative option to be attempted by the Attorney General’s Commission, even in face of previous judicial obstacles (ibid.). This branch of federal government clearly took a more proactive stance, more consistent with the recommendations suggested by hierarchy theory, than did Congress. This is likely not coincidence either, considering that the commissioners were appointed for a year to study the problems of pornography, particularly chosen for that investigation by Attorney General French Smith. By contrast, members of Congress who deliberated on the same problem were restricted to evidence they were exposed to during hearings and consultations with their constituencies and others. Thus, these Congresswomen and Congressmen were likely less focused, having several other issues to attend to apart from the civil rights legislation against pornography. The difference in treatment between the legislative and executive branches suggests that, as predicted by hierarchy theory (148–168), it is necessary to strengthen the particular disadvantaged and affected groups in the democratic process just as in the legal approaches themselves. Survivors of pornography related harms who organize can also be expected to be more committed to change than can legislators. As predicted by their knowledge of the issue, specialists such as those included in the Attorney General’s Commission may also be fairly committed to change, even though they lack personal experience and incentives to challenge this particular practice of subordination as do the groups that are directly affected.


After the attempt to pass the civil rights legislation against pornography in Congress was obstructed, adult pornography in the United States has largely been unchallenged as a civil rights violation outside the confines of sexual harassment doctrine at work (e.g., 329–331 above). Absent civil rights legislation, and absent enforcement of prostitution and trafficking laws on pornography production, the remaining route for legally challenging the production and consumption harms is through obscenity law. When considering its history, that the concept is neither victim-centered nor concerned with sex discrimination, it is a dubious route (cf. chapter 6). Nonetheless, considering the dearth of other options, it is important to study its application. The Department of Justice made renewed efforts after the turn of the twenty-first century to pursue adult pornography producers parallel to targeting child pornographers. This initiative was initiated during the Bush-Administration and, as will be shown below, has continued during the Obama administration. The new tack was
described by observers as “‘trying to set boundaries as to the acceptable realm of adult material.’”\textsuperscript{1502} The approach has been contrasted with the Bill Clinton-era, were obscenity charges often served as proxies for increasing the prosecutorial leverage, “piled onto other counts, like child pornography, to enhance a prison sentence or encourage plea bargains.”\textsuperscript{1503}

**The New Tack against Violent, Aggressive, and Degrading Materials**

The motives behind the resurgence of federal obscenity litigation during the 2000s were associated with a more progressive view on the harms of pornography. For instance, federal prosecutor Mary Beth Buchanan, who testified in a congressional hearing in 2003, made statements reflecting some of these new concerns. Rather than emphasizing public morality, “prurient interest,” or lack of other “value,”\textsuperscript{1504} her testimony emphasized violence against women when exemplifying parts of the materials that her unit intended to prosecute: those included presentations of “brutal rape and killings of three women” that were “hit, slapped, and spit upon.”\textsuperscript{1505} Further allusions were made to productions harms. For instance, she cited a letter from a woman whose daughter, after being exploited by pornographers, had reportedly “been reduced to an anorexic drug addict with severely compromised mental and physical health” \textit{(S. Hearing, at 267)}. Illustrating the resulting lack of alternative legal remedies to obscenity, Buchanan emphasized that “it is important to recognize that adults, as well as children, are often victims of pornography” \textit{(id. at 266)}. She noted that the particular mother had written to her office since there is “no where else to look for help,” and that this woman wanted the office to “continue to work to . . . prevent the exploitation and destruction of other young women” \textit{(id. at 267)}. Buchanan took the view that “[o]bscenity, by its very nature, reduces human beings to sexual objects” \textit{(id. at 267)}. Sexual objectification, as recalled above, was part of several sub-definitions in the civil rights antipornography ordinances, assuming that such materials were first deemed to present graphic sexually explicit subordination.\textsuperscript{1506}

The statements made in the congressional hearing above are consistent with the content of much contemporary materials (pp. 44–53 above). They are also consistent with the documented production harms (pp. 67–72 above). Thus, Buchanan’s position on what obscenity is corresponds to what would be an empirically sound argument for pursuing criminal laws against pornographers consistent with the approach suggested by hierarchy theory; pursuing it promotes substantive equality by deterring the most abusive and degrading productions. Moreover, its preventive effects furthers the interest of those who might otherwise be vulnerable to victimization or discriminated by the social practice of pornography, albeit less directly than would the civil rights approach due to the lack of civil remedy under existing obscenity laws. However, Buchanan’s assumptions are not entirely consistent conceptually with the obscenity law as it has traditionally been understood (pp. 188–202 above). As recalled, the \textit{Miller}-test does not suggest that the reduction of “human beings to sexual objects” is more or less obscene.\textsuperscript{1507} Other traditional obscenity approaches

\textsuperscript{1502} Ward, “Federal Obscenity Case Stalled,” \textit{supra} chap. 6, n. 812 (quoting political science professor Todd Lochner).
\textsuperscript{1503} Ibid. (citing Todd Lochner).
\textsuperscript{1506} See, \textit{e.g.}, Minneapolis Proposed Ordinance, \textit{supra} note 1266, §§ 139.20(gg)(1)-(2)).
\textsuperscript{1507} \textit{Miller}, 413 U.S. at 24–25.
are not either concerned with sexual objectification, unless that would be perceived as being offensive to community standards (cf. chapter 6 above). Community standards might even be more desensitized to sexual objectification today, considering that pornography consumption desensitizes the viewers who look for more extreme, aggressive, or violent materials. However, as women very seldom consumes pornography apart from occasional curiosity or when initiated by others (pp. 33–37 above)—and they are over half of the adult population—at a minimum the violent or degrading pornography subject to Buchanan’s interest would likely be regarded as beyond reasonable community standards by the majority.

The First Judicial Response: An Affirmation of the Doctrine

The first court case that caught national media attention under the Department of Justice’s new effort to target violent and dehumanizing pornography was United States v. Extreme Associates, Inc. (2005). An indictment was brought against producers of violent pornography in a district court in Pennsylvania. The government’s brief on appeal to the Third Circuit Court of Appeals presented similar content as had been described in Congress two years earlier. A video entitled “Forced Entry” reportedly presented “the rape and murder of three women, who are slapped, hit, spit upon and generally abused and degraded throughout graphic portrayals of forced sex acts.” Similarly, other videos included women who were subjected to “sex acts with multiple partners while a bowl . . . is filled with various bodily liquids” (Brief of Petitioner, 7 n.2). The brief describes how at the “conclusion of each vignette, the women drink the concoction” (id.). Furthermore, other materials presented sexual abuse “between adult males and females dressed to look like minor children” (id.). Moreover, internet “video clips” were also included in the prosecution that among other things presented “men urinating directly into the mouths of women and a woman having sex with multiple men, marketed as a ‘gang bang’” (id.).

None of the parties disputed that Extreme Associates, Inc., “maintained a website through which it engaged in the business of producing, selling, and distributing obscene video tapes, DVDs, and computer files in interstate commerce.” That is, the obscenity indictment was not disputed, but its constitutionality was. In federal district court, the defendants successfully pleaded their constitutional challenge of obscenity law “as applied,” although the decision was reversed in the court of appeals. In the period from the dismissal of the government’s indictment in the district court to the appeal’s reversal, the case against Extreme Associates received much public attention. For instance, law review articles were published that cast the case as a wholesale assault on obscenity law in the age of Internet. Even though

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1508 See, e.g., supra pp. 50–51 (discussing experimental psychology and other studies showing increased desensitization to violence and extreme presentations after prolonged consumption of common nonviolent materials).
1511 Extreme Assocs., 431 F.3d at 151 (emphasis added).
1512 Extreme Assocs., 352 F. Supp. 2d at 591–92 (“A court may hold a statute unconstitutional either because it is invalid ‘on its face’ or because it is unconstitutional ‘as applied’ to a particular set of circumstances [citation omitted]. . . . Under those standards . . . the obscenity statutes are unconstitutional as applied to the defendants’ conduct in this case.”), rev’d and remanded, 431 F.3d at 161, cert. denied 547 U.S. 1143.
the case was ultimately reversed, the first reactions exposed a potential fragility of obscenity law. The question that remains is whether obscenity is an effective means for protection against empirically documented harms of pornography. It is an important question when considering that Extreme Associates produced among the most extremely violent forms of pornography on the market—a type of materials least likely to sustain under contemporary community standards.

One of the central arguments made in the district court to invalidate the obscenity law as applied alleged that obscenity law had been superseded by developments in privacy law. The district court invoked a purportedly analogous case, Lawrence v. Texas (2003), where a sodomy statute did not pass constitutional muster. In Lawrence, a statute prohibiting sodomy was held to violate adults’ right to liberty and privacy, including gay persons who were engaging in consensual sex. The district court thus attempted to cast pornography (or rather, obscenity) as analogous to matters concerning privacy, that is, consensual sex between gay people, allegedly raising the standard from rational review to strict scrutiny:

[A]fter Lawrence, the government can no longer rely on the advancement of a moral code, i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest. Second, we find that, as applied to the particular circumstances of this case, the laws are not narrowly drawn to advance the government’s two asserted interests: 1) protecting minors from exposure to obscene materials; and 2) protecting unwitting adults from inadvertent exposure to obscene materials.

The Lawrence decision... can be reasonably interpreted as holding that public morality is not a legitimate state interest sufficient to justify infringing on adult, private, consensual, sexual conduct even if that conduct is deemed offensive to the general public’s sense of morality.

The district court decision raises similar objections that have often been raised against obscenity laws; that they are laws against the “wrong morality” rather than laws against more compelling state interests to prevent sex discrimination, sexual exploitation, and abuse. In essence, these were the same arguments made in Sweden in 1969 to rationalize the repeal of all obscenity laws—the only laws against distribution of pornography at the time, subsequently taken off the books in 1970. Accordingly, a Swedish lawyer who had defended pornographers, including “sadistic” materials, asserted in a book co-authored with a journalist that consumption of such materials was mere “private business,” thus of no concern for the government.

However, these analogies, including the one made in the Pennsylvania district court with consensual gay sex, are factually misleading. For instance, consensual sex by definition is very different from the coercive circumstances that are documented to be inherent in production of pornography (pp. 55–75 above). Moreover, to identify the government’s interest in pursuing obscenity litigation only as being to protect “minors” or “unwitting adults” from being involuntarily exposed to obscenity is ignorant to the underlying implicit interest to pursue pornographers. Such an interpretation ignores the sexual aggression, attitudes supporting violence against women, exploitation and severe sexual abuse of prostituted women that the evidence over-

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1515 Extreme Assocs., 352 F. Supp. 2d at 587 & 591, rev’d, 431 F.3d at 150.
1516 Prop. 1970:125 Kungl. Maj:ts proposition nr 125 med förslag till ändring i tryckfrihetsförordningen m.m. [government bill] at 79 (Swed.).
1517 Silbersky and Nordmark, Såra Tukt och Sedlighet [Offending Discipline and Morality], supra chap. 6, n. 789, at 184. His arguments were not accepted in his own case, but sadistic materials of more grave nature were allegedly acquitted in later decisions. Ibid., 25–26.
whelmingly shows pornography produces (chapter 3). These misleading assumptions about “privacy,” “consent,” and “unwitting exposure” are similar to the Swedish pro-pornographers who in 1969 argued that pornography was merely a “private business.” The latter, of course, ignores production and consumption harms documented consistently for 40 years now, accounted for in this dissertation.

Yet the Third Circuit Court of Appeals rejected the district court’s invalidation of the obscenity law as applied, including the argument that attempted to rely on Lawrence to say that obscenity law unconstitutionally infringed on the right to privacy. However, their reversal was made on doctrinal grounds—not empirical grounds. For instance, the Third Circuit did not say that obscenity causes sex discrimination, and therefore amounts to a compelling interest to pursue under the constitution. Instead, the Third Circuit held that because a case concerning the privacy violations of sodomy statutes is not directly controlling for obscenity law, only the Supreme Court has the authority to overrule its own decisions on obscenity. Balancing between privacy rights and liability under obscenity laws is thus an issue directly controlled by other precedents, and the Internet does not change the basic foundation of that law. Consistently with the Third Circuit opinion, the Supreme Court denied an appeal (certiorari) to review the case. The outcome of Extreme Associates and other cases that followed (more below) suggest that obscenity laws can still act to deter pornographers from abusive exploitations of performers. But the responses in the lower court suggests that this law is not fully sound as a foundation for review of relevant facts in a modern democratic context, where constitutional rights framed with the “moral” language of prior centuries may be questioned.

The Second Response: Well-Known L.A. Producers Sentenced to Prison

After the Extreme Associates case was reversed in higher court, it eventually led to that the couple behind the company, Rob Zicari and his wife, Janet Romano, were sentenced to prison after making a plea bargain, July 1, 2009. Each one of them received a one year and one day sentence. Their defense attorney H. Louis Sirkin

\[1518\] Extreme Assocs., 431 F.3d at 150.

\[1519\] Extreme Assocs., 431 F.3d at 155 (holding that “if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”) (quoting Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989)). As a matter of law, Lawrence contained no First Amendment issues, was not about “commerce” in anything (by contrast to Extreme Associates), nor was it explicitly about obscenity any more than perhaps to the extent that dissenters haphazardly equated sodomy laws with a diverse set of legal subjects, including “laws against bigamy, same-sex marriage, adult incest, prostitution, adulterery, fornication, bestiality, and obscenity . . . laws based on moral choices,” Lawrence, 539 U.S. at 590 (Scalia, J., dissenting, joined by Rehnquist C.J., and Thomas, J.) (emphasis added).

\[1520\] The Third Circuit emphasized that there are no indications that the Supreme Court’s prior decision holding that “commerce in obscene material is unprotected by any constitutional doctrine of privacy” would not hold for such commerce being conducted over the internet. Extreme Assocs., 431 F.3d at 161 (quoting Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69 (1973)). Furthermore, the Third Circuit noted that “Extreme Associates was indicted for engaging in commercial transactions that its own brief on appeal describes as ‘Internet commerce.’ This case cannot be meaningfully distinguished merely because it involves the Internet.” Id. at 161. Although the Supreme Court has carved out a right to enjoin obscenity in the “privacy” of home, Stanley v. Georgia, 394 U.S. 557, 564–65 (1969), this zone of privacy does not extend “once material leaves [home], regardless of a transporter’s professed intent.” United States v. Orito, 413 U.S. 139, 143 (1973). Along these lines the Court has held, for instance, that prohibiting mailing obscenity to consenting adults is not unconstitutional. United States v. Reidel, 402 U.S. 351, 354–55 (1971). Similarly, seizing returning foreign traveler’s materials is also not unconstitutional. United States v. Thirty-Seven Photographs, 402 U.S. 363, 376–77 (1971).


alleged that the decision “‘obviously’” caused a “‘ripple effect on the adult industry’”; it had also been “‘devastating’” to the defendants, ruining them and making them lose “their home,” even blacklisting them in “their industry.”1523 Whether or not these statements should be taken with a grain of salt, compared with another high-profile case prosecuted around the same time the Zicari’s and Romano’s penalties seem quite lax. In United States v. Little (2010), a possibly more well-established producer of a variety of pornography materials, Los Angeles Hollywood-based Paul F. Little, was successfully sentenced a prison term of almost three years after a jury trial in 2008.1524 He went under various nicknames such as “Max Hardcore” and “Max Steiner.”1525 According to the Department of Justice’s press release in 2007, Little was a “nationally-known director, producer and star of films featuring acts such as anal penetration, urination, insertion of an entire hand into a vagina or anus, vomiting, and severe violence towards the female performers participating in the acts.”1526

It is further clear that the Obama administration has not ended, but continued vigorously the obscenity prosecutions initiated during the Bush-era. For instance, in 2012 Los Angeles-based pornographer Ira Isaacs was convicted by a jury in federal district court to serve four years in prison under obscenity laws for having produced or distributed materials including, among other things, women being used for sex with animals or with human bodily waste.1527 The Ninth Circuit Court of Appeals upheld the sentence in its entirety in 2014.1528 During the judicial proceedings in early 2012, Obama-appointed U.S. Attorney General Eric Holder was according to the Los Angeles Times touting “Isaacs’ prosecution as ‘a major case’” during a congressional hearing, describing it as “‘an example of what we are doing’ with respect to adult obscenity.”1529

Only one of the four most prominent cases run by the U.S. Department of Justice have so far been unsuccessful, and then only on technical grounds—not on constitutional or other substantive legal grounds. As reported in Washington Post in July 2010, a federal district court in D.C. dismissed a case against John A. Stagliano—one of the larger producers and distributors who has been “honored” by the pornography film industry “with several awards.”1530 The reason for dismissal was according to the Post related to proving beyond a reasonable doubt the link between Stagliano and the production and distribution of two DVD videos at the center of the case. Although the materials in the case reportedly included “urination, use of enemas and bondage,” Stagliano is said also to have distributed a wider range of materials that were indistinguishable from other pornography videos according to a profes-

1523 Ibid. (quoting and citing H. Louis Sirkin, a well-known defense attorney for pornographers).
1525 Little, 365 Fed. Appx. 159.
sor in the First Amendment. This professor reportedly believed that as the government had already been successful in convicting “the most extreme stuff” prior to this case, by targeting Stagliano they intended to be more assertive and “put pressure on the entire industry.”

In their coverage of the Stagliano case, Washington Post cited statistics of some fifty-four Department of Justice obscenity charges laid in 2008, and some twenty charges in 2009, implying the legal efforts to challenge pornographers were decreasing. Although these charges were allegedly significantly fewer than during the previous Bush administration, such statistics do not entail the qualitative nature of the charges. It does not say, for instance, whether obscenity was only supplemental to other counts, such as child pornography, child sexual abuse, or human trafficking, thus used primarily to enhance prison sentences or encourage plea bargains. The later conviction of Ira Isaacs to forty-eight months imprisonment in 2014 suggests that the government has not stalled in their efforts to use obscenity laws against exploitative abuses in the pornography industry.

Organized pornographers have so far seemed to hold a relative low profile during these prosecutions when compared to their media presence during the antipornography movements in the 1980s. Not surprisingly, veteran William Margold, now a spokesman for a trade organization, told a newspaper journalist who reported on the Extreme Associates case in 2012 that it “could have been a lot worse.” He suspected the case against Zicari and Romano could have turned into “the quintessential witch hunt of all time and used them as the sacrificial lamb.” Nonetheless, he didn’t think other producers “would learn from the sentence.” Indeed, he had “warned Mr. Zicari when he flaunted his movies in a 2002 PBS ‘Frontline’ special that he was going to be prosecuted.” However, Margold implied that the trade had nonetheless adopted: “There are certain things you just don’t do anymore—denigration and degradation,’ he said. ‘We have to comply with what society feels is comfortable.’” The veracity of these comments is yet to be assessed by systematic research.

Certainly, common content in best-selling and most rented pornography videos around 2004 and 2005 in the United States—violent, aggressive, dehumanizing and degrading sex—have lately subjected producers to prison sentences that are not trivial. Still, it seems as if those convicted have so far only been dealing with the most extreme materials—a conclusion consistent with how obscenity laws generally applies only to materials that breaches the “contemporary community standards of tolerance” (cf. 199–206 above). Yet the fact that even a relatively well-established pornographer such as Stagliano was threatened by imprisonment for years could potentially act to deter other producers from making excessively abusive and exploitative productions in the future. However, there is no data yet to indicate that these prosecutions have had any deterrent effect on the industry as a whole. Put otherwise, although the “policy output” may be different in the sense that the law now more clearly prohibits violent and degrading pornography compared to previously, it is unclear to what extent the “policy outcome” has become much different in terms of production, distribution, or consumption.

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1531 Ibid. (citing Robert D. Richards, professor at Penn State University).
1534 Bridges et al., “Aggression in Pornography,” supra chap. 1, n. 153, at 1065–85. For an analysis of this study and other studies on popular demand and supply, see supra pp. 44–50.
Potential and Limitations

When considering the future prospects of obscenity law, it is important to note that it is not consistent with any modern concept of human rights or democratic freedoms. From a constitutional point it might not need to either. It is currently regarded as a traditionally unprotected category of expression that sustains on a rational review, only requiring a “legitimate” governmental interest (pp. 210–211 above). However, this situation may be the Achilles heel. Whereas charging pornography at work as sexual harassment was constitutionally sustained by the “compelling interest” to prevent sex discrimination, no similar constitutional right to a “good morality” exist that can be claimed under obscenity law. Such doctrinal constructions provide fodder to the law’s critics who claim that pornography is a “victim-less crimes,” noting that the law does not recognize any substantial or compelling interest to protect. It is preferable that law and reality is more consistent, as pornography demonstrably causes sex discrimination and other compelling abuses, including sexual exploitation and gender-based violence (chapters 1–3 above).

Nonetheless, as clearly shown above, committed prosecutors such as Mary Beth Buchanan and others have been creative with existing law, infusing it with notions that aggressive, dehumanizing, and degrading materials that clearly subordinate women are contrary to “community standards.” This application was possibly in spite of the fact that Buchanan relied on a body of law that on its face is more concerned with whether the community finds materials appealing to prurient interests, patently offensive, or lacking serious cultural values. American obscenity law does not on its face proscribe materials that are made through sexual exploitation, abuse, and cause gender-based violence and rape myths. Nevertheless, well-known pornography producers and distributors have received substantial prison sentences under the new federal approach to obscenity. To what extent or not these convictions have impacted meaningfully, such as reducing the production and consumption harms documented in chapters 1–3, is a matter in need of further investigation though. When considering these seemingly minor developments, the broader question is to what extent an obscenity approach per se is efficient as a response to those well-documented harms. For instance, obscenity law has so far been adjudicated exclusively via criminal law. Consistent with tradition, criminal law regard obscenity as an offense against the community or the public order, rather than as crime against the persons who are used in or harmed by pornography (see chapter 6). That said, individual prosecutors, such as Buchanan, may be driven more by the incentive to prevent harm to individuals. But regardless of such individual motivations the method of adjudicating obscenity—contemporary community standards of tolerance—is more consistent with the “consensus” approach suggested by opponents to the Minneapolis Ordinances among Downs’ local interviewees in the 1980s (pp. 312–319 above).

The fact that the initiative to use obscenity law is currently put in the hands of public representatives (prosecutors) as opposed to civil plaintiffs (survivors) also creates a distance to those immediately affected by the harms. This framework empowers professionals rather than those immediately affected. Professionals belong to a more well-educated and socially less disadvantaged group. They are likely not well-represented by the populations that have experienced significant sexual exploitation in pornography (cf. 55–64, 72–75). In the words of democratic and hierarchy theorist Shapiro, one might say that professionals are socially more privileged

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groups who can apply or delay legal sanctions, thus have power over the laws application “by virtue of the decision-making procedure.” Hierarchy theory favors a more empowering legal means for survivors and others who are directly affected to influence the application of the law, as in the civil rights approach suggested in Minneapolis (pp. 301–312 above). For instance, under the proposed Minneapolis Ordinance’s “trafficking” provision, “any woman” or similarly subordinated person was empowered to file a civil lawsuit for being discriminated by the circulation of specific materials. Such a provision was anticipated to make producers, distributors, sellers or exhibitors facing a potential endless stream of similar lawsuits that could make them go bankrupt. Without doubt, this would have been a significantly more effective law against the harms of pornography than the present obscenity law, as applied in the United States

Law enforcement and prosecutors might nonetheless be personally committed to the issue, as Buchanan seems to be. They might also have experienced consumption-related harms themselves, such as gender-based violence or trivialization of sexual abuse (see 98–129 above, on research and evidence). This is likely when considering the large proportion of females who experience men’s violence (cf. 4–7). Yet it is generally at a much less frequent basis compared to those exploited in pornography (pp. 59–72, 124–129). In contrast to sex industry survivors or other particularly victimized groups, who could have brought lawsuits under the civil rights approach, the interests in challenging pornography would primarily arise from professional or ideological incentives among judicial actors. That said, a legislature could also pass civil remedies consistent with obscenity law, as was proposed in Congress in 1992. Such a law would be a hybrid, containing the limitations of the “contemporary standards” while simultaneously harboring the potential of many more women who would file civil lawsuits than prosecutors might do at current. So far criminal obscenity law is the only tool for targeting the harms of pornography directly, outside of sexual harassment law at work. Hence, the detached prosecutor-initiated “consensus” approach stressed by critics of the Minneapolis ordinances has prevailed. Democratic interventions against non-state abuse of power are thus pursued under criminal law, rather than under a civil rights law that would empower those who are victimized and discriminated against with the initiative to use the law and tangible remedies to compensate damages and/or support escape from the sex industry.

Democracy and Equality

The findings in this chapter suggest that the U.S. legal architecture has potential to balance equality rights against expressive freedoms when regulating pornography. Even though the U.S. legal framework has been hypothesized to be least conducive to challenges when compared to Canada and Sweden (see Part II), some changes have evidently taken place. From the perspective suggested by the attempted civil rights challenges, these are certainly few. The local challenges in Minneapolis, Indianapolis, and in other local or state jurisdictions across the United States where the

1537 Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 44.
1538 Minneapolis Proposed Ordinance, supra note 1266, § 139.40(l)(3).
1539 Dumas, “Porn-Victims Bill,” 1711; “Pornography Victims’ Compensation Act,” CQ Almanac, 331. Creating civil rights committees with specialized juries might also be an alternative that would standardize a predictable procedure and draw on knowledge that is more systematic rather than relying on local juries who rule on many different subjects.
antipornography ordinances were passed or proposed, were ultimately defeated by judicial action or legislative resistance. Neither were federal challenges that drew conceptual ideas from those challenges successful in Congress. However, one important exception is the status of pornography in federal sexual harassment law. When pornography is forced on someone at work, it is now regarded as a violation of civil rights to equality and a form of sex discrimination—a law that was originally included under the Minneapolis Ordinance’s broader set of civil causes of action.

The development in sexual harassment law to include pornography was built on a balancing judicial review; equality rights sustained against expressive freedoms on a strict scrutiny standard. As previously suggested, this change was likely facilitated because women are more equally situated to men at work than they are outside work. Similarly, men’s experiences are likely to provide them with a sense that harassment and discrimination are dysfunctional at the workplace, even if not exactly having experienced sexual harassment per se. By contrast, in the “private spheres” (e.g., prostitution, domestic abuse, dating, or other social interactions) women’s subordination to men is less likely to be similarly recognized as discrimination under law. Rather, it has so far been “naturalized” as a matter of personal choice or an exceptional unfortunate history, alternatively a cultural practice that is beyond the purview of democratic intervention from the perspective of a liberal concept of “negative rights” (cf. 142–148 above). Unfortunately, as noted by a drafter of the Minneapolis Ordinance, when “the lack of similarity of women’s condition to men is extreme because of sex inequality, the result is that the law of sex equality does not properly apply.”

To promote substantive equality more effectively, one needs a more inclusive sex discrimination law against pornography, such as that provided by the civil rights ordinances. These ordinances could have placed, in the words of Crenshaw, “those who currently are marginalized in the center.” For instance, one would empower prostituted people, who are often multiply disadvantaged (e.g., pp. 57–64 above) and intersectionally discriminated (pp. 162–166), with a civil rights law that they in particular could use. This position would empower them to challenge more forms of discrimination than does the narrower laws that can only be applied by women who are relatively the most equal to men (e.g., sexual harassment law at work).

With respect to the civil rights approach, the dominance of a concept of “negative rights” in the judicial response has so far obstructed change. That said, as shown above most of the key objections from the courts could have been judged differently. There was always a room for a more favorable interpretation of the U.S. Constitution, including its doctrines that regulate free expression and equality rights. When dismissing the civil rights approach the Seventh Circuit even made some legally erroneous claims, including the assumption that the Supreme Court only balances competing interests under rational review within predefined categories of speech—not on basis of “content.” Other progressive cases, such as the group libel in Beauharnais v. Illinois, did in fact create new categories that were based on the very content they proscribed. If following the Seventh Circuit’s reasoning, a groundbreaking decision such as Brown v. Board of Education would not have been possible. Brown did not either rely on a predefined category or existing doctrine. Indeed, Plessy v. Ferguson would still have to be law if prior categories could not be questioned when empirical evidence of harm suggests they should.

A similar critique can be directed against the Seventh Circuit’s decision to apply the “viewpoint neutrality” doctrine to pornography. Here, the court seems also to

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have been hostage to a narrow doctrinal view, despite that it evidently faced a novel legal challenge never tried before. Indeed, United States v. O’Brien provided a reasonable route for sustaining the ordinance as a regulation of “conduct” with “incidental” effects on free expression. These would be acceptable to further a “substantial interest” to prevent sex discrimination and subordination of women. Nevertheless, the court shoehorned the ordinance into the viewpoint-neutrality doctrine. Yet nowhere did the ordinance prohibit even the most reactionary viewpoints that women should be subordinated. It only regulated the actual practice of subordination. The court’s interpretation draws from a misleading equation of “speech” with “pornography,” as if “Hitler’s orations” or a “communist world view” would be empirically similar to pornography. The latter is produced by sexually exploiting real persons; it further provides sexually behavioral responses in consumers. The former can be produced entirely by mental labor; it does not generally produce sexual, but rather ideological convictions. Particularly in light of the O’Brien doctrine, the choice not to save the “coercion provision” of the ordinance—which did not even target dissemination or consumption, only the conditions of production—is arguably a decision based on ideology, not law. Another option was open to the Seventh Circuit that had been taken by the Supreme Court in analogous challenges that balanced sex equality rights against First Amendment freedoms in non-commercial associations. Here, the Court held that that sex discrimination was a compelling governmental interest that could sustain a First Amendment challenge. The empirical evidence suggests that pornography cause sexual exploitation, abuse, aggression, and attitudes supporting violence against women that constitute compelling harms of sex discrimination (see chapters 1–3 above). The legislation was also demonstrably narrowly tailored to reach only harmful materials (a requirement under strict scrutiny), especially when compared to the much more sweeping child pornography and obscenity laws. This route thus would appear possible.

The ordinance was a civil remedy built on the perspective and interest of perhaps predominantly sex industry survivors who had suffered rape, sexual exploitation, and often unspeakable harms due to pornography production and consumption. Nonetheless, the Seventh Circuit rhetorically cast the legislation as a first step on a slippery-slope that would enable the government to be “in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.” This rhetoric is highly exaggerated. First, the state could actually not control the law in the same sense that it controls criminal law, as it was a purely civil remedy. Second, by regulating a social practice that subordinates women, one does not regulate culture, viewpoints, even less “thoughts.” This familiar repertoire of tropes blurs empirical nuances and distinctions under the First Amendment, substituting ideology for law. When comparing this ideologically tainted outcome with the challenges in Canada and Sweden, it should be considered to what extent such sweeping statements could have been possible without the peculiar American liberal architecture. Possibly Sweden is not very different than the United States in these regards (cf. 225–237 above). However, Canada with its more clearly balancing constitutional framework and emphasis on equality, likely is (cf. 241–263).

There are some surprising findings in this chapter with regards to alternative approaches to the civil rights framework. Obscenity law has emerged as a revitalized approach to target the harms of commercial pornography, contrary to both its language and its history. Perhaps this development is due in part to the lack of success of civil rights laws against pornography during the 1980s and 1990s, even as the evidence and harm they exposed produced pressure to act. Creative prosecutors are

1542 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985).
now infusing obscenity law with an approach that targets those materials that are particularly likely to have been made with coercive and abusive means. Moreover, such materials are also proven to cause sexual aggression and attitudes supporting violence against women. But they are only one subset of pornography that would have been covered under the more inclusive civil rights approach. Nevertheless, the federal government’s high-profile convictions of a number of well-known producers in Los Angeles, who were sentenced to substantial prison terms, suggest that the pornography industry is not invincible. The prosecutions evidently continue under the Obama administration, despite some pundits who believed otherwise when Bush left office. For instance, Attorney General Eric Holder reportedly “touted” their successful litigation in Los Angeles in Congressional hearings. These cases have made the “community standards” concept recognize sexual aggression, dehumanization, and degradation as unacceptable phenomena, at least for now.

Yet it is important to observe that the controlling definition of obscenity in *Miller v. California* from 1973 defines it in terms of appeals to prurient interests, offensiveness, and lack of serious value. Those terms have no bearing on the real harms of pornography (cf. 199–202 above). Moreover, the procedure in obscenity litigation is also state-initiated, not victim-centered. Similarly, it does not provide civil remedies for damages and/or support escape from the sex industry. Compared to civil rights legislation, the new approach to obscenity is more consistent with a conservative view that public intervention against the harms of pornography should build on “consensus” and “compromise.” That said, passing civil remedies under obscenity law is possible, as was proposed in Congress in the 1980s and early 1990s. It would make existing laws against pornography’s harms more efficient. Indeed, no one would gainsay that obscenity is unprotected under the First Amendment. An attempt to suggest otherwise was squarely rejected by the Third Circuit Court of Appeals, and further denied certiorari by the Supreme Court. Certainly, obscenity is a less conceptually sound route than the civil rights approach, and the former is also more ambiguous than the latter. Nevertheless, the new obscenity approach could offer more potential as a legal challenge to pornography in the years ahead, if only so far as other more effective civil rights alternatives are unavailable.

With regard to the various legislative responses to legal challenges accounted for in this chapter, some empirical patterns emerge that are possible to use for further theoretical analysis. As discussed in chapter 4, several authorities within the group of theories labeled hierarchy theory suggest that progressive democracies should strengthen disadvantaged groups via their own autonomous organizations. This will facilitate the development of survivor-based strategies that draw from the special knowledge they harbor, as such groups often develop an “oppositional consciousness” that is necessary to articulate and challenge oppression. A democracy that so supports disadvantaged groups would thus support those who are directly affected by the harms of pornography. The civil rights approach to pornography, as envisioned first in Minneapolis in 1983, was shown above to be consistent with this theory of democracy. In order to assess further the explanatory potential of hierarchy theory, one may compare the Minneapolis and Indianapolis challenges to the challenges mounted on a federal level before making cross-national comparisons.

1545 Certainly, democracies are also cautioned against supporting organizations that merely purport to represent these disadvantaged groups. As shown in chapter 2, such organizations are sometimes supported by third party profiteers or include tricks or pornography consumers. It has become evident that public officials, professional organizations, and even research journals need to be much more vigilant in these regards. *E.g.*, *supra* pp. 76–84.
The Congressional attempts drew from the prior civil rights approaches that were pioneered locally. However, there were different degrees of consistency with the tenets of the civil rights approach in the different legislative forums. While both initially embraced the approach, they produced very different policy proposals. For instance, neither in Minneapolis nor Indianapolis where the ordinances watered down by any significant compromises or requirements for “consensus” in the decision-making procedure, apart from the so-called Playboy exception in the Indianapolis version that narrowed the cause for action under the trafficking provision (but not under the three other causes of actions). Consequently, a legislative majority pushed for a largely unmodified challenge to pornography as a social practice of subordination, albeit later being precluded by a mayor, or the judiciary, respectively. By contrast, in Congress the first attempt to pass legislation based on a civil rights approach was dropped from the agenda. The second attempt was watered down by various compromises and requirements for “consensus,” eventually becoming disbanded as well. Contrasting with these two attempts, the 1985 Attorney General’s Commission on Pornography wholeheartedly recommended a civil rights approach in their final report in 1986. They even questioned the judgment of the judicial branch in having previously invalidated the ordinances. However, their recommendations were not translated into policy nor attempted to by the executive, although the Congressional bills did in some versions explicitly invoke their findings.

A major reason for the Attorney General’s Commission’s lack of influence on public policy, which negatively impacted on the Congressional attempts to pass civil rights laws against pornography, can likely be attributed to the orchestrated media campaigns by the pornography industry that intended to discredit it by spreading various misinformation (see 349–351 above). But differences still exist between these federal challenges when compared to the challenges in Minneapolis and Indianapolis that could have additional causes apart from the influence of the pornography lobby. As recalled, the local legislators passed more substantive challenges before being precluded by vetoes or judicial intervention. Moreover, the legislation proposed in Congress between the years 1984 and 1992 would probably never have been introduced without Minneapolis and Indianapolis acting as trailblazers. Seen in this light, Congress has been reactive rather than proactive, which might have impacted on the relative strength of their law proposals compared to Minneapolis and Indianapolis in the 1980s. Indeed, the more recent laws passed by Congress, which made children exploited in pornography entitled to civil damage awards, even from consumers, have similarly adopted the civil rights approach championed in Minneapolis in 1983. In this respect, the civil rights approach has not been without legal impact, though these laws pronounced in Congress are certainly more narrow in their impact than their original conception in Minneapolis were.

Politicians are often reacting to popular demands. Certainly, popular demands may also have created a “window of opportunity” for members of Congress who

1546 This exemption applied only to the sixth subcategory of pornography under the Indianapolis ordinance, see Indianapolis, Ind. Code Ch. 16 § 16-3(g)(8)(1984) (listing defenses). That subcategory included materials where women “are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.” Id. § 16-3(q)(6). See also Hudnut, 771 F.2d at 326 (noting exceptions and defenses); Downs, New Politics, supra chap. 4, n. 557, at 132–33 (discussing the “Playboy exception”).
1547 18 U.S.C. § 2259(b)(1) (2014) (directing defendant “to pay . . . the full amount of the victim’s losses” due to child pornography); but see Paroline v. United States, 134 S. Ct. 1710, 1727 (U.S. 2014) (5–4) (holding that consumers are liable under 18 U.S.C. § 2259 to “an amount that comports with the defendant’s relative role in the causal process that underlies the victim’s general losses. The amount would not be severe . . . . It would not, however, be a token or nominal amount”).
were already receptive to similar ideas to those promoted in Minneapolis and Indianapolis, thus making it difficult to disentangle those who acted reactively as opposed to proactively. Yet when considering that only the local antipornography activists got civil rights antipornography ordinances passed in their jurisdictions, the theory of a reactive as opposed to proactive Congress is appealing on its face. The problem with this theory is that the well-orchestrated lobbying campaign against federal legislators suggests that the resistance simply was stronger when the challenges came to Congress. There is also another hypothetically complementing explanation to the different substance of the policy proposals on the local and federal legislative level. That is, Congress is a more powerful legislative body than any local or state legislature—at least when considering the potential implication of federal civil rights legislation. Thus, activity in Congress draws more opposition from interests opposed to civil rights legislation, including the sex industry, consumers, or those who for various ideological reasons opposed it. However, local legislative challenges may also create very influential precedents by adopting progressive civil rights legislation. A successful local adoption of a new approach would support diffusion to other jurisdictions as well, especially if such an attempt survives judicial review. The size or direct reach of the legislature may thus be less important than presumed.

All in all, this chapter indicates that the more aggressive legal challenges in Minneapolis and Indianapolis relative to the federal challenges can be explained by the fact that the former came earlier and might have been more proactive than the latter. But it is also likely that the former took the pornography industry more by surprise than when their challenges were mounted at the federal level. At that point, there was more time to mobilize resistance. More theoretical insights on conditions that are favorable or disfavorable to such legal challenges are gained by looking at Canada and Sweden, where the comparative analysis of different legal conditions is developed more systematically (see chapters 11–12).
This chapter analyzes substantial legal challenges to pornography’s harms that have taken place in Canada from the early 1980s until now. The aim is to explain their successes and failures to understand what is in the way to address the harms. I analyze four distinguishable events. First, I look at the legislative responses in 1983–1985 from a public inquiry appointed to address public concerns of pornography’s harms and the law’s failure to address them. Second, I look at how Parliament responded in 1986–1987 to the inquiry’s proposal. The government proposed two bills, of which none were passed by Parliament. Third, I look at judicial responses to the public concerns of harm during the period 1982–1992, which resulted in a reinterpretation of Canada’s peculiar obscenity law into a harms-based equality law. Fourth, I analyze the judicial interpretations that followed 1993–2012, which in some provinces entailed a watering down of the gains made in 1992 while other provinces show how the law still has potential even though its enforcement as a criminal law is admittedly weak. The chapter corroborates hierarchy theory in showing how a weaker recognition of substantive inequality and a limited representation of perspectives and interests of those groups who are harmed by pornography lead to weaker legislative and judicial support for approaches that would otherwise have addressed the harms. Further, the absence of a representation of those who are harmed precipitates a lack of adequate evidence in courts and an increase in prejudice and misinformed opinions about pornography and gender-based violence. By contrast, when intervenors or others represent disadvantaged groups and present arguments recognizing their perspectives and interests more clearly, courts seem to interpret pornography laws more progressively. The fact that some unnecessary and problematic elements of obscenity law have not been abandoned, in addition to the limitations of the state-centered criminal law approach—as distinguished from a plaintiff-centered civil rights approach—emerge as additional obstacles.

Obscenity law is the most direct legal tool in Canada for targeting pornography and its associated harms, just as in the United States. However, Canada’s obscenity law differ to a substantial extent from other countries’, especially since the 1980s. The Commonwealth definition of obscenity in R. v. Hicklin (1868) was already superseded in England by case law in 1954; shortly thereafter, it was replaced by statute in Canada when its Parliament passed its own definition of obscenity in 1959. Obscenity in Canada is now statutorily 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, shall be deemed to be obscene.”

Background to Legal Challenges in the 1980s

Obscenity law is the most direct legal tool in Canada for targeting pornography and its associated harms, just as in the United States. However, Canada’s obscenity law differ to a substantial extent from other countries’, especially since the 1980s. The Commonwealth definition of obscenity in R. v. Hicklin (1868) was already superseded in England by case law in 1954; shortly thereafter, it was replaced by statute in Canada when its Parliament passed its own definition of obscenity in 1959. Obscenity in Canada is now statutorily 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, shall be deemed to be obscene.”

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1549 Criminal Code, R.S.C. 1985, c. C-46, s. 163(8) (Can.).
planted the prior Hicklin-test with this new definition from the Criminal Code, and took the position that the application was to be determined by the “contemporary standards” of tolerance test.\footnote{Brodie v. The Queen, [1962] S.C.R. 681, 706 (Can.).} It should be noted that the community standards test was not mandated by the legislation per se. The concept is, as mentioned, amenable to wide latitude of interpretation and as such unreliable (cf. 199–202 above). Canadian law professor Kathleen Mahoney has noted that until the beginning of the 1980s, the meaning of “undue exploitation of sex” in the obscenity statute was usually understood only to imply that the degree of explicit sex was important for assessing obscenity.\footnote{Id.} Accordingly, the additional elements “crime, horror, cruelty and violence” were “largely ignored by the courts” before the early 1980s.\footnote{R. v. Hicklin, (1868) L.R. 3 Q.B. 360, 371 (Lord Cockburn, C.J.).} This situation entailed that the difference to the prior British definition in Hicklin was not as important as it could have been—with the exception that explicit sex became the focus of what was obscene rather than other elements. As recalled from chapter 6, Hicklin targeted materials that have a “tendency . . . to deprave and corrupt” the minds of persons so inclined,\footnote{Similarly, the American definition in Miller v. California (1973) does not either on its face require such additional elements to be included for a presentation to be judged obscene. As recalled, Miller requires that an “average person” who applies “contemporary community standards” deems that an alleged obscene presentation “appeals to the prurient interest,” that it “depicts or describes, in a patently offensive way, sexual conduct,” and that it “lacks serious literary, artistic, political, or scientific value” when “taken as a whole.” Miller v. California, 413 U.S. 15, 24–25 (1973). In America, federal cases have nonetheless since 2002 sentenced a number of well-known Los Angeles-based producers and distributors to prison for what can be described as particularly violent, dehumanizing, and cruel pornography, in spite of that such applications may even be contrary to the language of the Miller-test, including contemporary standards and artistic values. See supra pp. 357–521.} and did not enumerate other elements such as “cruelty and violence.”\footnote{See supra notes 557–560 and accompanying text.}

In Canada the public critique against pornography was largely similar as in the United States in the 1980s. Yet the legal challenges were different. As previously discussed in chapter 4, the women’s movement articulated their opposition to pornography already in the 1970s.\footnote{Cole, Sex Crisis, supra chap. 4, n. 557, at 72.} They formed organizations, took visible actions such as picketing outside pornography stores, and organized marches and rallies. One of the events that ignited feminist opposition to pornography in both Canada and the United States was the release of the movie Snuff in 1976. That movie presented murder and dismemberment of a woman as erotic entertainment. For instance, while the courts had not found Snuff obscene in Canada, hence did not prevent it to be shown at movie theaters, a women’s organization called Women Against Violence Against Women (WAVAM) picketed outside its screening in Toronto, ON, in 1977.\footnote{Lacombe, Blue Politics, supra chap. 4, n. 557, at 78–79.}

The lack of judicial enforcement of obscenity laws in face of the rapidly growing pornography industry became the source of widespread discontent among women’s organization in Canada. One group who called themselves “Wimmin’s Fire Brigade” took credit for bombing three video stores in 1982 that were part of a pornography chain in the Vancouver area.\footnote{See supra notes 557–560 and accompanying text.} Although “most” women’s groups in Canada did not endorse such methods at the time, these other groups nevertheless “sympathized with the [former] group’s frustration at not being able to get the police to lay obscen-
ity charges.” Some of the most prominent such nongovernmental women’s groups who organized and campaigned, protesting the lack of legal response to the harms of pornography, were the Canadian and provincial Advisory Councils on the Status of Women (CACSW), the National Action Committee on the Status of Women (NAC); and WAWA. According to Mahoney, there were also other organizations who protested the state of current laws that did not belong to women’s movement necessarily; for example, the Canadian Coalition Against Media Pornography (including several provincial coalitions); Media Watch; Canadian Civil Liberties Association (and provincial associations); Canadian Conference of Catholic Bishops; and the United Church of Canada.

First Response: Government Inquiry


The appointment of the federal governmental Special Committee on Pornography and Prostitution by the liberal government in Canada in 1983 marked the “culmination” of the extensive and diverse public pressure since the mid-1970s to change, improve, or abolish existing obscenity laws. The Committee has often been referred to as the “Fraser Committee,” after its chair Paul Fraser. Their final report was delivered in February, 1985 (see Fraser Comm., vii). Around the time of the Fraser Committee’s appointment, there was a consensus among virtually all critics that the Canadian obscenity law was “too broad and too vague.” Antipornography critics noted that the section in the Criminal Code not only often let through “violent” and “degrading” pornography, but that “non-violent, non-degrading sexual material” was also found obscene at times. The Canadian Criminal Code’s requirement that obscenity should be a matter of “undue exploitation of sex” also meant that there was an acceptable “due exploitation” of sex. Some argued from a more critical standpoint that even violent sex could be so excused as “due,” thus the code should be changed to prevent such excuses.

The Fraser Committee made an investigation of the harms of prostitution and pornography although they did not connect the two issues as systematically as have

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1558 Lacombe, Blue Politics, 79.
1560 Mahoney, “Defining Pornography: Bill C-54,” at 576 n.3.
1561 Mahoney, “Defining Pornography: Bill C-54,” at 576; see also Lacombe, Blue Politics, 81 (noting that the Liberal government appointed the Fraser Committee).
1563 Mahoney, “Defining Pornography: Bill C-54,” at 578.
1564 Id. at 579.
1565 See, e.g., R. v. Ramsingh (1984), 29 Man. R. (2d) 110 at 112, 14 C.C.C. (3d) 230 (Man. Q.B.) (“One must bear in mind that in the search for the elusive contemporary Canadian standard of tolerance we deal not with ‘exploitation’ of sex, but with ‘undue’ exploitation of sex”); R. v. Doug Rankine Co. (1983), 9 C.C.C. (3d) 53 at 60, 36 C.R. (3d) 154 (Ont. Cty. Ct.) (stating that “for a publication to be deemed to be obscene it is not sufficient that a dominant characteristic of it has been the exploitation of sex. There must have been an ‘undue’ exploitation of sex”).
1566 Mahoney, “Defining Pornography: Bill C-54,” at 579; cf. Spec. Comm., Pornography & Prostitution in Canada, 114 (“Some observers have said that the term ‘undue exploitation’ is a contradiction in terms and that no exploitation can reasonably be considered due.”).
others. As noted by their American counterpart, the U.S. Attorney General’s Commission on Pornography, the Fraser Committee did not investigate conditions for producing pornography nor otherwise systematically elaborate on the associations between off-camera and on-camera prostitution.\textsuperscript{1567} Hence, while the Committee opined that they knew “that the relations between the producers of violent pornography and the actors in it are often such that there is little or no respect for the rights and physical welfare of the latter” (Fraser Comm., 265), they defended their decision not to study the issue further by summarily claiming that most pornography in Canada was of foreign origin: “From the information we have it appears that a very small number of pornographic films are produced within Canada but that the production of other forms of pornography, for example, magazines and books is not undertaken for commercial purposes” (p. 87). Through their “discussions” with officials from Canada Customs, an estimate was made that the “sources” of pornography in Canada at the time were U.S. (85%), European (12%), and domestic (3%) (p. 153–54). However, it is unclear exactly how the estimation was made since the Committee also reports that “sales and rental figures for pornography videotapes are not available” (p. 154). Moreover, child pornography was said to be “well hidden and is not frequently encountered by Customs officers” (p. 154).

When considering that laws against the harms of prostitution could potentially be applied to pornography production (cf. chapter 9 above), it is of significance to what extent the Committee’s approach took into consideration the perspectives and interests of survivors of the sex industry. Evidence from a number of countries shows that it is generally the same population cohort that is exploited in pornography as in other off-camera prostitution venues (e.g., 55–57; cf. 73–75 on male prostitution). These two groups generally share the same type of multiple disadvantaged preconditions that predicts prostitution, including childhood sexual abuse in a majority of cases as well as persistent poverty, or discrimination on racial, ethnic, or gendered grounds, alternatively other forms of social vulnerabilities (pp. 55–64). A survey study in nine countries (including Canada) with 854 respondents even found that those who experienced prostitution for pornography report statistically higher symptoms of posttraumatic stress disorder (PTSD) than those experienced prostitution exclusively off-camera; the finding was significant even after controlling for other relevant factors, with two thirds of the combined group exhibiting symptoms on the same level as treatment seeking U.S. Vietnam veterans.\textsuperscript{1568} If the Committee’s proposals for changes to pornography laws would be consistent with hierarchy theory and a substantive equality approach to pornography, they should also include considerations of those exploited in its production (cf. 153–168 above).

**Recommended Legal Distinctions of Vulnerability**

The Fraser Committee deliberately consulted a wide variety of views from the Canadian society during their investigation. The diverse public opinions repeatedly resurfaced during the committees public hearings and closed interview sessions held across twenty-two centers and towns where hundreds of organizations and individuals (including some prostituted women) presented their views, often complemented by written submissions (Fraser Comm., 9–10, 63). Those in favor of regulations were women’s organizations, churches and church groups, community organizations, educational associations, representatives from the police, different sorts of elected government representatives, or other similar groups such as men’s groups that specifically had been organized against pornography (pp. 63–64). Those opposing them

\textsuperscript{1567} Final Report Att’y General’s Comm., ed. McManus, supra p. 27 n.78, at 226.

\textsuperscript{1568} See supra notes 245–246 and accompanying text (citing and discussing studies).
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 (p. 64).

During the course of their work, the Committee collected numerous testimonies and documentations that suggested women and children were harmed in prostitution generally. For instance, recent sociological research was presented to the committee suggesting that a majority of prostituted persons had been subjected to incest or sexual abuse already as children (p. 352). Similarly, research and testimonies from organizations engaging in social work suggested to the Committee that most prostituted persons had entered during early or middle adolescence, and that many had been runaways (pp. 351–53). Many groups and individuals stressed the association between women’s subordination and low status in society with the phenomenon of prostitution. For instance, it was pointed out to the Committee that women in Canada earned only 60% of what men earned, and that 75% of all minimum wage workers were women (p. 353). Others suggested to the Committee that pornography worked as a “cause and contributor” to prostitution (p. 354). In the words of the Committee, who reiterated these opinions, pornography “reinforces the view that women are sexual objects for men’s pleasure,” and “the prostitute is the most available person to engage in the sexual acts portrayed in pornography. One promises, the other delivers” (p. 354). It is notable that this information about the associations between prostitution and pornography is now well-documented in numerous research studies and public inquiries in a number of countries (e.g., 123–129 above).

When considering that prostituted persons are the group that pornography performers are drawn from, it should be noted that Canada at the time criminalized prostituted persons as well as third party profiteers and tricks in a number of venues.1569 The Swedish substantive equality prostitution law that asymmetrically targets tricks and third parties with criminalization, and decriminalizes the prostituted persons while offering them support for escape (see 277–286 above), had not been enacted anywhere yet. Put otherwise, Canada penalized prostituted persons themselves for what the evidence shows is a form of abusive sexual exploitation (pp. 55–75)—evidence that was available to a significant degree to the Committee in the form of research studies and submission from the public at the time. When the Committee thus elaborated further on the underlying conditions of prostitution, that is, “what causes prostitution,” they observed that “women’s groups” offered “many theories and opinions” about it (p. 351). It was also noted that other interest groups such as community associations, the police, and civic leaders—groups who did not want prostituted women on the streets in their cities, and were “anxious to force” them away—“said very little when it came to a discussion of the root causes of the phenomenon of prostitution” (p. 351). Although the Committee apparently took notice of the more disinterested groups, and seemed to contrast them against the women’s groups, it nevertheless did not accept the latter’s conclusions.

We are of the view that as a general rule, the adult must accept responsibility for his or her actions. We heard during the public hearings that adult women, in particular, who become involved in pornography or prostitution should be seen as victims, wheth-

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1569 There were only a few exceptions to criminalization in “outcall” or escort prostitution (i.e., indoor prostitution outside the prostituted person’s home, but not inside a “bawdy house”). See, e.g., Canada Criminal Code, R.S.C. 1985, c. C-46, s. 210(2)(a) (criminalizing anyone who “is an inmate of a common bawdy-house”), s. 213(1)(c) (criminalizing anyone who “stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution”), invalidated in Canada (Att’y Gen.) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101 ¶ 164, 366 D.L.R. (4th) 237.
er the economy or patriarchal social structure, or of abuse directed at them during early years. We have sympathy with this point of view, and do not think that it would be out of place as a consideration in sentencing the individual case. 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, and in need of society’s protection, when dealing with the issues of pornography and prostitution. Children would thus be seen as victims or potential victims of people engaged, or wanting to engage, in these activities. (Fraser Comm., 25)

Unless the Committee was not in disagreement with the women’s groups and much of the research it had reviewed, the position taken in the above quote would seem inconclusive. As mentioned previously, research had been presented to the Committee showing a high prevalence of child sexual abuse and teenage homelessness among prostituted persons. Women’s groups had further emphasized the coercive social forces of poverty and gender inequality. In light of this evidence, the Committee’s quote above suggests that after having been subjected to sexual abuse and incest, then forced to run away from home during childhood or adolescence—with the near impossibility of staying alive and still managing school and obtain professional skills under conditions of extreme poverty (see 57–59 above)—prostituted persons should be regarded as responsible for their situation as soon as they pass the age of majority. Put otherwise, if not actually disagreeing with the women’s groups presented evidence, the Committee blames the victim for their own victimization.

As recalled previously, the legal distinction between children and adults often appear too rigid. A majority of prostituted adult persons, from which those who are used in pornography are drawn (e.g., 55–57), were sexually abused as children (pp. 59–62). When passing the legal age of adulthood, these persons are typically in an effective condition of slavery where they lack real or acceptable alternatives to prostitution (pp. 57–59). They are the same people that were mistreated as children. If they had been supported as children, there would have been more potential for them to change their lives. By contrast, the sudden change in legal treatment at age of majority will severely reinforce their oppression, as they are multiply disadvantaged—not only by child sexual abuse that make them vulnerable for further exploitation; in addition, many other disadvantages such as extreme poverty, race or ethnic discrimination, and sexism worsen their situation. They become entrapped in a vicious cycle of abuse and coercion that is well-documented (pp. 55–75 above). Unless the rights of adults in pornography are strengthened and enforced, sexually exploited children can never count on the society to provide justice or recompense in their lifetime; not even for wrongs committed during their childhood, as they invariably influence their life as a whole. An intersectional perspective would legally address the multiple disadvantages that include both adults and children. Sexually exploited children would benefit as much as those few adults who were not disadvantaged already during childhood.

Both the Swedish and American legal approach to adult persons exploited in pornography were previously criticized for similarly failing to recognize an intersectional perspective, including how to further the interest of children who eventually

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1570 See, e.g., Silbert and Pines, “Pornography & Sexual Abuse of Women,” supra chap. 2, n. 268, at 864–65 (among 200 prostituted women and girls sampled in San Francisco through informal recruitment and advertising in order to avoid “arrestable” or “service oriented” respondents, many made spontaneous unsolicited comments during open-ended questions how they had been used to make pornography before age 13).

1571 For instance, First Nations aboriginal women and girls are vastly overrepresented in Canadian prostitution relative their size of the population. See supra note 214.

become adults (see 212–214, 291–293 above). The Fraser Committee’s conclusions quoted above are similarly reinforcing the rigid divide between children and adults to the detriment of both groups’ interests. A comparison with the Fraser Committee’s American counterpart, the 1985 Attorney General’s Commission on Pornography, is striking. The latter focused much attention on “performers,” devoting a whole chapter only on their preconditions and the harm while in pornography production.\textsuperscript{1573} That Commission found that people in pornography where “exploited under conditions providing them a lack of choice and have been coerced to perform sex acts against their will,” noting that their multiple disadvantages such as “age, race, disability, or other vulnerability” apart from their gender, had “singled” them “out” for such abuse (U.S. Att’y Gen., 189).

The U.S. Commission’s emphasis on those who are harmed by pornography suggests that it saw itself as to some extent representing and promoting those groups’ interest. Therefore it is also not surprising that the U.S. Commission recommended the civil rights antipornography ordinances to challenge the harms of pornography (pp. 187–89). Their stance is consistent with hierarchy theory and a substantive equality approach to pornography and prostitution (cf. 154–159 above). As shown previously, the ordinances promoted substantive equality, recognizing the perspectives and interests of those who are most affected by the harms of pornography in consequence with the intersectional approach (pp. 301–312 above). The Fraser Committee’s view that the adult prostituted person should take criminal “responsibility” for their own situation emphasizes a stance to the contrary. The Committee did not consider the exploitative situation of people in prostitution to the degree of questioning their criminal law approach that criminalize both prostituted persons and tricks. By contrast, Sweden did this when it asymmetrically decriminalized prostituted persons and offered them support, while criminalizing tricks on the finding that tricks generally exploited the substantive inequality of prostituted persons (cf. 277–286).

**Constitutional Substantive Equality**

During the time that the Fraser Committee conducted hearings and made various investigative efforts, the American antipornography civil rights ordinances that were proposed and litigated across local and state jurisdictions in the United States became well-known over the world. Not surprisingly, the Fraser Committee’s final report referred to the “great interest” surrounding the ordinances in Canada at the time, particularly its trafficking provision that enabled any woman to sue pornographers and distributors for sex discrimination given that materials fit the definitions under the ordinances (Fraser Comm., 309).\textsuperscript{1574} They even noted that the “interest in the human rights, or hate literature, approach to pornography has in great measure arisen from the work of two American thinkers, Catharine MacKinnon and Andrea Dworkin” (Fraser Comm., 201). The work of these two was further said to have “generated considerable enthusiasm in Canada, and was referred to often by persons appearing at the public hearings (ibid.). Hence, the Committee was confronted with a similar menu of legal options as American government inquiries had confronted.

For instance, when mentioning the Minneapolis Ordinance’s assault provision that would enable plaintiffs to sue producers when having suffered harm caused by specific pornography,\textsuperscript{1575} the Fraser Committee cited Canadian women’s shelters who reported consistent evidence in support for such a legal remedy. Shelters had


\textsuperscript{1574} For an explanation of the trafficking provision, see supra pp. 309–314, sub-para. (1).

\textsuperscript{1575} For an explanation of the assault provision, see supra pp. 309–314, sub-para. (4).
testified that their clients had experienced male partners who required them to participate in or be subjected to acts that these men had seen in pornography (Fraser Comm., 308). There were also reports of violent sex crimes where the perpetrator had been found with “a supply of violent pornography” (p. 308). As this dissertation shows, more recent research corroborates such testimonies with large quantitative surveys among populations in women’s shelters and among populations of prostituted women around the world (pp. 123–129 above). Qualitative interviews with tricks as well as prostituted persons confirm the same pattern of tricks who wish to imitate pornography they have seen (pp. 124–129). American public hearings taking place at the same time as the Fraser Committee was pursuing their investigation also conform the pattern with similar testimonies being made (pp. 122–129, passim).

Wherever in Canada the Fraser Committee made a visit to conduct hearings during their investigation, they were presented with extensive samples of what contemporary pornography looked like. These were often accompanied by complaints how existing laws failed to stop such materials from circulating. The materials shown to the Committee were reportedly abundant with misogyny, racism, degradation, coercion, violence against women (Fraser Comm., 64–67). To the extent they were, those materials are similar to the aggressive, dehumanizing, and degrading materials shown to be popular in more recent scholarly content studies (cf. 44–50 above). Moreover, detailed descriptions of the social effects of pornography consumption (i.e., consumption harms) were provided the Committee in “many briefs” (Fraser Comm., 37). Accordingly, “most” briefs expressed concern “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 . . . .” (p. 67). According to the Committee, several submissions included both references to “academic research studies, many of which were from the United States,” as well as experiential accounts that the Committee choose to refer to as “local anecdotal evidence” (p. 64). Foreign studies and local anecdotal evidence nonetheless, many studies available at that time already strongly suggested that pornography produces sexual aggression, attitudes supporting violence against women, and cause sexual exploitation of people in prostitution, and this evidence has continued to grow since (see chapter 3 above).

In their concluding recommendations, the Committee took the position that the consumption harms of violent pornography “lower the status of women and thus contravene their right to equality” (Fraser Comm., 268). In this context the equality guarantees in section 15 of the Canadian Charter of Rights and Freedoms (the “Charter”) were specifically mentioned to support stronger governmental regulations of the dissemination of such materials (pp. 266–68). The possibilities of limiting the freedoms of expression that might otherwise protect pornography under section 2(b) was recognized by either one of two routes: by balancing equality rights in section 15 against the expressive freedoms in section 2(b); or, if such balancing would not by itself sustain, invoking section 1 of the Charter to support “reasonable limits” of expressive freedoms that were demonstrably justified (pp. 266–68). The Committee made an analogous legal argument to that made in the case that upheld the criminal code provision against hate propaganda against a freedom of

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1577 As recalled, section 1 “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.” Canadian Charter, supra note 1576, s. 1.
speech challenge (pp. 266–68). The same case, R. v. Keegstra, was previously discussed in chapter 8 (pp. 251–263 above). At the point of the Committee’s writing, Keegstra had only been decided in the court of first instance, but its outcome was the same as in the Supreme Court. The latter sustained the hate propaganda provision by also relying on section 1.\footnote{R. v. Keegstra, [1990] 3 S.C.R. 697, 114 A.R. 81, CarswellAlta 192 [Keegstra cited to S.C.R.], rev’g [1988] 87 A.R. 177, CarswellAlta 280, 5 W.W.R. 211 (C.A.) (invalidating hate propaganda provision on grounds of expressive freedoms).} By contrast, the court of first instance had held that the equality rights in section 15 and the protections in section 27 for the multicultural heritage in Canada by themselves were sufficient to sustain the hate propaganda provision against a challenge under section 2(b), thus that section 1 was superfluous.\footnote{See R. v. Keegstra, [1984] 87 A.R. 200 at 209, CarswellAlta 428 ¶ 62 (Q.B.), aff’d in outcome [1990] 3 S.C.R. 697.}

**Recommended Definition of Materials**

Despite their perception that constitutional equality imperatives supported a law against pornography, the Fraser Committee’s own proposal for a legal definition of pornography did not define it in terms of a contravention of women’s right to equality. The Fraser Committee defined pornography gender-neutrally in terms of depictions of sexual explicitness, the degree of violence depicted, or depictions of certain body-parts or sexual practices, including whether or not “lewd” acts or “lewd exhibition of the genitals” were presented (Fraser Comm., 276–79). Such definitions, although not expressly referring to “obscenity” or “indecency”, do not on their face recognize how pornography reinforces gender inequality, as obscenity law has also been criticized for (cf. 199–202 above). By contrast, the Minneapolis and Indianapolis civil rights ordinances had defined pornography as a graphic sexually explicit subordination of women (or of men and transgender persons who are similarly presented), and required further specifications under various sub definitions consistent with that approach (see 43–44, 302–306 above). Those ordinances were thus more consistent with documented research findings that pornography empirically promotes sexual aggression and attitudes supporting violence against women (see chapter 3 above), which in turn reinforce gender inequality and subordinate women to men (e.g., 4–9). Hence, they conformed to research and experiential accounts and were narrowly tailored to reach only such materials provably harmful (pp. 325–333). By contrast to the civil rights approach, the “body-parts approach” taken by the Committee is more concerned with sexual explicitness per se than with sexual subordination, as are also obscenity laws generally. It has less connection to the constitutional equality imperatives purportedly recognized by the Committee than would the civil rights ordinances.

The Fraser Committee concretely recommended that regulations on pornography should be organized according to a “three-tier system” (p. 271). The “most serious criminal sanctions” would be used for the first tier. In the second tier, “less onerous” sanctions would apply. Furthermore, no criminal sanctions would apply for the third tier apart from cases of exposure to children, unsolicited exposure, or exposure without warnings (ibid.). The first tier included child pornography or other materials that in various ways condoned or normalized “sexual abuse of children,” or materials that had been produced by physically harming participants (ibid.; cf. 276). Notably, the Committee does not discuss the evidence required to prove physical harm to participants, as opposed to “simulated” harms.\footnote{Cf. Final Report, Att’y General’s Commission [U.S.], ed. McManus, supra p. 27 n.78, at 226.} The second tier included some...
categories of adult pornography, but only those presenting “sexually violent behavior, bestiality, incest or necrophilia” (pp. 271, 276–77). As the criminal sanctions would be less severe in this category, by contrast to the first tier defenses of “artistic merit and educational or scientific purpose” would be permitted for these materials (pp. 271, 278). In comparison, the Indianapolis Ordinance did not include artistic or other such defenses, but it barred lawsuits under the “trafficking” provision against “isolated passages or isolated parts,” thus shielding from lawsuits pornography that was used in the context of literary irony, political criticism, or such. The third tier included all adult nonviolent pornography apart from the few exceptions included in tier two. However, as recalled, no criminal sanctions were recommended for these materials except time, place, and manner restrictions (Fraser Comm., 271–72, 278).

All in all, the Fraser Committee’s recommendations are significantly more limited than the definition of actionable materials under the Indianapolis ordinance. Notably, the latter was also more restricted than the Minneapolis version of the civil rights antipornography ordinances. Nonetheless, the Indianapolis ordinance included a category of “graphic sexually explicit subordination of women” that also included presentations of “women . . . as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.” Under the Indianapolis Ordinance, the requirement that presentations also included sexual violence, bestiality, or necrophilia for materials to be actionable, as the second tier was defined by the Fraser Committee, was thus not necessary. Indeed, the Ordinance was consistent with more detailed psychological experiments suggesting that it may not primarily be the level of aggression or violence in pornography materials that determines the level of antisocial outcomes (e.g., rape and rape-myths). Rather, it seems to be to what extent materials dehumanize or present women as stereotypically submissive or sexually indiscriminate (pp. 102–106 above). Moreover, pornography that does not dehumanize women is virtually nonexistent on the market (cf. 44–53). Researchers in Canada even had to make edited excerpts for an experiment because they couldn’t find materials that were premised on equality rather than subordination.

The Fraser Committee’s distinction between violent and extreme material on one hand, and common nonviolent dehumanizing materials on the other hand, was thus not based on social science. Yet the fact that people are often likely to be abused in the second tier category that included violent pornography was implied as an additional rationale for criminalizing it, apart from the “message” that such materials generally conveyed in the eyes of the Committee (Fraser Comm., 265). However, as noted by the U.S. 1985 Attorney General’s Commission on Pornography, abuse may also occur off-camera in nonviolent materials. This fact was glossed over by the Fraser Committee, as they avoided inquiring into the conditions of production (e.g., 371–372 above) and how to distinguish between simulated or actual harm. As recalled, their first tier covered materials where abuse in production was purportedly to be prohibited, but there was no specification of how such ostensible abuse was to be proven against defenses claiming it was based on simulation.

1581 Indianapolis, Ind. Code Ch. 16 § 16-3 (g)(4)(c) (1984), invalidated in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
1582 See supra notes 1366–1370 and accompanying text.
1583 Ind. Code Ch. 16 § 16-3(q) (1984).
Nevertheless, the Committee at least did not make the same problematic assumption as the United States Court of Appeals for the Seventh Circuit, who questioned the need for a special law for coercion into pornography on the assumption that “a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.” The Seventh Circuit, wrongly equating pornography with a “viewpoint,” also neglected the fact that “independent” laws already exist that on their face prohibit practices that cause “injury,” thus would seem applicable to the production of films or other social contexts. However, such laws have virtually never been used in the context of pornography or prostitution (e.g., rape laws or laws against unlawful coercion). Existing legal practice regards adult pornography as essentially voluntary and consensual (regardless if obscene or not). Moreover, the introduction of monetary remuneration in pornography production—a context where many women are destitute and poor, thus easy to exploit for sex—makes it even more difficult for women who purportedly received money to use any conventional law in retrospect, such as laws against sexual coercion (not to mention rape laws), even if the women themselves experience it as “paid rape.” This problem exists nowhere else than in the sex industry, where the singular legal concepts of law do not work for women harmed in pornography due to their multiple disadvantages. Their situation necessitates a more intersectional legal approach, which recognizes their abuse in its full social complexity as a form of severe substantive inequality exploited by others.

Certainly, the Fraser Committee’s recommendation for a law against abuse in pornography production implicitly recognizes that pornography production is a special context that needs specific recognition for law to be effective. In this more narrow sense, the Committee’s recommendation recognized the need for substantive equality by acknowledging the particular groups who are harmed in the course of making pornography. By contrast, the corresponding provision for coercion into pornography under the proposed Minneapolis civil rights ordinance enumerated a number of impermissible defenses that would protect those who would use that cause of action. Those impermissible defenses shielded plaintiffs against common prejudice such as that “only bad girls are raped,” or other attempts to avoid liability for harm because she ostensibly “consented” by accepting money or signing a contract. Without such impermissible defenses, a law against exploitative harm in pornography would be very hard to enforce. The Fraser Committee did not recommend such measures. Hence, their law would have been more vulnerable to prejudicial defenses that trivialize women who report sexual abuse, especially as the criminal standard of proof is generally “beyond a reasonable doubt.” If a civil rights ordinance had been recommended, proof on a “balance of probabilities” would suffice in Canada. However, the Committee suggested a criminal (not a civil) law.

All in all, the part of their recommendation about production harms is nevertheless an advancement compared to the judicial treatment of the civil rights ordinances in the United States, as it recognized abuse in pornography specifically (pp. 319–346 above). It is also an advancement compared to the outcome of attempts to pass simi-

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1586 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 330 (7th Cir. 1985).
1587 See supra pp. 335–340 (analyzing the Seventh Circuit’s decision to apply the viewpoint-neutrality doctrine and its neglect of the lack of alternative remedies to production harms).
1589 For an explanation of the coercion provision, see supra pp. 310–311.
1591 E.g., id., ¶ 104 (remarking that seizure of obscene materials by customs is “a civil proceeding which generally requires proof only on a balance of probabilities.”).
lar legislation in the U.S. Congress (pp. 352–355). Similarly, it is an advance to existing U.S. obscenity law, which does not recognize anyone victimized through the production of pornography (pp. 355–363). However, as shown above it is not an advance compared to the civil rights ordinances (see 301–312), especially their coercion provision (pp. 308–309). Similarly, it is not an advance when compared to the recommendations of the U.S. Attorney General’s Commission on Pornography, who indeed suggested a civil rights law that would have included a coercion provision (pp. 347–349).

Civil Rights and Criminal Law

The Fraser Committee conceded that “a lot of the interest” in the civil rights antipornography ordinances “really derive[d] from Canadians’ dissatisfaction with the administration of the criminal law relating to pornography” (Fraser Comm., 309). Nevertheless, the Committee preferred “to address directly the deficiencies in the criminal law rather than create a new form of civil action” (p. 309). Although the Committee did not include civil rights measures, they nonetheless recommended incorporating the same criminal definitions in various regulations of the activities of the customs, post, broadcasting and communications, film classification, or film review agencies (pp. 257–337). Just as with the criminal code, these regulations are applied by the government’s representatives—not by those directly victimized and affected by the harms of pornography, as under the antipornography civil rights law. Apart from referring to ordinances at various places, the Committee spent a number of consecutive pages commenting at length upon them (e.g., 305–15).

For instance, it was noted that the American federal district court at the time had invalidated the antipornography civil rights ordinance on the grounds that it violated the First Amendment (p. 311). The Committee suggested here that the ordinances would receive a more favorable judicial treatment in Canada (p. 311). An important reason for this opinion was said to be that the interest underlying the ordinances was more strongly supported under Canada’s Charter than under the U.S. Constitution. The Committee noted that the broader equality rights in section 15 as well as the specific gender equality rights in section 28 supported the Ordinance, thus creating an alternative argument “to be preferred in the Canadian context to the reasoning [of U.S. courts]” (p. 311). The Committee concluded, while referring to the Keegstra hate propaganda case that had been reviewed by the first court of instance at the time, that these two sections on equality would outweigh the expressive freedoms contained in section 2 of the Charter (p. 311).

The Committee cited only the first court of instance, as the case had not yet rendered an opinion by the Seventh Circuit Court of Appeals. However, eventually both federal courts invalidated the ordinance if, to some extent, on different technicalities and arguments. See American Booksellers Ass’n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), aff’d 771 F.2d 323 (7th Cir. 1985).

As recalled, s. 28 of the Charter holds that “[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.” Canadian Charter, supra note 1576, s. 28. For further explanation how this provision can be interpreted in support of regulating pornography, see supra notes 987–989 and accompanying text.

See supra chapter 8 (analyzing the potential for legal challenges to pornography under the Canadian Charter). In another part of the report, the Committee raises doubts regarding whether certain definitions found in the Minneapolis versions are “reasonable” limits on freedom of expression in a criminal law context. See Spec. Comm., Pornography & Prostitution in Canada, supra chap. 2, n. 188, at 56. However, those arguments are not raised in the comprehensive section on the civil law remedies. The Committee accordingly questions whether defining pornography as the graphic sexually explicit subordination of women where women are “presented as whores by nature” or women are presented as “commodities” would be a “reasonable” limit under the Charter. Ibid. These definitions were found only in the proposed Ordinance in Minneapolis, not the Indianapolis version as the Committee erroneously appears to believe. Compare ibid, with Indianapolis, Ind. Code Ch. 16 § 16-3 (q) (1984), invalidating in American
The Committee themselves did not suggest a civil rights approach despite that they found it likely to sustain a constitutional challenge in Canada. In explaining why they did not endorse it as a more efficient tool for applying their own pornography definition, the Committee likened the civil rights ordinances to conferring “a private cause of action to restrain or redress a public wrong” that “has not, until now, been a prominent feature of Canadian law” (p. 309). Further, this action “ordinarily” necessitated the Canadian “Attorney General’s permission”—an executive decision that the courts could not second-guess (Fraser Comm., 309). It was thus implied that tradition by itself militated against adopting new forms of legal frameworks. In essence, this is a conservative argument, which starkly contrasts with how the Supreme Court of Canada shortly thereafter made paradigmatic expansive reinterpretations of constitutional equality in 1989 including substantive equality, rather than equality only for “similarly situated” persons.\(^\text{1595}\) Nonetheless, the Committee’s response was to encourage the use of gender equality clauses under existing human and civil rights codes instead of recommending “that a separate pornography-related offence be added to human rights codes at this time” (p. 313). Here, the Committee seems to have believed that gender equality provisions in existing domestic human rights legislation would be applicable, in spite of the fact that not once before, nor once thereafter, have any of these laws been used against the consumption or production harms of pornography.

It is notable that under various international human rights instruments, pornography is explicitly defined as a violation of women’s human rights, and not just—as suggested by the Fraser Committee—assumed to be covered under more general categories. For instance in 1992, just a few years after the Committee’s report, the monitoring body of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) explicitly identified “pornography” as a practice that “contributes to gender-based violence” (gender-based violence already being a violation to women’s equality); states parties were obliged to “take all legal and other measures . . . including . . . civil remedies and compensatory provisions”\(^\text{1596}\) to stop it. 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

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dissemination of such material.”1597 Under the 1995 Beijing Convention, States parties also agreed that “[i]mages in the media of violence against women... including pornography, are factors contributing to the continued prevalence of such violence[.]”1598 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.”1599 Notably, Canada is known generally for respecting international law (e.g., by contrast to the United States), and section 26 of its 1982 Charter of Rights and Freedoms also explicitly takes considerations of it.1600

In none of the international human rights instruments on gender equality cited above was the position taken, suggested by the Fraser Committee (p. 313), that pornography could be explicitly omitted because it would be covered implicitly. Just as with the enumeration of other grounds for discrimination in equality laws, it is generally assumed that explicit recognition of a practice that discriminates is the best remedy to avoid future application problems. By contrast, the Committee reviewed a body of largely, if not exclusively, analogous human rights law in Canada at the time. Here, it was suggested that actions against pornography as a form of human rights violation could be taken under in this diverse set of cases, statutes, and regulations, despite that none of them on their face mentioned pornography (pp. 195–201). Opinions often differ on what should be covered as a human rights violation, likely so with regards to gender and pornography in particular. In this light, the Committee’s recommendations appear uninformed, at best. At worst, they are deliberately misleading. Securing facial recognition of specific practices of discrimination seems to be generally preferable compared to relying on ad hoc applications. The only position against this argument is that provided by postmodern theories on legal challenges to social dominance and group-based disadvantages. Those theories would appear to favor a law that avoids facial recognition of disadvantaged groups on the assumption that such recognition might reinforce social dominance by renaturalizing stereotypical categories of oppression (see 168–175 above). However, no explicit arguments in the Fraser Committee’s final report suggest that this was their theoretical position. They did not invoke it in support for their rejection of the separate pornography-related offence under human rights codes (p. 313). This rejection thus appears more to be based on an assessment that it was somehow unnecessary to include a separate pornography offence—a standpoint countered by the international instruments that have done contrary by facially recognizing that pornography is a violation of women’s human rights.1601

Concluding Analysis
The Fraser Committee took the view that their recommendations represented “a rational, fair and realistic balancing of the interests involved” (Fraser Comm., 260) in

1600 Canadian Charter, supra note 1576, s. 26 (stating that the “guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada”).
1601 See supra notes 554–556, 1596–1599 and accompanying text.
the problems posed by pornography and prostitution.\(^{1602}\) Yet their recommendations never gave rise to consistent legislative action.\(^{1603}\) It is also unclear for whom the Committee’s recommendations represented “a significant advance.” Certainly, it did advance beyond the existing method of assessing obscenity through the contemporary community standards test, thus offering a more predictive legal definition. Otherwise, the Committee’s definition’s emphasis on “sexually violent behavior, bestiality, incest, or necrophilia” (Fraser Comm., 277) is not very different from existing obscenity legislation. At least sex and violence were unequivocally included in the code. As recalled, since the mid-1950s federal Canadian law defined obscenity as “the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence.”\(^{1604}\) Moreover, no explicit recognition of subordination—a key element in the civil rights approach to pornography in the Minneapolis and Indianapolis ordinances (see 43–44, 302–306 above)—was found in the Committee’s definition.

Likewise, the continuing reliance on criminal means of enforcement—in spite of the “enthusiasm” shown by supporters of the civil rights approach during their hearings—does not “advance” from the prior conventions in Canada. In comparison to the civil rights approach, the Committee’s proposals can hardly be said to promote substantive equality or the perspectives and interests of survivors and those directly affected. Their only exception is their recommendation for a law against pornography that was made through the abuse of people. However, this recommendation lacked the safeguards against defenses that were found in the proposed American civil rights ordinances that prevented defenses on the grounds that the person “consented” or was otherwise “paid,” and similar arguments. Without such defenses, any criminal law against abuse in pornography production would be hard to prove “beyond a reasonable doubt” (especially in comparison to a “balance of probabilities” standard under civil law).

Similarly, in comparison with the substantive equality prostitution law adopted in Sweden in 1998 that asymmetrically criminalized tricks while supporting and de-criminalizing prostituted persons, the Committee’s opinion that adults in prostitution must take responsibility for their actions under existing criminal law lies far from what is suggested by hierarchy theory. From the latter’s perspective, prostitution is an unequal practice where people are effectively coerced into being bought for sex by circumstances that includes poverty and lack of other realistic options for survival (cf. 294–298 above). Consequently, it is unclear to whom the Committee’s approach was “fair,” except to those in favor of status quo. Rather, it seems as if the committee to a large extent ignored the interest of those victimized and subordinated by pornography. Although legislator necessarily have to engage democratically with dominant interests it becomes a serious problem of inequality for democracies when, as Ian Shapiro reminds us, the oppressors are given an equal place during deliberation with the oppressed that practically grants the former a veto-power over decision making.\(^{1605}\) In this sense the Committee’s approach seems more similar to the conservative “consensus” requested by the critics of the Minneapolis Ordinance in the

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1602 For an alternative critique of this notion of rational compromise, see Lacombe, Blue Politics, supra chap. 4, n. 557, at 81–92.

1603 See, e.g., Mahoney, “Defining Pornography: Bill C-54,” at 1559, 575–99, for a critical review of the last major Parliamentary effort at this time to change the laws regulating pornography.


1605 Cf. Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 44.
United States—especially when being compared to the civil rights approach, which is more consistent with hierarchy theory (cf. 301–312 above).

Second Response: Parliament Attempts Reform

Bill C-114 (1986): A First Failed Attempt

The Fraser Committee’s Report did not lead to immediate legislation after its submission in February 1985. However, the Progressive Conservative government (who replaced the liberal government that initially appointed the Fraser Committee) introduced bill C-114 in 1986 in an attempt to reform pornography law. Bill C-114 did not stick to the recommendations made by the Committee to only criminalize violent materials, but included an extensive “body-parts approach” that defined pornography more broadly. Hence, the bill had four sub-definitions of pornography where the most expansive one included “any visual matter showing vaginal, anal or oral intercourse, ejaculation, sexually violent behaviour, bestiality, incest, necrophilia, masturbation or other sexual activity.” Bill C-114 also contained specific provisions against “degrading” and “violent” pornography, as well as “pornography that shows physical harm.” Even though it was significantly more expansive than the Fraser Committee’s definition, Bill C-114 did not either consider pornography as social practice of subordination (as the Minneapolis Ordinance did) or the sex/gender inequality that precedes as well as is precipitated by it.

For instance, the concept of “degradation” is not an equivalent to “subordination”; neither inequality nor subordination is degrading per se in the common sense of the word. Indeed, Bill C-114 defined “degrading pornography” as “any pornography that shows defecation, urination, ejaculation or expectoration by one person onto another, lactation, menstruation, penetration of a bodily orifice with an object” or treating someone as “an animal or object,” and similar practices. With the possible exception of treating someone as an object, outside of a context of subordination it is difficult to see why practices such as “ejaculation” or “menstruation” would promote gender inequality or even be degrading per se. As recalled, the Minneapolis Ordinance found pornography to be “a systematic practice of exploitation and subordination based on sex which differentially harms women,” thus defining it as “the sexually explicit subordination of women, graphically depicted,” with additional required sub-definitions. Research suggests that it is such subordinating gender-based presentations that produce harmful effects (pp. 102–106 above)—not just any “other sexual activity,” degrading or not, as the more expansive definitions in bill C114 implied.

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1607 Bill C-114, An Act to amend the Criminal Code and the Customs Tariff, 1st Sess., 33d Parl., 1986 (1st reading, June 10); Lacombe, Blue Politics, 81, 99 (mentioning the two different governments).
1608 Bill C-114, supra note 1607, s. 138 [all citations are to section numbers as they would appear in an amended Criminal Code, had the Bill been passed in the proposed form].
1609 Id., s. 138.
1610 See supra notes 147–150 and accompanying text.
1611 Bill C-114, supra note 1607, s. 138.
1612 Minneapolis Proposed Ordinance, supra note 1594, §§ 139.10(a)(1), 139.20(gg)(1), 1st Reading, Nov. 23, 1983.
Certainly, research suggest that there is very little, if any, popular demand for adult heterosexual pornography that does not subordinate women (pp. 44–50 above)—a finding not surprising when considering that consumers tend to be desensitized quickly, and look for more violent, dehumanizing, or otherwise extreme materials (pp. 50–51). However, an expansive definition as that provided in bill C-114 is so broad it will be vulnerable for criticism—scientifically, conceptually, legally, and politically. Although the bill provided educational, scientific, or artistic defenses, initially it targets a broad swath of materials that would not be considered at all as pornography under the civil rights ordinances; for example, educational materials about safe sex that do not subordinate anyone, such as “any visual matter showing...ejaculation...masturbation or other sexual activity.”

By contrast, the civil rights ordinances were designed to survive strict scrutiny under the First Amendment in support of a compelling governmental interest to prevent harm; therefore, they were more narrowly tailored to reach only provably harmful materials that do subordinate (see 325–333 above). For such reasons, they did also not offer educational, scientific, or artistic defenses for materials that would demonstrably cause harm, though the Indianapolis Ordinance included limitations against lawsuits under the trafficking provision that targeted isolated passages or parts.

If the primary objective is to prevent materials that cause harm, the artistic defense is inconsistent. An artistically well-made graphic sexually explicit presentation that subordinates women might simply cause stronger effects in consumers that promote sexual aggression and attitudes supporting violence against women than would materials of lesser quality.

Indeed, recent studies with tricks in a number of locations in the world show that they seek to imitate pornography, even if it necessitates severe abuse of prostituted women (pp. 126–129 above). Materials of lesser artistic qualities would likely be less appealing for these tricks to imitate than materials with better qualities. Hence, although bill C-114 could potentially “chill” those who deal with a broader set of non-harmful sexually explicit materials than could the civil rights ordinance, the artistic defense permits dealings with provably harmful materials that the civil rights ordinances would not have protected against lawsuits. The result of these two tendencies in the bill was that it provided a definition that became broad and sweeping simultaneously as it provided loopholes for harmful materials.

Furthermore, bill C-114 provided only criminal measures, with no civil recompense or opportunity for survivors or those affected to use the law. As the Fraser Committee’s recommendations in these regards, bill C-114 can hardly be said to promote substantive equality or the perspectives and interests of survivors and those directly affected by the harms. Bill C-114 put the initiative to use and apply the law among prosecutors and law enforcement—not primarily with those who are subjected to sexual aggression and attitudes supporting violence against women that pornography provably promotes (chapter 3). Criminal law gives these former groups power over the legal process “by virtue of the decision-making procedure” (using the words of Shapiro).

By contrast, a legal approach more consistent with hierarchy theory would favor empowering legal means for survivors and others who are directly affected to influence legal applications, as they are likely to have stronger

1613 Bill C-114, supra note 1607, s. 138.
1614 Indianapolis, Ind. Code Ch. 16 § 16-3 (g)(4)(c) (1984), invalidated in American Booksellers Ass’n v. Hudnut. 771 F.2d 323 (7th Cir. 1985).
1615 Cf. Mahoney, “Defining Pornography: Bill C-54,” 596 (discussing artistic defenses in the following bill proposed the year after bill C-114).
1616 Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 44.
incentives to use the law than other groups. Such a theory favors the civil rights approach (cf. 301–312 above) and disfavors the criminal law approach proposed in bill C-114.

Considering the analysis above, it is hardly unsurprising that bill C-114 was criticized from several quarter in Canada, even though most of it came from those interested primarily in protecting civil liberties. The “women’s groups and feminist organizations” were not ambiguous in their stance toward the bill; while some thought the bill was “totally unacceptable” because it did not differentiate between materials that subordinated and materials that did not, many others believed it was important not to lose a strategic opportunity to legislate against pornography (Lacombe, 115). The latter group wanted to improve the bill with a number of suggestions that would replace its focus on “sexual explicitness” with a focus on “dominance and power imbalance” instead (p. 115). Based on interviews and other sources (press and public statements), Lacombe claims that the Progressive Conservative government during their drafting of the bill had subsequently “lost track of feminists’ concerns about the harm pornography causes to women’s rights to equality” (p. 112). According to her, the legislative work was dominated by negotiations within the conservative caucus (p. 111). Considering the plain text of the bill as analyzed above, there is clearly support for her account. As shown above, subordination was not the focus of the bill. Rather, its intent seems to have been to prevent exposure to sexual explicitness that lacked artistic, scientific, or educational merits, for whatever reasons. Additionally, in particular the artistic defense could be used to exonerate misogynist and subordinating materials that promote sexual aggression and attitudes supporting violence against women, while other harmless materials could still be sanctioned under the bill. Bill C-114, as written, was abandoned and never debated in Parliament after the minister of justice, John Crosbie, was sent to the department of transportation, replaced by Ramon Hnatyshyn (p. 116). According to Dany Lacombe, in his newly acquired position Hnatyshyn seriously considered the public discontent over Bill C-114 and intended to make an attempt to improve it (p. 116).

**Bill C-54 (1987): A Second Failed Attempt**

**Broad Definitions and Exceptions, Little Equality**

The next response by the Department of Justice came with bill C-54. The bill started out by defining such sexually explicit presentation that would not be subject to criminal sanctions under the label “erotica” (Bill C-54 s. 138). This material would only be subject to time, place, and manner regulations, including of exposure to minors, with summary penalties for violations (ss. 159.4, 159.5, 159.7). Erotica was defined as “any visual matter a dominant characteristic of which is the depiction, in a sexual context or for the purpose of the sexual stimulation of the viewer, of a human sexual organ, a female breast or the human anal region” (s. 138). The next item in the bill’s definitional section that included criminal sanctions in addition to time, place, and manner regulations was “pornography.” This category was to include “any visual matter that shows” (s. 138 (a); emphasis added): (i) child pornography, that is, “sexual conduct . . . in the presence of a [minor]” or “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 minor]”; (ii) *infliction of bodily harm*, or attempting to cause harm “in a sexual context”; (iii) *sexually violent conduct*, “including sexual assault and any conduct in which physical pain is inflicted or apparently inflicted on a person”; (iv) *degrading activity*, that is, “a degrading act in a sexual context, including [treating someone] as an animal or object [or] bondage, penetrat[ion] with an object,” as well as defecation, urination, or ejaculation “onto another person, whether or not the other person appears to be consenting . . . or lactation or menstruation in a sexual context”; (v) “bestiality, incest or necrophilia”; (vi) “masturbation or ejaculation not referred to in subparagraph (iv), or vaginal anal or oral intercourse” (s. 138 (a)(i)–(iv)). Additionally, *non-visual* materials were proscribed when “any matter or commercial communication that incites, promotes, encourages or advocates any conduct referred to in any of subparagraphs [s. 138 (a)(i) to (v)]” (s. 138 (b)).

On its face, bill C-54 makes it apparent that the government attempted to appease different public opinions. For instance, the last distinction between non-visual and visual materials recognized that written materials had a greater scope of protection since the category (v) would be protected under it (s. 138 (b)). This provision accepts an assumption that visual materials are more powerful in their harmful effects, and concedes greater leeway for producers and disseminators of written materials. Yet this assumption finds no support in empirical evidence where, for instance, audiotaped rape presentations have been used in experimental studies for quite some time with similar harmful exposure effects as those caused by visual pornography. It is, however symbolic, a concession to a more conservative notion that sexual matters, to the extent they are more publicly exposed in visual forms (e.g., pictures or video) than non-visual forms (e.g., text or audio), are private and not for exposure per se, thus “obscene” and “off-stage” in public. Similarly, the first distinction between *erotica* and *pornography* may also appear to have been attempt in part to make a concession to those women’s groups who argued that legislation on these matters should “allow for an appreciation of healthy adult sexuality.” By the same reasoning, the government would appease some liberal groups who were against restricting sexually explicit materials per se. However, as will be shown below, it is an ill-informed attempt that, in conjunction with other deficiencies, made the bill potentially more misguided than the previous abandoned bill C-114.

Canadian journalist Susan Cole and others criticized the bill’s definition of “erotica” for simply defining it as “the depiction of human genitalia,” and, as such, hinging on “male experiences with so-called girlie magazines” that simply constitute “a

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1619 Cf. R. v. Doug Rankine Co. (1983), 9 C.C.C. (3d) 53 at 66, 36 C.R. (3d) 154 (Ont. Cty. Ct.) (“A description in a book of an erotic scene, no matter how luridly written, still remains only a description; the same scene presented in the form of a vivid photograph instantly rivets the attention, whether its effect is to shock, stimulate, or amuse. The familiar saying that one picture is worth a thousand words applies with special force in the field of obscenity.”)


milder form of pornography."\textsuperscript{1622} Indeed, the bill C-54’s definition of “erotica” was a body-parts approach to defining explicit presentations that do not include actual sexual conduct (but may have included simulated conduct). The provision made no allusions to equality, mutual pleasure, or positive choice of participants (\textit{see Bill C-54} s. 138). As Mahoney states, presentations “of a woman’s body which humiliate, ridicule or present the female in a demeaning, unequal context could not only be saved by the Bill C-54 definition, they would acquire the positive label of ‘erotica.’”\textsuperscript{1623} As the other proscribed presentations under the bill simply enumerated a number of practices without reference to \textit{subordination}—by contrast to the antipornography civil rights ordinances in the United States that were narrowly tailored to reach provably harmful materials (pp. 325–333 above)—Mahoney’s assessment are suggestive of the actual limitations of bill C-54.

Similarly as Mahoney, Cole criticized the bill for failing to consider “women’s experience . . . that erotica and pornography can stand in contradistinction, and are not simply matter of degree” (Cole, 78). Here, she cites a piece by Gloria Steinem (p. 78 n.31). Certainly, bill C-54 could have defined erotica as Steinem did, that is, as “a mutually plasurable, sexual expression” guided “by positive choice.”\textsuperscript{1624} By such a definition, it would be clear that materials actionable under the Indianapolis Ordinance that “subordinate” would not be protected as “erotica” even when including nonviolent acts where women were “presented as sexual objects for domination . . . possession, or use, or through postures or positions of servility or submission or display.”\textsuperscript{1625} Hence, bill C-54 suffered from the same problem as bill C-114; none recognized that subordination is the key element that makes pornography harmful in its consumption effects, whether further dehumanizing, degrading, or violent.\textsuperscript{1626} Indeed, even non-explicit advertising that presented “women as sexual beings” whose primary function in the ads were “to be erotically enticing” have been shown to produce significantly more attitudes supporting violence against women than ads presenting progressive “non-traditional role-reversed portrayals of women performing a variety of component social functions.”\textsuperscript{1627} A law against the harms of pornography that cannot recognize subordination as the key element of harm is misguided.

As shown above, bill C-54’s distinction between “erotica” and “pornography” does not promote substantive equality, thus is not consistent with a democratic practice that promotes the perspectives and interests of those directly affected by the harms of pornography (\textit{cf.} 153–168 above). The distinction protects nonviolent but subordinating, objectifying, dehumanizing materials, or materials presenting women as stereotypically promiscuous that have been proven to be harmful (pp. 101–109). The other definitions of pornography in bill C-54 reached materials that could be harmful; that is, those that are explicitly violent or physically harmful or otherwise extreme (e.g., penetration with objects, defecation, urination, or ejaculation, lactation, or menstruation in “sexual context,” s. 138 (a)(iv)), or those that simply present

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\textsuperscript{1623} Mahoney, “Defining Pornography: Bill C-54,” at 584.

\textsuperscript{1624} Steinem, “Erotica and Pornography,” \textit{supra} chap. 1, n. 140, at 37.

\textsuperscript{1625} Indianapolis, Ind. Code Ch. 16 § 16-3(q) (6) (1984), \textit{invalidated} in American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

\textsuperscript{1626} \textit{See supra} pp. 101–109 (analyzing experimental studies on the effects from different materials, ranging from plain nudity in still images, subordination and sexual “objectification” in advertising, to dehumanizing and violent materials)

explicit sexual acts instead of simulated conduct, that is, “masturbation or ejaculation... or vaginal anal or oral intercourse” (s. 138 (a)(vi)). But this definition also reached far more materials than are probably harmful, including educational or scientific materials that presents ejaculation, safe-sex, or masturbation, which makes medical, scientific, educational, and artistic safeguards necessary. Just as bill C-114 contained such defenses—contrary to the civil rights ordinances, which were narrowly tailored to reach only harmful materials (cf. 325–333 above)—bill C-54 also contained them. Hence, without a clear position against subordination a judicial interpretation of artistic merit could, on a balance of probabilities, have made pornography that also included a range of violent or other degrading presentations apart from actual sexual conduct protected from liability (see Bill C-54 s.159.1(1)). The only exceptions for artistic defenses were child pornography, or materials presenting conduct that caused demonstrable physical harm (id.).

For the same reasons mentioned above with regards to bill C-114, the artistic defenses in bill C-54 are inconsistent if the legislative objective was to recognize and remedy substantive inequality and prevent sexual aggression and attitudes supporting violence against women.¹⁶²⁸ For these reasons, bill C-54 was poorly drafted and virtually no better than the previous attempt in bill C-114. Mahoney remarked with regards to bill C-54’s criminalization of presentations of “masturbation or ejaculation... or vaginal, anal or oral intercourse” that there is no “reference to a context” of subordination to “evaluate these sexual acts.”¹⁶²⁹ She concludes that it neglects both the position that some sexually explicit presentations may be beneficial, as well as the liberal position that harm must be “demonstrated” to justify restrictions (pp. 588–89). Her conclusion is that what such a law does is rather “reflect” conservative views that “any explicit sexual portrayal which sexually stimulates the viewer should be prohibited” (p. 589). Considering the high stakes involved for women harmed by pornography to legislate against materials that demonstrably promote gender-based violence, the Canadian government’s decision to propose the sweeping and vague bill C-54 was irresponsible. It could not end anywhere but in failure (see 390–391 below).

In addition, it is notable that in response to bill C-54, women’s organizations demanded a better conceptualization of its definitions as well as urging the government not to limit itself to criminal measures, but to explore civil remedies as well.¹⁶³⁰ Indeed, just as the previous bill C-114 and the Fraser Committee’s recommendations before it only included criminal measures, bill C-54 can neither be said to promote substantive equality nor the perspectives and interests of survivors and those directly affected by the harms. It restricted the initiative to use and apply law against pornography to prosecutors and law enforcement—not those who are victimized by sexual aggression and attitudes supporting violence against women that pornography have been shown to promote (see chapter 3 above). By contrast, the outlook of hierarchy theory favors a civil rights approach (cf. 301–312 above) over a criminal law approach as that proposed by the Canadian government. Bill C-54 thus provided nothing directly for survivors and others who are directly affected by pornography’s harms that could have empowered them to use the law to further their interests. Similarly, it did not change the prostitution laws in a way that would have recognized prostituted persons in the production of pornography as being exploited. Such

¹⁶²⁸ See also Mahoney, “Defining Pornography: Bill C-54,” at 596.
¹⁶³⁰ Johnson, Canadian State, 52–53 (citing/quoting Nat’l Action Comm. Status of Women (NAC), Brief to the House of Commons Justice Comm. on Bill-C54, prepared by Kate Andrew and Debra J. Lewis (Toronto: NAC, Feb. 1988)).
recognition would have been consistent with the Swedish substantive equality prostitution law that asymmetrically criminalizes only exploiters and tricks, while supporting prostituted persons to escape the sex trade (pp. 277–286 above).

**Public and Political Response to Bill C-54**

At its presentation, 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.’” As suggested above, this “broad consensus” nevertheless did not include the perspectives and interests of those most affected by pornography’s harms. Moreover, its general recognition of substantive equality, for instance in definitions of actionable materials, was limited. Furthermore, considering bill C-54 sweeping broad definitions of pornography that, without an accurate analysis of the many sometimes contradictory exceptions it also provided, suggested that the public response would be far from what the government could have expected when announcing the law as relying on a “broad consensus.”

Lacombe describe how the Canadian Civil Liberties Association (CCLA) “largely orchestrated” a protest against the bill among librarians by soliciting a legal opinion from a well-known criminal lawyer, Edward L. Greenspan “concerning the potential vulnerability of library personnel to Bill C-54.” Greenspan had represented defendants in obscenity trials. Just as the American Media Coalition’s strategy was successful when it paid Washington D.C.’s largest PR-firm for “a ‘strategy designed to further discredit’” the Attorney General’s Commission on Pornography’s final report (pp. 349–351 above), the effort to make Canadian librarians join the cause against legal reform of pornography laws was also successful. In his letter, Greenspan suggested that the supposed consequences of the proposed legislation would make members of library boards and staff liable for distributing pornography under the new law, with potential penalties ranging up to 10 years in jail. Having swallowed the bait, the Chair of Toronto Public Library Board, Sheryl Taylor-Munro, decided to close 28 of 32 public libraries in Toronto on Dec. 10, 1987. In explaining the move, she was quoted saying that “[t]his 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.”

Mr. Greenspan’s letter appears in hindsight as an exaggeration. As shown above, there were exceptions for artistic merit and educational, scientific, or medical purposes, and the definition of “erotica” contained additional exceptions. Nonetheless, granted his position one may still ask why artistic and educational matters should be more important than discrimination, harm, and sexual violence against women per se?

In responding to the librarian’s subsequent protests, minister of justice Hnatyshyn (as he then was) tried to assure them that it was “‘hard-core pornography,’” not the

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1632 Lacombe, *Blue Politics*, 124.
1635 Lacombe, *Blue Politics*, 126 (quoting Edward L. Greenspan, “Correspondence to the Canadian Civil Liberties Ass’n Re the Potential Vulnerability of Library personnel to Bill C-54,” (1987), at 4).
librarians, that was the target of bill C-54. However, as other conservative MP’s had defended the bill in ways that implied that some “reorganization” of libraries might be necessary in order to keep some works away from young populations, the librarians were given fuel for their distrust and kept protesting. According to Lacombe’s account, many people within the Department of Justice had felt that the librarians’ “revolt . . . singlehandedly killed the legislation.” On the other hand, her analysis of parliamentary debates at the time suggested that the librarian’s revolt had not been as important as these government staffs perceived it (Lacombe, 128). Moreover, there had also been protests by others, such as writers and artists in 1987 who exhibited art by Matisse that they covered in brown paper (pp. 118–20), casting bill C-54 as a broad attempt at censorship of culture and expressions that would prevent public discourse on legitimate subject such as AIDS. Such critique also seemed exaggerated when considering the defenses for medical, scientific, educational, and artistic purposes and the additional permissible expressions of “erotica” in the bill’s definition (see above).

It should be noted that the Progressive Conservative government had a majority in the House and could easily have pushed the bill through, but did not (Lacombe, 128–29). As the events unfolded, more internal critique came from their own conservative caucus, as well as from the women’s antipornography movement who had been partially supporting. For instance, both conservatives and feminists noted to various degrees that the bill was inconsistent and on its face contained both broad exceptions as well as unnecessarily broad definitions (cf. Lacombe, 120–23, 129–33). This critique suggests that the librarians were not solely responsible for terminating the bill.

Moreover, religious and conservative organizations that initially supported the bill were later said to withdraw their support. As it turned out, another lawyer that was hired by the Inter Church Committee on Pornography (ICCP) had found “numerous loopholes that could drastically liberalize an apparently conservative law” (Lacombe, 130). This lawyer’s opinion stand in apparent contradiction to the one offered by Mr. Greenspan that arguably exaggerated the criminal liability imposed under the bill. Although Greenspan’s opinion made librarians protest the bill as a form of overzealous censorship (see above), liberalization is rather suggested by the bill’s text itself. As shown above, the inconsistent definition of “erotica” as well as the artistic defense in particular created “loopholes” that would protect provably harmful materials.

Concluding Analysis

By contrast to the civil rights challenges to pornography in the United States at the time (see chapter 10 above), the Canadian political challenges were seemingly hijacked by moderate liberals in the Fraser Committee and conservatives in Parliament. In this context some contemporary observers have concluded that Canadian “feminist strategies for reform of obscenity law have shown a lack of strategy.”

For instance, one stated that “most of the submission to the Fraser Committee provided an emotional purge for all women who are sickened by the extent of violent and degrading pornography, but few attempted to address the specifics of law re-

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1637 Lacombe, Blue Politics, 127.
1638 Ibid., 128 (quoting MP Richard Grisé, parliamentary secretary to the deputy prime minister and president of the Privy Council).
1639 Lacombe, Blue Politics, 128. Further citations in text.
1641 Johnson, Canadian State, 53.
Surely, there are exceptions such as legal scholar Kathleen E. Mahoney, who wrote important academic pieces on legal reform during the time of the Fraser Committee and when Parliament considered new legislation. Nonetheless, the political mobilization and legal strategy of Canadian activists appear comparatively undeveloped relative to the movements in Minneapolis and Indianapolis in particular. Key actors in the Canadian women’s movement might have thought that their southern neighbors’ example and their own efforts would be sufficient to push their own representatives in government to make sufficient and adequate reforms. Nonetheless, the results showed otherwise. The fact that bill C-54 exhibited virtually no substantial improvements, neither in comparison with the Fraser Committee’s recommendations, nor with the previous bill C-114, proves the point.

Certainly then, the comparatively more well-articulated presence in the United States of the civil rights antipornography activists precipitated the adoption of civil rights legislation in various local legislatures, even though these laws eventually were precluded by judicial resistance or executive vetoes (chapter 10 above). In the sense of this practical outcome, the antipornography civil rights activists were not more successful compared to their Canadian counterparts, although their influence on future political and legal attempts is unsurpassed. Indeed, the Canadian challenges were saturated with references to the American trailblazers. Similarly, the American Congressional attempts, although more focused on the interests of those actually affected by pornography’s harms than their Canadian counterparts were, nonetheless became disbanded before being put to a legislative vote. Although certain countries have more or less favorable legal architectures for supporting legal frameworks that would regulate pornography more efficiently, such relationships do not necessarily apply to actions taken at the political level. That is, executive cabinets, presidential commissions, and legislatures are not driven particularly much by constitutional principles, by contrast to the courts.

The analysis in Canada and the United States has so far implied that when the perspectives and interest of those who are most directly subordinated and harmed by pornography are not adequately recognized by legislatures and governments, their harms are unlikely to be address politically apart from accepting status quo (e.g., keeping criminal obscenity laws intact). Not surprisingly then, around the time for the second parliamentary failure to make reforms to the obscenity law in 1987 discussed above, the site for the women’s antipornography movement had already started to focus on the courthouses, where judges were becoming more influenced by those movements’ viewpoints in their progressive interpretation of existing obscenity laws. We will now turn to these judicial sites in Canada, where legal challenges to pornography’s harms took place both before and after the legislative events above.

Third Response: Judicial Reinterpretation

As recalled, Canada’s obscenity law regulates the production and dissemination of “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.” During the 1980s, as shown below, Canadian courts incorporated notions of sex inequality, including concepts such as dehumanization, degradation, and to some extent subordination, while rejecting freedom of expression challenges to such applications of obscenity law. This development can be seen particularly after the adoption of the new Charter of Rights and Freedoms in 1982. Perhaps not coincidentally, the development continued more noticeably when section 15 took effect in 1985, three years after its quarantine exception had expired. At this point, all new cases would be considered in light of the new Canadian equality guarantees at trial courts. Although the development of Canadian obscenity law for long looked more promising than U.S. obscenity law, many typical problems of criminal obscenity law nonetheless returned in the 1990s. Nonetheless, contrary to the more traditional U.S. doctrinal line of reasoning, the section below will show how the legal discourse in Canada explicitly recognizes that obscenity must be interpreted from a standpoint that recognizes the imperative of substantive equality and even the perspectives and interests of those who are directly harmed by the consumption effects of pornography. Although the result certainly has not been unequivocal, and leaves much to ask for, the recognitions of the law’s purpose as such may indirectly affect those who are exploited in the production of pornography. Those persons are typically exposed to severe forms of multiple disadvantages, including the grounds of discrimination enumerated in the Canadian Charter, which merit special constitutional consideration.

Substantive Equality in Obscenity Law (1980s)

In 1983, a first major conceptual shift since 1959 took place when Ontario County Court judge, Mr. Stephen Borins, infused the contemporary community standards test (used to adjudicate the concept of obscenity) with a rejection of “degradation, humiliation, victimization and violence in human relationships.” Judge Borin’s concluded that “films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance” (Rankine, 70). This judicial opinion is considered the first in Canada to address pornography “from the point of view of the victims of the sexual abuse, rather than of the sensibilities of the observers.” Hence, Rankine exhibits a move toward representing the perspective and interests of those more directly affected by pornography, consistent with the empirical evidence of harm as found in chapters 2–3 above. This move is also consistent with the approach suggested by hierarchy theory (cf. 153–168). The decision did, however, also retain a definition of criminal obscenity that included materials that

1646 In my own analysis of this history of cases I have been able to benefit by prior scholarly work by such authorities as Kathleen Mahoney, Christopher Kendall, Catharine MacKinnon, Susan Cole, Kirsten Johnson, and Janine Benedet.
1647 Canadian Charter, supra note 1576, s. 32(2) (barring section 15 from taking effect until 1985).
1648 For a detailed explanation of the Canadian constitutional approach to equality in a comparative perspective, see supra chapter 8, esp. pp. 243-265.
1649 See supra notes 1010–1021 and accompanying text (discussing the Canadian conceptualization of “disadvantage” as it can be applied to persons in prostitution).
were sexually explicit in nature even though they did not contain violence or cruelty (Rankine, 70).1652

Regarding the constitutional disposition in Rankine, the defendant argued that the new Canadian Charter from 1982 implied a “heightened respect for freedom of expression” that was to be considered in an assessment of whether or not the movies were obscene. Nonetheless, he did not challenge the constitutionality of the obscenity law per se (Rankine, 65). Neither did the prosecution ask the court to declare that obscenity was to be regarded as unprotected from expressive protection on the balancing rationale that the “governmental interest served by the regulation of obscenity can be reasonable and justifiable” under section 1 (id. at 66). Further, no explicit legal citation to the Charter’s equality guarantees in section 15 and 28 was made in the case, although concepts partially aligned with substantive equality such as dehumanization, degradation, humiliation, and victimization were mentioned (e.g., id. at 68, 70).

The major conceptual change in Rankine was to link contemporary community standards with a rejection of degradation and dehumanization in combination with violence. Previously, the law had almost exclusively emphasized explicit sex, often under a lax standard for intervention. Rarely had elements such as violence and cruelty been considered, despite that they were included in the code. Nonetheless, these elements had begun to appear in Supreme Court dissents and dicta during the 1970s.1653 Mahoney notes that the courts previously had difficulties to understand that sexual violence against women was not experienced as “sex” for women, even though the sexual violence was patently visible in the materials.1654 Her observations suggest that prior to Rankine, many courts were likely to view sexual violence simply as synonymous with sex. Those courts did not question the bigoted bias in “male perceptions of violence” that “can exclude the consideration of female reality.”1655 Such views could not as easily be expressed after Rankine.

One year after Rankine was decided the Manitoba Court of Queen’s Bench developed further the obscenity law in R. v. Ramsingh (1984) to include degradation and dehumanization even where violence was not patently visible.1656 Judge Mr. Patrick Ferg held that “where violence is portrayed with sex, or where there are people, particularly women, subjected to anything which degrades or dehumanizes them, the community standard is exceeded, even when the viewing may occur in one’s private home” (Ramsingh, 116 (¶ 22)). Judge Ferg’s opinion criticized pornography for sexual objectification, dehumanization, and for spreading rape myths that women “secretly” desire pain and to be forced to sex.

The films . . . portray women in a most degrading way . . . as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage . . . pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window washer, supposedly to transport them into complete sexual ecstasy . . . or that they secretly desire to be forcefully taken by a male. (id. at 116 (¶21))

1652 Rankine, 9 C.C.C. (3d) at 70 (“As for the other films which I am satisfied are obscene and which do not contain scenes of sex and violence and cruelty, it is the degree of explicitness of the sexual acts which leads me to the conclusion that they exceed community standards.”)
1654 Id. at 60–61.
1655 Id. at 61.
By contrast to Rankine, the defendant in Ramsingh had not only appealed the application of the law, but challenged it wholesale as unconstitutional under the Canadian Charter’s freedom of expression guarantees in section 2 (b) (e.g., id. at 112, 118 (¶¶ 6, 29)). The challenge was resolved in favor of the government by relying solely on section 1, obscenity law being held a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society” (id. at 121 (¶43)). Lower courts in British Columbia had made similar decisions at the time, though they were technically not binding on the Manitoba courts and had been granted an appeal at the time (id. at 118 (¶¶ 31–33)). Although the arguments in favor of sustaining the obscenity law were not explicitly referring to any of the Canadian Charter’s sex equality guarantees in section 15 and 28, the idea that pornography asymmetrically harms women as a group thus denies them substantive equality was hinted at. For instance, when mentioning that regulation of “pornography qua obscenity” that would restrict freedom of expression was “demonstrably justifiable,” the Manitoba judge added that “women of this country, quite legitimately, have a right to demand that some limitation be imposed by government on freedom of pornographic expression” (Ramsingh, 119 (¶35)). One reason why constitutional equality was not explicitly mentioned may have been that the primary equality guarantee of section 15 was not in force yet. But it could also be that the prosecution had not raised equality in their briefs. There were no interveners listed in the opinion, which makes sense when considering that the case was only reviewed in a lower court, thus not being of particular national interest at the time. However, the absence of constitutional equality may also be more fundamentally related to the fact that it was a criminal and not a civil rights law. That is, there were no actual plaintiffs who were harmed by pornography represented in the court’s deliberations.

The lack of representation of the perspective and interest of those who are harmed by pornography in Ramsingh may be symptomatic for obscenity law in general, especially when considering its potential to promote substantive equality effectively. For instance, although the pornography movie Deep Throat was one of several films that were prosecuted in the case, and all movies were found “without hesitation” to have exploited sex, that movie was not among those that were judged obscene (Ramsingh, 115 (¶ 19)). The performer in Deep Throat, Linda Boreman, has testified in numerous public hearings (even successfully performing a lie detector test) that she was tricked by a violent pimp, threatened, battered, and raped, sometimes on a daily basis. She was thus literally coerced into performing in Deep Throat. Yet Ramsingh does not consider such production harms. The holding on Deep Throat rather invokes artistic defenses. The judge thus concluded that all movies had “generally good” quality in terms of “colour” and “camera work” (id. at 115 (¶ 19)), but not all had redeeming artistic qualities. Deep Throat was here “described as a satirical, very humorous contemporary statement upon the sexuality of the 60’s and 70’s in which well-known [sic] actors and actresses played their roles well. . . . One could not describe [the] film as the least bit offensive” (id. at 116 (¶ 20)).

Certainly, the judgment on Deep Throat did not rely primarily on an artistic defense in the acquittal. The assessment is perhaps predominantly made from the point

1657 Canadian Charter, supra note 1576, s. 32(2) (barring s. 15 from taking effect until 1985).
of view that *Deep Throat* was not dehumanizing, thus “undue” and obscene. Nonetheless, the artistic arguments were raised to distinguish the movie from those that were so deemed obscene. Hence, Mahoney’s argument that an artistic defense is inconsistent since it would make a law against harmful pornography potentially useless is given considerable empirical support in this case.\footnote{Mahoney, “Defining Pornography: Bill C-54,” *supra* chap. 6, n. 695, at 596.} Surely, off-camera coercion and production harms have never been the concerns of the obscenity law. However, even when considering consumption harms, the case of *Ramsingh* misses the mark on *Deep Throat*. For example, clients in programs for sexual assault survivors, particularly survivors of throat-rape, have reported that their assailants were referring precisely to the movie *Deep Throat* prior to their assault.\footnote{Letter submitted to the Minneapolis City Council from Flora Co, supra chap. 1, n. 126, at 214–15.} Similarly, clients at women’s shelters and particularly prostituted women, even tricks themselves, report from a number of different locations and countries in larger quantitative surveys that men force these women to imitate specific pornography they have seen (pp. 123–129 above). In this light, when Mahoney wrote that the more artistically well-made a pornography becomes, the more harmful it may be to women, seems not to have been a position considered by the *Ramsingh* court at all.

Apparently there was not sufficient knowledge in the Manitoba court of the harmful effects of pornography to accurately judge *Deep Throat*. However, it would be difficult to demand that there should have been more knowledge in that court since neither prosecutors nor judges are experts on sexual aggression. Legislatures should know better now though. The outcome of the *Ramsingh* decision shows precisely why a civil cause for action on behalf of those victimized by such pornography, as proposed under the civil rights antipornography ordinances (pp. 307–312 above), would be preferable to criminal law. Civil lawsuits under such a law would inform, educate, and sensitize the judicial system to consider gender-based violence and sexual exploitation based on more accurate knowledge. This is one of the reasons previously mentioned why hierarchy theory favors civil rights remedies. They are the most effective means to counter the harmful effects and promote substantive equality better by representing the perspectives and interests of those immediately affected (cf. 301–312).

In *R. v. Wagner* (1985),\footnote{R. v. Wagner, [1985] CarswellAlta 35 ¶ 64, 36 Alta. L.R. (2d) 301 (Q.B.) (Westlaw) (Can.), aff’d (1986) 69 A.R. 78, 43 Alta. L.R. (2d) 204 (C.A.), *leave to appeal refused* [1986] CarswellAlta 1148, 50 C.R. (3d) 175n, 26 C.C.C. (3d) 242n (S.C.C.) [Wagner cited to CarswellAlta]. Further citations in text.} which was decided in the Alberta Court of Queen’s Bench only one year after *Ramsingh* in Manitoba, the standards under obscenity law were developed further again. Judge Mr. Melvin Earl Shannon took the position that dehumanization does not need to be related to explicitness, as had been implied by some of the prior decisions. It was thus held that “it is the message that counts, not the degree of explicitness” (*Wagner*, ¶ 64). One of the experts who testified in the case for the prosecution was Canadian psychologist James V. P. Check. He has published seminal studies on the relationship between consumption, sexual aggression, and attitudes supporting violence against women that are cited to throughout this dissertation (e.g., 102–109 above). In order to make the assessment of obscenity more precise, the court decided literally to adopt Check’s three-pronged pornography definition: (a) sexually explicit materials with violence; (b) sexually explicit materials without violence, but dehumanizing or degrading; and (c) explicit erotica (*Wagner*, ¶¶ 58–60, 64). Categories (a) and (b) were deemed obscene, but not (c) (*id.*
Check’s testimony convinced the court “that social harm does result from repeated exposure to obscene films” as so defined (id. ¶ 87). Judge Shannon found most of the films reviewed in the case before him to “fall into the category of non-violent but degrading and dehumanizing, with some episodes in the sexually violent class” (id. ¶ 64). As shown previously in this dissertation, a number of psychological experiments with Check’s definition show strong conceptual validity, and are corroborated by studies with similar concepts, including Indianapolis-style materials (see 102–109 above). Hence, the Canadian legal definition to obscenity since Wagner has become significantly more consistent with scientific research on consumption harms. This law now stands out in contrast to American obscenity law, which operates in a conceptual limbo from the point of view of social science although federal prosecutors have applied it to proscribe more violent materials the last ten years (see e.g., 355–363).

Regarding the constitutional disposition, Wagner took the same approach as Ramsingh. It balanced the imperative of the obscenity legislation against freedom of expression concerns under section 1, but without explicit constitutional citation to the equality guarantees in section 15 and 28. The lack of recognition of constitutional equality may appear perplexing when considering that the decision was based on a substantive recognition of actual harm. As recalled, Wagner adopted the position that violent or dehumanizing materials should be covered by the obscenity law—materials that cause sexual aggression and attitudes supporting violence against women (pp. 102–109 above). Such materials contribute to gender-based violence, which impairs women’s substantive equality to men in society (cf. pp. 4–9). Referring to section 15 or 28 under the Canadian Charter to proscribe pornography would have been consistent with the Canadian approach to equality (cf. 241–251 above). Yet it was not an argument spelled out explicitly, only implied. This seeming inconsistency may also be related to the fact that the case was brought as a criminal prosecution, without representatives of those actually harmed by consumption or production of pornography. Such representatives might have found it more obvious to invoke the fact that their right to substantive equality is violated by pornography, by contrast to vaguely referring to that which is allegedly offensive to community standards of tolerance.

By a similar tendency as in Ramsingh, where the movie Deep Throat was deemed not obscene despite its documented production and consumption harms (see above), a number of remarks in Wagner exhibit tendencies to trivialize production harms. For instance, a film in the case (Greenhorn) reportedly presented gay male materials. Without any further evidence, Judge Shannon assumes that “[a]ll of the participants are willing, consenting adults. No one is degraded or dehumanized. It qualifies as erotica” (Wagner, ¶ 65). As in Ramsingh above, the conditions of production are not scrutinized. Indeed, the court seems even not to have imagined that they could be potentially coercive in the absence of outright violence on the set. However, off-camera abuse is very hard to discern merely on basis of the presented materials. In another telling passage judge Shannon describes materials where one female performer in a scene of bondage is said to be in pain (id. ¶ 31). Here, coercion and abuse is implied. In the following scene a man reportedly did “squirt semen in her face” (id.). Now, by contrast to the bondage scene, Judge Shannon remarks that “[s]he seems to like that” (¶ 31). Yet there is no evidence to draw an inference about what she likes and dislikes on basis of such a scene.

The remarks about coercion and consent in Wagner are unwarranted and show ignorance about the real conditions. Such judicial views support the argument for a civil rights based approach to pornography rather than the criminal law approach. Unless pornographers become more directly accountable to survivors through civil
liability for damages, and the law provides compensation and support for those who are exploited in the industry and who wish to escape it, the law will continue to harbor ignorance and prejudice expressed in judicial opinions such as Wagner and Ramsingh. The affected groups of people are not in the courts to correct them. Under current criminal pornography laws, there are no incentives to get them there for doing so even if prosecutors wanted them to. Rather, such witnesses could expose themselves to the prejudice and contempt that often attaches to persons who reveal personal sexual experiences in public.

The lack of approaches to production harms notwithstanding, the Canadian obscenity law has developed its approach to consumption harms further. The same year Wagner was decided, the Supreme Court of Canada in Towne Cinema Theatres, Ltd. v. R. (1985) reviewed whether or not a trial court had “applied the proper test” for obscenity.\footnote{Towne Cinema Theatres, Ltd. v. R. [1985] 1 S.C.R. 494 at 497, 61 A.R. 35 (Dickson, C.J., plurality opinion) [Towne Cinema cited to S.C.R.]. Further citations in text.} The trial court had found that a cinema presented an “obscene entertainment” by showing Dracula Sucks to their audience in Edmonton, Alberta (Towne Cinema, 497–501). The case was not a constitutional challenge to the obscenity law. However, it provided opportunities for the Court to further refine the law’s application. Hence, an attempt was made to clarify the relationship between community standards of tolerance and the Criminal Code’s requirement of an “undue exploitation of sex.” The Court remarked that the community standards of tolerance test had never been seen as the only measure of such undueness; still less has a breach of community standards been treated as in itself a criminal offence. There are other ways in which exploitation of sex might be “undue.” Ours is not a perfect society and it is unfortunate but true that the community may tolerate publications that cause harm to members of society and therefore to society as a whole. Even if, at certain times, there is a coincidence between what is not tolerated and what is harmful to society, there is no necessary connection between these two concepts. Thus, a legal definition of “undue” must also encompass publications harmful to members of society and, therefore, to society as a whole. (Towne Cinema, 505).

On one hand, the Court here recognizes that the contemporary community standards test is inadequate since it is relativistic and could tolerate empirically harmful materials. On the other hand, the Court’s reasoning is veiled behind a mystifying discourse. For instance, if a publication is harmful “to members of society,” it does not necessarily follows that it is “therefore” harmful to “society as a whole.” A publication might be harmful to women and their equality without being harmful to men for that reason. There is an inferential leap from “members” of society to “society as a whole” that needs further explanation. Certainly, the Court’s plurality related “undue exploitation of sex” to sexually violent and dehumanizing materials because no person “should be subject to the degradation and humiliation inherent” in such publications (Towne Cinema, 505). The concurrences confirm this view.\footnote{Cf. Towne Cinema, [1985] 1 S.C.R. at 523 (Wilson, J., concurring) (quoting and referring approvingly to the dehumanization approach taken in R. v. Doug Rankine Co. (1983), 9 C.C.C. (3d) 53 at 70 (Ont. Cty. Ct.); see also Towne Cinema, [1985] 1 S.C.R. at 518 (Beetz, Estey, J.J., concurring); id. at 518–19 (McIntyre, J., concurring).} But even if some members of society are harmed by degradation and humiliation it does not entail that the same materials are harmful to “society as a whole.” It would have appeared more consistent with the empirical evidence, as shown previously in this dissertation, if the Court had framed the problem more in substantive inequality terms. That is, pornography surely subordinates “members of society” (usually women)
relative others (usually men); but this is an asymmetrical harm that discriminates against women rather than harms the whole society indiscriminately.

Unfortunately, the Court holds on to the sanguine notion that harmful pornography harms “society as a whole,” rather than admitting that it is primarily harmful to women’s right to equality. The latter position is much more consistent with the empirical evidence (see chapters 2–3 above). The Court’s empirically vague position is also repeated when, after concluding that an imperfect society might tolerate degrading and dehumanizing materials, it nonetheless asserts that “[i]t is not likely that at a given moment in a society’s history, such publications will be tolerated” (id. at 505; citing Rankine and Wagner). The Court contradicts itself; either society tolerates dehumanization, or it does not. The Court inconsistently oscillates between different harms: against “members” of society, against “society as a whole,” or against contemporary standards of tolerance, but without making sense of their relationship to each others. These statements are likely to impact on future cases, as will be shown in the analysis of R. v. Butler (1992) and its progeny (pp. 400–437 below).

In its framing of the issues to be resolved in Towne Cinema, the Court seems also to have assumed per se that the contemporary standards test was not to be questioned in its entirety (Towne Cinema, 501). From a substantive equality perspective it would have been preferable if the Court had abandoned the community standards test. The Court itself recognizes that “[e]ven if certain sex related materials were found to be within the standard of tolerance of the community, it would still be necessary to ensure that they were not ‘undue’ in some other sense, for example in the sense that they portray persons in a degrading manner as objects of violence, cruelty, or other forms of dehumanizing treatment” (id. at 505). In light of their own critique of the shortcomings of the contemporary community standards, it is puzzling why the Court did not consider Check’s three-prong dehumanization test as the sole test of obscenity. Such a position would recognize substantive inequality more clearly, and promote the perspectives and interests of those who are directly harmed by pornography consistent with hierarchy theory (cf. 153–168 above). By retaining the contemporary community standard as one of the tests for undue exploitation of sex, the Court retains the internal conflicts between one test that recognize harm and another test that may easily ignore it. The practical result after Towne Cinema was thus that three internally competitive tests would be used to interpret “undue exploitation of sex”: (1) the community standards test; (2) the violence, degradation, and dehumanization test (Check’s three-pronged definition); and (3) the “internal necessities” test, which provided an artistic defense for serious literary or political treatments (Towne Cinema, 502–05).

Although most of the progressive cases during the first half of the 1980s did not enter into explicit constitutional balancing against any of the Canadian Charter’s sex equality guarantees in section 15 and 28, there are exceptions. Certainly, section 15 did not take effect until April 17, 1985, which effectively barred it from being invoked until that date. Yet section 28 was under no such restrictions. Perhaps not coincidentally then, and considering the developments already heading in the direction of recognizing substantive equality, section 28 was invoked explicitly in an obscenity case on appeal in 1985. The British Columbia Court of Appeal—the highest court in the province—in R. v. Red Hot Video Ltd. (1985) unanimously dismissed a constitutional challenge on March 18 that had alleged that the obscenity law was vague, uncertain, overbroad, thus not a reasonable limit of expressive freedoms sus-

1664 See Canadian Charter, supra note 1576, s. 32(2).
tainable under section 1 and 2(b) of the Charter (Red Hot Video, ¶¶ 3, 37, 41, 53). This was slightly less than two months prior to the opinion in Towne Cinema being handed down by the Supreme Court on May 9.

The B.C. Court of Appeals adopted the approach taken in Rankine, Ramsingh, and Wagner, where violent as well as nonviolent but dehumanizing and degrading materials that deal excessively with explicit sex were regarded as obscene, unless literary, artistic, political, or scientific defenses applied (Red Hot Video, ¶¶ 27–29). In one of the two opinions in the case (both concurring in the outcome), Appeals Judge Anderson rebuts the restrictive view that such pornography is “not a threat to society” other than if it “may fall into the hands of children” (id. ¶ 30). By contrast, Judge Anderson took the view that these materials “constitute a threat to society because they have a tendency to create indifference to violence insofar as women are concerned,” exalting “the concept that in some perverted way domination of women by men is accepted in our society” (id.). In this context, Judge Anderson asserted that determining whether or not the obscenity law is a reasonable limitation of expressive freedoms under section 1 should not be decided “in a vacuum but should have regard to the provisions of the Charter as a whole, including section 28, reading as follows: ‘28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons’” (id. ¶ 31; quoting s. 28). Furthermore, Judge Anderson submitted that sex equality could not be “achieved” if ignoring the consumption effects caused by pornography.

If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above [in Wagner]. As I have said, such material has a tendency to make men more tolerant of violence to women and creates a social climate encouraging men to act in a callous and discriminatory way towards women. (Red Hot Video, ¶ 32)

Nowhere did the alternative opinion in the case, written by Chief Judge Nemetz of the B.C. Court of Appeal, question the balancing of expressive freedoms in section 2(b) against sex equality rights in section 28. The result was that in 1985, a judicial opinion had been expressed that violent, dehumanizing, or degrading pornography infringe women’s rights to equality under the Canadian Charter. A more clear move toward accepting the antipornography women’s movement claim that pornography is a form of sex discrimination was largely absent until the Supreme Court of Canada, in R. v. Butler (1992), decided to hear a challenge against the obscenity law resulting from a prosecution initiated in the province of Manitoba in 1987 (see below).

Consolidation and Progression in R. v. Butler (1992)

Representation of Perspectives and Interests

Shortly after the second unsuccessful parliamentary attempt in 1988 to pass a bill against pornography (see 386–392 above), parts of the women’s antipornography movement in Canada were able to intervene in 1992 in the criminal obscenity case of R. v. Butler in the Canadian Supreme Court. An owner of a pornography store in Manitoba had challenged the obscenity law as unconstitutional under section 2(b) of the Charter after being convicted under it.1666 Apart from the prosecution, four pro-

vincial attorney generals (and one federal) intervened, along with four nongovernmental organizations that were granted intervener status, two on each side (Butler, 460). The Canadian Women’s Legal Education and Action Fund (LEAF) and the Group Against Pornography (GAP) defended the law, while the Canadian and British Columbia Civil Liberties Associations and the Manitoba Association for Rights and Liberties argued that the law impermissibly infringed freedom of expression.

In LEAF’s factum (an equivalent to amicus brief in the U.S. system), they addressed the constitutional issues in part by submitting that pornography is a practice of sex inequality that disproportionally harms women. Their position is consistent with the evidence presented in this dissertation (see chapters 2–3), and was also partially accepted by the court (more below), who eventually upheld the law against the challenge (Butler, 509–11). By contrast, the Crown reportedly never raised a defense of the obscenity law on the grounds that it promoted substantive sex equality.

This situation corroborates the hypothesis of hierarchy theory that those groups who are disadvantaged by social dominance are best suited to recognize, articulate, and represent their own perspectives and interests (pp. 153–168 above). It is also a reminder that the criminal law process, as opposed to a civil rights law, provides fewer institutional mechanisms for disadvantaged groups to be so represented. Although the Butler case might suggest otherwise, it should be noted that in no other of the previous cases discussed (pp. 393–400) had such groups intervened.

Moreover, LEAF’s intervention was also facilitated by a federal program, the “Court Challenges Program,” which was cut by the government just after the Butler decision. The program supported women, poor people, “visible minorities and other disadvantaged groups” to hire lawyers and intervene in important constitutional litigation (Sallot). As the Canadian Charter was relatively new and the equality guarantees in s. 15 had only been in force since 1985, many groups were critical of the government’s decision to cut the program as soon as in 1992 (ibid.). Shelagh Day of the Canadian National Action Committee on the Status of Women (NAC) noted that the program had provided “‘disempowered groups . . . a little bit of control over the way very important issues were being argued in the court’” (Sallot; quoting Day). Such a program is consistent with hierarchy theory (cf. 153–168 above). As argued most clearly by Iris M. Young, a policy that amplifies the representation of disadvantaged groups’ perspectives in decision-making bodies (e.g., judicial review) will confront more privileged groups with perspectives they might otherwise be unaware or ignorant of, thus counter social dominance.

Moreover, groups that are directly affected by the negative effects of pornography production and consumption, such as women or prostitution survivors (chapters 2–3 above), are likely better situated to predict the effects of policies in these areas than other groups (cf. Young, 186). They should thus be represented during public deliberations in order to promote more well-informed decisions (p. 186). Furthermore, their representation is needed to counter the groups’ who may otherwise benefit from status quo (p. 185)—that is, consumers, producers, distributors, and other third party profiteers. Following hierarchy theory, the “Court Challenges Program” may have provided particularly favorable conditions to a legal challenge to pornography. It is worth

1668 MacKinnon, Sex Equality, supra p. 6 n.23, at 1428.
1670 Young, Justice & Politics of Difference, supra chap. 4, n. 571, at 185–86. Further citations in text.
looking more closely at LEAF’s arguments, since they were the only women’s group participating in the judicial deliberations.

**Violence, Dehumanization, and Subordination in Materials**

The materials that had been seized at the defendant’s store in *Butler* were described in LEAF’s *factum* in detail. Among other things, they presented women (some appearing to be children) as being raped, with a mixture of reactions to the abuse: resistance, screaming, attempts to run away, or with opposite reactions such as enjoyment.\(^{1671}\) Other materials presented sex performed by persons in a superior relationship on subordinates, such as “employer on employee, priests on penitent, doctor on nurse, and nurse on patient” (LEAF, ¶ 4). Women were presented as having sex with other women for men’s viewing (*id.*). Women were presented as “sexually insatiable” (*id.*). They were “simultaneously or serially penetrated in every orifice by penises or objects,” or “gagging on penises down their throats” (*id.*). Materials showed women licking the anus of men, and showed women being “bound with rings through their nipples, and hung handcuffed from the ceiling” (*id.*). Materials showed men who ejaculated in women’s faces and into their mouths. The women in these situations were “referred to and described” with terms such as “pussy,” “cunt,” “split beavers,” “dyke meat,” “chocolate box,” and/or racist insults (*id.*). Moreover, a “small number” of the seized materials in *Butler* presented men who sexually aggressed against other men in analogous ways as women were treated, including similar physical abuse (e.g., gagging on penises, ejaculation, and urination on someone, or into their mouths) (*id.* ¶ 5).

In short, the type of materials sized in *Butler* was precisely such that have been documented as popularly demanded in a number of studies (*see* 44–50 above). The seized materials in *Butler* also fit the definition of “graphic sexually explicit subordination of women” under the Indianapolis antipornography civil rights ordinance well, including its relevant subcategories of violent or ostensibly nonviolent materials.\(^{1672}\) These materials have been documented to cause sexual aggression and attitudes supporting and trivializing violence against women (chapter 3, esp. 101–109 above). As recalled, the production of such materials has been shown to rely on the exploitation of multiply disadvantaged populations—persons who are usually found in other forms of prostitution as well (pp. 55–64, 73–75). Such exploitative conditions do not appear enough to produce them though. Coercion and violence have been reported during productions as a way to make the persons perform acts against their consent (*cf.* 64–67)—acts likely to be documented in the materials sized in *Butler*. The effects of such abuse is implied in a large cross-national survey with 854 respondents in nine countries, where prostituted persons who reported being used in pornography were found with significantly higher symptoms of PTSD (a common symptom of extreme abuse) than those who experienced prostitution exclusively off-camera; the finding was significant even after controlling for other relevant factors.\(^{1673}\) Two thirds of both groups combined exhibited symptoms on the same level as Vietnam veterans seeking treatment.\(^{1674}\) When comparing studies in Canada, Mexico, Switzerland, and Korea with different samples of prostituted persons with similar mental health problems, such symptoms were significant after controlling for

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\(^{1671}\) Factum of LEAF in *Butler, supra* chap. 4, n. 563, ¶ 4. Further citations in text.

\(^{1672}\) Indianapolis, Ind. Code Ch. 16 §§ 16-3(q) (1–6) (1984), *invalidated in American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985). The full definition is quoted *supra* pp. 43–44.

\(^{1673}\) *See supra* notes 245–246 and accompanying text.

\(^{1674}\) *See supra* notes 249–250 and accompanying text.
other relevant factors apart from prostitution, suggesting prostitution per se cause much harm to these persons’ mental health.\footnote{See supra notes 253–258 and accompanying text.}

The Women’s Group Intervener (LEAF)

Politicians in American jurisdictions that proposed the civil rights ordinance connected such materials as seized in Butler with women’s social subordination at large, thus defined it as sex discrimination and actionable as such (cf. 298–312 above). This argument was also made by LEAF in its defense of the obscenity law (LEAF, ¶¶ 7, 22). LEAF here followed the route suggested by their previous intervention in the case R. v. Keegstra (see 251–263 above). But they significantly modified their argument to account for the differences between pornography and hate propaganda. Their argument used a three-level approach where only the last level would consider a balancing under section 1 of the Canadian Charter as necessary. This approach was defended on the rationale that if protecting pornography under section 2(b) before engaging section 1, one runs the “risk” of “not only dignifying a vicious traffic” in sexual subordination, but also “eroding” expressive guarantees for other expression in favor of a “policy-oriented” approach under section 1 that permits more indiscriminate suppression of expression (LEAF, ¶ 55).

LEAF drew from the Supreme Court’s previous statements in Irwin Toy Ltd. v. Quebec (Att’y General) (1989) and other cases that violence and threats of violence were unprotected by section 2(b) because of their impermissible “form” of expression (id. ¶¶ 28–29).\footnote{See Irwin Toy Ltd. v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927 at 978, CarswellQue 115 ¶ 56; cf. Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580, [1986] CarswellBC 411 ¶ 27 (WL), (sub nom. R.W.D.S.U. v. Dolphin Delivery Ltd.) 2 S.C.R. 573 (“Charter protection for freedom of expression . . . of course, would not extend to protect threats of violence or acts of violence”); Rocket v. Royal College of Dental Surgeons (Ontario), [1990] CarswellOnt 1014 ¶ 24 (WL), (sub nom. Royal College of Dental Surgeons (Ontario) v. Rocket) 2 S.C.R. 232 (citing Dolphin Delivery, supra) (“a law prohibiting violence or threats of violence might be held not to be protected by s. 2(b) because of the expression’s offensive form”) (citation omitted); see also Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada), [1990] CarswellMan 206 ¶ 78 (WL), 1 S.C.R. 1123 (Lamer, J.) (stating that “threats of violence,” inter alia, “have not received protection under s. 2(b),” although noting that “the mere fact that Parliament has decided to criminalize an activity does not render it beyond the scope of s. 2(b) of the Charter.”).} In their first level, LEAF thus submitted that some of the materials sized at Butler’s store were entirely outside the bounds of expressive protection under section 2(b) because such pornography was produced by coercion and abuse, thus itself a “violent form of expression” (LEAF, ¶¶ 27–34). Moreover, the sexual aggression and attitudes supporting violence against women that pornography produces in its consumers (cf. 98–129 above) were also cast as “threats of violence,” at least according to LEAF with regards to materials that combined violence and sex (id. ¶¶ 33–34; citing research). In addition, LEAF submitted that as physical violence was inflicted on “real people” to produce some pornography sized in Butler, such materials were appropriately conceived as a less protected category than hate propaganda (id. ¶ 30). Indeed, hate propaganda does not “require violence against real people” to be produced (id. ¶ 30). Furthermore, LEAF argued that “the mass marketing” of abuse as “sexual entertainment” was “no more worthy of protection as expression than are the assaults themselves” (id. ¶ 31). Here, an analogy was made with the U.S. child pornography law (id. ¶ 32). Dissemination and possession of child pornography is unprotected and permissible to proscribe in part because the production of such materials is regarded as inherently abusive due to the power imbalance between children and adults, but also because distribution and possession contributes in creating a market for as well as encourage the further abuse of children (id. ¶ 32; citing U.S. cases). Assuming this argument, at a minimum the produc-
tion and distribution of abusive adult pornography similarly contributes to a market for further abuse, thus would lose protection under section 2(b) on LEAF’s rationale.

LEAF’s position on violence and threats of violence was supported by explicit statements made in *Irwin Toy*. That case articulated a similar position as under the American doctrines on viewpoint neutrality that permit regulation of “symbolic conduct” or “secondary effects” (cf. 214–225 above). As recalled, *Irwin Toy* held that when the *purpose* of a law is not to restrict attempts to convey “meaning” (e.g., viewpoints), the law needs no support from section 1 so long as its restrictions on expression was an incidental “effect” caused by that purpose.1677 LEAF suggested that when applying obscenity law on pornography that is made through coercion, the objective is to prevent sexual abuse; the objective is not to suppress the “viewpoint” that women should be sexually abused. Just as the Indianapolis antipornography civil rights ordinance could not, a harm-based equality law against the “undue exploitation of sex” would not be able to restrict someone from expressing the viewpoint that women should be sexually coerced (cf. 333–338 above). For instance, one does not need to exploit presentations of explicit sex to communicate statements with a meaning that endorses sexual abuse. Put otherwise, it is the violent and threatening “form” of expression that is proscribed by the law, not primarily its “meaning.”1678

Following *Irwin Toy*’s distinction between impermissible forms and permissible meanings, it would be incumbent on defendants to show how the former category promoted at least one of the underlying liberal values of section 2(b): (1) “seeking and attaining truth,” (2) “participation in social and political decision-making,” and (3) “diversity in forms of individual self-fulfillment and human flourishing” that is “cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.”1679 It can hardly be argued that coercing anyone into performing pornography is an attempt to seek and attain the “truth.” Much coercion and abuse is also hidden behind cameras (cf. 64–72 above), thus it is rather an attempt to hide the truth than attaining it. Pornography also makes no attempt to be cast as a form of participation in social and political decision making.1680 Lastly, if pornography would be regarded as “human flourishing,” LEAF submitted that it was “at women’s expense” (LEAF, ¶ 55). Indeed, its well-documented production harms and consumption effects (chapters 2–3 above) suggests that it does not contribute to a “welcoming environment” for anyone but those who intend to sexually subordinate others.

In its second level of argument, LEAF submitted that by contrast to the hate propaganda litigated in *Keegstra*, laws that regulate pornography are protected by section 28 that guarantees all rights and freedoms in the Charter “equally to male and female persons.”1681 Indeed, a similar balancing against section 28 had been made by Judge Anderson of the B.C. Court of Appeal already in 1985, although un-

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1678 However, LEAF distanced itself from “position that pornography has no meaning”; by contrast, they submitted that “all social practices, however invidious, have meaning.” Factum of LEAF in Butler, supra chap. 4, n. 563, ¶ 51.


1680 Perhaps pornography intends to make society subordinate people, thus influencing “decisions” that would do so. Yet even if regarded as a “decision” in the sense conceived under *Irwin Toy*, there is no particular meaning conveyed in pornography that could be intelligibly transferred into policy decisions. For instance, it distinguishes neither apartheid from integration (e.g., state-sanctioned brothels vs. private subordination); it only presents a graphic sexually explicit subordination of persons.

1681 *Canadian Charter*, supra note 1576, s. 28.
der section 1 rather than directly under section 2(b). By contrast to Judge Anderson’s analysis, LEAF argued that the language in section 28 already suggests that the defendant has to “demonstrate” that the impugned materials “do not limit women’s rights before the protection of section 2(b) can be claimed” (LEAF, ¶ 43). Indeed, section 28’s strong language “guarantees” equal rights, and pornography has been shown in this dissertation to seriously erode such equality rights. For instance, its consumption promotes not only sexual aggression, but also the trivialization of sexual abuse (pp. 98–129 above)—for example, significantly and substantially reducing recommended penalty for rape in simulated jury trials (pp. 104–105). That is, not only does pornography promote, but it also minimizes gender-based violence that numerous human rights instruments since at least the 1990s recognize is a violation of sex equality rights. Section 28 of the Canadian Charter can thus be read as implying a more strict scrutiny of any claims for protection of expression that undermines equality rights. Such a reading would cast a presumption against those wishing to protect pornography, rather than against those wishing to restrict the right to produce and distribute it. In this part of their factum, LEAF also noted that more recent research since the Fraser Committee issued its final report in 1985 showed that nonviolent but dehumanizing and degrading pornography produces the same effects as violent materials (LEAF, ¶ 45)—a position consistent as well with more recent research (cf. 101–109 above).

As previously discussed in chapter 8 (pp. 241–251 above), the Canadian Charter puts a premium on substantive equality; indeed, this position has been reiterated in a number of statements by the Supreme Court itself, such as in 1989 when the Court asserted that section 15 is “the broadest of all guarantees” and “applies to and supports all other rights” in the Charter. Here, LEAF noted that equality under the Canadian Charter “centres on eliminating the disadvantage of historically subordinated groups,” and that the Charter therefore “is not neutral on practices that promote inequality, but rather is a constitutional commitment to ending them” (LEAF, ¶ 40). As previously shown in this dissertation, the production and consumption harms of pornography affects multiply “disadvantaged groups” in particular who are either specifically enumerated in section 15 (e.g., women, young people, or ethnic minorities), are directly related to them, or are analogous to them, which include members of the population of prostituted persons as well as survivors of gender-based violence. These groups fit the Supreme Court of Canada’s description of those who merit protection under section 15 against discrimination, for instance since prostituted persons and persons victimized by gender-based violence have also been subject to as “stereotyp-

1683 See supra note 16. Many of the rights recognized by the instruments and cases in supra note 16 were not explicitly recognized in the international jurisprudence when Butler was decided in 1992. But it should be noted that section 26 of the Canadian Charter, which states that “guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada,” Canadian Charter, supra note 1576, s. 26, could be invoked more forcefully today in protecting a law that has as its purpose to prevent the harms of pornography. See, e.g., supra notes 554–556, 1596–1599 and accompanying text (analyzing international human rights law on pornography).
1686 See Canadian Charter, supra note 1576, s. 15(1). See also supra notes 1010–1021 and accompanying text (discussing the Canadian conceptualization of “disadvantage” as it can be applied to persons in prostitution).
ing, historical disadvantage or vulnerability to political and social prejudice.” Put otherwise, the Charter casts a presumption against anyone who intends to challenge a law that promotes substantive equality and the elimination of such historical disadvantage. Such a presumption supports sustaining a law against pornography on equality grounds, rather than retorting to an indiscriminate policy-oriented balancing under section 1 that would dignify pornography as meriting constitutional protection (cf. LEAF, ¶ 55).

In its third level of argument, LEAF conceded that if the Court would not accept that equality interest outweigh the expressive interests of pornography under section 2(b), the same arguments applied forcefully under the more relaxed standard of section 1 (LEAF, ¶ 56). As recalled, section 1 “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.” When balancing rights and freedoms under section 1, the test adopted in R. v. Oakes (1986) specified that the “objective” of a limitation had to be “of sufficient importance,” and “at a minimum,” relate to an objective of “pressing and substantial” importance. Further, the chosen legal means had to be “reasonable and demonstrably justified.” That is, (a) the adopted measures must not be “arbitrary, unfair,” or “irrational,” but had to be “rationally connected to the objective”; (b) the means should “impair ‘as little as possible’ the right or freedom in question” even when rational, and (c) a “proportionality” had to exist between the limiting measures’ effects and their objective’s importance.

The effects of pornography’s production and consumption harms had already been stressed in LEAF’s factum as providing a pressing and substantial objective for legal regulation, in that they entailed the sexual abuse, victimization, coercion, aggression, and attitudes endorsing or trivializing such behaviors against women (e.g., LEAF, ¶¶ 30–34, 44–48). It was further argued that “pornography promotes systemic discrimination against women through systematic bias and subordination. . . . even for those who do not experience abuse related to pornography directly” (id. ¶ 59). LEAF argued that prohibiting such materials would promote equality, thus be rationally connected to the objective of preventing harm and discrimination—an objective supported by sections 15 and 28, so far as the obscenity law is interpreted consistent with the Charter’s equality guarantees rather than with outmoded moral concerns about offensiveness and explicitness per se (id. ¶¶ 57–63). Hence, LEAF stressed that the “Wagner line of authority” (pp. 393–400 above) was the appropriate standard (LEAF, ¶ 60) since it had identified real harms, by contrast to other Canadian interpretations of the obscenity law (cf. id. ¶¶ 16–26). As an implicit response to the Oakes test that demands a proportionality between means and ends and minimal impairment of expressive rights, LEAF submitted that “[w]hen interpreted to promote equality” the obscenity law was “neither vague nor overbroad”; the pressing and substantial interest in “eliminating systemic social subordination provides a clear guide to interpretation and a limit that constrains any potential overreach in the statutory language” (id. ¶ 65).

1688 See also supra notes 1010–1021 and accompanying text (discussing the Canadian conceptualization of “disadvantage” as it can be applied to persons in prostitution).
1689 Canadian Charter, supra note 1576, s. 1.
1691 Oakes, 1 S.C.R. at 139, CarswellOnt 95 ¶ 74 (paraphrasing the Canadian Charter).
1692 Oakes, 1 S.C.R. at 139, CarswellOnt 95 ¶ 74 (internal quotation to Big M Drug Mart, 1 S.C.R. at 352, [1985] CarswellAlta 316 ¶ 140).
Furthermore, referring to a Supreme Court decision decided in 1986, LEAF reminded the Court that they had expressed concern that the Charter should not to be made into a vehicle for more privileged persons “to roll back legislation which has as its object the improvement of the condition of less advantaged persons” (id. ¶ 67). LEAF thus implied that if rolling back existing prohibitions on pornography by striking down the obscenity law, the conditions of the disadvantaged populations affected by the production and consumption harms would be adversely affected, contrary to how the Charter ideally should be used according to the Court itself.

The Supreme Court’s Balancing of Equality vs. Expression

The Supreme Court did not adopt LEAF’s first two levels of arguments that violent, dehumanizing, and degrading pornography was without expressive protection under section 2(b), but took the position that the obscenity law “seeks to prohibit certain types of expressive activity and thereby infringes s. 2(b) of the Charter.” Nonetheless, the Court chose to save it under section 1 (Butler, 509–11). The Court was unanimous in the case’s outcome, with a majority (7) opinion delivered by Justice John Sophinka and a concurring minority (2) opinion delivered by Justice Charles D. Gonthier (id. at 452–57). When analyzing the reasons for sustaining the obscenity law as a reasonable limitation of freedom of expression under section 1, Justice Sophinka invoked the imperative of sex equality in its defense. Building on the previous cases since Rankine (see 393–400 above), it was hence conceded that “degrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation. They run against the principles of equality and dignity of all human beings” (Butler, 479; emphasis added). Moreover, in his reasoning Justice Sophinka rejected the notion that “the appearance of consent” should determine whether or not a presentation unduly exploited sex, thus was obscene under the law (id.). “Sometimes the very appearance of consent,” he argued, would make a degrading or dehumanizing presentation “even more degrading or dehumanizing” (id.). This position would militate against making the type of unwarranted and prejudicial assumptions about consent that was seen previously in Wagner (pp. 396–398 above), where Judge Shannon assumed that materials was “eroticca,” and not dehumanizing or degrading, in part on the assumption of consent among participants.  

Justice Sophinka concluded that degrading or dehumanizing materials “fail the community standards test” not because they offend “morals” but because they are “perceived by public opinion to be harmful to society, particularly to women” (Butler, 479). Although the opinion did not go as far as saying that these conclusions were “susceptible of exact proof,” a “substantial body of opinion” was said to exist in their support, at which point it cited the U.S. 1985 Attorney General’s Commission on Pornography’s final report from 1986 and other public inquiries on the subject from Australia, New Zealand, and Toronto, Canada (id.). Justice Sophinka found it “reasonable to conclude that there is an appreciable risk of harm to society in the portrayal of such material” (id. at 479–80). The Court further reiterated the position taken in previous decisions that “the overriding objective” of the obscenity law was “not moral disapprobution but the avoidance of harm to society,” and “that criminal-

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izing the proliferation of materials which undermine another basic Charter right” was “a legitimate objective” (*id.* at 493).

Nevertheless, the Court asserted that “the harm sought to be avoided” was similar to the harms prevented by legislation against hate propaganda (*Butler*, 496), which the Court had previously sustained under section 1: “The message of obscenity which degrades and dehumanizes is analogous to that of hate propaganda” (*id.* at 501). Now quoting *Red Hot Video* from 1985, the Court agreed with B.C. Court of Appeal’s Chief Judge Nemetz’s view that “exploitation of women and children, depicted in publications and films, can, in certain circumstances, lead to ‘abject and servile victimization’” (*id.* at 497). Additionally, referring to Judge Anderson’s opinion in the same case, the Court agreed that “if true equality between male and female persons is to be achieved, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material,” such as the impugned pornography (*Butler*, 497). Prior to *Butler*, few others than Judge Anderson’s opinion had invoked equality in such an explicit fashion, although it had been raised more or less indirectly by others (*cf.* 393–400 above).

Certainly the Court, contrary to what was argued by LEAF, found that the obscenity law infringed on expressive freedoms in section 2(b) under the Charter. Yet it asserted that promoting equality was a more important imperative than protecting pornography—a balancing assessment that sustained the law under section 1.

The infringement on freedom of expression is confined to a measure designed to prohibit the distribution of sexually explicit materials accompanied by violence, and those without violence that are degrading or dehumanizing. As I have already concluded, this kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfilment, and it is primarily economically motivated.

The objective of the legislation, on the other hand, is of fundamental importance in a free and democratic society. It is aimed at avoiding harm, which Parliament has reasonably concluded will be caused directly or indirectly, to individuals, groups such as women and children, and consequently to society as a whole, by the distribution of these materials. It thus seeks to enhance respect for all members of society, and non-violence and equality in their relations with each other.

I therefore conclude that the restriction on freedom of expression does not outweigh the importance of the legislative objective. (*Butler*, 509)

The Court here recognizes that by preventing distribution of pornography, the government promotes equality by preventing such aggression and discrimination against “groups” that its distribution would otherwise cause. This position takes a substantive equality approach to obscenity law consistent with hierarchy theory; it advances the interests of disadvantaged groups affected by production and consumption harms (*cf.* 153–168 above).

From a comparative perspective, the Indianapolis definition of pornography is conceptually very close to the violence, dehumanization, and degradation standard effectively adopted in *Butler*. In fact, these two definitions are based on the same research evidence and have been corroborated repeatedly in quantitative experimental and naturalistic, as well as in more qualitative studies (*see* 41–53, 101–109, 302–306). The *Butler* decision can thus be cast as a hypothetical decision by the

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1696. No specific “right” was here mentioned more than in terms of “harm to society,” which contrasts to *Red Hot Video* where section 28 on women’s equality rights had been explicitly invoked by a lower court. *R. v. Red Hot Video Ltd.*, [1985] B.C.J. No. 2279 ¶¶ 31–32 (B.C.C.A.) (Anderson, J.) (Lexis).


Seventh Circuit Court of Appeal that would have sustained the Indianapolis ordinance on strict scrutiny (see 325–333); that is, the compelling governmental interest to prevent sex discrimination would outweigh First Amendment interests that protect pornography. Indeed, when the Supreme Court of Canada sustains the obscenity law as applied to violent and dehumanizing materials, there is no need to invoke any similar exceptions as under American intermediate scrutiny standards, for example, “viewpoint neutrality,” “symbolic speech,” or “secondary effects” doctrines (cf. 214–225). The Supreme Court of Canada simply balances equality against expressive interests, without assuming per se that freedom of expression is the norm, equality the exception, as under the more liberal regulations usually applied in Sweden or the United States (cf. chapter 7). These conditions support the hypothesis that the legal architecture—in the Canadian case, the balancing approach—is one of the more important independent conditions for successful legal challenges to pornography. Perhaps it is more important than many other alternative social variables in the context of legal challenges to pornography, for example, popular opinion, the strength of the women’s movement, the existence of effective prostitution laws, and similar factors.

However, as will be seen further below, Butler did not only adopt the violence, dehumanization, and degradation standard. More problematically, Butler retained the community standard of tolerance test, the artistic defenses, and the decision was limited to the criminal law that was litigated in the case. The Canadian law after Butler is thus very different from the American antipornography civil rights ordinances proposed in various jurisdictions. The latter were entirely civil laws that empowered those who are empirically affected, rather than empowering prosecutors and law enforcement (e.g., 306–307). They were not to be governed by a community standard of tolerance, but precise definitions proven scientifically to cause the harms that the laws intended to stop (e.g., 302–306). In other words, although Butler supports the comparative hypothesis that legal architecture “matters,” it only does so in the limited sense that such architecture enables or obstructs a legal challenge that would produce conditions conducive to more efficient remedies. Certainly, Butler refined and reinforced the equality and harm-based constitutional standard for regulating pornography. But it did not by itself create a more efficient remedy. The decision allows for the legislatures (Parliament or provincial bodies) to pass civil rights legislation against the harms of pornography. Butler itself does not deliver such a more substantive law advancing perspectives and interests of survivors and those directly harmed by pornography.1699 Canada’s pornography regulation after Butler is still stymied by problems associated with community standard of tolerance and criminal law approaches, meriting further analysis.

Assessing Obscenity under Butler

As prior analysis showed (pp. 393–400 above), the artistic defense tests prevented the Canadian obscenity law from being used against provably harmful materials, such as the movie Deep Throat (e.g., 394–396 above). In their decision in Towne Cinema in 1985, the Supreme Court also accepted the community standards despite simultaneously criticizing it for being able to tolerate harmful materials that are sexually violent, degrading, or dehumanizing.1700 As mentioned previously, it would have been preferable to replace community standards with Check’s three-pronged definition of such sexually explicit media, as it offered a relatively more unambigu-
ous standard.\textsuperscript{1701} Certainly, this is the position argued by LEAF when urging the Court to adopt the “Wagner line of authority” and “the sex equality rationale for the regulation of pornography,” which would “make more visible those harms of pornography that have been obscured in the past” (LEAF, ¶66). Yet the factum of LEAF did not either explicitly reject the use of the contemporary standards test. Rather, it suggested that the lack of recognition of harm in prior applications of obscenity law in Canada “was because the community standards test was not properly anchored by a harms-based principle that found harms to women to be determinative” (LEAF, ¶15). However, the underlying assumption of a community standard of tolerance appears to be that it is a test decided by the “community”; that is, a standard that is relative to what the community tolerates. A test that is “anchored by a harms-based principle” would more or less make community standards superfluous. Such an approach seems better served solely by the test adopted in Wagner that distinguished between violent and dehumanizing pornography and explicit erotica,\textsuperscript{1702} or even more by the narrowly tailored definition adopted under the Minneapolis and Indianapolis antipornography civil rights ordinances (cf. 302–306, 325–333 above).

When LEAF did not explicitly reject the community standard of tolerance test, a possibly strategic or even optimistic notion as that expressed by the Supreme Court in Towne Cinema in 1985 may have been present. As recalled, the Court there lamented that communities could tolerate harmful materials while simultaneously, and inconsistently, the Court believed that violent and dehumanizing materials were “not likely” to “be tolerated” at a given historical moment.\textsuperscript{1703} Not coincidentally perhaps, when LEAF quotes Towne Cinema they only include its criticism of the contemporary standards test, and not the opinion’s belief that the community would not tolerate dehumanization (LEAF, ¶ 24)—a belief provably wrong by the historical record of the pornography industry’s expansion. In Butler, the Court tries again to overcome previous ambiguities how to resolve internal competing rationales between the different tests, with Justice Sophinka recognizing that previous cases failed “to specify the relationship of the tests one to another,” and that this “raises a serious question as to the basis on which the community acts in determining whether the impugned material will be tolerated” (Butler, 483). While he then reiterates Check’s three-pronged test from Wagner,\textsuperscript{1704} he engages further in a discussion that concludes that the community standard of tolerance test should mediate the determination of harm:

Some segments of society would consider that all three categories of pornography [i.e., violence, dehumanization, and erotica] cause harm to society because they tend to undermine its moral fibre. Others would contend that none of the categories cause harm. Furthermore there is a range of opinion as to what is degrading or dehumanizing. See Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution (1985) (the Fraser Report), vol. 1, at p. 51. Because this is not a matter that is susceptible of proof in the traditional way and because we do not wish to leave it to the individual tastes of judges, we must have a norm that will serve as an arbiter in determining what amounts to an undue exploitation of sex. That arbiter is the community as a whole.

The courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure. (Butler, 484–85)

\textsuperscript{1701} See supra notes 1662–1664 and accompanying text.
\textsuperscript{1703} Towne Cinema Theatres, Ltd. v. R. [1985] 1 S.C.R. 494 at 505 (Dickson, C.J., plurality opinion).
\textsuperscript{1704} See Wagner, [1985] CarswellAlta 35 ¶¶ 58–60, 64.
The above quote may be interpreted as conceding that even if there is harm flowing from “such exposure,” if the community nonetheless tolerates that others are exposed to the materials—even tolerating “the degree of harm that may flow from such exposure”—those materials are not obscene. This apparent decision to allow community standards to be the “arbiter” in assessing what is or is not an “undue exploitation of sex” opens up for a divergence from what seemed initially to a substantively harms-based equality approach. Justice Sophinka’s opinion is here unclear as to whether it is primarily because the dehumanization and degradation test was otherwise difficult to apply, or because “segments of society” (id. at 484) have different opinions of what is harmful (or because of both factors). In particular his ambivalence about harm seems to downplay the position previously taken in his opinion that “there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women” (id. at 479; citations omitted). Although he did note in that context that such evidence was “not susceptible of exact proof,” it is unclear what that means since a phrase such as “exact proof” implies a very demanding standard—one rarely reached in the social sciences. Indeed, the U.S. Attorney General’s Commission on Pornography, which was also cited approvingly in that same paragraph though to another page range (id. at 479), did note that “[w]henever a causal question is even worth asking, there will never be conclusive proof that such a causal connection exists, if ‘conclusive’ means that no other possibility exists.”

However, there exist an overwhelming amount of social science and other evidence finding production and consumption of pornography harmful; and it has been shown how pornography promotes sexual exploitation, gender-based violence, and attitudes supporting such abuse, including when controlling for alternative causes (see chapters 2–3 above). Much of this evidence was also available already at the time of the Court’s decision in 1992. Justice Sophinka’s opinion at other places repeatedly recognized that “Parliament has reasonably concluded” that distribution of obscenity causes harm (Butler, 509; emphasis added). Hence, the legislature was entitled to have a “‘reasoned apprehension of harm’ resulting from the desensitization of individuals exposed to materials which depict violence, cruelty, and dehumanization in sexual relations” (id. at 504). Such a reasonable apprehension of harm made Butler adopt “the view that there is a sufficiently rational link between the criminal sanction, which demonstrates our community’s disapproval of the dissemination of materials which potentially victimize women . . . and the [legislative] objective” (id. at 504). There seems to be no apparent reason why, then, when applying the law, a decidedly reasoned apprehension of harm should be subject to the whims of different “segments of society” (id. at 484) by the permitting the community standards to mediate it. Yet Sophinka’s opinion suggests precisely such a more ambiguous piecemeal approach:

In making this determination with respect to the three categories of pornography referred to above, the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex. Explicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial. Finally, explicit sex that is not violent

1706 See, e.g., Factum of LEAF in Butler, supra chap. 4, n. 563, ¶ 34, 44–46 (citing studies on consumption harms); Final Report, Att’y General’s Commission [U.S. 1986], ed. McManus, 31–48, 197–290 (analyzing existing research on production and consumption harms); Zillmann and Bryant, eds., Pornography: Research Advances [1989], supra p. 3 n.14 (anthology); Malamuth and Donnerstein, eds., Pornography & Sexual Aggression, supra chap. 1, n. 155 (anthology).
and neither degrading nor dehumanizing is generally tolerated in our society and will not qualify as the undue exploitation of sex unless it employs children in its production. (Id. at 485; emphasis added)

These formulations—“almost always,” and “may be”—have been interpreted in a liberal fashion to support acquittals in cases decided after Butler in lower courts where materials that were demonstrably violent, dehumanizing, and degrading were prosecuted (see 419–433 below). Regarding Justice Sophinka’s doubt about the capability of applying the violence, dehumanization, and degradation test judiciously—“there is a range of opinion as to what is degrading or dehumanizing” (id. at 484)—his citation to the Fraser Committee (id.) quoted previously seems to rely on their assumption that the distinction is subjectively based.

The Fraser Committee had distinguished between “merely sexually explicit” materials and materials presenting “sexual exploitation and degradation of its participants, with portrayal of men as aggressors and women as subordinate.”1707 It was then said that in practice “there can be no real dividing line between the two, since interpretation of a particular image depends to such a great degree on shades of meaning and implication, and on what a particular viewer brings to it.”1708 Yet social scientists have consistently applied that very distinction, finding it intelligible in distinguishing different categories of pornography on the popular pornography market and their consumption effects.1709 Similarly, a heterogeneous sample of 436 men drawn from Toronto, Ontario, rated materials classified according to the three-pronged distinction along a number of related dimensions, with the results “generally conform[ing] quite well” with those of the researchers”.1710 Likewise, the conceptually similar Indianapolis definition of pornography as the “graphic sexually explicit subordination” was successfully applied by law students in an experimental study, outperforming both the American obscenity test and an alternative definition drafted by law professor Cass Sunstein.1711

Justice Sophinka’s opinion, that it is difficult to define dehumanization and degradation objectively, seems overly skeptical—especially when considering it in context of sex inequality. Check’s three-pronged distinction had already been accepted by lower courts in Wagner in 1985, who, although ostensibly referring to contemporary standards, nonetheless categorically concluded that “the contemporary Canadian community will not tolerate either of the first two classes” (violent or dehumanizing pornography), but “tolerate erotica no matter how explicit it may be.”1712 Certainly, this position did not prevent that court to trivialize potential harm in some materials, for instance assuming that performers were “consenting” when there was no evidence of genuine consent or the absence of off-camera coercion.1713 However, as argued above, such problems are likely to be remedied by a stronger representa-

\[1708\] Ibid.
\[1709\] See, e.g., Check and Guloien, “Violent, Dehumanizing, & Erotica,” supra chap. 1, n. 138, at 159–84 (using the dehumanization-test to categorize materials); supra pp. 44–53 (analyzing studies of contemporary pornography along the categories of violent, dehumanizing, and degrading content).
\[1710\] Check and Guloien, “Violent, Dehumanizing, & Erotica,” 168.
\[1713\] Compare id. ¶ 65 (assuming that “[a]ll of the participants are willing, consenting adults” and that “[n]o one is degraded or dehumanized. It qualifies as erotica” with R. v. Butler, [1992] 1 S.C.R. 452 at 479 (Can.) (asserting that “[s]ometimes the very appearance of consent makes the depicted acts even more degrading or dehumanizing.”).
tion of those who are directly harmed in the courts (cf. 393–400 above).\textsuperscript{1714} Put otherwise, the problems of interpreting the violence and dehumanization standard shown in prior cases was likely caused to a large degree by the criminal procedure per se, rather than an inherently vagueness in the violence and dehumanization test itself. There seems to be no need for the community standard of tolerance test under the Canadian obscenity law—but the courts keep holding on to it, for no apparent reason other than tradition. Increasing the presence of survivors and those more directly affected in the future could be done either through the passing of antipornography civil rights laws, or by passing other laws or programs that mandated their representations in obscenity cases. For example, the “Court Challenges Program” that was ended in 1992 could be revived for the purpose of sharpening accurate litigation in obscenity trials. Civil rights laws or such programs that support the perspectives and interest of those discriminated and subordinated by pornography can now also be sustained on the same constitutional rationales that have upheld the \textit{Butler} and \textit{Wagner} decisions. If anything, this is a legacy that \textit{Butler} upheld, even if its holding on how to adjudicate the test of obscenity leaves more to ask for.

\textbf{Community Standards and Representation}

Some more recent decisions conceptually related to obscenity have moved in the direction of de-emphasizing the community standard of tolerance test, although they have not entirely abandoned it. Particularly notable is \textit{R. v. Labaye} (2005), a Supreme Court case that set aside a conviction of a so-called swingers club in Montréal for violating the prostitution-related offense of “keeping a ’common bawdy-house’ for the ‘practice of acts of indecency,’”\textsuperscript{1715} under a statute invalidated in 2013.\textsuperscript{1716} In \textit{Labaye}, community standards of tolerance had been invoked along with the concept of “harm” to adjudicate “indecency,” a concept related to yet distinct from obscenity. The Court criticized the concept of community standards, noting that members of a “pluralistic society” hold divergent views that makes it difficult to discern the relevant “community,” and concluding “that despite its superficial objectivity, the community standard of tolerance test [has] remained highly subjective in application” (\textit{Labaye}, ¶ 18). By contrast, the Court noted that “[h]arm or significant risk of harm is easier to prove than a community standard” (\textit{id.} ¶ 24), and further stated that “harm must be shown to be related to a fundamental value reflected in our society’s Constitution or similar fundamental laws . . . . Autonomy, liberty, equality and human dignity are among these values” (\textit{id.} ¶ 33). This Court’s opinion on decency would seem to imply that the violence, dehumanization, and degradation test advo-

\textsuperscript{1714} Indeed, without the presence of intervener LEAF who represented the perspectives and interests of those most directly affected by pornography, i.e., Canadian women (see 402-409 above), the relatively stronger recognition of equality in \textit{Butler} than in previous cases might not have been articulated. For instance, Judge Anderson’s opinion in \textit{Red Hot Video} was not particularly elaborate, nor cited or repeated by the concurring opinion. \textit{Compare Red Hot Video}, [1985] B.C.J. No. 2279 ¶¶ 30–32 (Anderson, J.) (outlining how s. 28 supports the obscenity law in face of expressive challenges), with \textit{id.} ¶ 50 (Nemetz, J.) (asserting that “degrading vilification of women” in the sense discussed in the \textit{Wagner} line of cases “is unacceptable by any reasonable Canadian community standard,” but without referring to section 28 on women’s right to equality in doing so). Neither did the Crown in \textit{Butler} defend the obscenity law with reference equality per se; nor did the opinions from below. \textit{See} MacKinnon, \textit{Sex Equality}, supra p. 6 n.23, at 1428 (noting that Crown did not raise an equality argument); R. v. Butler, [1990] CarswellMan 228, 73 Man. R. (2d) 197 (C.A.) (3–2) (impregnating obscenity law from expressive freedom challenges under s. 2(b) without reference to equality nor to section 1), \textit{modified} [1992] 1 S.C.R. 452 (sustaining obscenity law under section 1 as implicating equality imperatives, but without specific Charter citation).


ulated by psychologist Check, and adopted since Rankine (1982)—a harms-test entirely evidence-based, by contrast to community standards—can determine obscenity on its own. Yet further statements in Labaye shows that the Court may not have abandoned contemporary standards to mediate the violence, dehumanization, and degradation test—an application endorsed in Butler (see 409–413 above).

First, Chief Justice McLaughlin, who writes for the majority, assumes that the “notion of harm” recognized in Towne Cinema (1985)—that obscene materials must “have a harmful effect on others in society” apart from violating community standards—“had been implicit [already] in Cockburn C.J.’s definition of obscenity in Hicklin [1868]” (Labaye, ¶ 20). Second, after more or less equating Hicklin with Towne Cinema, she concludes that since Butler and subsequent cases, “the community standard of tolerance was determined by reference to the risk of harm” (Labaye, ¶ 21). Her statements imply that contemporary standards after Butler became a mere proxy for harm. Criminal justice and sociology scholars in Canada, Richard Jochelson and Kirsten Kramar (formerly Johnson), appear to interpret Labaye in approximately this way when they claim that it “abandoned the community standards of tolerance test for undue exploitation of Butler, replacing it with a more abstract test for risk of harm and harm.”

However, McLaughlin’s strong reliance on the explicit language of Butler, which she quotes approvingly (Labaye, ¶ 21), does not suggest a different interpretation of community standards than courts that have decided obscenity cases since 1992 have used. As recalled, Butler held that “courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure” (id; quoting Butler, 485). This statement implies that even if harm is flowing, the community might tolerate that others are exposed to the materials, thus compelling courts not to judge them obscene. Unsurprisingly then, R. v. Price (2004), included blatantly violent and the judge conceded harmful pornography that was nonetheless found non-obscene—a decision rationalized by the extensive availability of similar materials in Canada, which was taken to imply community tolerance, even of the harm.

After 2005 when Labaye was decided on December 21, no published obscenity case has ruled on or otherwise resolved issues related to community standards, which makes the role of community standards unclear.

For instance, an obscenity case that took ten years to litigate, including two jury trials and numerous appeals on tangential issues, was finally decided in the Court of Appeals for Ontario in 2012. At this point, community standards were indeed mentioned in a way suggesting that harm is the only relevant standard for obscenity, though it stops short from explicitly saying so. Earlier in the proceeding of the same case in 2005, the same court did not show any clear tendency to having departed from the previous usage of contemporary community standards as a mediator alongside the dehumanization and artistic tests when it accepted evidence both by behavioralists (on consumption harms) and “evidence about materials with sexual content combined with extreme violence that were available in the community.”

1717 E.g., Richard Jochelson and Kirsten Kramar, Sex and the Supreme Court: Obscenity and Indecency Law in Canada (Halifax: Fernwood, 2011), 59–60; cf. ibid., 64–65.


1719 R. v. Smith, 2012 ONCA 892, [2012] CarswellOnt 15792 ¶ 29 (C.A.) (discussing how the “core” of a psychiatrist’s “testimony was directed to explaining paraphilia and the effect that exposure to material such as was displayed on the websites at issue in this case has on those who have a paraphilia. This evidence was necessary to establish an evidentiary foundation for the community standards test, which the jury would have to apply to render a verdict.”), leave to appeal refused [2013] CarswellOnt 9111 (Fish, Moldaver, Rothstein J.) (S.C.C.).
along with opinions from literature and film experts on artistic merits. As recalled, in *Price* the extensive availability of harmful materials was taken to imply community tolerance of harm. If community standards had truly been “abandoned” for a harms-based test already after *Butler*, as claimed by *Labaye*, evidence about the availability of obscenity qua pornography in the community, however widespread and tolerated, would have no place in the equation of harm, and artistic merits would be of little relevance. However as noted above, such availability was not mentioned in relation to community standards in the final decision in 2012—only behavioral harm was.

Although one may wish that risk of harm would now determine obscenity, as suggested by Jochelson and Kramar, neither the explicit language in *Butler* nor the few later obscenity cases (pp. 419–433 below) have yet explicitly stated that they departed from having the contemporary community standard mediate, or even compete with the other two tests, i.e., dehumanization and artistic merits. However, the decision in *Labaye* should be regarded as an important recognition by the Supreme Court in 2005 that the community standards test should not determine a relativistic notion of harm, but rather should itself be determined by objective evidence of harm. In this sense, the decision comes close to replacing community standards with a dehumanization and degradation test, other than in name. In order to prepare the ground for future challenges, if any, to interpretations of the relative role of community standards in this area, it would be of assistance to know exactly why previous Courts in *Butler*, *Towne Cinema*, and the Wagner-line of authority did not reject it. This becomes even more pressing a question since *Labaye* considers it to be almost insignificant in filling its original function, which was, and in the United States still is, to gauge the obscene according to whether the “average person” tolerates specific materials.

One, if not the most important reason *Butler* did not reject the community standard of tolerance test, may simply be that none of the parties or the interveners argued that it should have. It is difficult to interpret whether or not the Court had even considered the issue as such. Nonetheless, some clues are given. For instance, one passage in Justice Sophinka’s opinion addresses the issue of how the legislative “objective” of the 1959 obscenity criminal code provision can be reinterpreted into a more contemporary context, and rejects vague “moral” standards in favor of harm–based equality standard. Here, the opinion quotes approvingly from the Ontario District Court’s opinion in *R. v. Fringe Product Inc.* (1990):

> Even though one can still find an emphasis on the enforcement of moral standards of decency in relation to expression in sexual matters in the jurisprudence subsequent to the enactment of [the obscenity law], it is clear that, by the very words it has chosen, Parliament in 1959 moved beyond such narrow concern and expanded the scope of the legislation to include further concerns with respect to sex combined with crime, horror, cruelty and violence.

Further, Justice Sophinka quoted another passage where *Fringe Product* in turn quotes the Supreme Court’s previous opinion in *Irwin Toy*, emphasizing that “in

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proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available.”\textsuperscript{1724}

The fact that a change in statutory wordings already implied a concern with more tangible harm than mere “decency”—together with a more updated evidentiary finding on harm—led \textit{Fringe Product} (quoted approvingly by Butler) to conclude that the obscenity law’s concept of “harm goes beyond public morality” in the traditional sense.\textsuperscript{1725} However, in his selective quotation of \textit{Fringe Products}, Justice Sophinka leaves out that the opinion shortly afterwards invokes the Supreme Court’s specific remark in \textit{Towne Cinema} in 1985 that “the definition of ‘undue’ must encompass publications harmful to members of society”; \textit{Fringe Products} interpreted that opinion as entailing that the community standards of tolerance cannot be the sole determination of obscenity; hence, others tests should also apply, such as the violence, dehumanization, and degradation standard.\textsuperscript{1726} Justice Sophinka, seemingly without noticing the differences in emphasis in \textit{Fringe Products}, retains the more inconsistent approach taken in \textit{Towne Cinema}-opinion as a whole (where contemporary community standards co-exists with the violence, dehumanization, and degradation test) when he relates the “shift in emphasis” from indecency to harm to the adoption of the community standards test by the judiciary after 1959, rather than associating the shift to a more updated evidence and constitutional standard: “A permissible shift in emphasis was built into the legislation when, as interpreted by the courts, it adopted the community standards test. Community standards as to what is harmful have changed since 1959” (Butler, 496; emphasis added).

Yet community standards were not mandated in the legislation. As noted by Justice Sophinka in Butler above, courts applied them by interpretation. Although contemporary standards may indeed change, \textit{Fringe Product} suggests that courts (\textit{Towne Cinema} in particular) have not really relied consistently on the contemporary standards to change the emphasis toward harm and equality. From this point of view, Justice Sophinka ascribes a far more important role to the contemporary standards test than is warranted by the law’s legislative history and judicial interpretation since 1959. If stating clearly that the obscenity law is sustained on basis of the constitutional rights to sex equality in section 15 and 28 under the Charter, as did Judge Anderson in \textit{Red Hot Video},\textsuperscript{1727} the community standard of tolerance test could be viewed as unconstitutional. That test by itself enables the application of the obscenity law contrary to the mandated equality guarantees under the Charter, since it could permit materials that promote sex discrimination and prohibit materials that might even promote equality (e.g., safe sex education). A test so vague that it can invert constitutional principles of equality is likely not to sustain judicial review, even though the obscenity law otherwise could sustain without it. This fact could possibly (though not very likely) explain why the Court—perhaps in a misdirected concern to sustain the community standards test, even though it does not appear necessary—never accepted LEAF’s more conceptually sound arguments.

As recalled, LEAF took the position that pornography (qua obscenity) does not only violate constitutional equality under section 15 and 28, but also that violent, dehumanizing, and degrading materials in particular amount to violent or threatening forms of expression that are without expressive protection under section 2(b) of the

\textsuperscript{1724} \textit{Id.} (quoting \textit{Fringe Product}, [1990] CarswellOnt 893 ¶ 71 (quoting Irwin Toy Ltd. v. Quebec (Att’y Gen.), [1989] 1 S.C.R. 927 at 984 (Can.))).

\textsuperscript{1725} \textit{Id.} (quoting \textit{Fringe Product}, [1990] CarswellOnt 893 ¶ 72).  

\textsuperscript{1726} \textit{Fringe Product}, [1990] CarswellOnt 893 ¶ 74.

\textsuperscript{1727} \textit{Red Hot Video}, [1985] B.C.J. No. 2279 ¶ 31 (Anderson, J.) (invoking s. 28 to sustain the obscenity law against expressive challenges under the Charter).
Charter, even without retorting to a balancing under section 1 (see 403–407 above). Albeit a speculative analysis, the potentially contradictory use of the community standards test of tolerance seems to prevent the court to fully grant, with formal citation, that the law is supported by Charter sex equality imperatives, as community standards could possibly lead to outcomes contradictory to those imperatives. When comparing Butler to a hypothetical ideal that fully recognize the empirical realities of subordination in pornography—that is, that the evidence shows it is a practice of exploitation and subordination that draws from and produce multiple disadvantages (cf. chapter 1–4)—it should be noted that Butler’s equality analysis was never explicitly anchored in any of the constitutional equality guarantees of section 15 or 28. By contrast, as mentioned, Judge Anderson in Red Hot Video had explicitly invoked section 28 to defend the law in the B.C. Court of Appeals (section 15 was not yet in force at the time).\footnote{Red Hot Video, [1985] B.C.J. No. 2279 ¶ 31 (Anderson, J.) (judgment filed March 18, 1985); Canadian Charter, supra note 1576, s. 32(2) (barring section 15 from taking effect until April 17, 1985).} Despite that equality is clearly and repeatedly mentioned in Butler as an objective supported by the law, nowhere in Justice Sophinka’s opinion are the formal equality guarantees in the Charter invoked by the court in their analysis. By contrast also to R. v. Keegstra, where section 15 and 27 (multicultural rights) and their respective doctrines were explicitly invoked to sustain a law against hate propaganda from being challenged under section 2(b),\footnote{R. v. Keegstra, [1990] 3 S.C.R. 697 at 755–57 (Can.).} any similar explicit citation to section 15 or 28 is absent in Butler. Put otherwise, Butler is a decision that sustained a challenged law on the rationale that its objective promoted equality, even outweighing its expressive infringement, but without specifying the precise constitutional guarantees or doctrines that would have supported the courts’ conclusion.

When considering the prior lack of explicit recognition of equality even as a term, sometimes only hinted at by terminology such as “dehumanization” and “degradation” (see 393–400 above), Butler is still a progressive development. Nevertheless, Butler never engages LEAF’s argument that some of the seized materials in Butler amounted to violent and threatening forms of expression, and that expressive guarantees must be interpreted in light of equality guarantees in section 15 and 28 before balancing under section 1 (cf. 403–407). When the Court analyzes the law’s position under section 2(b), it only directs itself to the explicit position argued by the lower court and that of intervener Attorney General of British Columbia.\footnote{R. v. Butler, [1992] 1 S.C.R. 452 at 486–90 (Can.). Further citations in text.} Those two entities had reportedly submitted that the pornography in Butler was physical activity without meaning (Butler, 486–90). In the Manitoba Court of Appeal’s opinion, it is evident that they interpreted Irwin Toy as supporting the conclusion that the impugned materials conveyed no “meaning,” only “sexual stimulation.”\footnote{R. v. Butler, [1990] CarswellMan 228 ¶ 30, 73 Man. R. (2d) 197 (C.A.) (Huband, J.) (3–2), modified [1992] 1 S.C.R. 452 (Can.).} That court did not, as LEAF did, view the purported expressive protection in light of sex equality rights in section 15 or 28, nor argue that the pornography under litigation was a violent or threatening form of expression. Rather, it took the view that the impugned materials did not further any of the underlying liberal values of section 2(b): “There is nothing of the quest for truth in the materials before the court. They add nothing to the democratic process. They are the antithesis of individual self-fulfillment and human flourishing,” the Manitoba Court of Appeal asserted.\footnote{Id. ¶ 37.} This position is not the same as LEAF’s, who did not simply say that pornography was
without meaning. Rather, LEAF submitted “that all social practices, however invidious, have meaning” (LEAF, ¶ 52).

The Supreme Court choose not to engage in the more sophisticated opinion of LEAF that, for legal purposes, had defined certain pornography as violent or threatening forms of expression. For sure, the Court asserted that “the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex,” thus should usually be judged obscene under law (Butler, 485). But the Court’s decision not to consider such sexual violence as providing a heightened scrutiny against expressive challenges already under section 2(b) is notable. The argument had been suggested by a large organization that represented Canadian women. From this point of view, LEAF’s opinions should have been given more recognition. Again, as Mahoney noted with regards to cases prior to Rankine, courts seem to have severe difficulties to understand that sexual violence against women is not simply experienced as “sex” to them. The sexual violence was patently visible in the materials; if the Court’s visual perception would not accurately perceive the violence, it was more than vividly described in the LEAF’s factum (¶¶ 4–5) previously summarized above. Butler still exhibited some of the bias inherent in “male perceptions of violence” that “can exclude the consideration of female reality,” which (as noted by Mahoney) was common in judicial opinions before the 1980s. Such perceptions were likely not countered enough, for example, when considering the relative lack of gender-based violence survivor representation in the Court. LEAF was the only one among the eight interveners who directly represented women’s interests; and this was a case that in its essence concerned women’s interests as a discriminated against majority in society!

By contrast to the affirmative democratic recognition and representation of disadvantaged interests suggested by proponents of hierarchy theory (pp. 153–168 above), and as proposed in antipornography civil rights laws (pp. 306–307), the criminal procedure in Butler reverses the order of interests represented. A civil rights law such as those proposed in Minneapolis and Indianapolis would only have provided those directly harmed the initiative to bring a lawsuit. In Butler, however, there was a predominance of criminal defendants, government parties, government interveners, and three nongovernmental groups that were not directly affiliated with women’s or prostitution survivors’ perspectives or interests. By comparison, one could imagine Butler as a challenge to the Minneapolis antipornography civil rights laws that defined pornography as sex discrimination (see 301–312 above). In such a case, LEAF would likely have represented the plaintiff that sued pornographers and would then be one of the two primary parties that the Supreme Court had to address. Provincial and federal attorney generals might not even be granted standing as interveners. Given the situation under Canadian obscenity law, where the perspectives and interest of those harmed are relatively marginalized, it is still notable that courts

1734 See supra notes 1671–1672 and accompanying text (summarizing LEAF’s description of materials).
1735 Id. at 61.
1736 As mentioned previously, apart from the governments’ representatives, four nongovernmental organizations were granted leave to intervene in Butler: with two on each side. Butler, [1992] 1 S.C.R. 452 at 460. The Canadian Women’s Legal Education and Action Fund (LEAF) and the Group Against Pornography (GAP) defended the law, while the Canadian and British Columbia Civil Liberties Associations and the Manitoba Association for Rights and Liberties argued that the law impermissibly infringed freedom of expression. According to one contemporary observer, GAP was not a women’s organization but embraced “a conservative critique of pornography and, although not exclusively religious, organized extensively through churches.” Lise Gotell, “Shaping Butler: The New Politics of Anti-Pornography,” in Bad Attitudes on Trial: Pornography, Feminism, and the Butler Decision, ed. Brenda Cossman et al. (Toronto, Ont.: Univ. of Toronto Press, 1997), 102 n.2.
since Rankine have adopted arguments and discourse (see 393–400) that can be traced back as originating from the Canadian and American women’s antipornography movement (cf. chapter 10). Butler is no exception in this regard, and did significantly advance the notion of pornography as a form of sex discrimination compared to previous cases. As shown previously (pp. 407–409), it improved the recognition of substantive inequality in the social practice of pornography, thus indirectly representing and advancing the perspectives and interests of the disadvantaged groups who are harmed by pornography in line with the approach suggested by proponents of hierarchy theory (cf. 153–168).

Post–Butler Law 1993–2012


After the success in sustaining the Canadian obscenity law on a harm-based equality rationale in Butler, many activists in the Canadian women’s antipornography movement may have expected a consistent progression where materials such as those litigated in Butler would be prosecuted. The cases that have followed have received comparatively little scholarly attention compared to Butler and those before it. In a case decided in 1993, where five cases were heard together on appeal in the Court of Appeal for Ontario (indexed as R. v. Hawkins), a key question concerned how to determine the middle category of pornography under Butler—that is, nonviolent but dehumanizing or degrading pornography. In trial courts, the nonviolent materials that had been seized from sellers and distributors who were prosecuted under the code were described more in detail. They included frequent presentations of men who ejaculated onto women’s faces and into their mouths (and over their bodies). Women were also generally presented as sexually insatiable and constantly looking for sex with strangers such as burglars or hitch-hikers, or with neighbors or coworkers, and often in groups, or with other women (the latter referred to as “lesbian” scenes by the court). These categories were also included in the Butler trial above. However, in Hawkins none of these materials were judged obscene.

While the Court of Appeal for Ontario in Hawkins concluded that the nonviolent materials lacked artistic qualities, thus could not be protected by the “internal necessities” test, the question was then whether or not they were “‘degrading or dehumanizing’ and, if so, whether the depiction creates the substantial societal risk of harm required by Butler to constitute it obscene.” It was noted that Butler “did not define ‘degradation or dehumanization’” and had taken the position that there is a “range” of opinions “as to what is degrading and dehumanizing” (Hawkins, 563). As previously discussed (pp. 409–413 above), Hawkins also took notice that Butler made community standards “the norm by which to determine whether material is degrading or dehumanizing and whether a substantial risk of harm is created by such material” (Hawkins, 563). Not surprisingly, Hawkins further quoted Butler’s position that violent pornography “‘will almost always’” be obscene (id. at 564), that

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1737 Notable exceptions exist though. See, e.g., Johnson, Canadian State, 84–87; Kendall, Gay Male Pornography, chap. 1, n. 91, esp. chaps. 1 & 8.


1741 See Factum of LEAF in Butler, supra chap. 4, n. 563, ¶ 4; supra pp. 404–405 (summarizing LEAF’s descriptions).

“[e]xplicit sex which is degrading or dehumanizing may be undue if the risk of harm is substantial,” and that “explicit sex” that is neither will “generally” be tolerated unless involving children.1743 Put otherwise, Butler suggested that a higher burden of proof for an obscenity prosecution against non-violent materials was needed, and that the community standards would be the final arbiter.

The Hawkins court judged that the Crown had not shown beyond reasonable doubt either that the materials were dehumanizing or degrading, or if so that they would be harmful (Hawkins, 565–68, 573). The Crown reportedly had argued that the nonviolent pornography in Hawkins would “cause ‘attitudinal harm’ in the sense that, among other things, they encourage unrealistic and damaging expectations” (id. at 564). However, the court referred to the Ontario Film Review Board who had approved the films for viewing which, even if not determinative for a judicial decision on obscenity, was “plainly relevant to the question of community standards of tolerance, and supportive of the trial judge’s conclusion” (id. at 565). The “fact” that such a provincial board, “composed of a cross-section of citizens,” did not consider the films prosecuted “to be either degrading or dehumanizing” was regarded “clearly” as evidence of contemporary standards of tolerance “that a trial judge must weigh in objectively” (id. at 566).

Community standards had, just as anticipated in the previous reading of Butler (pp. 409–413 above), become increasingly important in judging obscenity. The Hawkins never fully expressed a determination of whether or not the nonviolent movies in the case were dehumanizing or degrading or whether or not they presented “purely sexual activity” without such elements of subordination. Instead, the court emphasized that “[u]nder the Butler test, not all material depicting adults engaged in sexually explicit acts which are degrading or dehumanizing will be found to be obscene” (Hawkins, 566). Indeed, Butler had only expressed that such materials “may be undue if the risk of harm is substantial.”1744 These wordings left room for questioning the harm in every case, even when materials undoubtedly are dehumanizing. Not surprisingly, the Court of Appeal for Ontario concluded that whether or not the harm is “substantial” must just like “any element of a criminal allegation... be proved beyond a reasonable doubt and that proof must be found in the evidence adduced at trial” (Hawkins, 567).

Hawkins also distinguished between a legislative finding of harm on “a reasonable basis” in context of justifying a law under section 1 of the Charter, as opposed to finding that specific materials creates a “substantial risk of societal harm... when a person is on trial” (id. at 566). Hawkins asserted that “[i]t remains... for the Crown, in every case, to prove that the material or type of material in question is such as to cause the harmful effects that constitute an integral element of the offence” (id. at 567). The nonviolent materials in the case were thus found to be non-obscene (id. at 568, 573). It should be noted that under the obscenity law, as in Hawkins, the standard of proof is “beyond a reasonable doubt” rather than, as generally in civil procedures in Canada, “on a balance of probabilities.”1745 These narrower thresholds of criminal law approach should be contemplated when compared to a civil rights law, such as the Minneapolis antipornography ordinance (cf. 306–307, 380–382 above).

Moreover, as has been noted throughout this chapter, the representation of survivors and other affected persons perspectives and interest in the obscenity trial in Hawkins were also virtually non-existent. Although the case was a major post-Butler obscenity trial, and had been appealed to the highest court in Ontario, there were no

1743 Id. at 564 (quoting R. v. Butler, [1992] 1 S.C.R. 452 at 485 (Can.) (emphesis modified)).
interveners on any side. The case was thus represented only by prosecutors and defense attorneys for the pornography sellers and distributors. Not surprisingly, the Court of Appeal thought none of the materials “indicates a lack of consent on the part of any of the participants” (Hawkins, 562)—as if such “consent” would make the materials causing less consumption harms, or as if consent and off-camera abuse could be so intelligibly discerned. As noted previously with regards to pre-Butler decisions such as Wagner and Ramsingh (cf. 394–398 above), these unproblematic assumptions support the argument for a civil rights based approach rather than the criminal law approach to regulating pornography. From a democratic perspective, hierarchy theory also suggests that criminal law is an inadequate model for decision making when the outcome will affect disadvantaged groups whose perspectives and interests are not directly represented (cf. 153–168 above). A number of problematic claims were made in lower courts about the supposed harmlessness of the nonviolent pornography under review (more below). The court opinion does not indicate that these claims were adequately countered by the prosecution. Deeming from type of research studies invoked by LEAF in Butler about non-violent pornography, and explained more below, they would easily have been countered if such an intervener had been present; or, in the case of a civil law, if LEAF had represented plaintiffs suing distributors and sellers.

For instance, a typical misconception about the consumption harms shown in the courts’ description of the nonviolent pornography is that so long as women are active and asserting sexual initiatives, as opposed to being presented as passive objects, the materials can be assumed to be harmless. In a description of a movie that both the Crown’s and defendant’s counsels agreed was representative of the seized materials in the case, the following was said by one of the trial judges:

I simply make the point that throughout, it is the women who take the lead in inducing the sexual activity with the men. Throughout, the impression is deliberately created that it is the women who are the dominant sex and, indeed, that they at last are asserting their equality, if not their superiority. And, not surprisingly, the male participants seem to be delighted with this new found assertion.

It would be quite wrong for me to say that there is even a hint of humiliation or degradation of one of the sexes and it would be just as wrong for me to say that collectively they are dehumanized or demeaned or that there is any tendency to do so.

The court seems here to make the same erroneous assumption as media researcher Alan McKee, who presumed that pornography that presented women as passive non-initiating actors would “objectify” them and cause harmful effects, as opposed to presentations of “agency” (see 51–53 above). However, nonviolent pornography movies with presentations of women as “assertive,” who indiscriminately initiate sex, have been shown in psychological experiments to cause among the highest trivialization of sexual violence, even when compared with more violent pornography. Such materials that present women in exaggerated promiscuous roles cause men to adopt various attitudes supporting violence against women, for example,

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1746 As shown previously in chapter 3, supra pp. 98–118, meta-studies as well as more detailed experiments shows no less harmful difference in attitudinal and behavioral changes among those who are exposed to pornography with respect to whether or not there is a perceived consent among performers. See, e.g., Zillmann and Weaver, “Pornography & Men’s Callousness,” supra p. 3 n.14, at 115–121.

1747 See supra pp. 64–72 (discussing abuse behind and in front of camera and symptoms of such abuse, e.g., mental disorders such as PTSD).

1748 Factum of LEAF in Butler, supra chap. 4, n. 563, ¶¶ 45–46.


1750 See, e.g., Zillmann and Weaver, “Pornography & Men’s Callousness,” 115–121.
viewing women as more deserving of aggression—attitudes documented to cause more sexual aggression against women.\textsuperscript{1751}

What the \textit{Hawkins} courts did when they asserted that the nonviolent materials contained no “humiliation or degradation” was to interpret pornography \textit{outside of context}. Sexually explicit materials do not exist in a gender-neutral vacuum. First, they are consumed regularly by mostly, almost exclusively, men, not women, (pp. 33–37). Second, they exist in a society with entrenched inequality between the sexes where male sexual aggression against women is more or less a systemic condition (cf. 4–9 above). In such a context of sex inequality, presentation of sexually indiscriminate women who constantly seek sex with strangers and whom men ejaculate upon, in their faces, mouths, and all over their bodies,\textsuperscript{1752} is likely to cause precisely what the Crown referred to as “unrealistic and damaging expectations” (\textit{Hawkins}, 564). No wonder a number of international surveys and interview studies with tricks from such diverse geographical locations as the United States, Europe, and South East Asia reveal how they frequently seek out prostituted women in order to imitate sex from pornography—sex that other women seem to deny them, including violent sex and “gang-bangs” (pp. 126–129 above). Not surprisingly, prostituted women corroborate their accounts (pp. 124–126). That these are “unrealistic and damaging expectations” is suggested by the men themselves. As one Cambodian trick admitted: “[s]he refused, so we beat her in order to force her to do what each of us wanted.”\textsuperscript{1753} Another one noted that in “the movies, the girl always agreed [to gang-rape], never rejected it. But in Cambodia, the girl . . . was likely to be beaten unless she agreed to it.”\textsuperscript{1754}

When law students were asked to apply the Indianapolis Ordinance subordination-based definition of pornography on various materials—a definition that is conceptually close to the dehumanization and degradation test (pp. 41–53, 101–109 above)—the phrase “whose dissemination \textit{in context} would tend to subordinate women” was shown to make it particularly easy to apply.\textsuperscript{1755} Those law students apparently understood that context matters. The dehumanization and degradation standard should, if to be consistent with social science research on consumption harms, similarly be interpreted in context. It is telling that when Canadian psychologist Check and associates attempted to find pornography materials that were not dehumanizing for an experiment, they could not find any and had to put together excerpts.\textsuperscript{1756} In this light it would appear surprising if the many nonviolent materials litigated in the \textit{Hawkins} appeal would have been regarded altogether as non-dehumanizing and non-degrading by Check and associates and their experimental subjects. Apparently, different interpretations of the terms apply. Yet the study of Check and associates showed the “strongest and most pervasive” effects from non-violent dehumanizing materials—not from violent materials.\textsuperscript{1757}

\textsuperscript{1751}Ibid., 112–121; see also Leonard and Taylor, “Pornography, Permissive & Nonpermissive Cues,” \textit{supra} chap. 1, n. 171, at 291–93, 297–99; \textit{infra} pp. 102–106 for citations to these experiments and others and discussion of their results. For a large number of studies that validate the association between \textit{attitudes} supporting violence against women and sexually aggressive \textit{behavior}, see \textit{supra} pp. 93–98 (summarizing and analyzing research).


\textsuperscript{1753}Farley et al., “Cambodian Men who Buy Sex,” \textit{supra} chap. 3, n. 486, at 31

\textsuperscript{1754}Ibid., 32.

\textsuperscript{1755}Lindgren, “Defining Pornography,” \textit{supra} chap. 1, n. 145, at 1210 (emphasis added).

\textsuperscript{1756}Check and Guloien, “Violent, Dehumanizing, & Erotica,” \textit{supra} chap. 1, n. 138, at 163.

\textsuperscript{1757}Ibid., 179.
Furthermore, a meta-analysis of 16 experimental studies with 2,248 subjects showed exposure effects of pornography that significantly increased attitudes supporting violence against women with homogenous results, regardless of whether studies exposed subjects to violent or nonviolent materials.\textsuperscript{1758} Such attitudes have been repeatedly shown to predict male sexual aggression against women (pp. 93–98 above). Moreover, another meta-analysis of 33 experiments on pornography exposure and laboratory aggression made with 2,040 subjects showed homogenous and significant increases in aggression after exposure when materials were divided in either nonviolent or violent categories; that is, both broad categories showed homogenous results when measured separately.\textsuperscript{1759} Homogenous averages in a statistical association suggest that there are no moderating categories that differ from the average statistical relationship, such as non-dehumanizing materials (cf. 92–93 above); this, in turn, indicates that the studies included in the meta-analysis did not include any harmless materials. Considering that the “erota” category (non-dehumanizing) is notoriously difficult to find in social reality, the homogenous harmful effects for all nonviolent materials may reasonably be generalized to cover commercial pornography in social reality, just as those materials litigated in Hawkins. In other words, evidence suggests that Hawkins’ decision that the nonviolent materials were harmless was factually wrong. Later obscenity cases in Canada have unfortunately followed the approach taken in Hawkins.

\textit{Erotica Video (1994), on Nonviolent Materials (Acquittal)}

For instance, a case in the Alberta Provincial Court decided in December 1994, \textit{R. v. Erotica Video Exchange Ltd.}, convicted one video store for selling and renting out violent pornography movies, but acquitted two others who sold and rented out non-violent but by defendants conceded d"egading and dehumanizing” pornography.\textsuperscript{1760} The court largely dismissed the psychologist James Check, who was relied on in Wagner and other decisions prior to Butler to establish the three-pronged violence and dehumanization test; the court cast him “more of an advocate than an academic or social science researcher” (Erotica Video Exchange, 192). Inconsistently then, Erotica Video Exchange quoted a passage by researcher Berl Kutchinsky (presumably less of an advocate than an “academic”) where aggregated data based on longitudinal official crime reports from West Germany was said to indicate that an association between “’pornography and rape’” was “’more than weak.’”\textsuperscript{1761} However, as shown previously (pp. 129–138 above), the aggregated methodology is easy to manipulate for “activist” purposes, especially with an audience of inexperienced students; when it purport to analyze associations of pornography and reported sexual aggression, often drawn from official crime statistics, it is very difficult to interpret such data because crime statistics are “over-determined” by various social phenomenon. Especially longitudinal data, such as Kutchinsky’s from 1971–1984 that actually inconclusively shows a stronger increase in reported sexual coercion and a small-

\textsuperscript{1758} Allen et al., “Exposure to Pornography & Rape Myths,” \textit{supra} chap. 3, n. 355, at 18–19. The study is further described above. \textit{See supra} pp. 115–118.

\textsuperscript{1759} Allen, Brezgel, and D’Alessio, “Meta-Analysis, Aggression After Exposure,” \textit{supra} chap. 3, n. 355, at 271, 274. This study is further described above. \textit{See supra} pp. 101–102 & et seq.


\textsuperscript{1761} Id. at 187 (Quoting Kutchinsky, “Pornography and Rape, Four countries,” \textit{supra} chap. 3, n. 424, at 62).
er reduction in reported rape,\textsuperscript{1762} is fraught with such problems (\textit{cf.} 129–138 above). By contrast, Larry Baron and Murray Straus’ 50-state survey study in the United States was comparative—not longitudinal—and controlled for a number of relevant alternative factors for rape reports. Their regression analysis showed that pornography consumption and their concept of “social disorganization” directly predicted higher rape reports, while their measurements of gender equality directly predicted reduced rape reports.\textsuperscript{1763} Baron and Straus’ study was also replicated with virtually the same results in 51 states (including D.C.) by two other researchers.\textsuperscript{1764}

The fact that the Alberta Provincial Court relies on aggregated data should caution the reader, especially when it also claims that researchers who triangulate results from more reliable methods (i.e., experimental psychology and social surveys)\textsuperscript{1765} are “advocates” (\textit{Erotica Video Exchange}, 192). Canadian Criminologist Christopher Nowlin remarked, however, that this court erroneously assumed social scientists do not represent a particular form of “advocates.”\textsuperscript{1766} Scientific disengagement per se need not be neutral in its impact, often constituting more a form of advocacy supporting status quo. After the decisions in \textit{Hawkins} and \textit{Erotica Video Exchange}, Canadian legal databases show virtually no prosecutions that include nonviolent but dehumanizing or degrading materials in case law reports (although unreported cases may exist). The suspicions previously made in the analysis of \textit{Butler}, that its opinion harbored a number of opportunities for interpretation in favor of permitting nonviolent pornography, have come true (\textit{cf.} 409–419 above).

\textbf{Jorgensen (1995), on Violent Materials and Liability (Acquittal)}

With respect to the status of violent pornography, which the Supreme Court of Canada in \textit{Butler} had stated “will almost always constitute the undue exploitation of sex,”\textsuperscript{1767} it is notable that the operator of the video store that had sold or rented out violent pornography in the five case appeal in \textit{Hawkins} were later acquitted when their cases were appealed to the Supreme Court of Canada (the “Jorgensen-Scarborough” appeal).\textsuperscript{1768} In \textit{Jorgensen}, the defendant was acquitted on a \textit{mens rea} requirement for sellers. The court was largely unanimous, with a majority opinion (8-1) delivered by Justice John Sophinka—the same Justice who delivered the majority opinion in \textit{Butler}.\textsuperscript{1769} As in the prior post–\textit{Butler} decisions, there were no interveners in the case. The only representation was that of the criminal parties—the prosecution (the Crown) and the defendant (see \textit{Jorgensen}, 61). As remarked repeatedly above, this situation is inadequate from a democratic perspective since, as submitted by proponents of hierarchy theory, those disadvantaged groups whose interests are most directly affected by consumption and production harms are not represented (\textit{cf.} 153–168 above).

\begin{itemize}
  \item \textsuperscript{1762}Kutchinsky, “Pornography and Rape: Four Countries,” 57 fig.7.
  \item \textsuperscript{1763}Baron and Straus, “Four Theories of Rape,” \textit{supra} chap. 3, n. 493, at 480.
  \item \textsuperscript{1764}Scott and Schwalm, “Rape Rates & Circulation Rates,” \textit{supra} chap. 3, n. 503, at 245–46.
  \item \textsuperscript{1765}See \textit{supra} chapter 3 for an analysis of the empirical evidence in social science research on pornography consumption effects and an assessment of the benefits and drawbacks of the major research methodologies.
  \item \textsuperscript{1766}Christopher Nowlin, \textit{Judging Obscenity: A Critical History of Expert Evidence} (Quebec, Canada: McGill–Queen’s Univ. Press, 2003), 131.
  \item \textsuperscript{1767}R. v. Butler, [1992] 1 S.C.R. 452 at 485 (Can.) (emphasis added).
  \item \textsuperscript{1769}\textit{Id.} at 84–122 (a partial concurrence was delivered by Lamer, J., \textit{at} 61–84); \textit{Butler}, [1992] 1 S.C.R. at 460–511 (Sophinka, J.).
\end{itemize}
The Court now took notice of the statutory wordings in the Criminal Code that divided the obscenity offense in two subsections: one with respect to producers and distributors, another with respect to sellers, exhibitors, and advertisers. With regards to the category of sellers (which video stores were deemed to be), the statutory wordings of the obscenity law held that anyone “who knowingly, without lawful justification or excuse, (a) sells, exposes to public view or has in his possession for such a purpose any obscene [material]” is liable under the law (s. 163(2); emphasis added). With regards to the first category of producers and distributors, none of the words “knowingly, without lawful justification or excuse,” are included (see s. 163(1)). Here, the Court suggested, inter alia, that since these words had been included in the Code since 1892, but an amendment omitted them in 1949 with regards to the first category (producers and distributors), the legislative history suggested a distinction between the two categories (Jorgensen, 95–96). The Court further stated that “a seller of pornographic material may include among her merchandise magazines, books and a myriad of other products,” and that it would be difficult to get sufficient information about potential criminal content from distributors and producers who—the Court hypothesized—would “not likely” be “inclined to scare off buyers by telling them his or her product can potentially subject the potential purchaser to criminal liability” (id. at 96–97). It was not simply a matter of sellers with “a myriad of other products” than pornography though, since after Butler it was clear that pornography “per se” was not obscene. Among other things, the Supreme Court here noted that there was a difference for sellers of pornography to know that their materials presented “exploitation of sex,” compared to knowing that it was an undue exploitation of sex (e.g., id. at 92, 100–01, 104–05).

The Crown had reportedly objected to the Court’s requirement to “prove beyond a reasonable doubt the retailer’s knowledge that the materials being sold have the qualities or contain the specific scenes which render such materials obscene in law” (id. at 107), such as violent sex in the materials appealed in Jorgensen. Such requirements were “impractical and would effectively make prosecution impossible,” the prosecution reportedly argued (id. at 107–08). Additionally, the Crown was said to have submitted that “retailers will simply choose not to view their videos thereby escaping conviction” (id. at 108). According to this view, when sellers “consciously” choose to operate in this “regulated and financially profitable field” they certainly know that their products may contain obscenity, but proceed nonetheless “in spite of this risk (id.). The Crown’s view was reportedly that the “retailer who has not viewed the film is thus as morally blameworthy as someone who has viewed the film,” and “should be held responsible for the social harm caused when the pornography that they sell crosses the line into obscenity” (id.). The Court’s response was to suggest that prosecutors should find other evidence that suggested a mens rea. For instance, continued dissemination in spite of warnings by law enforcement or others regarding certain materials, or the keeping of “separate selection” categories in stores or special lists for “on request only” and other similar circumstantial


1771 The fact that provincial film review boards made classifications of pornography at the time was also taken into account as evidence of contemporary community standards, but although those “may be relevant” they were not determinative for an assessment of obscenity and whether a defendant “knowingly” sold it. Jorgensen, [1995] 4 S.C.R. at 113–16. Nor could such board approval of films suffice as a defense of “lawful justification or excuse” of knowingly selling obscenity. Id. at 116–21. As remarked by the Court, a provincial body could not be given the constitutional power to “preclude the prosecution” under the Criminal Code, id. at 116, which is federal law in Canada.

1772 It is notable if the prosecutors, as reported, used the word “morally” blameworthy rather than simply saying “blameworthy.” It casts them as being concerned with “morals,” rather than with law.
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Evidence would suffice to show a knowing state of mind (id. at 108–10). Furthermore, willful blindness was said to be sufficient for a conviction of sellers. “If the retailer becomes aware of the need to make further inquiries . . . yet deliberately chooses to ignore these indications and does not make any further inquiries, then the retailer can be nonetheless charged under s. 163(2)(a) for ‘knowingly’ selling obscene materials” (id. 110).

In response to the Crown’s objections the Court further stated that it was “quite properly not suggested that there is any constitutional impediment” barring Parliament from amending the obscenity law by omitting the “knowing” requirement as applied to sellers, exhibitors, and advertisers (id. at 111). However, to date no such amendment has been made (see s. 163(2)). Previous legislative attempts at reforming pornography in the second half of the 1980s resulted in two inadequate law proposals that no party or group was satisfied with (pp. 384–392 above), and the more progressive development had already begun to take place in the courts (pp. 393–419). Assuming that legislative action would be taken on such a divisive issue is fairly optimistic, to say the least. Moreover, the absence of interveners in the Supreme Court in Jorgensen, suggested little public opinion in support for such a change. The cuts in the government Court Challenges Program that supported such intervention may also have affected this situation.\footnote{As pointed out previously in this dissertation, public representatives at the top government level rarely share the social perspectives and interests of those mostly affected by the production and consumption harms of pornography (cf. 153–168 above). This is why it is important to support those groups’ autonomous organizations, as it has been shown to produce significantly more progress in political challenges to gender-based violence generally than other factors such as number of women or left-wing parties in government.} However, the current situation in Canada at the time of the decision in Jorgensen seemed less favorable to such change than it had been in the 1980s. Not surprisingly then and corroborating the Crown’s objections about impossible burdens of proof, legal databases show virtually no prosecutions against sellers in Canada since Jorgensen in case law reports (although unreported cases may exist). By contrast to sellers, two reported prosecutions under the obscenity law in the 2000s were made against producers who also distributed pornography over the Internet—materials that included violent sex (more below).

Price (2004), on Violent Materials (Acquittal)

Subsequently, in 2004 a prosecution was brought in a British Columbia provincial court in the case R. v. Price against Mr. Randy Price for producing and distributing over the Internet (alternatively possessing for this purpose) eleven pornography movies, mostly involving bondage, discipline, and sadomasochism (BDSM).\footnote{The defendant’s company made the videos available to paying subscribers “through various websites” controlled either by his company or by others with whom he had contracts with (Price, ¶ 18). The materials prosecuted presented, among other things, a man who verbally abused a woman, then forced her to bend backward over a toilet while he urinated into her mouth (id. ¶ 59). When her mouth overflows in the movie, he “punishes” her by scrubbing the toilet bowl with her head (id.). The judge observed that this woman was “obviously” not consenting (id.), and that there was no evidence of her consent (id.).} The materials prosecuted presented, among other things, a man who verbally abused a woman, then forced her to bend backward over a toilet while he urinated into her mouth (id. ¶ 59). When her mouth overflows in the movie, he “punishes” her by scrubbing the toilet bowl with her head (id.). The judge observed that this woman was “obviously” not consenting (id.), and that there was

\footnote{Cf. Sallot, “Legal Victory Bittersweet,” supra note 1669; see also supra notes 1669–1670 and accompanying text paragraph (discussing the Court Challenges Program).}

\footnote{Weldon and Htun, “Civic Origins,” supra p. 16 n.49, at 548–69.}

“strong evidence simply from the content of the Eleven Videos themselves by which [one] may infer a risk of harm” (id. ¶ 88). Nonetheless, the defendant was ultimately acquitted (id. ¶ 101). As will be shown below, the justification for the acquittal relied in large part on community standard of tolerance, even in face of apparent harm. This is consistent with the concern raised previously (pp. 409–419 above) that when the Butler decision made community standards “arbiter” of the determination of obscenity, it could protect patently harmful materials. Yet it should be noted that Price was decided in April, 2004, which was over a year before the decision on indecency in Labaye was handed down by the Supreme Court of Canada in December, 2005. Considering the possibility that Labaye have weakened the importance of contemporary standards as the “arbiter” of harm (see 413–415 above), the history of Price should nonetheless discourage future legislators and courts to rely on the concept of community standards.

Apart from the scene with the toilet bowl and the man and woman described above, the “remaining ten” movies were said to present scenes of BDSM that were largely similar, of which eight contained a “subservient” female and two a “subservient” male (id. ¶ 60). Among other things, the movies presented confinement in small cages, whipping by use of “canes, crops, switches or cat o’ nine tails,” application of hot wax from burning candles to all body parts, including breasts and genitals, inter alia, and application of electric shocks to all parts of the body, including genitals among others (id. ¶ 62). Similarly, weights, clamps, mousetraps or other such devices were attached to various body parts including, for example, genitals (id.). Moreover, piercing with small gauge needles was performed on various body parts, including, for example, genitalia, and sometimes accompanied by “minor amounts of bleeding” (id.). The devises and needles are reportedly removed in the end, and accompanied by the pouring of alcohol as “disinfectant” before and after insertion of needles (id.). Furthermore, various forms of restraints and entrapment was visible, such as straps, hoods, gags, tied ropes, and these were among other things applied over hands, feet, and head, respectively (id. ¶ 64). In one of these movies there is also a man who urinates into the face of the woman after the preceding practices had been performed, while in another movie a woman does the same on a man (id. ¶ 63). Some subjects “shriek and writhe continuously,” others “merely wince or twist in discomfort,” while some “after being asked, expressed pleasure” (id. ¶ 65).

An expert, “Dr. Mosher,” testified in the case that “consensual BDSM,” that is, those behaviors presented in the materials, were “normal” sexual behavior and reportedly carried out in public regularly in Canada (id. ¶¶ 34–36). Similar claims were made by a retired police who was hired by the defense to attend various BDSM events in B.C. to corroborate these accounts, as well as by a thirty-year-old woman who testified that she participated in such practices (id. ¶¶ 29–30). These practices were allegedly not demeaning or dehumanizing, but pleasurable in a variety of ways given that there was consent from the parties involved, the expert claimed (id. ¶¶ 34–43). Nonetheless, nowhere in the opinion is it explained how this supposed “consent” is to be validated, apart from the belief expressed by the judge that the expert’s “form of consent envisioned” met the requirements for consent under Canadian law (id. ¶ 34). The judge thus concluded “that despite what is portrayed, the subservient parties in all Eleven Videos consented to the taking part in the procedures” (id. ¶ 68) and “indication of fear, pain or lack of consent portrayed by the subservient parties” was “merely play acting” (id. ¶ 69). This is a statement slightly contradicting the opinion regarding the toilet scene previously mentioned, where the judge wrote that the “woman is obviously not consenting” (id. ¶ 59).
With regards to pornography production in general, no studies or tangible evidence suggest that it is not a practice that exploits multiple disadvantages such as extreme poverty, child sexual abuse, or social discrimination (e.g., racism, sexism, and minority ethnicity) among participants to make them accept various more or less abusive acts (see chapter 2 above). The evidence presented in the Price opinion appears wholly inadequate in rejecting such a conclusion in their case. With regards to consumption harms (as distinguished from production harms), a meta-analysis of experiments on pornography exposure and laboratory aggression showed homogenous and significant increases in aggression after exposure to violent pornography that also included “sadomasochism and bondage” among 353 subjects. Another meta-analysis of 16 experimental studies with 2,248 subjects showed that exposure to pornography significantly produced more attitudes supporting violence against women with homogenous averages. Those attitudes have been proven repeatedly to predict male sexual aggression against women (pp. 93–98 above). As mentioned previously regarding nonviolent materials, homogenous averages suggest that there are no moderating harmless categories, such as the sadomasochism prosecuted in Price (cf. 92–93 above).

Another expert called upon by the defense in the Price trial, “Dr. Fisher,” in complete contradiction to the large number of social science studies, meta-analysis, and other evidence showing otherwise (see chapter 3), claimed that “exposure to diverse forms of pornography does not (a) cause attitudinal harm”; (b) does not “cause anti-social attitudes towards men or women”; (c) “does not cause sexual aggression”; and (e) does not “cause the mental or physical mistreatment of women or men” (Price, ¶ 51). The only data invoked in the opinion to support this claim, but without specific citation, was allegedly drawn from official sex crime reporting in different countries; with a longitudinal perspective, Dr. Fisher claimed that this data showed that the advent of Internet had no impact on attitudes supporting violence against (id. ¶¶ 46–49). Similarly, Dr. Fisher was said to rely on official U.S. and Canadian crime reporting statistics showing a decline in “reported sexual assaults” from 1994 to 1999 (id. ¶ 50).

During cross-examination it had been revealed that reported forcible rapes in the United States had actually increased during 2001 and 2002, but it is still notable that the judge claims that “no evidence” was presented by the prosecutors or otherwise to “contradict” Dr. Fisher’s statements (id. ¶ 53). As shown previously in this dissertation (pp. 129–138 above), the type of aggregated correlational data relying on official crime reporting allegedly invoked in Price are far from reliable, especially longitudinal studies that suffer from particular over-determination. More precise and controlled comparisons, where alternative variables that may change over time are held constant, show a positive correlation between crime reporting and the circulation of pornography. In addition, the claim that reported rapes had been “reduced” over the years is virtually meaningless when actual rapes have been estimated to increase based on more reliable social survey data. As recalled from the introduction, a U.S. study from 2006 estimated that the prevalence of “forcible rape” has in-

1778 See supra notes 1758–1760 and accompanying text.
creased 27.3% per capita since 1991; however, only 18% of those victimized by forcible rape reported it.\textsuperscript{1780}

One may compare LEAF’s factum submitted in Butler in 1992, which included numerous citations to the most updated social science research and evidence at the time,\textsuperscript{1781} with the reported lack of evidence presented by the prosecution in Price (at ¶ 53). The criminal procedure in the case, with only prosecutors representing the perspectives and interests of those directly harmed by pornography, implies that the incentive to rebut the claims made by the defendant with more accurate research might not have been adequate. Indeed, as shown empirically and hypothesized by democratic theorists (\textit{cf.} 148–168 above), with regards to political challenges to gender-based violence in general the autonomous women’s movements’ strength have been key to successful and progressive change in observed in state policies.\textsuperscript{1782}

Perhaps it is not a coincidence then that during a period when the Court Challenges Program supported the legal intervention of autonomous organizations representing perspectives and interest of disadvantaged groups in Canada,\textsuperscript{1783} more thorough presentations of evidence were presented by those groups receiving support under the program. As have been argued throughout this dissertation, policies that promote the recognition and representation of disadvantaged groups, their perspectives and interests, are likely to promote successful legal challenges to pornography, thus promote substantive equality.

However, the court in Price did not accept Dr. Fisher’s opinion as a matter of law, recognizing that they “simply contradict Parliament’s reasonably based concerns as found by Butler” (\textit{Price}, ¶ 86). Therefore, the claim that violent pornography would do no harm was not considered “in determining the charges” (\textit{id.}). Indeed, the judge rather agreed with the prosecution that “there is strong evidence simply from the content of the Eleven Videos themselves by which I may infer a risk of harm and that Canadians would have no tolerance for other Canadians viewing this material” (\textit{id.} ¶ 88). Nonetheless, despite this agreement about harm, the judge took the view that among “the three tests for undueness, considered in Butler, the most important is the community standard of tolerance test” (\textit{id.} ¶ 89). The judge noted that under Butler, the standards must be “contemporary” and account for social changes (\textit{id.}).

With apparent regards to more recent community standards of tolerance, the court noted that there were “at least seventy websites” readily available elsewhere on the Internet with similar materials (\textit{id.} ¶ 21). These websites provided “in many cases identical . . . [or] even more extreme examples of BDSM activities than shown in the Eleven Videos (\textit{id.} ¶ 22). Moreover, mainstream movies with more plots and artistic pretenses that contained sexual violence, although being less sexually graphic, such as \textit{American Psycho}, \textit{I Spit on Your Grave}, \textit{Rape Me (Baize Moa)}, \textit{Irreversible}, and \textit{Henry: Portrait of a Serial Killer}, were claimed to show even more violence (\textit{id.} ¶¶ 25, 27, 95). These conditions of “tolerance” were found to support an acquittal of the producer and distributor, despite the recognition that the materials were harmful.

\[C\]anadians, for better or for worse, tolerate other Canadians viewing explicit sexual activity coupled with graphic violence which is more or less indistinguishable from the Eleven Videos.

\textsuperscript{1780} Kilpatrick, et al., \textit{Drug-facilitated, Incapacitated, & Forcible Rape}, supra p. 5 n.18, at 43, 57, 59.

\textsuperscript{1781} Factum of LEAF in Butler, supra chap. 4, n. 563, ¶¶ 15, 23, 31, 34, 44–46.

\textsuperscript{1782} \textit{Cf.} Weldon and Htun, “Civic Origins,” \textit{supra} p. 16 n.49, at 561–64.

\textsuperscript{1783} \textit{Cf.} Sallot, “Legal Victory Bittersweet” \textit{supra} note 1669; see also \textit{supra} notes 1669–1670 and accompanying text paragraph (discussing the Court Challenges Program).
This evidence of tolerance... leaves me with a reasonable doubt that the contemporary Canadian community would not tolerate other Canadians viewing the Eleven Videos on the basis that harm would flow from watching the Eleven Videos. (Price, ¶¶ 99–100)

To reach this conclusion, it is should be noted that Hawkins and Butler were cited in support that harm must be proven in every case, even with respect to violent pornography (id. ¶¶ 78–79): “even if sex and violence are portrayed together, it remains open to the Court to find that the evidence does not establish beyond a reasonable doubt the portrayals exceed Canadian standards of tolerance and that the harm component has been established” (id. ¶ 79). Furthermore, the court’s opinion in the former quote suggests that even if objectively harmful, the community standards mediate a determination of obscenity if society regards such harm as tolerable.

One may argue that Price was wrongly decided, but it was never appealed by the prosecution. Butler, not surprisingly, only held that “portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex”;

.... that is, violent pornography presentations are not “always” undue. Furthermore, it was held that because “there is a range of opinion as to what is [causing harm, or] degrading or dehumanizing [and] because this is not a matter that is susceptible of proof in the traditional way... we must have a norm that will serve as an arbiter [which] is the community as a whole.” Apparently, the community standard of tolerance was the primary arbiter over the dehumanization or harm and artistic tests in Price. Nonetheless, Price did recognize harm in the materials even though the only experts in the court claimed otherwise, as it contradicted Parliament’s reasonable conclusions of harm. Yet the court held that pervasive social presence of similar materials justified legal tolerance when interpreting what was “undue exploitation” of sex—a position de facto mirroring a harmful existing condition and leaving it without legal remedy. However, since the Supreme Court of Canada’s decision on indecency in Labaye may have weakened the importance of contemporary standards as the “arbiter” of harm after 2005 (see 413–415 above), it is unclear whether a decision such as Price could be made again in Canada. Even so, those who wish to challenge the harms of pornography should be warned by Price for what may happen when community standards forms part of pornography laws.

Smith (2012), on Violent Materials (Conviction)

In an apparent contradiction to Price, but not contradictory to Butler, a more recent appeals decision in R. v. Smith (2012) from the province of Ontario upheld an obscenity conviction of a producer and distributor of violent pornography that were deemed to present explicit sex even if not actual sexual activity. The Court of Appeal for Ontario decided a case that had been litigated for about ten years, with trials by two juries on the same materials, largely upholding the trial court’s position from 2002 in Smith. A retrial had been order because of some errors in the jury instructions. However, the only difference in outcome after the second trial was a lowering of the penalty for the same counts: from Can$100,000 and three years on proba-

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1785 Id. at 484.
tion to Can$28,000, two years on probation, and 240 hours of community service for the defendant.  

The case did not involve any investigation of conditions of production—only the consumption harms aspects. There were two types of materials prosecuted: either (1) audio-visual presentations of simulated lethal violence against semi-nude and nude women in an explicitly sexual context (though without sexual activity such as “intercourse or fellatio”); or (2) written short stories that presented “brutal rape and killing or sexualized killing of women in the most graphic terms” that “reinforce the myth that women enjoy being raped; that they enjoy their victimization.” The audiovisual materials did not present the same acts as those in the written stories. But the producer’s stated purpose on one of his website was “to show beautiful women getting killed.” According to the trial court’s description, nude or semi-nude women were presented as “shot, stabbed, stalked, executed by bow and arrow, or shown in combat with swords and knives” by a man “portrayed as being competent and a successful individual who can silence women with his violence, leave them on sexual display, and walk away without consequence” (Smith 2002, ¶¶ 5–7). The court stated that the women were presented as “easily manipulated” and sometimes as “being complicit in the violence”; that is, being rendered as “bad women’ by being sexually loose, or attempting to use their sexuality to control men, violence against them is portrayed as being justified” (id. ¶ 7).

The prosecution had called two witnesses: Dr. Neil Malamuth, who is probably the most widely published researcher on sexual aggression and pornography exposure in psychology; and Dr. Peter Collins, a psychiatrist, and expert in “sexual deviance” and “paraphilia.” The defendant called two university scholars in literature and film studies of which one is explicitly named by the courts; Dr. Barry Grant, an expert in film studies. Dr. Malamuth testified that exposure to the impugned materials could increase attitudes supporting violence against women, such as myths that women enjoy being raped violently dominated, and could increase risk for sexual aggression (Smith 2005, ¶ 13). Drs. Collins and Malamuth both noted that the materials included “submissive positions” of women, “the use of ‘sexy’ women,” and a combination of nudity and dominance of women that supported their opinions about the materials’ power to change attitudes and behaviors against women negatively (id. ¶ 14). The defendant’s experts submitted evidence “about materials with sexual content combined with extreme violence that were available in the community” (id. ¶ 15), apparently in attempt to show tolerant community standards that supported an acquittal rather than conviction. Dr. Grant also submitted that there was a distinction between pornography showing sexual acts and so-called exploitation films showing nudity, and that these genres could merge (id.). In his opinion, the defendant’s new special “skin-ripping technique” would be appreciated by “aficionados of horror.

1788 Smith, [2012] CarswellOnt ¶¶ 38–44.
1789 There was early evidence indicating that the defendant might have hired and used prostituted women to produce audiovisual materials in his home, and that he forced his wife and children into his basement while doing this. However, a statement to that end was later withdrawn by the wife. See retrial-judgment on application to exclude evidence in R. v. Smith, [2007] O.J. No. 3075 ¶ 12, CarswellOnt 6286 (Super. Ct.) (Lexis) (mentioning statement by Lorna Smith that she later rejected).
and exploitation films” (id.). These special effects provided the presentations with “artistic merit,” according to Dr. Grant (id.). The type of experts called upon by the distinctive parties is opposed to that in Price, where the prosecution did not rely on psychologists or similar social science experts. By contrast, the defendant in Price had called upon scholars who relied heavily on aggregated correlational longitudinal data on official crime reports despite that they are concededly unreliable, and invoked an expert who submitted that BDSM was a harmless practice tolerated by the community (see 426–430 above). In Smith, only the Crown called social scientists that relied, not on aggregated correlational data on reported crime, but on data based on individual measurements (e.g., experimental and social survey psychology). The latter are more reliable and valid for the purpose of understanding consumption effects than the former (cf. 129–138 above). It is possible that the Smith defense hypothesized that it would suffice to posit expert testimony on community tolerance against expert testimony on harm. Yet one may also speculate on whether it was difficult to find experts who defended materials presenting murder, lethal violence, and death in a sexual context, however simulated. Despite that the materials did not present common pornography acts such as intercourse or fellatio, the particularly pronounced violence might have been a moderating factor in the prosecution’s success, though it is difficult to assess on the face of the written opinions. In any event, the constellations of experts appear to have been stronger for the prosecution when considering the harm-component of the tripartite Butler test of obscenity (i.e. violence and dehumanization test, contemporary standards, and artistic defenses).

Regarding the first conviction of Smith in 2002, it is notable that it occurred about seventeen months before Price. The approaches in regards of expert support of evidence were highly divergent in these two provincial courts. Likewise, the assessment and evaluation of contemporary standards were also markedly different. As recalled, Price referred to the ready availability of similar material as evidence of community “tolerance” for pornography that presented male violence against women. By contrast, the courts in Smith took a decisively different approach. It was noted that both the Crown and the defense “agree that women are the invariable targets of sexualized violence” in “horror genres” and that the defendant’s materials “always” so targeted women (Smith 2002, ¶ 30). But these materials were rejected by the court, regardless of their appeal in the community.

These are not victimless crimes. The undue exploitation of sex and violence directed at women is a poison in our society. It comes to us increasingly in films, literature and on the Internet. It has become acceptable and increasingly graphic entertainment. It has the power to change our perceptions, our attitudes towards each other. It may even prompt us to act on these negative attitudes. And then to justify ourselves. This poison threatens to overrun our conviction that the individual has dignity and worth. (Smith 2002, ¶¶ 31–32; Pierce, J.)

After the second trial with a new judge and jury and its unsuccessful appeal, the Court of Appeal for Ontario in 2012 quoted that trial’s judge who had noted that the defendant had “remained unrepentant throughout the many proceedings and, in fact, has shown a certain defiance, apparently having convinced himself that he is right and the law and his fellow citizens who have on two occasions found him guilty of

producing and distributing obscene material are wrong.” These two statements above show that the Smith courts were aware that graphic sexually violent and explicit subordination of women, including in “submissive positions” (Smith 2005, ¶ 14), were popular thus “tolerated” by segments of the community. But rather than regarding that as a mitigating circumstance (as in Price), in Smith their popularity were regarded as toxic to society. As mentioned previously the 2012 opinion in Smith does not reveal to what extent any of the parties considered the Supreme Court of Canada’s decision on indecency in Labaye in the end of 2005, which have been interpreted by scholars as substantially weakening the importance of contemporary standards (see 413–415 above). Certainly, the appeals opinion in 2012 mentions community standards in a way suggesting that harm is the only relevant standard for obscenity, though it stops short from explicitly saying so. This could be taken as an implicit recognition that contemporary standards are now functioning as a proxy for the dehumanization and degradation test, and essentially measures evidence of harm (e.g., harm to women’s equality, as guaranteed by the Canadian Charter of Rights and Freedoms) rather than measuring community tolerance for pornography.

**Concluding Analysis**

Judicial responses to legal challenges to pornography in Canada have shown mixed success. The outcomes in obscenity trials in courts do to some extent mirror the public protests against the production and consumption harms of pornography, particularly those of the women’s movement. A progressive change of the judicial discourse on obscenity law since the early 1980s can be observed. The law is increasingly promoting substantive equality, rather than applying outmoded concepts such as “indecency.” Freedom of expression is not seen as an absolute, but as a value that needs to be balanced against equality imperatives when the latter are impaired by pornography. These developments are consistent with hierarchy theory that stress the need for recognition of disadvantaged groups in order to promote substantive equality as a means for reducing social dominance and illegitimate social hierarchy (see chapter 4 above). The seminal case of Butler (1992), where these trends were significantly consolidated and refined, has not been overturned since.

In comparison, the American judicial response to similar legal challenges to pornography (e.g., in Indianapolis in 1984–1985) has not recognized such an unambiguous balancing approach to equality rights and expressive freedoms as was recognized in Butler. As recalled, Butler held that even if “obscenity” was regarded as protected expression under section 2(b) of the Charter, the law’s restrictions on freedom of expression did not out weigh the importance of the legislative objective to

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*R. v. Smith, 2012 ONCA 892, [2012] CarswellOnt 15792 ¶ 42 (C.A.) (quoting unreported trial opinion by McCartney, J.). Further attesting to the diametrically opposing views of the Smith and Price courts, an assessment of the defendant’s profit from his websites was said in Smith to make a “nominal fine” insufficiently deterrent to defendant. Smith, [2002] CarswellOnt 6125 ¶ 25. Nor would a conviction create sufficient “stigma” either. Id. By contrast to stigma, evidence suggested the opposite, as he had drawn public attention to the criminal charges and solicited financial support from subscribers. Id. ¶ 26. He continued to run the website throughout the litigation and to profit from it, while refusing to remove materials despite previous promises during the beginning of the proceedings. Id. ¶¶ 27–29.*

*R. v. Smith, 2012 ONCA 892, [2012] CarswellOnt 15792 ¶ 29 (C.A.) (discussing how the “core” of a psychiatrist’s “testimony was directed to explaining paraphilia and the effect that exposure to material such as was displayed on the websites at issue in this case has on those who have a paraphilia. This evidence was necessary to establish an evidentiary foundation for the community standards test, which the jury would have to apply to render a verdict.”) (emphasis added), leave to appeal refused [2013] CarswellOnt 9111 (Fish, Moldaver, Rothstein JJ.) (S.C.C.).*
prevent harm and promote equality (Butler, 509). There were no requirements to draft the law according to liberal concepts such as “viewpoint neutrality,” “symbolic speech,” or “secondary effects” doctrines, or other recognized categories of exceptions such as “low-value speech,” “fighting words,” or “defamation,” as was necessary in the United States when similar legal challenges were mounted (pp. 325–344 above). Likewise, in Butler there were no requirements to show a “compelling interest” that was served by “narrowly tailored means” (ibid.). Rather, a “pressing and substantial” legislative objective would suffice, given that the means were “reasonable and demonstrably justified” and not arbitrary, unfair, or irrational, but proportional to their objective.

The progressive development in Canada has not been without problems since the 1980s. Several limitations have been observed. The most important obstacle has been inadequate representation by prosecutors. Not only did prosecutors often lack updated and appropriate social science evidence that was otherwise readily available. They also failed to note the constitutional equality interests at stake. Expectedly, a number of relatively ignorant and sometimes baseless opinions where expressed by judges who had not been confronted with accurate evidence and arguments during judicial deliberations. Their perceptions of “consent,” dehumanization and degradation, and the accurate state of knowledge on harms, were repeatedly inconsistent. Sometimes the judicial treatment varied considerably between different provincial courts, as in the more recent Price and Smith cases in the 2000s (pp. 424–433 above). The immediate years after Butler had been decided in 1992, the concepts of dehumanization and degradation were also beginning to be interpreted more outside of context; that is, not considered in light of such facts that women are structurally subordinated in society and regularly exposed to gender-based violence and attitudes supporting those same conditions. When this empirical context of inequality have been considered explicitly, a number of experiments and studies suggest that lawyers can apply progressive pornography laws with conceptual consistency, even terms such as “dehumanizing” and “degrading,” in order to identify what materials that tend to subordinate women in social context. In Smith (2012), Ontario courts returned to such a more consistent harms-based equality approach.

Another important obstacle to progress is that the community standard of tolerance test was never abandoned—a concept predicted to be unreliable as a foundation for legal challenges to pornography (pp. 199–206). Expectedly, that test obstructed more successful challenges to pornography after Butler, although the related decision in Labaye on indecency charges in December 2005 may have subsequently weakened its importance to merely figuring as a proxy for harm. Whether such a development will happen in future obscenity cases, it should be noted that community standards are not mandated by the obscenity legislation, and could be cast as unconstitutional under the Charter’s sex equality guarantees when protecting demonstrably subordinating materials. The fact that it has not yet been explicitly challenged as such is perhaps related to the relatively weak influence of the women’s groups and other representatives of those harmed by pornography on judicial deliberation. As shown repeatedly, in no Canadian criminal obscenity trial reported above, except for Butler, were there intervening autonomous organizations that represented women or other groups that are negatively affected by pornography. And even in Butler, there was only one among eight interveners who represented Canadian women at large. A civil rights approach, which is favored by hierarchy theory (see 298–312), would have reversed this relative representation of perspectives and interests in judicial deliberations. Those immediately affected would be in the majority, while prosecutors would be the minority, possibly completely excluded.
Criminal law approaches have usually been insensitive to the perspectives and interests of those harmed by pornography, unless there are committed prosecutors who coincidentally choose to recognize some of their concerns. There has been some success in this regard in the United States in the new millennium, where creative prosecutors made use of the obscenity laws to successfully convict well-known producers and distributors of particularly violent, dehumanizing, and degrading materials (cf. 355–363). The obstacles caused by the criminal law approach and community standards in Canada have been expected from the point of view of hierarchy theory, which prefers civil and survivor-centered approaches (cf. 298–312). However, governments do not have to adapt wholesale the civil rights approach to support subordinated groups in judicial proceedings; relatively minor efforts can improve the application of obscenity law considerably. For instance, the Canadian Court Challenges Program that existed at the time Butler was litigated demonstrably supported LEAF (the women’s group intervener) to intervene in Butler and clarify the equality interests at stake. Put otherwise, there are intermediate means for governments who want to promote substantive equality and the interests of disadvantaged groups, to ensure that courts are properly informed of all the relevant evidence and perspectives.


This chapter so far have illustrated how legal challenges against social dominance that is reinforced by pornography are successful when they consistently recognize substantive inequality; that is, when they represent the perspectives and interests of those who are harmed. By contrast, legal challenges are unsuccessful when they do not recognize disadvantaged groups and their interests. Such lack of recognition in judicial challenges has among other things lead to inadequate evidence being considered in courts, and that contemporary community standards of tolerance become more predominant in judicial assessments of obscenity—both with detrimental results. Likewise in legislative challenges (see 371–392 above), when there is failure to recognize and represent such groups the result tends to produce proposals for criminal laws and other deficient proposals rather than empowering civil rights and otherwise effective laws. As recalled, criminal laws are associated with more obstacles in the form of higher burdens of proof and lack of empowerment for groups who are harmed by pornography to use and control the law. Put otherwise, misattribution and misuse of the Canadian obscenity law typically occurred because disadvantaged groups were inadequately recognized and represented—a result that supports hierarchy theory (cf. chapter 4 above).

Yet most laws may have faults or some room for misuse, whether minuscule or serious. For instance, in *Little Sisters Book & Art Emporium v. Canada* (2000), the Supreme Court of Canada conceded that customs authorities had “systematically targeted” a gay and lesbian bookstore in B.C. under regulations that prohibited importation of obscenity into Canada; officials had “wrongly delayed, confiscated, destroyed, damaged, prohibited or misclassified materials.” General-interest and traditional bookstores did not encounter such targeted inspections (*Little Sisters*, ¶ 8–10), although other “small bookstores with specialized inventory or clientele,” including a “women’s” and a “feminist” bookstore, had been similarly targeted by selective customs inspections (*id.* ¶ 11). Moreover, there was a patent lack of training

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for customs officials to classify obscenity, and a lack of time to perform this task (id. ¶¶ 6–7) that likely contributed to the misapplication of the regulation. Although the impact of the customs’ administrative practices may certainly have discriminated unfairly against gay and lesbian people’s freedom of expression and information, it does not appear to be because there was too much recognition of substantive inequality in \textit{Butler}. A selective enforcement would likely have happened under any regulation of pornography, and just as much if not more under an approach neutral to harms and equality.

Otherwise, arguments in the Supreme Court of Canada further strengthens the presumption that one need to address the most directly harmed groups, who are best situated to legally challenge the harms of pornography. To illustrate, it is worth looking at two interveners in \textit{Little Sisters}, who pursued different arguments in this regard. The first one, LEAF—the Canadian women’s litigation organization—intervened again in \textit{Little Sisters}. But this time they pursued an opposite argument to the one they made in \textit{Butler} eight years earlier. As noted by the Court, “intervener LEAF took the position that sado-masochism performs an emancipatory role in gay and lesbian culture and should therefore be judged by a different standard from that applicable to heterosexual culture” (id. ¶ 63). LEAF had further submitted that “by definition, gender discrimination is not an issue in ‘same-sex erotica’” (id.). This categorical position appears to assume that same-sex pornography may not cause harms to gay and lesbian people.

The second intervener in \textit{Little Sisters}—Equality Now, an international organization—by contrast to LEAF “took the view that gay and lesbian individuals have as much right as their heterosexual counterparts to be protected from depictions of sex with violence or sexual conduct that is dehumanizing or degrading in a way that can cause harm” (id.). Equality Now’s position (contrary to LEAF’s) suggests that sexually explicit media that promotes sexual aggression and trivialization of such abuse may harm people belonging to a minority group just as it may among the majority. The gay and lesbian context does not differ in this regard. That is, just as not all women are equally harmed by pornography, and may not perceive it as being equally in their interest to fight it, neither are all gay and lesbians. To effectively address those harmed in any minority or majority group, one needs to adopt an intersectional perspective that accounts for multiple disadvantages and particular vulnerability to harm (cf. 159–168 above). Such a perspective would also address subordination within minority groups, just as it would address subordination and dominance between majority and minority groups.

Although the body of evidence is not as large on the harms of same-sex pornography as it is with regards to heterosexual materials, much evidence suggests a similar dynamic of multiple disadvantage among male performers who are exploited to produce gay materials (e.g., 73–75). Moreover, the same expert (Dr. Malamuth) who was called to testify in the post–\textit{Butler} case \textit{R. v. Smith},\footnote{R. v. Smith, [2012] CarswellOnt 15792 ¶¶ 30–32 (C.A.); \textit{Smith} (2005), 76 O.R. (3d) 435 at 440–41 (¶¶ 11–14) (C.A.).} where violent audiovisual materials were found obscene, also testified in the \textit{Little Sisters}. The Court accepted his testimony from the trial court that “homosexual pornography may have harmful effects even if it is distinct in certain ways from heterosexual pornography” (\textit{Little Sisters}, ¶ 66). It was concluded “that the attempt to carve out of \textit{Butler} a special exception for gay and lesbian erotica should be rejected” (id. ¶ 68). In affirming that \textit{Butler}'s harms-based equality approach to obscenity held equally for gay and lesbian materials, it was also stated that “non-violent degradation of an ostensibly willing sex slave is no less dehumanizing if the victim happens to be of the same sex, and no
less (and no more) harmful in its reassurance to the viewer that the victim finds such conduct both normal and pleasurable” (id. ¶ 60).

The Little Sisters case suggests that even though customs officials selectively misused the law to target the gay and lesbian society, that finding by itself does not negate the pattern matching from Canada that supports hierarchy theory: when groups who are particularly affected by the harms of pornography are recognized and represented in the legislative and judicial deliberations, or in other situations of legal application, challenges are more successful than otherwise. Moreover, as Little Sisters shows, the Supreme Court vindicated the harms-based equality approach by ruling that customs officials had violated Butler, thus confirming hierarchy theory in concluding that there is no exception from the harm-standard because the materials are gay or lesbian. The same pattern can be seen across all legislative, judicial, and administrative challenges to pornography in Canada analyzed above: when survivors and those harmed are recognized, represented, and their perspectives and interests are promoted, the results are progressively consistent with hierarchy theory.

Democracy and Equality

Summarizing the patterns in the legislative challenges to pornography in Canada shows that they were substantially different compared to legislative challenges in United States. As shown above, the recommendations of the Fraser Committee and the two Parliamentary attempts at reform suggest that the women’s antipornography movement was largely left out of control over the agenda. For instance, the Fraser Committee’s definition of pornography focused on explicit sexual acts and violence rather than subordination. The Committee also rejected a more survivor-friendly empowering civil rights approach in favor of continued state-controlled criminal regulations. Although the Committee recognized the constitutionality in Canada of civil rights laws such as the Indianapolis Ordinance, they choose not to recommend them for Canada nevertheless. The Committee thus exhibited a limited recognition of subordination, qua substantive inequality. All in all, its recommendations would not have advanced the perspectives and interest of disadvantaged groups that are harmed by pornography to any significant extent. Likewise, the two bills proposed by Parliament provided few improvements to the prior Committee’s recommendations, if any. They lacked recognitions of subordination in the definitions of pornography, focusing instead on explicitness, violence, but with artistic defenses. The proposed bills included numerous loopholes and possibilities for misuse. They did not promote substantive equality, nor the perspectives and interests of those harmed, with the exception of a provision against coercion in production that would likely need improvement to work efficiently. Canadian legislative challenges stand out in stark contrast to American legislative challenges in Minneapolis, Indianapolis, as well as to U.S. federal government Committees and Congress.

The American women’s groups were relatively well organized compared to their Canadian counterparts. Their politicians adopted and pushed forward the movement’s proposals, and without much compromises. The women’s groups appeared to be in control of the political process. Even when they faced resistance in federal

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1800 It is fairly reasonable also to assume that if survivors of pornography related harms had been given an opportunity to consult the customs authorities—just as LEAF could intervene in Butler and provide the Court with more accurate evidence and arguments—the customs’ application of the law might have been more adequate.
courts in the mid 1980s, politicians continued to follow their lead as far as into 1992. The different conditions that could explain variation in political mobilization in Canada and America are not systematically analyzed in this dissertation. The policy output in Canada shows why this dissertation has chosen to focus not on explaining the conditions conducive to political mobilization, but rather the conditions favorable to legal challenges. As hypothesized, and in spite of the lower visibility and organization of the Canadian women’s movement vis-à-vis their American counterparts, the legal discourses challenging the production and consumption harms were more successful in Canada compared to the United States. Since the 1980s, the Canadian obscenity law has been judicially reinterpreted into judging pornography for whether or not it impairs equality imperatives by promoting gender-based violence and attitudes supporting violence against women. As argued above, the violence, dehumanization, and degradation test promotes substantive equality, and recognizes the perspectives and interests of those who are harmed by pornography from an equality and harms-based viewpoint. But the enforcement and practical outcome of the Canadian law has admittedly been meager; not because of too much substantive equality, but rather because the law still maintains a traditional obscenity approach, including criminal procedures and a partial “community standards of tolerance” test (if potentially weakened by Labaye in 2005), rather than civil rights and an exclusively harms-based test.

By contrast, U.S. obscenity law has not officially adopted a harms-based equality standard at all. American federal law still applies an obscenity definition from 1973 that permits criminal regulations of materials that (i) appeal to a so-called “prurient interest” that is contrary to community standards of tolerance, (ii) present “patently offensive” conduct as defined in applicable state laws, and (iii) lack serious value. Nonetheless, creative federal prosecutors since the beginning of the new millennium have applied that law against adult violent materials that also present subordination of women (see 355–363 above). However, Canada has an obscenity law that targets most violent pornography, not only the more “extreme” materials that seem to have been the focus of the most recent U.S. challenges. Certainly, the enforcement of Canada’s obscenity law leaves much to ask for, especially the limitations of the criminal law approach and the ambiguity of the contemporary standard of tolerance test, even though the statutory wordings in the law are more unequivocal than their American counterparts (the Canadian code emphasizes violence, “namely, crime, horror, cruelty and violence”)1802. As interpreted in Butler, “the portrayal of sex coupled with violence will almost always constitute the undue exploitation of sex,”1803 thus be obscene. Moreover, as seen above in Smith (2002/2012), even materials that do not present sexual activity such as intercourse or fellatio, hence only show explicit sexualized presentations that “fuse sex and violence,” have also been ruled obscene.1804 Again, although the U.S. obscenity law has lately been used to target particularly violent and subordinating materials, there is nothing inherent in the law on

1802 Criminal Code, R.S.C. 1985, c. C-46, s. 163(8) (Can.) (emphasis added).
its face that supports such applications. The *Miller* test’s focus on prurience, sexual offensiveness, and lack of serious value do not—without more—support such interpretations.

Furthermore, the pattern matching in this chapter shows that the Canadian *legal architecture* has offered a significantly more conducive condition for successful legal challenges to pornography than the U.S. legal architecture did (see chapter 10 above, on the United States). For example, a similar legal challenge was mounted in *American Booksellers Ass’n v. Hudnut*\(^{1805}\) as in *Butler* (cf. 319–344 above). In both cases, the value of substantive equality was pitted against expressive freedoms. Only in *Butler* was a harms-based equality law found constitutional. There were no requirements in Canada that Parliament draft legislation that is not viewpoint based. By contrast, the *Hudnut* court’s judicial review shoehorned the legal challenges to pornography under such “viewpoint neutrality” doctrines that traditionally have regulated “symbolic speech” and “secondary effects” (cf. 333–338). Similarly, Canada was not limited to traditionally predefined categories such as “low-value speech” or “group libel” that obstructed the *Hudnut* court from visualizing how a harms-based equality approach to pornography rather deserves its own category (cf. 338–344).

Likewise, in *Butler* there were no requirements to show a “compelling interest” as in *Hudnut* (cf. 325–333); a “pressing and substantial” purpose would suffice, as long as the means to promote it were rational and proportional. The pattern matching in Canada thus shows that with a more balancing approach to constitutional rights, the perspectives and interests of disadvantaged groups, such as those harmed by pornography in its production and consumption, are more easily recognized, represented, and promoted under law, as in a harms-based equality law. There is thus a “match” between theoretical predictions and empirical evidence that corroborate that balancing approaches are more conducive than liberal frameworks are in recognizing and promoting the perspectives and interests of disadvantaged groups’ who are harmed by pornography.

Moreover, the analysis shows that the later problems in applying the obscenity law in Canada post-*Butler* were already predicted, and does not negate the explanatory power of hierarchy theory. As recalled, obstacles were primarily related to three factors: (a) contemporary standards of tolerance permitting harm to “flow” unabated, at least before the end of 2005,\(^{1806}\) (b) inadequate presentation of social science and other evidence of such harm, including materials being interpreted outside of a context of inequality;\(^{1807}\) and (c) criminal burdens of proof and statutory requirements of a mens rea.\(^{1808}\) Particularly regarding evidence (b), it is notable that when a large well-organized Canadian women’s litigation group (LEAF) received government support under the Court Challenges Program—a program supporting recognition and representation of disadvantaged groups, consistent with hierarchy theory—that group intervened, complementing courts with more adequate social science and other evidence in support for harms-based interpretation of the law (cf. 403–407 above). By contrast, when there were no interveners representing those who are harmed by pornography, the evidence assessed in courts was frequently inaccurate. On such occasions, judicial opinions often exhibited bigoted remarks, and at worst contradic-
ry acquittals. These conditions are consistent with hierarchy theory’s hypothesis that successful legal challenges need recognition and representation of perspectives and interests of those harmed in pornography production and by consumption effects. Favorable conditions for legal challenges exist with such legislative or judicial representation.
This chapter’s first section asks what the obstacles are to legally challenging the production harms of pornography with real persons in Sweden. As recalled from chapter 9 above, the Swedish prostitution laws seem directly applicable to pornography production insofar as compensation is paid for the sex. An analysis of a challenge that unsuccessfully attempted to get the laws to be applied accordingly in the late 1990s and early 2000s will subsequently be made. Perhaps most relevantly when charging the production is that the laws against purchase of sex, procuring, or sex trafficking do not address the resulting materials. This means that expressive concerns are not raised to the same extent that other legal challenges, such as the trafficking and assault provisions under the Minneapolis civil rights antipornography ordinances (see 307–312, paras. 1 & 4 above), or the Canadian obscenity law (chapter 11) raise them. The latter two laws target distribution, sale, and exposition of the materials, while a prostitution or trafficking law only regulates the production conditions of making such materials. The basic position of the latter approach would appear to cover production of pornography regardless of its dissemination, just as laws against rape, assault, or murder would arguably not be set aside simply because such activity was conducted in part as expressive activity (cf. 273–277). In this chapter, democratic theories, concepts, and legal analysis are used to explain the unsuccessful attempts to address production harms with prostitution laws in Sweden. The analysis of the evidence, arguments, and legal doctrines in Sweden finds that there were only ideological inhibitions to address pornography production with existing prostitution laws—not legal obstacles.\footnote{For the distinction between law and ideology, see supra pp. 180–181.}

Regarding prostitution laws in general, hierarchy theory predicts that a substantive equality approach to prostitution in law will empower disadvantaged groups (e.g., 294–298 above), just as such an approach is predicted to empower those harmed by pornography (cf. 153–168). Indeed, the strategy to apply substantive equality prostitution laws on pornography production shares similar objectives to combat the harms of sexual exploitation that underlie Sweden’s prostitution laws (cf. chapter 9). The legislative objectives of the Swedish prostitution law—that is, to prevent sexual exploitation, support prostituted persons who wish to escape the sex industry, and to promote gender equality more generally (see 277–286)—are just as relevant in the context of prostitution for pornography as in off-camera prostitution. The evidence analyzed in chapter 2 suggested that the population used in pornography is typically drawn from other forms of prostitution (e.g., 55–57). They are usually in a vulnerable social precondition that include multiple disadvantages, for example, poverty, childhood sexual abuse and neglect, homelessness, and racism (pp. 55–64, 72–75). As a consequence of this social power imbalance, it is easy for pornographers to subject them to unwanted or dangerous sexual acts. Production of pornography is thus generally exploitative and unequal. In addition, it is often abusive, with well-documented and severely harmful mental and physical consequences (pp. 64–75)—evidence even suggesting that prostitution in front of a camera is associated with more harmful consequences and abusive conditions than prostitution off-
camera is.\textsuperscript{1810} Not surprisingly, studies have shown that about nine in ten people in prostitution, from which those used in pornography are typically drawn, explicitly say they want to escape it.\textsuperscript{1811} Applying effective laws against sexual exploitation in pornography production appears therefore to be a compelling objective. Yet in the absence of any application to pornography that could be empirically investigated, it is imperative to know the existing “outcome” of the Swedish prostitution laws; for example, whether or not the laws have worked as intended in reducing sexual exploitation, supporting prostituted persons, and promoting substantive equality. If hierarchy theory is confirmed with regards to prostitution laws in such respects, it indicates that similar legal challenges to pornography production would be successful given that the objectives are same (e.g., reducing sexual exploitation, providing support, exit, and substantive equality to prostituted persons). Accordingly, the second section of this chapter will analyze the “policy outcome” of the Swedish prostitution laws that took force in 1999, particularly the Sex Purchase Law.

Policy “outcome” is distinguished from the policy “output.” The latter, for example, is relatively less ambitious to investigate in that it can be a measure of changes in laws or doctrines, but without considering their effects on social behavior.\textsuperscript{1812} Fortunately, and by contrast to the policy “outcome” of changes in pornography laws, the outcome of prostitution laws is easier to measure with reliable data in Sweden. To illustrate by comparison, an analysis of the “outcome” of pornography laws (as distinguished from “output”) lacks cross-national data on key dependent measurements that could be reliably compared, such as pornography consumption,\textsuperscript{1813} sexual aggression, and attitudes supporting violence against women. Moreover, such behavior is typically over-determined by multiple causes, thus hard to disentangle from changes in legal policy.\textsuperscript{1814} In the case of prostitution, by contrast to pornography, there are a number of studies (below) with more precise measurements on the outcome of legal change. These studies may answer questions regarding to what extent the prevalence of prostitution was reduced in Sweden after 1999 relative to other countries, to what extent prostituted persons in Sweden became more or less empowered, and to what extent prostitution in Sweden did not become more “dangerous” after 1999. Sweden would, consistent with hierarchy theory, show positive results on these three dimensions, including supporting those who are exploited in

\textsuperscript{1810} For example, a large study of prostituted people in nine countries with 854 respondents prostituted in a number of different venues showed that two thirds exhibited symptoms of PTSD on the same level as treatment seeking U.S. Vietnam veterans. See supra notes 249–250 and accompanying text. Yet those who had experienced prostitution for pornography reported statistically higher symptoms of posttraumatic stress disorder (PTSD) than those who experienced prostitution exclusively off-camera, even after controlling for other relevant factors. Farley, “Renting an Organ,” supra p. 38, n.113, at 146 (finding that 49% of 802 prostituted women in nine countries reported being used by pimps or tricks to make pornography—a group diagnosed with statistically “significantly more severe symptoms” of posttraumatic stress disorder (PTSD) than did those who did not report being used in pornography, and without reaching the statistical ceiling effect reported for alternative factors such as childhood abuse or assault in prostitution); Cf. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 37 (when events in their lives triggered reminders of past trauma, the group who had pornography made of them reported statistically significant higher levels of emotional distress than prostituted persons who had not reported being used for pornography). Several individual studies also show that the extent of prostitution is significantly predictive of mental health problems even after controlling for other causes such as extra violence, venue, child abuse, or neglect. See supra notes 249–258 and accompanying text.

\textsuperscript{1811} See supra notes 195–196 and accompanying text (citing and discussing studies).

\textsuperscript{1812} For the distinction between output and outcome, see supra note 76 and accompanying text.

\textsuperscript{1813} For instance, although anonymous social surveys on consumption exist in the United States, Sweden, and Canada, they do not use uniform conceptualizations and measurements, thus cannot be systematically compared. See supra pp. 33–37.

\textsuperscript{1814} See supra p. 27 n.78 (discussing literature on over-determination of social behaviors); cf. supra pp. 130–139 (analyzing “aggregated” studies on pornography, sex crime, and related problems).
prostitution, whether or not they are also exploited in pornography, and especially in comparison to countries without a similar legal substantive equality approach to prostitution.

In the second section of this chapter, a number of additional informal units of analysis\textsuperscript{1815} will be brought into the comparative case study design; that is, countries culturally and socially comparable to Sweden (and Canada and the United States), but with different legal approaches during the same time period that Sweden changed its laws. They include primarily Denmark and Norway, but also the Netherlands, Germany, New Zealand, and jurisdictions such as Nevada and Victoria (Australia), where buying sex and third party profiting from prostitution were legal in various forms.\textsuperscript{1816} The results below show that Sweden’s law has indeed had its intended effects, reducing sexual exploitation, supporting prostituted persons, including to exit prostitution, without making prostitution more dangerous or “hidden” as some critics have tried to claim. Certainly, there are areas where substantial improvement of the law is needed. However, those problems are shown below to be related to a lack of, rather than an abundance of, substantive equality concerns and representation of the perspectives and interests of prostituted persons. Thus, hierarchy theory is confirmed repeatedly; in the additional sense that where the law is found to be insufficient, to improve it progressively would only be further consistent with the predictions of hierarchy theory, rather than being contrary to the theory.

Section 1: Legislative Challenges to Production Harms

1993 Prostitution Inquiry’s Recommendation

The idea to apply prostitution laws on pornography production was proposed already by the government’s 1993 Prostitution Inquiry, who investigated the need for reform of prostitution laws prior to the adoption of the Sex Purchase Law in 1998. The head of the inquiry, Inga-Britt Törnell, who was a Supreme Court Justice before this appointment, suggested in particular to extent coverage under existing criminal prohibitions on procuring\textsuperscript{1817} to pornography production and strip clubs that promoted so-called private posing.\textsuperscript{1818} Accordingly, the Inquiry’s final report recommended that liability for procuring should be extended to include a person promoting or improperly exploiting that someone else “for remuneration in connection with the produc-

\textsuperscript{1815} For an explanation of the concepts of “formal” and “informal units of analysis” in (comparative) case study methodology, see Gerring, “What Is a Case Study?,” supra p. 17 n.53, at 344; cf. supra pp. 17–18 (summarizing and complementing Gerring’s concept with an additional distinction of “indirect” and “direct” units of analysis).

\textsuperscript{1816} Drawing from these additional “informal units of analysis” conforms to a Most Similar Systems Design (MSSD) in comparative research, cf. supra pp. 22–24, in the sense that they have very similar social policies (Norway, Denmark, and Sweden), or if not, they are at least similar economic systems (i.e., western industrialized nations).

\textsuperscript{1817} The offense of normal procuring is committed by a “person who promotes” or a person who “in an improper way financially is exploiting a person who has casual sexual relations in return for payment.” Brottsbalken [BrB] [Criminal Code] 6:12(1) (Swed.) (maximum imprisonment four years). There is also gross procuring, with a maximum penalty of eight years, where “special consideration shall be given to whether the crime has concerned a large-scale activity, brought significant financial gain or involved ruthless exploitation of another person.” BrB 6:12(3) (Swed.). For further conceptual discussion of these offenses, see supra note 1180.

\textsuperscript{1818} SOU 1995:15 Könshandeln [gov’t report series], supra chap 2, n. 190, at 230–31 (Swed.). Further citations in text.
tion of pornographic pictures or films had casual sex that included intercourse or was of a gross offensive nature” (SOU 1995:15 p. 230). In addition, persons who “promoted” or “profited” from prostitution where “bodily contact does not occur, for example, sexual posing,” were to be liable for the same offense (id. at 230). The 1993 Inquiry had candidly recognized “[p]ornography production to be, in reality, prostitution in front of the camera,” and that “through the resulting films” the prostituted person’s “degradation can be preserved and repeated during a long time” (id. at 136). Thus was also emphasized the potentially more harmful practice of pornography production compared to off-camera prostitution.

There were no special laws against human trafficking at the time of the publication of the Inquiry’s final report in 1995.\textsuperscript{1819} Applying procuring laws was thus the most parsimonious and logical response to fight sexual exploitation in pornography production with existing legal provisions. The 1993 Inquiry noted that evidence showed production harms to be substantial and just as harmful as those affecting persons who were prostituted off-camera (SOU 1995:15 p. 231). In addition, it was concluded that pornography performers are “not rarely subjected to a profoundly degrading treatment” while their possibilities to prevent such treatment by producers were “often very limited” (id.). If being compared to “normal” procuring,” the head of inquiry concluded that the conditions in pornography production would not seldom amount to a “gross procuring” (id.). According to Sweden’s Criminal Code, gross procuring entails a maximum penalty twice as harsh as normal procuring; and when assessing if it is gross or normal, “special consideration” is given to whether or not it “involved ruthless exploitation of another person,” among other things.\textsuperscript{1820}

The head of the 1993 Inquiry submitted that one could not motivate a penalty for the “traditional procurer” while regarding the conduct of third parties within the pornography and “sex club” industry as legal (id.). According to the head of inquiry, the actions of the traditional pimp could neither be regarded as more harmful for society, nor more “devastating for the exploited persons” than those of the pornography producer (id.). It was submitted that anyone who dismissed the thought of an extended liability for procuring along these lines would need to dismiss procuring as a criminal offence in its entirety (id.). Although the profiteers in the pornography industry could be regarded as “purchasers” or “accomplices” to a purchase of sex, the head of inquiry took the position that their business was predominantly constituted by a “promotion” or a “profiteering from the fact that a weaker party is exploited for casual sex, that is, a form of procuring” (id.). Hence, procuring rather than purchase of sex was found to be the most appropriately applicable offense.

The head of inquiry further submitted that the current formulation of the procuring provision “may appear as covering” pornography production. Yet without any citation, legal or otherwise, she took the view that it was “clear that the legislator only considered to make procuring criminally liable in the form of the profiteering on someone else’s prostitution in that sense that the latter has casual sex with ‘customers’ who pays for being sexually stimulated” (id.). She further expressed the view, again without citation, that the present provision fit well with “the sex club owner who promotes the casual sex for remuneration of someone else by permitting or contributing to the occurrence of private posing”; by contrast, the pornographer


\textsuperscript{1820} BrB 6:12(3) (Swed.). On differences between normal and gross procuring, see supra note 1817.
who remunerates persons to perform sexual conduct with each other was not perceived as being “covered” by the “present wordings” (id.).

It is unclear what, precisely, in the provision’s wordings that support or do not support the distinctions in applications that the head of inquiry claimed. The relevant procuring provision reads: “A person who promotes or improperly financially exploits a person’s engagement in casual sexual relations in return for payment shall be sentenced for procuring.”1821 Contrary to what the head of inquiry, who lacked citation, implied, these statutory wordings do not distinguish procuring as a conduct that must involve “‘customers’ who pays for being sexually stimulated” (SOU 1995:15 p. 231). They simply proscribe the financial exploitation of “causal sexual relations in return for payment.” There are no distinctions among “customers,” “performers,” “prostituted persons” or other “persons” on its face. A “person’s engagement in casual sexual relations” says nothing about whether the sex is engaged in for a paying customer, for a paying pornography consumer (voyeur), for a paying third party (pornography producer), or for anyone else. The provision thus appears applicable on its face to pornography production, and in no need for a legislative amendment.

In support of direct application, and as shown in chapter 9 above, the Supreme Court had already in 1979 extended the procuring provision to cover new conduct, such as newspaper ads for prostitution. In that case, the Court dismissed objections from the newspaper editor in the indictment who argued that such a legal application impermissibly added conduct demonstrably not conceived in either the original or later legislative history.1822 That case shows that it may be irrelevant whether a particular conduct, such as pornography production or newspaper ads, has previously not been “perceived” or “considered” in any legislative history. Such omissions do not bar Swedish courts from applying the procuring provision on its face, and in a new terrain such as pornography production, where it is conceptually sound to apply the provision. The head of inquiry’s doubts that existing laws could not cover pornography production therefore appear inconsistent, not the least since she otherwise readily thought existing laws already should cover private posing at strip clubs.

Although it can thus clearly be argued that the procuring provisions already applies to pornographers, the 1993 Inquiry at least suggested a “reform” that would clearly extend the law to cover such third party promotion and exploitation of casual sex for remuneration in pornography production (SOU 1995:15 p. 231). The head of inquiry further rebutted potential objections from those who were concerned with expressive freedoms, taking the position that freedom of expression was not infringed by the proposals.

It is not an issue of criminalizing the production of the image/film, but the underlying conduct. As a comparison could be mentioned the case where someone films an assault that he himself instigated—a condition that does not bar a conviction for liability for complicity in the assault, the provisions on freedom of expression notwithstanding. (id.)

In rebutting freedom of expression objections, the head of inquiry compared with a contemporary provision against sexual molestation of children that was applied in the context of pornography production (id. at 231–32). Similarly, an extension of

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1821 BrB 6:12(1) (emphasis added).
such a law to cover adults who were made to perform in a pornography movie was said to be applied in Denmark at the time (id. at 232).

1998 Government Demands Further Inquiry

The 1993 Inquiry’s suggestion to view pornographers as procurers was first dismissed in 1998 in the government’s omnibus bill on violence against women. There, in one short paragraph, the limited explanation given was that the 1993 Inquiry had not considered enough the “consequences” to freedom of expression and freedom of the press; thus was the issue sent back for further review in a new commission of inquiry. In 1998 the government had also appointed a committee with members from all political parties (those with parliamentary seats) to make a total review of the existing sexual offenses in the criminal code. It was this particular committee that was tasked with reviewing anew the issue of extending procuring laws to pornography production. In this new 1998 Sexual Offenses Committee’s Charter (Kommittédirektiv), the government thus noted the seeming inconsistency that the existing procuring law, which proscribes the promotion or undue exploitation of sex for money, was not applied to “a person who is paying another person to participate in pornography movie . . . despite that his incentive often is financial gain.”

Without specifying what was wrong with the prior suggestions, the government stated that the new committee was to investigate how the procuring provision could be extended “in some other way” than had been suggested by the 1993 Inquiry (dir. 1998:48; repr. SOU 2001:14 p. 609). Furthermore, a “starting point” was to avoid “infringements in the constitutional regulations of freedom of the press and expression”; consequently, the Committee was not to “propose a general prohibition against pornography” (p. 609), such as a specific law against dissemination or sale of sexually explicit media.

A general impression one is given when reading the Charter of the 1998 Sexual Offences Committee is that the Swedish executive government was never fond of the idea to extend the procuring offense to cover pornography production. They might simply have felt a need to respond to outside pressures when writing the Committee’s Charter. Such a hypothesis is theoretically consistent when considering Laurel Weldon and Mala Htun’s findings drawn from seventy nations in a panel data set (1975–2005), showing how initiatives for comprehensive policies against gender-based violence were predominantly found outside the government; that is, questions similar to the 1993 Prostitution Inquiry’s proposal are generally pushed for by autonomous feminist social mobilization, and not by government agencies within the administration.

From this point of view, the Swedish government’s disengagement makes sense. Moreover, the conclusion that forces outside the government rather than within were pushing for these legal reforms is also indirectly strengthened by the many minority motions raised in Parliament during this period—minorities who never mustered enough votes to decisively influence the government cabinet. As shown below, these motions called for empirical investigations of pornography’s harms, and focused on its various connections to sexual aggression, attitudes sup-

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porting violence against women, sexual exploitation, abuse, and sex discrimination and inequality generally.

For instance, in one of the larger minority motions at the time authored by six MPs, of which one had even been appointed to 1998 Sexual Offences Committee herself, a more sweeping proposal was made to extend the government’s directive to include a comprehensive review that would “analyze pornography from a gender-political perspective, and from this analysis propose further measures with special emphasis on preventing harmful effects on young people.” The motion made it to a floor vote on February 16, 2000 with forty-nine MPs in support and 251 MPs against, plus forty-nine abstentions. In addition, there had been numerous other suggestions among parliamentary minorities around the time of the Committee’s term, all reflecting a consistent public opinion to take more decisive action against pornography and its relationship to gender-based violence and discrimination.

Accordingly, a parliamentary minority motion in the fall 2001, written by two MPs from the green party, demanded the appointment of a government investigation to review specifically the evolution of pornography: the motion noted that pornography had become “a cruel exploitation of female children and young women in the name of profit,” and requested the appointment of an investigation of the views among “different researchers on the associations between pornographic film, rapes, and other sexual violence.” In another motion the same term authored by two social democrats, pornography was referred to as being among “the forces that . . . actively counteract the work for gender equality.” In yet another motion by two MPs from the Center Party the prior term of 2000, an observation was made of the associations between pornography consumption and the increase of rapes that were “often brutally executed”; the motion appealed to Parliament to take action that would ”reduce the possibility to ‘spur’ people to . . . rape women (and men).”

Further, two duplicate motions in the two parliamentary terms 1999 to 2001 was authored by three social democrats, noting a “probable” connection between “the use of pornographic movies and making use of sexual slurs, sexual harassment, and sexual assault,” urging the government to propose more restrictions on TV-broadcasts in this area. In addition, another motion by a social democrat in the fall 2000 also claimed a “probable” connection between pornography use and sexual coercion and violence, remarking that the European Union, which should prioritize gender equality, needed to investigate the export of pornography to developing countries and recognize the harmful contribution by pornography particularly in context of the countries that were fighting against AIDS.

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1828 Mot. 2001/02:K348 Pornografins utveckling [parliamentary motion] (Oct. 3) (Swed.) (Ewa Larsson and Kia Andreaasson; Greens).

1829 Mot. 2001/02:Ub348 Jämställdhetsarbete mot pornografi [parliamentary motion] (Sept. 28) (Swed.) (Christina Nenes and Göte Wahlström; Social Democrats).

1830 Mot. 2000/01:K351 Pornografi i kabelTV-kanaler [parliamentary motion] (Oct. 4) (Swed.) (Birgitta Sellén and Rigmor Stenmark; Center Party).

1831 Mot. 2000/01:K375 TV-kanaler med pornografiska sändningar [parliamentary motion] (Oct. 2) (Swed.) (Carina Hägg, Birgitta Ahlqvist, and Agneta Brendt; Social Democrats); Mot. 1999/2000:K304 Pornografiska sändningar [parliamentary motion] (Sept. 30) (Swed.) (authors and content same as supra).

1832 Mot. 2000/01:N310 Export av pornografiskt material [parliamentary motion] (Sept. 26) (Swed.) (Carina Hägg; Social Democrats).
Furthermore, a motion by two Christian Democrats in the fall 1998 demanded a government review and a strategy against pornography on the view that pornography is a multi-billion industry; it presents women and girls as “objects” and “slaves” for men; it “is complicit in the oppression of women”; it is a “threat against the security” for women and girls; it is produced by the filming and photographing of sexual abuse; and it “encourages rape, incest, abuse, torture, and murder of women and girls . . . . and claims that women enjoy rape and abuse.” Two other duplicated motions from the Left Party in the parliamentary terms of 1997 to 1999, signed by ten or eight MPs, respectively, submitted that current laws against violent pornography in Sweden were useless, and further stated that “[c]ontempt for women is the essence of pornography; the presentation of woman as an object, a sub-human creature who even enjoys violence and torture mirrors this contempt.” Moreover, these two motions submitted that “the pornography industry” was “the largest cause” to an increase in sexual violence in society, and urged the government, inter alia, to review legislation on pornography that is “degrading” to females and also to restrict it in the meantime.

The documents referred to above were not the only parliamentary motions during this time. Others were submitted, some more limited in their approach. However, neither the conditions of pornography production, nor its consumption harms, even less “young people” in this context, were ever addressed by the 1998 Sexual Offences Committee. Such calls were also dismissed by the parliamentary majorities. Considering that the 1998 Committee was formally being tasked with reviewing laws regulating pornography production, the fact that they dismissed the idea to make a thorough empirical review of the conditions of production is particularly notable in comparison with government committees that were given similar missions in Canada and the United States during the 1980s (e.g., the Canadian Fraser Committee and the U.S. Attorney General’s Commission on pornography). The latter two made extensive documentations and conducted numerous hearings on the empirical evidence (see 346–352, 371–384 above). Some similar findings on the harms in pornography production, and also consumption-related harms, were however presented already by the 1993 Prostitution Inquiry. Deeming from the final report of the 1998 Sexual Offences Committee, those findings do not seem to have been subject to much discussion. Perhaps not surprisingly then, the Swedish 1998 Committee eventually dismissed the suggestion to extend procuring laws to cover pornography production.

Accordingly, in 2001 the 1998 Committee’s final report took the position that although the purpose of “protecting those who participate in pornographic pictures and movies” did not aim at the constitutional rights to produce or disseminate printed matter per se, the “actual restrictions” caused by extending the procuring provision were said to be “so significant” that a constitutional amendment to the laws regulat-
ing freedom of the press and expression was needed. The government itself then dropped the issue entirely when amending the criminal code’s chapter on sexual offenses in 2004. In light of the fact that procuring laws would not themselves necessarily address expression per se—that is, the laws could be restricted simply to specific conduct done during their production, but not the distribution or sale of the resulting materials—the Committee’s legal conclusion as well as their express refusal to suggest a constitutional amendment for this limited purpose are perplexing. Although their charter (Kommittédirektiv) did specify that the Inquiry was to investigate how the procuring provision could be extended “in some other way” than had been suggested by the 1993 Inquiry, thus avoid “infringements in the constitutional regulations of freedom of the press and expression,” and not “propose a general prohibition against pornography,” these directives did not necessarily preclude recommending a limited constitutional Amendment to set aside only the production conditions from expressive protections under the constitution. Such constitutional amendments are made by the Swedish Parliament with some frequency; two decisions with a general election in between are needed, as was done with regards to the much more sweeping child pornography exemption under the constitution.

The decision of the 1998 Sexual Offenses Committee will be further analyzed, including counterfactual doctrines that suggest it was a decision based on ideology rather than on existing law (pp. 455–465 below). Yet as a contextual background for the decision, it is necessary to review the changed constitutional landscape since the 1960s that had probably led the Committee to adopt a more absolutist ideological position on expressive freedoms regardless of actual law. As shown further below, at the time of the Committee’s work the general trend was to show more deference to freedom of expression per se. This position had not always been predominant. It seems to have developed in the doctrine only during the last three decades prior to their decision. But as will be shown further below, it did not grant the Committee to draw their conclusions about purported obstacles to use procuring laws in the context of pornography production.


As recalled from chapter 7 above, when it comes to exceptions from expressive protections under Sweden’s constitution there exist a number of different routes depending on the specific situation and its context. For the dissemination laws regulating otherwise free expression (as distinguished from production laws), one of three predominant routes is usually chosen: (i) a constitutional amendment in Sweden’s fundamental laws regulating media that exempt certain conduct from expressive protection by a rule of delegation to general law; (ii) a constitutional amendment that includes certain conduct within the catalogue of “freedom of expression offenses” that is governed by specific procedures (e.g., Chancellor of Justice’s consent, qualified jury trial with a six-three majority, exclusive editorial liability); or (iii) complete exclusion from constitutional protection according to the “Alexanderson doctrine” for

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1839 Id. at 415.
1840 Prop. 2004/5:45 En ny sexualbrottslagstiftning [government bill] (Swed.).
expression that is regulated with a *purpose* unrelated to the underlying liberal values protecting freedom of expression; traditionally, this route (iii) included, inter alia, illicit invitation to lotteries, dishonest conduct, blackmailing, fraud, unfair competition, counterfeit, illicit printing of money, misleading information.\(^{1843}\)

Furthermore, when regulating the *production conditions* of expressive materials such as pornography, it is questionable whether even the third alternative (i.e., the Alexanderson doctrine) is necessary for supporting a regulation. Indeed, by contrast to regulations of misleading ads, promotion of foreign lotteries in newspapers, and other illicit expressive conduct (e.g., counterfeit or stock market manipulation), applying prostitution or trafficking laws to production does not regulate any dissemination of expressive materials directly. Certainly, the effects of applying prostitution laws to pornography production may impinge indirectly on the producers and disseminators’ profits. Nonetheless, as stated in the introduction to chapter 9 above, just as publishers, newspapers, or printing activities are not exempted from applicable criminal, labor, and human rights laws, violations of prostitution and trafficking laws in pornography production should arguably not be either. For instance, it is hardly conceivable that child labor would ever be regarded as protected under expressive guarantees, thus legal by dint of being integral to the production of newspapers or books that otherwise promote the liberal values of a vibrant democracy.

In order to assess the responses to legal challenges to pornography production in Sweden during the time of the 1998 Sexual Offences Committee’s mandated inquiry, some additional changes in the legal doctrines since World War II need to be analyzed. As shown further below, there appears to have been a shift toward a more “absolute” interpretation of expressive rights in a number of indirectly related areas in Sweden since the 1960s, such as advertising law, alcohol and tobacco regulations, and regulations of unlawful threats by expressive means. But the government had also adopted a more “absolutist” view of freedom of expression in the 1980s and 1990s in their approach to *dissemination* of child and adult pornography laws to the extent that they required constitutional amendments to exempt such dissemination from expressive protection under the “principle of exclusivity.” By contrast, some of their critics argued that the Alexanderson doctrine would be sufficient to sustain such laws (pp. 233–237 above). Constitutional amendments that require two parliamentary decisions are a form of procedural check consistent with early liberal ideals, such as those of Locke, Madison, or Mill that emphasize a more negative-rights concept (cf. 143–148 above).

As shown in chapter 9 (pp. 227–230 above), the original Alexanderson doctrine clearly emphasized the legislative intent and protected interest underlying the potentially colliding law. The original formulation even implied that general law was more important than freedom of the press when assessing the applicability of the “principle of exclusivity.” As recalled, Alexanderson stated that it was the “prerogative of criminal law to examine more closely when a crime, brought about through print, is an offence against freedom of the press or not.”\(^{1844}\) In the end of the 1940s, Alexanderson’s approach was still conventional wisdom.\(^{1845}\) Late legal scholar Gunnar Persson noted that a change took place since the 1960s however, when the doctrine more commonly started to ask whether an “activity by itself” had less to do

\(^{1843}\) See supra pp. 229–235 (explaining the general constitutional system regulating freedom of expression in Sweden); cf. SOU 1947:60 Forslag till tryckfrihetsförordning [government report series] pp. 119–21, 250–51 (Swed.).

\(^{1844}\) Alexanderson, Föreläsningar öfver tryckfrihetsprocessen, supra chap. 7, n. 923, at 8.

\(^{1845}\) See, e.g., SOU 1947:60 [gov’t report series], supra note 1843, at 119–20 (referring approvingly to Alexanderson and the doctrine on permissible exceptions to the principle of exclusivity).
with the purposes of the fundamental laws, rather than inquiring into the purposes underlying the regulations of that same proscribed activity in general law. According to this new line of thought, the intent of the fundamental laws of expression appears to be more important than the intent of a potentially conflicting general law. This is contrary to the balance ascribed by Alexanderson in his original formula.

**Marketing Law Colonizes Expressive Doctrines**

An attempt to move the law toward greater deference to expressive freedoms could be seen already in 1961 when Swedish tabloid newspaper *Expressen* tried to challenge the Swedish Lottery Ordinance’s prohibition against promoting foreign lotteries. The paper had reported winning numbers in a German lottery in their news section—not among advertisements, seemingly attempting to deemphasize its commercial aspects to merit expressive protection. Yet in part since such information was of no interest to anyone else than participants in the lottery, by publishing this information the newspaper knowingly, “objectively,” and “substantially promoted” the foreign lottery in contravention of general law. Consistent with the Alexanderson doctrine, even though there was no explicit delegation to general law in the fundamental laws, the lottery regulation was applied without consideration of the Freedom of the Press Act. The legislative history The lottery offenses were removed in 1949 from the Freedom of the Press Act in the legislative history on the rationale that such offenses could indeed be regulated entirely by general law; hence, according to Persson “it would have been surprising” if the defendant had been acquitted.

A few years after the 1961 lottery decision, the concept of so-called commercial advertising began to appear in the doctrine in conjunction with the passing of the 1970 Marketing Act. The government’s expert commission who prepared the new bill had, consistent with Alexanderson, emphasized the purpose of commercial advertising as determinative to application of the principle of exclusivity. However, the government objected that marketing law should not proscribe advertising “that aimed to influence the public in general opinions or influencing their general behavior in certain directions.” It decided that “information” about a business person’s “race, religion, political viewpoint, or personal relationship” should not be unprotected by freedom of expression, even if the advertising had “a purely commercial

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1848 Id.
1849 NJA [Supreme Court] 1961-11-29 p. 715 et seq.
1850 Persson, *Exklusivitetsfrågan*, 353. Indicating the 1961 lottery decision’s doctrinal importance, another Swedish legal scholar criticized it in 1984 from a more absolutist stance. See Axberger, *Tryckfrihetens gränser*, supra chap. 7, n. 934, at 50–51 (arguing that since lottery legislation was not included among Freedom of the Press offenses, the Supreme Court should not have set aside the principle of exclusivity for “purely an information of the list of lottery prizes,” as distinguished from “ads from lottery organizers” at 51).
1852 SOU 1966:71 Otillorljig konkurrens, betänkande av utredningen om illojal konkurrens [Undue Competition: Report of the Inquiry on Unfair Competition] [government report series] p. 87 (Swed.).
1853 Prop. 1970:57 1970 Kungl. Maj:ts proposition nr 57 Förslag till lag om otilîrljig marknadsföring m.m. [Proposal for an Act on Undue Competition] [government bill] p. 67 (Swed.).
1854 Id. at 66.
Exemptions were only permissible for “such presentations that have purely commercial relationships to things.” Marketing law now began to colonize other areas. For instance, it appeared in the Supreme Court’s 1979 opinion on ads for prostitution discussed in chapter 9, even though that decision also enabled applications of procuring laws on a wider range of conduct. As recalled, a newspaper editor was convicted for procuring because he had approved the systematic publication of contact information to prostituted women in ads, thus promoted and benefited from the prostitution of others. In the Scania and Blekinge Court of Appeals the emphasis was on general law, with little discussion of freedom of the press. The editor was found to have contributed to “that prostitution has developed faster and in a larger extent than otherwise possible”; hence, consistent with Alexanderson, the legislative objective to prevent prostitution applied, and the editor was found criminally liable under the procuring provision. His liability was thus different from editorial liability that applies to most offenses against freedom of expression, where criminal intent is not required.

On appeal to the Supreme Court the outcome was affirmed, but the Court qualified their opinion with an additional analogy not previously made in lower courts. Language was “borrowed” from marketing doctrine. The prostitution ads were thus said to be “of completely commercial nature,” and not “to be perceived as statements in the debate on prostitution or otherwise as molding opinion.” The Supreme Court thus applied an additional category of “commercial advertising” in setting aside the principle of exclusivity, whereas the lower courts had relied only on Alexanderson by focusing on the procuring law’s objective. However, it should be noted that this case concerned legal action against the dissemination of potentially expressive materials (ads), as distinguished from actions taken against the production of material when using real people in prostitution. Whether it has more general implications is yet to be seen.

A move toward the liberal concept of negative rights that discourages government interventions (cf. 143–148 above) may be seen over time in the Swedish law on expression. Whereas lottery offences were previously removed from the Freedom of the Press Act in 1949 on the Alexanderson rationale that such offenses could be regulated entirely by general law, in the 1970s the Parliament begun to reverse this doctrine. Now, the Freedom of the Press Act was amended in 1974 with an explicit rule of delegation that sweepingly set aside the principle of exclusivity with respect to marketing associated with “alcoholic beverages or tobacco products.” Doubts had been expressed that new marketing laws, including the requirement of “purely commercial relationship to things,” could not sustain comprehensive regulation without such constitutional amendment, even if a particular product was deemed harmful for “social or similar reasons.” A few similar remarks were made.

\[\text{Id. at 67.}\]
\[\text{Id. at 67 (emphasis added) (“relationships” added as qualifier to “commercial purpose”).}\]
\[\text{All three courts’ opinions are reported in NJA 1979-09-28 pp. 602–10 (Swed.).}\]
\[\text{NJA [Scania & Blekinge Ct. App.] 1979-09-28 p. 606.}\]
\[\text{Id. at 606.}\]
\[\text{For an account and legal history analysis of problems and benefits with different intent standards in the area of freedom of expression law, see Persson, Exklusivitetsfrågan, supra chap. 7, n. 918, at 378–416.}\]
\[\text{Id. at 67.}\]
\[\text{Id. at 67 (emphasis added) (“relationships” added as qualifier to “commercial purpose”).}\]
\[\text{All three courts’ opinions are reported in NJA 1979-09-28 pp. 602–10 (Swed.).}\]
\[\text{NJA [Scania & Blekinge Ct. App.] 1979-09-28 p. 606.}\]
\[\text{Id. at 606.}\]
in conjunction with other new amendments being passed to the Freedom of the Press Act in 1987,\textsuperscript{1865} potentially raising the procedural thresholds for the Swedish democratic legislature to pass legislation against \textit{dissemination} of pornography, but not necessarily against \textit{production}.

The increase of new amendments since the 1970s has been generally interpreted as reinforcing the principle of exclusivity when there is no explicit exemption in the fundamental laws. For instance, in 2010 the Supreme Administrative Court argued that Parliament now would most likely require a further constitutional amendment if they intended to apply a total prohibition against advertising for services such as lotteries and gambling.\textsuperscript{1866} Nonetheless, the Court noted that established doctrines still do \textit{not} exclude permissible restrictions on basis of the \textit{particular circumstances}; hence, a prohibition in specific and well defined cases could still be sustained consistent with the principle of exclusivity, even without an explicit rule of delegation in the fundamental laws.\textsuperscript{1867} Thus general law could still be applied to expressive media, although on a case-by-case basis rather than by categorical generalizations.

\textbf{Unlawful Threats as Protected Expression: The Aftonbladet/Nazi Case}

A highly contentious Swedish case in the 1990s involved tabloid newspaper \textit{Aftonbladet} and Neo-Nazis who were charged with unlawful threat. A journalist at \textit{Aftonbladet} met with three publicly known persons in January 1998 and showed them threatening photographs of Nazis that had been taken outside their respective homes.\textsuperscript{1868} The photos were published a few days later, accompanied by headlines such as “Death Threat against Chief of Police”; the photos showed armed persons covering their faces with balaclavas, in one case with a tear gas gun pointed against an apartment door’s mailbox.\textsuperscript{1869} The five Nazis that had made the photographs (but not the journalist) were convicted in lower courts for having committed gross \textit{unlawful threat} and gross \textit{threat to public servant},\textsuperscript{1870} despite that these offences were not explicitly enumerated as being without protection in the fundamental laws.\textsuperscript{1871}

The Supreme Court subsequently reversed four of five judgments on the rationale that the Nazis were protected as “informants”\textsuperscript{1872} under the Freedom of the Press Act. Certainly, the Court submitted (following Alexanderson) that although the charged offenses were not among that constitutionally enumerated offenses against freedom of expression, their absence “do not prevent that threats that are presented in printed matter, under certain circumstances, may entail punishment according to general law, for example, if the threat is integral to an attempted blackmailing, or otherwise entails a precondition for crime.”\textsuperscript{1873} Nonetheless, the Court took the view that in the particular circumstances of the case the journalist wanted an illustration that provid-

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\textsuperscript{1865} Prop. 1986/87:151 om ändringar i tryckfrihetsförordningen [government bill] p. 53 (Swed.).
\textsuperscript{1866} Regeringsrättens årsbok [RA] [Sup. Admin. Ct.] 2010-11-30 ref. 115 Mål 2208-09, slip op. at 8 (Swed.) ("Expressen Case").
\textsuperscript{1867} See Id. at 6 (noting that the “primary rule in criminal law settings” now appears to be “that an assessment shall be made in the particular case whether a presentation is covered by the Freedom of the Press Act or not.”).
\textsuperscript{1869} NJA [All Courts] 1999-05-19 pp. 275–81 (Swed.).
\textsuperscript{1870} BrB [Criminal Code] 4:5 (unlawful threat), 17:1 (threat to public servant) (Swed.).
\textsuperscript{1871} NJA [Supreme Court] 1999-05-19 pp. 275–78. For the criminal statutes, see BrB [Criminal Code] 4:5 (unlawful threat), 17:1 (threat to public servant) (Swed.).
\textsuperscript{1872} NJA [Supreme Court] 1999-05-19 pp. 278–81. For constitutional provisions on informants and anonymity in general, \textit{see TF [Const.]} 1:1(3) & chap. 3 (Swed.).
\textsuperscript{1873} NJA [Supreme Court] 1999-05-19 p. 281.
\end{flushleft}
ed a visual impression of the defendant’s Neo-Nazi organization, which the journalist was writing an article about; thus, the publication of the photographs were said to be integral to the journalist’s “journalistic activity,” and therefore the informants were seen as being constitutionally protected.  

Persson has criticized the novel concept of a “journalistic activity” for “leading very far when tying the informant’s liability to the issue of whether someone else has a journalistic purpose.” Although Persson published his views later, it is perhaps not surprising that the Supreme Court eventually dismissed the fifth Nazi who had sought relief for a substantive defect, or a petition for a new trial (he did not appeal together with the other defendants). Here, the Supreme Court took the position that the lower courts’ judgments “could not be regarded as manifestly in conflict with law.” Hence, the case-by-case logic of individual assessments was emphasized anew. The Court might also have realized how controversial their prior decision had become, evidenced by Parliament’s constitutional amendments taking effect in 2003 that eliminated the possibility of such decisions in the future.

As opposed to an analogous challenge against pornography production under procuring or sex trafficking provisions, even the district court in the Aftonbladet/Nazi case readily admitted that making threatening photographs outside people’s homes is not an offense by itself. What constituted the crime was the defendants’ intent, or at least their “complete disregard” of whether the images would come to the plaintiffs’ knowledge. In the case of a legal challenge to pornography production, the relationship between criminal activity and use of expressive means is the reversed: if production of images is done by procuring or purchasing sex from real persons it may be criminal as an act of prostitution, but the possession and publication may be constitutionally protected according to Sweden’s view on non-violent adult pornography (cf. 233–237 above). Such a challenge to pornographers does not target the resulting material or expressive activity per se, as the government attempted to do in the Aftonbladet/Nazi case. According to this analysis, the Aftonbladet/Nazi actually conforms much more to the original Alexanderson test, while the pornography production setting appears more as lying completely outside the protections afforded under the fundamental laws. As opposed to fraud, misleading ads, and similar offenses typically reviewed under the Alexanderson test, the activities of procuring or trafficking in sex it do not themselves make use of printed or other expressive media, nor are they expressive conduct by themselves.

All in all, despite the move from a more permissive position to a more absolutist position in Swedish freedom of expression law since the 1940s, the doctrine is apparently still open for case-by-case exceptions under the fundamental laws—even against actual expressive materials. Moreover, in analogy with prostitution laws, no one in Sweden has to my knowledge argued that sexual coercion, assault, rape, human trafficking, or manslaughter would be protected when being integral to expressive activity on the rationale that such offenses are not listed in the fundamental laws. Furthermore, no application of comparable laws to prostitution regulations, such as rape, sexual coercion, or purchase of a sexual act from a child (under age

\[1875\] Persson, Exklusivitetsfrågan, supra chap. 7, n. 918, at 374.  
\[1876\] NJA [Supreme Court] 2001-01-01 (notiser) C38 p. 32 Ö2710-99 (Swed.) (emphasis added).  
\[1877\] Prop. 2001/02:74 Yttrandefrihetsgrundlagen och internet [government bill] pp. 60–66 (Swed); Bet. 2001/02:KU21 Yttrandefrihetsgrundlagen och Internet, m.m. [parliamentary committee report/proposal] pp. 37–44 (Swed.); Bet. 2002/03:KU8 Yttrandefrihetsgrundlagen och Internet (vilande grundlagsförslag och följdlagstiftning) [parliamentary committee report/proposal] (Swed.).  
eighteen).\footnote{For the Criminal Code provision “purchase of a sexual act from a child,” see BrB [Criminal Code] 6:9 (Swed.) (maximum penalty is 2 years imprisonment).} seems ever to have been challenged as an infringement freedom of expression in Sweden. Indeed, a review of a number of recent Swedish cases that involved the filming and photographing of various sexual offenses, subsequently reviewed in district courts and court of appeals, reveal no objections on freedom of expression grounds (see 460–463 below). Thus, there seem to be no doctrinal obstacles to applying Sweden’s prostitution law to pornography production itself, although any legal application of the prostitution or trafficking laws on pornography production has yet to be reported.\footnote{This is to the best of my knowledge, as the Swedish judicial system is not obliged by law to report decisions, or to facilitate the documentation of all cases and opinions. Various commercial databases and legal publications make decisions what cases to report and what cases to make available. For the last five years, the coverage has sometimes been almost complete. But for earlier periods researchers still have to contact every individual court and request access to their public archives. Even then, finding all cases on a particular subject may be a difficult task, depending for instance on the filing system of how cases are archived.} From this perspective, it also appears puzzling how the Swedish 1998 Sexual Crimes Committee could later dismiss applying prostitution laws that do not target expressive sexual activity per se, only the economic or otherwise compensatory means of engaging in it.

\section*{2001 Sexual Crimes Committee Report’s Dismissal}

In the 1998 Committee’s final report released in 2001,\footnote{SOU 2001:14 Sexualbrotten [gov’t report series], supra note 1824, at 403–15 (Swed.). Further citations in text.} it was admitted that one “could argue” that the fundamental laws do not prevent that “production and the dissemination of printed matter and other media . . . are subject to the same legal rules as other similar activity, for example, comparable business activity” (SOU 2001:14 p. 411). Hence, “[g]eneral restrictions that have nothing to do with the expected content are not regarded as violating the fundamental laws” (id.). The Committee exemplified with the Working Environment Act that criminalized the use of child labor, and recognized that this Act also covers production and dissemination of pictures and movies (id. at 411–12). From this vantage point it was said that the legislation on sexual offenses, including the procuring provision, holds generally, and “actual limitations that follows from them do not violate the fundamental laws” (id. at 412). In this sense it is not a direct restriction of the freedom to produce or disseminate pornography—only an “indirect” one (id.), and, it should be added, only when using money to buy real persons.

However, the Committee then objected to their own suggested indirect line of reasoning. A more absolute reading of the statutory provision against prior restraint that is found in the fundamental laws was emphasized (id. at 411),\footnote{For the most clear formulation of prior restraint in the Freedom of the Press Act, see TF [Constitution] 1:1(1) (Swed.) (“Freedom of the press is understood to mean the right of every Swedish citizen to publish written matter, without prior restraint by a public authority or other public body . . .”); cf. id. at 1:2 (censorship/prior restraint regulations); Yttrandefrihetsgrundlagen [YGL] [Constitution] 1:3 (censorship/prior restraint regulations in non-print media).} despite that the suggested legal route would not target the dissemination of pornography—only its conditions of production. Similarly, the Committee inconsequentially invoked the legislative history of the child pornography prohibition, despite that it targeted dissemination and possession, and was not isolated to production as the proposed application of the procuring laws (SOU 2001:14 p. 413). Assuming, arguendo, the assumption that dissemination of non-violent pornography is protected—as it has not been

\footnote{For the Criminal Code provision “purchase of a sexual act from a child,” see BrB [Criminal Code] 6:9 (Swed.) (maximum penalty is 2 years imprisonment).}
given an explicit exception in the fundamental laws, a more absolutist interpretation suggests that no law can be applied to its dissemination without a constitutional amendment—that observation lends no support to the Committee’s reasoning that applying laws against conditions of production creates impermissible “indirect” restrictions on expression.

To further support their rejection of the proposal to extent the procuring laws to pornography production, the Committee attempted to invoke an analogous discussion of “indirect” media restrictions that had been entertained in the legislative history of media antitrust and bankruptcy law (id. at 412). With respect to antitrust, it was claimed that two previous government committee reports on antitrust law had taken the view that “case law” as well as “legislative history” suggested that indirect restrictions were permissible as long as they did not “in practice” make the freedoms to print, publicize, and disseminate “illusory” (id. at 412).\textsuperscript{1884} Yet the Committee never explains exactly how procuring laws would make those rights “illusory” for pornographers. Just because laws against sexual exploitation could prevent pornographers from finding real persons who would want to participate in pornography, that itself does not make their constitutional guarantees to engage in “printing, publishing, or dissemination” to become “illusory.” The procuring and trafficking laws in no way bar pornographers from making virtual materials that present precisely the same type of conduct that common pornography that is not violent, thus legal in Sweden, already does.

Moreover, nowhere did the two cited reports on antitrust law invoke “case law,” as claimed by the Committee (id. at 412), in support for any analogous view applicable to the problem of deciding how to assess the consequences of applying procuring laws in the context of freedom of expression. Quite the contrary, the more recent report says that except for one precedential case concerning the editor-in-chief’s right to refuse to publish an advertisement, there is no consistent doctrine on constitutional conflicts between antitrust law and freedom of expression when the former is applied against media monopolies.\textsuperscript{1885} Here, the later report even encouraged the Swedish Competition Authority to continue with their antitrust litigation in order to make the law more predictable, despite criticism by others.\textsuperscript{1886}

The government reports on antitrust law cited by the 1998 Sexual Crimes Committee were more sophisticated than the latter portrayed them as being. The reports made lengthy discussions of two different ideological perspectives among legal scholars on the putatively indirect expressive restrictions by the application of competition law on media businesses. According to one of these two perspectives, there is a danger that media monopolies rather than democratic intervention will stifle diversity in the media, thus restrict freedom of expression so that the opportunities for individuals to express themselves or make informed and objective judgments become “illusory”; hence, applying antitrust laws on media businesses promote, rather than restrict, the values that Sweden’s freedom of expression guarantees were intended to protect.\textsuperscript{1887} Such a view is consistent with the concept of “positive rights”—as opposed to the concept of “negative rights” that is more consistent with the view that freedom of expression is best preserved by not intervening against me-

\textsuperscript{1885} SOU 1999:30 [gov’t report series], supra note 1884, at 219.
\textsuperscript{1886} Id.
\textsuperscript{1887} Id. at 206–22; also SOU 1980:28 [gov’t report series], supra note 1884, at 93.
dia monopolies. The older government report noted that the contrary perspective of negative rights found some support from a textual interpretation of the constitution. Therefore, that report suggested a constitutional amendment that would unequivocally exempt competition law from expressive protection when applied to media businesses, as a means to promote substantial freedom of expression along the lines of a more positive rights concept. Certainly, such an amendment was never passed. But the more recent antitrust report remarked that a constitutional interpretation in defense of media monopolies was “irreconcilable” with statements made by Parliament, albeit in non-binding settings; hence, the later report concluded that “no one can with certainty know” which one of the two interpretations will prevail in the future.

In the pornography context, the positive rights approach to constitutional guarantees of freedom of expression suggests a position that recognizes how pornography generally promotes sexism and gender-based violence (cf. chapter 3 above), and by such effects silences women’s voices in public relative men’s. So although applying procuring laws on pornographers would “indirectly” restrict the pornographer’s expression, just as antitrust laws would restrict some individuals’ or corporations rights to acquire more media publishing businesses, such legal applications would apart from preventing exploitation also promote more equal enjoyment of freedom of expression for women. Indeed, the analysis that pornography, while ostensibly being protected as “speech,” rather silences women’s speech and expression in society, has been made in the literature before. If the 1998 Sexual Crimes Committee had considered more fully the content of the reports it choose to cite, a different conclusion might have been reached: proscribing pimping in pornography is consistent with the purpose of freedom of expression as a guarantee of a diverse, vibrant, and democratic public discourse. With the analogy to antitrust law, the Committee attempted erroneously to show that an absolute conflict of interests between equality and speech was inevitable, where it was not; indeed, their cited sources support just as readily a view contrary to the Committee’s.

Apart from misrepresenting the antitrust law, the Committee further invoked an older government bill from February 1980 that prohibited insolvent persons from conducting private businesses. Before the bill was finalized, the parliamentary Council on Legislation had objected that if such persons for instance were authors, free-lance journalists, troubadours, or photographers—thus made use of constitutional rights in their daily profession—the law could infringe on their constitutional rights. Although the government subsequently added a waiver to protect expressive rights for such persons, its legislative history was much more cautionary than it was purported by the Sexual Crimes Committee who choose not to cite to all relevant pages. For instance, in response to the parliamentary Council on Legisla-

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1888 For an explanation of the concept of negative and positive rights, including the related concept of negative and positive “freedoms” as developed from Immanuel Kant to Isaiah Berlin and beyond, with examples from domestic abuse case law on obligations for the public to intervene, see supra notes 542–546 and accompanying text.


1890 SOU 1999:30 [gov’t report series], supra note 1884, at 218.


1892 The Council on Legislation (Lagrådet) is an advisory non-binding body to the Parliament composed of Supreme Court Justices.


1894 Konkurslagen [KonkL] [Bankruptcy Code] 6:1 (Swed.).
tion, the government “doubted” whether the proposal without a waiver would “really” have entailed any indirect infringements, as it targeted businesspersons who were “liable to grossly unlawful conduct—often in the area of white collar crime.”1895 The government’s implication seems to be that it was unlikely that any such aggravated criminals would also conduct serious literary, journalistic, or other expressive activity that merited constitutional protection. Furthermore, the government assumed that the waiver would “not be of such great practical importance,” since it only protected individual persons, not individuals acting on behalf of legal entities (Prop. 1979/80:83 p. 191). Nonetheless, it was added that “there would be reasons to discuss” the waivers “again” if they would “cause practical troubles” (id.), such as providing latitude to conduct business patently in violation of serious criminal statutes. None of these cautionary remarks were mentioned by the 1998 Sexual Offenses Committee. Considering that the 1980 government believed the constitutional “waiver” under the Bankruptcy Code should only be applied in exceptional cases, the analogous application to pornographers is grossly disproportionate; it provides exploitative and abusive businesses the freedom of liability for procuring offenses that otherwise can entail several years in prison.1896

The 1998 Sexual Crime Committee’s dismissal in 2001 of using procuring laws against pornographers rests to a significant and large part on the analogy between the bankruptcy waiver and prostitution laws as well as the disingenuous analogy with antitrust law in the context of media monopolization. Not only does this analogous reasoning assumes that the objective to prevent sexual exploitation can be equated legally with the objective to prevent insolvency or media monopolies (id. at 412)—three social practices that have little in common. For instance, the two latter have no relation to either sex inequality or gender-based violence—a relationship prostitution had been explicitly recognized to have already by the government in 1998.1897 What if the analogy to bankruptcy law was transferred to other areas of criminal law, such as the provisions proscribing rape, sexual coercion, assault, or unlawful coercion? Would such conduct also be protected if being integral to producing expressive media? If the Committee’s reasoning is grounded in law, one should find a case law corroborating their position accordingly. However, when looking at Swedish cases where persons were convicted for other criminal offences conducted as integral means to expressive activity, even for much lesser offences than those exemplified here, it has been impossible to find any defendant whom successfully invoked (if invoking at all) freedom of expression to acquire freedom from liability. A number of examples will be provided below showing that the conclusion drawn by the Committee was an ideological rather than a legal one that relied on erroneous citations, misrepresented sources, and moot analogies.

Rebutting Committee’s Position: Counterfactual Doctrine

Violent Resistance and Dishonest Conduct; the Anna Odell Case

In the Anna Odell case, widely known in Sweden since 2009, criminally proscribed conduct that is not explicitly exempted from protection under the fundamental laws on expression was undertaken in order to produce otherwise lawful expressive mate-

1896 For penalties under the procuring provisions, see supra note 1817.
1897 Prop. 1997/98:55 Kvinnofrid [government bill] 22 (Swed.) (noting that prostitution is related to gender-based violence as well as to sex inequality).
This is an analogous situation to a person who commits criminal conduct, for example, procuring, purchase of sex, or human trafficking, as an integral means to produce otherwise lawful nonviolent pornography. The Odell case and its analogy to pornography production is contrasted by the Aftonbladet/Nazi case (pp. 453–455 above), where photographing threatening images was not alleged to be an offense by itself until intent to disseminate them existed.

On January 21, 2009, Anna Odell, a student at Stockholm University College of Fine Arts, staged a psychosis and suicide attempt on a public bridge. Her conduct led to intervention from police and mental care providers, who apprehended and restrained her with straps, to which she admittedly violently resisted by, inter alia, kicking her legs, pulling her arms, and shouting (slip op. at 3, 7–8). The conduct was filmed by another person for Odell’s art movie production (id. at 5). Stockholm District Court in 2009 convicted her under the Criminal Code for violent resistance (against public servant) and dishonest conduct (id. at 1, 7–9). These two offenses are not listed as exceptions under the fundamental laws. The Odell case has been reported, discussed, and debated extensively in Swedish mainstream media. Had the constitutional issues been disposed of manifestly in error, it would likely have been appealed.

Odell’s defense unsuccessfully invoked the “journalistic activity” concept from the Aftonbladet/Nazi case (cf. 453–455 above) with regards to the violent resistance charge because “that part of the conduct [was] depicted in film” (slip op. at 5). Nevertheless, the court dismissed her appeals to be protected as being involved in such “journalistic activity”: on one hand, the court noted that Anna Odell was the author and could therefore not enjoin an informant’s protection; on the other hand the court generally stated that the sole fact that Odell intended to show the video for the public “does not entail that the Freedom of Expression Act is an obstacle in the way for a regular criminal law trial of the [proscribed] conduct” (id. at 5). Contrary to the reasoning of the 1998 Sexual Offenses Committee (pp. 455–458 above), the Odell court seems not to have found any impermissible “indirect” constitutional restrictions by enforcing the violent resistance and dishonest conduct provisions against an artist who demonstrably produced a work of art as well as a contemporary commentary on public policies related to mental disorders. The court explicitly recognized Odell’s purpose to raise public awareness regarding compulsory care of persons with psychiatric disorders—a condition that mitigated her sentence only to the extent of lowering the amount of fines that would otherwise have been sentenced (slip op. at 9). Odell’s penalty of 50 daily fines (id. at 1) is in the exact range for a typical purchase of sex, which in over 85% of the cases during the first ten years of the Sex Purchase Law’s application also entailed 50 daily fines.

Expression that contributes to the discourse on public policy on mental disorders appears to merit no less constitutional protection than the illustrated journalistic report on Neo-Nazis in the Aftonbladet case; not surprisingly, such an argument was

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1898 Stockholms tingsrätt [Dist. Ct.] 2009-08-31 B3870-09 (Swed.). Further citations in text.
1899 They are only found in the criminal code. See BrB [Criminal Code] 17:4 (violence), 9:8 (dishonesty) (Swed.).
1900 It may also be noted that Odell’s legal counsel represented two of the three parties seeking damages from the defendants in the Aftonbladet case in 1999. See NJA [Supreme Court] 1999-05-19 pp. 275, 278 (Swed.) (noting that Claes Borgström was legal counsel). Her selection of a counsel that had taken an opposing position in another somewhat similar constitutional case might therefore have made her position appear more legitimate.
Moreover, violent resistance and dishonest conduct are not listed in the fundamental laws as exempted from protection. Such lack of explicit recognition is generally perceived as an obstacle to exceptions when taking legal actions against dissemination itself, even if a case-by-case assessment might constitutionally be sustained (cf. 451–455 above). Although contrary to such exception, Odell’s movie and public exhibitions (i.e., her expressive materials) were never charged for violating any laws, as opposed to the Afionbladet case or other non-listed exempted offenses, such as misleading ads even in non-commercial settings,\textsuperscript{1903} counterfeit, and fraud (cf. 227–230 above). In this light, the Odell case is legally analogous to the production of pornography—unlawful when sex is either procured or purchased—even though disseminating the resulting materials may otherwise be lawful. Moreover, her case directly contradicts the conclusions of the 1998 Sexual Crimes Committee (pp. 455–458 above); that is, even when having comparatively low penalties, criminal conducts such as purchase of sex, dishonest conduct, procuring, or violent resistance do not become legal simply by being integral means in producing otherwise lawful expressive media.

**Filmed Sexual Offenses in Case Law**

Apart from the Odell case and the theoretical arguments above, there are a number of cases of filmed sexual offenses in Sweden supporting the conclusions that the 1998 Sexual Offenses Committee was legally wrong when dismissing the use of procuring laws against pornographers. For instance, Scania and Blekinge Court of Appeals convicted a man for countless acts of gender-based violence committed against two women during the period 2002 to 2008 (the “2009 Malmö case”).\textsuperscript{1904} The case included charges of gross rape and gross violation of a woman’s integrity (the latter is an umbrella offense covering other offenses that form a pattern of repeated violations).\textsuperscript{1905} The defendant had repeatedly filmed his sex with the two women, and, according to him there were “many hours of film.”\textsuperscript{1906} His statement was explicitly corroborated by at least one of the female plaintiffs.\textsuperscript{1907} The court of appeals held it irrelevant that the women expressed consent in those filmed situations, such as when being made to perform group sex with him on camera; the “repetitive and almost routinely abuse” by the defendant created coercive circumstances that effectively implied potential abuse for failing to accede to his demands.\textsuperscript{1908} Consent was thus irrelevant. Similar situations have been documented in pornography production as well, where pimps abuse women off-camera who might then appear to consent to various sexual conduct presented in the resulting materials (cf. 64–67 above).

The man had artistic ambitions regarding the content of his movies and photographs. This becomes evident when considering, for example, how he erased his first

\textsuperscript{1902} Furthermore, in the more contemporaneous Freedom of Expression Act from 1991 that protects non-print media, “artistic creation” is explicitly enumerated alongside other protected interest such as “opinion” and “information.” YGL [Const.] 1:1(2) (Swed.).

\textsuperscript{1903} In 1995 the Swedish Supreme Court for instance upheld an injunction against using the misleading expression “guaranteed interest rate” even in public sponsored information. NJA [Market Court] 1995-11-21 pp. 677, 681, Ö5258-95, aff’d id. p. 684 [Supreme Court] (Swed.).

\textsuperscript{1904} Hovrätten över Skåne och Blekinge [Ct. App.] 2009-05-18 B452-09 (Swed.), modifying Malmö tingsrätt [Dist. Ct.] 2009-02-03, B6656-08 (Swed.).

\textsuperscript{1905} Rape is found in the same chapter as procuring and purchase of sex. BrB [Criminal Code] 6:1 (Swed.). Gross violation of a woman’s integrity is found among “Crimes Against Liberty and Peace,” BrB 4:4a.

\textsuperscript{1906} Malmö tingsrätt, B6656-08, slip op. at 10.

\textsuperscript{1907} Id. at 18 (plaintiff A testifying “a lot of film has been recorded and many photographs have been taken of their sex life”).

\textsuperscript{1908} HovR Skåne & Blek., B452-09, at 26–27, 34–35 (Swed.).
version of a group sex movie because one of the women “cried all the time” while the other one “sat on the bedside and looked sad”; similarly, he consistently tried to eliminate violence and sadness from being shown in any movie he made.\(^{1909}\) Thus, whatever one thinks of the criminal offenses the man committed when producing his materials, by themselves the movies could be disseminated with constitutional protection according to existing doctrine on adult nonviolent materials: that is, “presentations characterized as pure entertainment and without cultural value, even pornography.”\(^{1910}\) Nonetheless, contrary to the Anna Odell case (above) the defendant did not perceive a constitutional freedom of expression defense even in order to mitigate his sentence. By contrast, other minor details successfully mitigated the opinion and sentencing. For example, his rape of women “more or less daily” was mitigated to “several times a week,” some were considered “normal rape” whereas previously all had been considered “gross,” and all charges of rapes (but not gross violation of integrity) of one woman during 2004 were dropped in part since defendant had more sex with the other woman as the former was pregnant that year.\(^{1911}\) If such details could influence the opinion and sentencing, had it appeared reasonable to invoke an “indirect restriction” of constitutional rights along the arguments of the 1998 Sexual Offenses Committee (pp. 455–458 above), his counsel is likely to have stressed the point. That was not done.

In another similar appealed case (the “2009 Western Sweden” case), a man had filmed a number of coercive sexual acts with his wife, alleging they were engaging in consensual role-play. The court of appeal found differently and convicted him for rape in the acts caught on camera.\(^{1912}\) In his computer, the police had seized “saved images of sexual violence in order to substantiate [his] interest in such matters.”\(^{1913}\) They also found he owned typical pornography apparel indicating such interest, for example, handcuffs, blindfolds, and dildos.\(^{1914}\) Additionally indicating his familiarity and artistic ambition in pornography production, he voluntarily submitted other films he had made to the court to support his contention that the coercive acts on film were simulated role-play.\(^{1915}\) As in the former 2009 Malmö case, undeniably this defendant also produced sexual media with some regularity and had artistic ambitions. However, contrary to the Anna Odell case (pp. 458–460 above), he never raised a freedom of expression issue in any court.\(^{1916}\) The 2009 Western Sweden case is therefore also notable when assessing applicability of prostitution laws to pornography production: had it appeared as a reasonable defense, even if only for mitigating the penalty, defendant’s counsel would have emphasized that his client was en-

\(^{1909}\) Malmö tingsrätt, B6656-08, at 17–18, 41. Regarding the group film mentioned, he managed to get the women to make a new one where they acted happily despite that they hated it, simply because they were afraid of him. Id. at 17–18, 41. Their fears were understandable considering that he could hand out violent punishments simply for their failure to cover up bruises with makeup, or when they showed pain during sex with him because “he then thought that he appeared as a bad person.” Id. at 16.

\(^{1910}\) NJA [Supreme Court] 1979-09-28 pp. 602, 608 (Swed); cf. Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [gov’t bill] 21 (Swed.) (“pure entertainment”).

\(^{1911}\) HovR Skåne & Blek., B452-09, at 14–15, mitigating sentence of Malmö tingsrätt, B6656-08, at 40, 65.


\(^{1913}\) Varbergs tingsrätt, B2771-07, Appendix no. 1 containing prosecutor’s summons application, at 3.

\(^{1914}\) See, e.g., Varbergs tingsrätt, B2771-07, at 3 (list of confiscated items); HovR Västra Sverige, B3766-08, at 5 (mentioning handcuffs).

\(^{1915}\) HovR Västra Sverige, B3766-08, at 6. The court found that the activity in his other films were too different to support the claim that the materials under charge were not showing criminal conduct.

\(^{1916}\) For the district court’s opinion, see Varbergs tingsrätt, B2771-07.
gaged in producing potentially protected expressive material. Again, such a defense was not attempted.

Moreover, several other cases decided in Swedish courts of appeals during the period of 2008 to 2011 involved persons who had filmed sexual conduct with cell phone cameras, and were that conduct was later subject to criminal charges. Just as in the two cases from 2009 mentioned above, no defendants raised freedom of expression concerns in support of an acquittal or a mitigation of the sentence; nor did they object the forfeiture of their cell phones (not even a defendant who was acquitted for the sexual offense charge).

The reasons for seizing their cell phones, which the courts subsequently forfeited, was said to be the risk for further criminal abuse—for example, slander and libel of the women depicted in the movies. The defendants objected unsuccessfully to these allegations, if at all.

One objection was that the defendant would supposedly not use the recorded materials in criminal ways, another objection that the films could be permanently erased with certainty (something that the courts did not believe), and a third objection (when defendant was acquitted for rape) that his movies were “non-criminal and of private character.” If any constitutional interest can be said to have been invoked at all, though in vain, it was a privacy interest rather than a freedom of expression issue.

The Swedish appeals court law on filmed sexual offenses above shows that courts have never perceived any legal conflict in enforcing sanctions against criminal activity that is conducted as an integral means to produce what may in some instances be constitutionally protected expressive materials. Moreover, as suggested by legal scholars when discussing illicit printing of money and other cases, confiscation was not only permissible regarding the cell phones, but also regarding movies stored on other media. Such forfeiture was apparently not regarded as a de facto prior restraint on (or censuring of) future potentially lawful uses of expressive media, nor regarded as making the defendant’s constitutional rights “illusory.” Arguably, in part these materials contained such non-violent pornography that is

\[1917\] See, e.g., Hovrätten för Västra Sverige [Ct. App.] 2011-04-15, B1607-11, slip op. at 8 (Swed.) (forfeiting cell phone for inability to permanently erase rape movies); Svea hovrätt [Ct. App.] 2010-04-23, B5077-09 (Swed.), aff’g Södertälje tingsrätt [Dist. Ct.] 2009-05-19, B366-06, slip op. at 11, 15, & Appendix (file no. 140), containing prosecutor’s summons application, at 5 (convicting for gross sexual coercion and forfeiting cell phone containing movie thereof); Svea hovrätt [Ct. App.] 2009-08-11, B5284-09, slip op. at 2 (upholding cell phone forfeiture, but dismissing rape charge), rev’d in part Södertörns tingsrätt [Dist. Ct.] 2009-06-05, B6371-09 (Swed.); see also Svea hovrätt [Ct. App.] 2009-09-07, B6354-09, slip op. at 4–5 (Swed.) (forfeiting cell phone containing copy of a movie seized in another cell phone in previous rape case involving the same defendant, see supra Svea hovrätt, B5284-09, at 2).

\[1918\] See Svea hovrätt, B5077-09, aff’g Södertälje tingsrätt, B366-06 (no objections to cell phone forfeiture).

\[1919\] Södertörns tingsrätt, B6371-09, slip op. at 6, 18 (defendant unsuccessfully objecting cell phone forfeiture, no particular legal grounds raised), rev’d in part Svea hovrätt [Ct. App.] B5284-09, at 2 (dismissing rape charge, but affirming cell phone forfeiture).

\[1920\] HovR Västra Sverige, B1607-11, at 8 (defendant objecting unsuccessfully that movies could be erased permanently).

\[1921\] Svea hovrätt, B6354-09, at 4 (defendant unsuccessfully objecting forfeiture of cell phone containing visual recording of conduct previously prosecuted as rape, arguing that his acquittal for the rape effectively makes the recording “non-criminal and of private character”).

\[1922\] Persson, Exklusivitetsfrågan, supra chap. 7, n. 918, at 309–10; see also id. at 315 (discussing erroneous claims in scholarly literature).

\[1923\] See Hovrätten för Västra Sverige [Ct. App.] 2009-05-15, B3766-08, slip op. at 2 (Swed.) (“2009 Western Sweden case”) (forfeiting movies stored on hard drives); see also Hovrätten över Skåne och Bleking [Ct. App.] 2009-05-18, B452-09, slip op. at 41 (Swed.) (“2009 Malmö case”), but note that it is unclear from the wording of the opinion whether the films and photographs were permanently or temporarily forfeited.
constitutionally protected according to the doctrine.\textsuperscript{1924} Perhaps most importantly though, and consistent with the judgment in the \textit{Anna Odell} case (pp. 458–460 above), the courts have not found any bar against charging perpetrators for sexual offenses simply because the conduct was also documented on film.

If offenses such as violent resistance and dishonest conduct can be enforced during artistic productions, even when only entailing low penalties, and sexual coercion, which is part of the same sexual offenses chapter in the criminal code as the prostitution laws, may too, one has to question why other prostitution laws cannot. The reasons why sexual coercion intuitively appears reprehensible are very similar to the reasons why Sweden chose to pass the Sex Purchase Law in 1998 and why sex trafficking is internationally condemned: the abuse of power or of a position of vulnerability, or the subsequent sexual exploitation by the trick of a prostituted person who is in an unequal social condition (\textit{cf.} 277–286). In this light procuring, or purchasing a person for sex with money, is simply other forms sexual coercion by economic means. The purchased person typically has less power already than her/his trick or procurer—often a result of years of childhood sexual abuse and other plights (pp. 55–64). Hence, a trick or procurer does not need to “coerce” in the traditional sense to obtain or sell their sex. The money contains sufficient power by itself. Indeed, Sweden criminalized tricks and decriminalized prostituted persons in large parts on the rationale that the formers abuses their relative social power over the latter (\textit{cf.} 282–286), who typically want to escape prostitution in at least nine out of ten cases.\textsuperscript{1925}

Considering the 1979 decision on prostitution ads in light of the \textit{Anna Odell} case and decisions on filmed sexual offenses discussed above, the lack of enforcement of Swedish procuring (or trafficking) laws on pornography production does not seem to have much to do with constitutional freedoms or the rule of law. Rather, the haphazard comments and cursory dismissals by the 1998 Sexual Offenses Committee (pp. 455–458) seem purely ideological. That is, instead of being based on legal precedents, they selectively applied the ideological concept of liberal \textit{negative rights}, which disfavors government intervention against non-state abuses of power per se, to release pornographers from liability under criminal laws intervening against such non-state conduct in ways no other media producers have been released from criminal liability. Hence, Sweden’s government selectively substituted existing law with ideological principles that lacked legal foundations. This, if anything, is content-based discrimination purportedly presented as content neutrality, erroneously protecting pornographers who violate the law. No absolute constitutional obstacle prevents the Swedish judiciary, or the Parliament, to take legal action against sexual exploitation in the pornography industry by using existing procuring or trafficking laws. In particular, the consistent case law on sexual offenders who systematically produced otherwise lawful sexually explicit media documenting their abuses show that the 1998 Sexual Offenses Committee’s analysis was prejudiced.

\textbf{Democracy and Equality}

One obstacle that may explain the failed attempts to apply prostitution laws to pornography production in Sweden is the liberal negative-rights concept. As recalled,

\textsuperscript{1924} NJA [Supreme Court] 1979-09-28 pp. 602, 608 (Swed.);
\textit{cf.} Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [gov’t bill] 21 (Swed.).

\textsuperscript{1925} \textit{See supra} notes 195–196 and accompanying text (citing and discussing studies).
“negative rights” assumes that granting the democratic state a power to intervene in social matters entails walking a “slippery slope” that eventually leads to abuse of state power (cf. 143–148 above). Along this vein John Stuart Mill, among others, feared an “unlimited right in the public not only to prohibit by law everything which it thinks wrong, but in order to get at what it thinks wrong, to prohibit any number of things which it admits to be innocent.” 1926 Previously in chapter 4, it was suggested that such views among early liberals were related to their particular social context. That is, those liberals were typically privileged men who feared (often rightly so) that other men would abuse the power of the state apparatus against them in vicious ways; hence, the concept of negative rights enabled a philosophical defense for checks on government powers, whatever the ideological leanings of those in power (cf. 143–148 above). However, this perspective has since been criticized as offering a too limited view of power, especially when applied to problems involving non-government forms of power such as gender-based violence (ibid.). 1927 Consistent with this critique there is now an increasing recognition of the need for “positive rights” to be enshrined in law.

For instance, although not yet accepted in all domestic jurisdictions, international law holds that where states fail to intervene in cases of domestic violence, they may be civilly liable to the victims. 1928 Similarly, if there is disparate impact by law, even if flowing from similar treatment (formal equality), it can be seen as a form of discrimination that states are obliged to enact proactive measures to fight against (e.g., affirmative action). 1929 Such a positive rights approach also underlies Sweden’s approach to prostitution; that is, Sweden does not treat the prostituted person “similarly” as those who buy and procure them, but rather views prostitution as a form of inequality that merits state intervention (cf. 294–298 above).

Sweden’s legal approach to prostitution is not consistent with how it applies those laws to pornography production, however. As shown in this chapter, legal rationales that were derived from such remote areas as marketing, lottery, antitrust, and bankruptcy laws have, sometimes patently in error, been allowed to influence and strengthen the principles of negative rights when prostitution laws could have been applied to pornography production. Most of those laws that were analogously allowed to influence the doctrine applicable to pornographers, however questionable and wrong, were construed in social contexts related to corporate or government abuses of power (i.e., monopolization or political infringements of expressive freedoms). Such contexts of power are very different from gender-based violence or sexual exploitation. The latter involve primarily abuse of power by private persons and are directly related to pornography production and consumption (see chapters 2–3). Certainly, corporations may amplify such problems by their marketing of pornography, but pornography is not advertising in itself. Indeed, the Swedish Supreme

1927 See also note 551 (citing numerous instances of international law suggesting that gender-based violence is now governed by a more positive freedom concept that has replaced previous doctrines).
The lack of empirical connection between the abstract legal concept (e.g., marketing and antitrust) and the substantive reality they were applied on in 2001 by the 1998 Sexual Crimes Committee (i.e., pornography production) stands out in contrast to the Sweden’s emphasis on gender-equality when it passed the Sex Purchase Law. In the latter case, directly relevant social evidence of power and inequality informed the legislature’s decision to asymmetrically target the tricks and support prostituted persons to escape prostitution (cf. 282–286). By contrast, the government’s response to production harms in pornography was that of non-intervention. Its policy outcome protects Swedish pornographers for liability to the harms they cause to persons they exploit in producing pornography (see chapter 2, on production harms). The government’s professed rationale for not applying procuring laws to pornography was that it would cause impermissible “indirect” restrictions on freedom of expression (pp. 455–458). Yet as shown above, courts have seen no problem in applying existing criminal laws on violent resistance, dishonest conduct, and a number of different sexual offenses—conduct that in each example was integral to the production of expressive media—thus these applications indirectly restricted the defendants’ expressive freedoms (pp. 458–463). The question is why pornographers have been granted such an absolute freedom compared to those other persons, of which at least one (Anna Odell) was demonstrably engaging in serious artistic and political discourse. Some answers are suggested by the democratic theories discussed in chapter 4.

Intersectionality, Multiple Disadvantages, and Representation

Law professor Kimberle Crenshaw argued that laws and political approaches that attempt to address inequality often fail to recognize the burden of multiple disadvantages—that is, problems of intersectionality (pp. 162–166 above). People prostituted in pornography, as mentioned, are usually burdened by numerous social disadvantages such as having been victimized by child sexual abuse and neglect, poverty, homelessness, sexism, and racial discrimination (cf. 55–64). But the ideological approach taken by Swedish legislators with regard to the proposal to apply procuring laws on the pornography industry only addressed one source of disadvantage: subjection to abuse of state power. The Swedish government’s legal treatment of pornography production adopted a singular logic that portrayed pornographers as purportedly weak individuals who merit constitutional protection against a powerful state, while those who are exploited and harmed in its production were left without any legal recourse. This approach fails to address the fact that social power operates in the intersection of multiple disadvantages. It renders power too simplistically.

By contrast to the Canadian Supreme Court’s balancing approach taken when sustaining Canada’s obscenity law (pp. 407–409), the Swedish government did not ask whether the negative consequences to freedom of expression by the proposed use of procuring laws could be outweighed by the benefits to equality and prevention of sexual abuse or exploitation. Instead, the Swedish government adopted a classic liberal posture of non-intervention as the preferred standpoint, quite different from its policy on violence against women and off-camera prostitution. However, what distinguishes domestic abuse from the pornography industry (and to a lesser extent off-camera prostitution) is that such gender-based violence may be presented

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1930 NIA [Supreme Court] 1979-09-28 pp. 602, 608 (Swed.); cf. Prop. 1986/87:151 Om ändringar i tryckfrihetsförordningen m.m. [gov’t bill] 21 (Swed.) (“pure entertainment”).
as problems with singular disadvantages, even when being more complex and amplified by additional social factors such as poverty, race, or prostitution (cf. 159–168). The possibility of simplifying a problem of intersectionality may thus have influenced the relative easy by which domestic abuse and prostitution were legally addressed by Sweden in their Kvinnofrid (Women’s Sanctuary) bill on violence against women in 1998.\textsuperscript{1931} Notably, this chapter confirms that in areas pertaining to freedom of speech, Sweden is more similar to the United States than it is with Canada. As recalled, Canada balances equality rights against expressive freedoms more often than the United States or Sweden do (cf. 225–227 above).

Compared to domestic violence, pornography production not only adds the additional constitutional interest of free expression. Furthermore, prostituted peoples’ multiple disadvantages constitute such coercive circumstances that usually make them have to accept, for lack of real and acceptable alternatives, being exploited sexually in ways that many non-prostituted persons would simply define as “rape.”\textsuperscript{1932} These conditions thus add another disadvantage that law and public opinion tend to attribute negatively to the prostituted person: money. Being paid to be raped, not to mention someone else being paid so that you are raped, should be viewed as evidence of an additional disadvantage. Yet for prostituted persons it often tarnishes their legal status. Following Crenshaw, all these factors make the pornography industry far too complex to be accurately addressed legally and politically on any singular logic. Perhaps this is also one reason why the filmed sexual offenses, violent resistance, and dishonest conduct by contrast to prostitution could be proscribed in Sweden without anyone successfully raising the freedom of expression flag (pp. 458–463 above). That is, these offenses did not necessitate an intersectional analysis; for example, rape is easily comprehended as illegitimate abuse, as are violent resistance and dishonest conduct. Being paid for sexual abuse or sexual exploitation is more complex, thus demands more attention from the legislature or judiciary.

Sweden’s legal approach to prostitution in 1998 was the first in the world to navigate through prostitution’s multiple forms of disadvantages sufficiently well to recognize that being paid money for sex is not an expression of genuine freedom, but rather a form of exploitation and inequality (cf. 277–286; 294–298). Regarding the pornography industry, a similar recognition of multiple disadvantages has failed to be delivered. It would have required an accurate interpretation of more conflicting constitutional interests than is required to legally address prostitution. Because there would also be more conflicting interests so involved, more social forces would likely attempt to influence democratic decision making in matters pertaining to pornography. For instance, data on number of tricks compared to number of pornography consumers suggest that the pornography consumption is an issue affecting far more number of men, at least in Sweden, than is prostitution per se. Several specific studies from a number of countries, Sweden included in particular, show that on one hand a majority of young adult men reportedly consume pornography each month to varying degrees, occasionally or every day, and typically in solitude—on another hand, pornography is very seldom used by women unless it is initiated by partners or friends, and then on a much less frequent basis than among men (pp. 33–37). By contrast, estimations of the percentages of men in Sweden who reported ever having

\textsuperscript{1931} Prop. 1997/98:55 Kvinnofrid [government bill] 22 (Swed.) (stating that prostitution is related to gender-based violence as well as to sex inequality). It should be noted that nowhere in this bill does the government state that their prostitution laws are not to be applied to pornography production, thus leaving this route open for future judicial interpretation.

\textsuperscript{1932} See supra notes 674–680 and accompanying text.
bought sex was as low as about 13% in 1996 in a large population-based survey; and of these men, as many as 58% reported only one, two, or three purchases during their lifetime.\footnote{1933} After Sweden’s new laws from 1999 had been in place for almost ten years, the subpopulation of men who reported ever having bought sex was estimated to be as low as about 8% in spring 2008.\footnote{1934} Put otherwise, the social interests underlying the continuing prevalence of pornography are much stronger than those underlying off-camera prostitution—a conclusion supported by the relative fewer tricks compared to pornography consumers.

**Representation and Democratic Decision Making**

The analysis in this chapter showed that there were no legal obstacles to apply Sweden’s procuring laws to pornography production—only ideological ones.\footnote{1935} This insight illustrates how difficult it is to address the harms of pornography effectively, when it is a legal and political subject that is ideologically clouded. Indeed, Marx and Engels’ analogy of the “camera obscura,” where the dominant ideology represents an inverse “upside-down” image of the material reality,\footnote{1936} is not without merit as a description of the ideology that protects pornographers and their consumers. That is, those who exploit vulnerable populations for sex are often cast as political underdogs and dissidents in liberal freedom of expression doctrines, while those victimized by its production and consumption harms are often effectively equated with the position of government censors (see, e.g., 219–222 above). This, if anything, represents an inversion of reality, turning power and inequality on their heads.

Although this study has not systematically inquired into the social mobilization against pornography in Sweden (as distinguished from the legal challenges), there are indications in the legislative history that there were less pressure from social movements in the latter legal challenge to pornography than there had been in the challenge to pass the Sex Purchase Act in 1998. One nongovernmental organization that was crucial in making Swedish parliamentarians adopt the idea to pass the Sex Purchase Law was the national women’s shelter umbrella organization (ROKS) under their first chairwoman Ebon Kram.\footnote{1937} Their interest for the Sex Purchase Act came about during the Swedish antipornography women’s movement in the early 1990s that ROKS were part of.\footnote{1938} It is not entirely clear why the antipornography movement lost momentum later on in Sweden, while the mobilization for the Sex Purchase Law obviously did not. One possibility may have been a strategic decision by ROKS and others to focus solely on the Sex Purchase Act. Indeed, experiences from other countries show that pornography is extremely difficult to challenge politically and legally (see, e.g., chapters 10–11).

The support for proactive measures, or inquiries about the situation in pornography around the time of the 1998 Sexual Offenses Committee’s mandate (1998–2001), could not muster a majority in Parliament.\footnote{1939} Considering that a historically unprecedented high female representation of 42.7% women existed in Sweden’s Par-

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1935 Supra pp. 458–463; see also supra pp. 180–181 (defining law as distinguished from ideology).
1936 Marx and Engels, German Ideology, supra chap. 5, n. 661, at 68.
1937 See supra notes 1193–1197 and accompanying text.
1939 See supra notes 1826–1838 and accompanying text.
liament at this time.\textsuperscript{1940} A strong women’s representation in legislatures is clearly not enough to address an issue such as pornography. As recalled, the harms of pornography affects different groups of women to different degrees, where those who are more multiply disadvantaged are the most exposed to production and consumption harms (e.g., prostituted women or women victimized by domestic abuse) (see, e.g., 55–72, 122–129 above). As noted among other places in chapter 4 above on democratic theory, just because women are overrepresented among those harmed by pornography as a social practice does not mean that women are equally harmed (cf. 159–168). This observation entails that an equal amount of women and men in a legislature says little about the degree that those women represent the perspectives and interest of women who are harmed by pornography (cf. 159–168). In this sense, women harmed by pornography are an intersectional group that, similar with Black women in America, “are marginalized in the interface between antidiscrimination law and race and gender hierarchies”\textsuperscript{1941} as well as being marginalized by other disadvantages such as class/poverty, childhood abuse and neglect, or discrimination on ethnic, sexual, or other grounds.\textsuperscript{1942} To be sure, in September 2002 Sweden’s women’s representation in Parliament reached even higher, setting a global record of 45.3% at the time.\textsuperscript{1943} Nonetheless, no action was taken to make new efforts to legally challenge pornography. The conclusion that female legislative representation may have little impact on such challenges is also consistent with the cross-national panel data (1975–2005) from over 70 countries analyzed by Weldon and Htun, which found that the strength of autonomous women’s movements was significantly more crucial for progressive policies on violence against women than female representation in government.\textsuperscript{1944}

Few, if any strong women’s antipornography movements, have survived anywhere, or attained enough influence over the legislatures or the judiciaries. In this context, Mansbridge’s recognition that the relevant descriptive representation may be contingent with issue and context shed light on the outcome in Sweden.\textsuperscript{1945} As mentioned, research shows that prostituted women are particularly vulnerable to consumption effects, such as demand for dangerous acts by tricks who seek to imitate pornography they’ve seen (pp. 124–129 above). The fact that the harms of pornography do not affect all women equally, but in part depends on various factors of social status, privilege, vulnerability—that is, multiple disadvantages\textsuperscript{1946}—is likely an important influence in why legislatures and courts have been disinterested to address them in spite of a high female representation in those government bodies. Certainly, research shows that the effects from pornography consumption affect general

\textsuperscript{1941} Crenshaw, “Demarginalizing Intersection,” supra chap. 4, n. 520, at 151.
\textsuperscript{1942} Cf. supra pp. 55–64 (analyzing multiple disadvantages as preconditions to prostitution).
\textsuperscript{1943} Ibid.
\textsuperscript{1944} Weldon and Htun, “Civic Origins,” supra p. 16 n.49, at 548, 564.
\textsuperscript{1945} Cf. Mansbridge, “Represent Blacks, Women,” supra chap. 4, n. 599, at 638 (emphasizing “historical contexts in which descriptive representation is likely to advance the substantive representation of interests”).
\textsuperscript{1946} Compared to women in general, prostituted women are also much more likely to be subjected to production harms, and among those who risk being sexually exploited in prostitution in general as well as in pornography in particular, there are a number of typical predictors of disadvantages such as poverty, childhood sexual abuse and neglect, race, or nationality, that further distinguish between various female cohorts. Supra pp. 55–64, 73–75. Conversely, battered and sexually abused women rather than women in general also experience the consumption effects more severely than women in general. Cf. supra. pp. 122-124.
attitudes toward all women in society (e.g., 104–105, 115–122, above). But such attitudes may be more difficult to relate to pornography for women who are not in prostitution or are not particularly vulnerable to sexual aggression or related attitudes. The mainstreaming of pornography in society, influencing everything from music videos to fictional literature,\textsuperscript{1947} also makes it difficult for the general public to distinguish various causes to sexism that patently concern all women and pornography’s role in that situation. Without adequate knowledge, it is easy to dismiss pornography as being a fringe phenomenon in causing women’s inequality. The industry and its consumers may also pretend that this is the case.

Crenshaw argued that conventional equality thinking often assumes a singular logic of discrimination, when the most unequal groups suffer multiple disadvantages. She stated that if we “began with addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”\textsuperscript{1948} Such an approach necessitates a more critical perspective toward the benefits of the concept of negative rights within liberalism. Albeit having merit in certain areas, negative rights are not a shoe that fits all sizes; that is, it does not work well for every political issue. It has already been replaced in legal approaches to domestic violence under international law, where gender-based violence is now defined as a human rights violation and governments are held civilly liable if failing to intervene.\textsuperscript{1949} Broader concepts such as the social welfare state, envisioned by political theorists like John Rawls and found in corresponding human rights law,\textsuperscript{1950} also suggest that negative rights is insufficient as an ideology and legal principle for the twenty-first century.

Yet to merely emphasize positive rights per se does not provide guidance for concrete issues; hence, it needs further specification. Iris Marion Young, and to some extent Ian Shapiro, have proposed several institutional mechanisms that may provide better guarantees that the perspectives and interests of socially subordinated groups will be better recognized and represented (see 154–159 above). Some of these measures may appear controversial from a conventional liberal democratic view, such as a veto-power for issues immediately affecting them as a group.\textsuperscript{1951} Although these may be perceived as very strong measures, when considering the failure to address pornography’s harms it may appear more reasonable why such measures may have to be considered to make democracy more inclusionary and equal. With respect to prostitution in the pornography industry, Young’s suggestions for considerations might, apart from the mentioned veto-proposal, also include (1) public support for “self-organization” of groups, for example, survivors or persons who are used in the sex industry, or more generally women’s shelter movements, in order “that they gain a sense of collective empowerment and a reflective understanding of their collective experience and interests in the context of the society”; (2) institutional mechanisms


\textsuperscript{1948} Crenshaw, “Demarginalizing Intersection of Race & Sex,” supra chap. 4, n. 520, at 167.

\textsuperscript{1949} See supra note 16.


\textsuperscript{1951} Shapiro, State of Democratic Theory, supra chap. 4, n. 592, at 5; Young, Justice & Politics of Difference, supra chap. 4, n. 571, at 184.
that oblige decision-makers to account for the perspectives voiced by such groups, for example, special consideration to their briefs or submissions, or government obligations to inquire into problems related to groups that are particularly disadvantaged,\textsuperscript{1952} which evidently prostituted persons in the pornography industry are (cf. 55–75).

Young’s proposals are consistent with Weldon and Htun’s findings in the sense that it is very likely that equality will be promoted if democracies promote and give special consideration to the autonomous organizations among disadvantaged groups suffering from oppression related to gender-based violence.\textsuperscript{1953} Conversely, the pattern matching in chapter 11 on Canada showed that when a women’s group was supported by the government’s “Court Challenges Program” to intervene in constitutional litigation, the quality of evidence and sophistication of legal arguments improved substantially relative to cases with no women’s interveners (cf. 392–437 above). Although generous in comparison to other countries, the program was unfortunately cut ten years after the Canadian Charter had been enacted in 1982.\textsuperscript{1954} Similarly, the pattern matching in chapter 10 on the United States showed that the women’s antipornography movement in Minneapolis, where prostitution and pornography survivors were relatively vocal, produced the comparatively most well-articulated and effective legal challenge that would have clearly recognized and represented the perspectives and interest of those groups who are most harmed by pornography production and consumption.

The evidence analyzed in Part III so far thus shows that if promoting the representation of people who have been exploited in the sex industry in democratic decision-making bodies, it would influence public policies to becoming more effective against those harms. A government obligation to promote such organizations can be laid down in law or, even better, be inscribed as a constitutional obligation rather than being an open issue subject to the whims of democratic majorities. Considering the gravity of the harms of sexual exploitation and abuse documented in over forty years of empirical research on pornography (see chapters 1–3), their situation appears to merit such a special constitutional guarantee. Canada’s 1982 Charter of Rights and Freedoms already includes sections that supports special constitutional protection for such socially disadvantaged groups,\textsuperscript{1955} though deeming from the slow progress of legal challenges to pornography in Canada these guarantees certainly need to be strengthened (see chapter 11 above). Of course, it is also imperative that legitimate organizations are supported, as opposed to organizations manipulated by pornographers or other sex industry interests. However, this is not a problem particular to the sex industry, but concerns numerous social interest organizations that apply for and receive public support and legal recognition. Their legitimacy can be validated by democratic institutions, if following standard procedures of audit and review. As shown in chapter 2 above, certain organizations already stand out as more or less representative in these regard (pp. 83–86).

Young has also suggested quotas for members of disadvantaged groups in various democratic decision-making bodies.\textsuperscript{1956} Quotas make privileged groups having to confront social experiences and circumstances from the sex industry that they may

\textsuperscript{1952} See Young, “Polity & Group Difference,” supra chap. 4, n. 571, at 124; Young, Justice & Politics of Difference, 184.

\textsuperscript{1953} Cf. Weldon and Htun, “Civic Origins,” supra p. 16 n.49, passim.


\textsuperscript{1955} See supra notes 1010–1021 and accompanying text (discussing the Canadian constitutional concept of “disadvantage” as it can be applied to persons harmed by pornography production and consumption).

\textsuperscript{1956} Young, Inclusion & Democracy, supra chap. 4, n. 571, at 141–53.
be unaware of. Quotas of groups who have demonstrably been harmed by pornography would thus likely make it more difficult for privileged groups to dismiss applying prostitution laws to pornographers by referring to the “common good” of non-intervention and negative rights, as was effectively done by the Swedish 1998 Sexual Crimes Committee in their final report (see, e.g., 463–465 above). Quotas are possible to apply at least in special commissions, for public hearings, courts (e.g., juries in pornography-related trials), and similar middle-level democratic bodies. They should be used to appoint members of validated autonomous organizations.

Section 2: Substantive Equality in Prostitution Law

Before looking at the outcome of the Swedish legal approach to prostitution—an approach previously argued to be applicable to pornography production—evidence from jurisdictions applying the opposing approach of legalizing various forms of prostitution, including the tricks and the third parties, will first be surmised. A substantive equality approach to law was shown to underlie Sweden’s legal challenge to prostitution when they passed their Sex Purchase Law in 1998—a law that asymmetrically criminalize tricks, while decriminalizing and supporting prostituted persons, consistent with hierarchy theory (pp. 277–286, 294–298). An opposing legal approach to Sweden’s has been to treat prostitution as a symmetrical social practice. Under such approaches, prostitution is legal in some (if not all) forms, and more or less equated with a “job”; that is, there are efforts attempting to regulate its practice, including preventing exploitation, harm, and ostensibly improving workplace safety, with consideration of various health issues. The trick is regarded as a customer, the prostituted person a worker (or even a self-employed entrepreneur), while third parties such as brothel owners, managers, and “escort agencies” are allowed to profit from the prostitution of such “workers” or independent contractors. For instance, under a Nevada statute, counties with populations under 700,000 can enable third parties, through a county licensing board process, to profit from businesses that use “natural persons” (as long as they are not minors) for the purpose of prostitution, though unlicensed prostitution is still regarded as a misdemeanor. This more symmetrical treatment of parties involved in prostitution is not consistent with hierarchy theory, as it does not recognize, or represent prostituted persons as disadvantaged groups (cf. 277–286, 294–298). The outcome of policies that legalize tricks and third party profiteers should, given the predictions of hierarchy theory, produce harmful social consequences to more disadvantaged groups than would laws such as Sweden’s.

Evidence from Legal Prostitution

Proponents of the legalization approach to prostitution laws have claimed that brothel owners, managers, escort agencies, bodyguards, drivers, or other third parties in prostitution supposedly would improve the safety and well-being of persons in pros-

1957 Cf. Young, Justice & Politics of Difference, supra chap. 4, n. 571, at 185–86.
stitution if they could operate legally, as opposed to being criminalized. Yet numerous studies referred to below suggest that decriminalizing such third parties does not improve prostituted persons’ safety or support, or reduce the harm in prostitution. Such a result is to be expected when considering that prostitution is an inherently unequal social practice: third parties are driven by profits; tricks are concerned with their perceived right to buy sex in whatever form they wish, even though most of them know the coercive circumstances that prostituted persons live under; and prostituted persons’ vulnerable situations provide them little leverage against either of the former two (cf. chapter 2).

For instance, prostituted persons in Victoria, Australia reported that legalization led to increasing competition to secure tricks, more demands for unsafe sex or other previously uncommon practices (e.g., a shift in demand for oral sex to anal sex), and that brothels mete out penalties for refusing abusive tricks. A government study reportedly also found that some tricks regard condoms “unacceptable” and if refused unsafe sex, they simply seek out another brothel that provides it. Unsurprisingly, not all brothels in Victoria, Australia insist on safe sex. Nonetheless, women prostituted in legal venues in Victoria, Australia, reported that if they wanted “to get booked,” they “have to do these things,” one explicitly admitting (despite incriminating her brothel) that there was “no option” not to engage in unsafe sex. It should be noted that reports about unsafe sex, abuse, or criminal activities within legal brothels are notoriously difficult to retain from people who are currently prostituted in such places, as third parties often threaten them not to report wrongdoings to authorities or to researchers.

In New Zealand, a government committee in 2008 reported that the “majority” of prostituted persons as well as brothel operators felt that the Prostitution Reform Act of 2003 that legalized some forms of prostitution could do little about violence against women in prostitution. Along similar lines, a German federal government report in 2007 found that reforms legalizing certain forms of indoor prostitution generally have “not been able to make actual, measurable improvements to prostitutes’ social protection,” and that “hardly any measurable, positive impact has been observed in practice” regarding “working conditions” for prostituted persons. Further, the government notes that the reforms did “not recognisably” improve prostituted persons “means for leaving prostitution,” nor were there “viable indications” that it “has reduced crime,” the government lamenting that the legalization “has as

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1960 See supra notes 217–221, 243–244 and accompanying text.
1962 Ibid., 20.
1966 See supra note 233 (citing and summarizing sources).
yet contributed only very little in terms of improving transparency in the world of prostitution.”

A recent feature article in Der Spiegel (Germany’s weekly equivalent to Time magazine) was more critical in its reporting than the German government, highlighting how Germany’s last decade of legalization policies had led to conditions becoming “worsened in recent years,” as a social worker who had worked over twenty years with prostituted women expressed the current situation, making it more difficult for law enforcement to reveal abuses in the sex industry (e.g., not being able to access brothels) while simultaneously promoting an influx of poor foreign women.\(^{1970}\) The increased supply of prostituted persons, Der Spiegel suggests, increases competition and exploitative operations (e.g., dropping prices) as well as pushes the demands for more harmful sex (e.g., unlimited time, sex without condoms, or so-called “gang-bangs”).\(^{1971}\) These trends of an increase in demand for harmful and unsafe sex practices following upon legalization are similar (if not worse) to those reported from Victoria, Australia above.\(^{1972}\)

Mirroring the reports from other countries, numerous testimonies from Nevada, where there are legal brothels,\(^{1973}\) tell of unsafe sex demanded by tricks as well as pimps. For example, during three years of research interviews there, psychologist and prostitution researcher Melissa Farley, a long-time expert on prostitution and principal author of the nine-country study referred to previously in this dissertation, was told of women fired from legal brothels upon receiving a positive HIV test while the management who ran the brothels, their assistants, and their health policies consistently seemed to favor the tricks, to the detriment of the prostituted women.\(^{1974}\) Tricks frequently “bribed” prostituted women not to use condoms.\(^{1975}\) Similarly, in 2002, Lenore Kuo, Professor of Women’s Studies and Philosophy at California State University at Fresno, found accounts from prostituted women in Nevada legal brothels that measures meant to protect them, “especially the requirement of condoms, were regularly disregarded for an additional fee and that brothel management made no serious effort to prevent this.”\(^{1976}\) Kuo also noted that the “impression” from visits and interviews in legal Nevada brothels “was that the overarching focus of brothel management was the satisfaction of its customers. Little interest was shown in the well-being of the workers.”\(^{1977}\) Another woman reporting about her experiences of being prostituted in legal brothels in Nevada attested in an article from 1989 that they “were strictly forbidden to use condoms unless the customers asked for one, as it took maximum pleasure away from the paying customer.”\(^{1978}\) These accounts conform to those from Victoria, Australia above.\(^{1979}\)

\(^{1969}\) Ibid.
\(^{1971}\) Ibid.
\(^{1972}\) See supra notes 1961–1965 and accompanying text.
\(^{1973}\) See supra note 1958 and accompanying text.
\(^{1975}\) Ibid., 44.
\(^{1976}\) Kuo, Prostitution Policy, supra chap. 2, n. 233, at 84.
\(^{1977}\) Ibid., 84.
\(^{1979}\) See, e.g., Sullivan, An Update on Legalization, 20 (citing studies showing that some men in Victoria, Australia, do not want to use condoms in legal brothels, and that some brothel operators do not insist); Pyett and Warr, “Women at Risk,” 186, 190 (reporting about legal brothels who condone or even encourage unsafe sex).
Several other persons have testified that brutal beatings and rape of prostituted women occurred regularly in Nevada and were covered up by management as long as the perpetrating trick paid the brothel. Such evidence suggests an exploitative dynamic where little concern is shown for the prostituted person. Not surprisingly, among Farley’s sample of forty-five women in legal brothels in Nevada, 57% out of forty-four who specifically responded told interviewers, while many spoke in whispers out of fear of being secretly recorded and making pimps unhappy, that they gave part or all of their earnings to someone other than those controlling the legal brothel; moreover, half of all women in the sample believed that at least half of the women in those brothels were controlled by external pimps. Thus, several levels of seemingly exploitative third parties appear to participate in controlling and influencing Nevada brothel prostitution. A coercive structure like this may be necessary for business to run smoothly, as many tricks around the world, corroborated by testimonies from prostituted women, acknowledge they solicit these women in order to have the kind of sex that others would refuse them, including among other things sadomasochism and pissing on someone, or various sexual conduct they have seen in pornography (pp. 124–129 above).

If unsafe, degrading, and abusive sex were truly prevented in prostitution, as opposed to being controlled by pimps, business might decrease significantly. The demand for abusive sex is likely an important reason why other sources report that brothel management, bodyguards, or other third parties often encourage unsafe sex, are uninterested in intervening with violent tricks, cover up violence after it happens, and may not be able to stop it even if they wanted to.

Decriminalization of prostitution is also documented to be associated with a “prostitution culture” in public attitudes. For instance, in a study comparing 783 undergraduate men in California, Iowa, Oregon, and Texas with 131 similar young

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1980 See Anastasia Volkonsky, “Legalizing the “Profession” Would Sanction the Abuse,” Insight on the News, Feb. 27, 1995, at 22 (“[C]ontary to the common claim that the brothel will protect women from the dangerous, crazy clients on the streets, rapes and assaults by customers are covered up by the management.”); Ryan, “Legalized Prostitution,” 22 (stating that “[o]nce you were alone in your room with a customer you had no protection from him. There were many different occasions where a woman was brutally beaten or raped by a john, but as long as he paid the house, it was kept quiet”); see also Kuo, Prostitution Policy, supra chap. 2, n. 233, at 84–85 (noting that, when pressed for answers, all her interviewees in Nevada legal brothels “acknowledged” that third parties and tricks were abusive there, though the women often downplayed the violence (tricks were said to be “overly rough”), or they were blamed for it themselves (they were “not sufficiently ‘professional’”)); cf. Farley, “Legal Brothel Prostitution in Nevada,” supra chap. 2, n. 196, at 29–30 (interviewing former brothel manager who stated that “only a small percentage of brothel violence is reported” and that prostituted “women are so accustomed to violence in their lives that an assault from a john seemed ‘almost insignificant’ to them”); Dan Kulin, “Prostitute Sues Musician Neil, Brothel over Alleged Assault,” Las Vegas Sun, Apr. 16, 2004, archived at http://perma.cc/03Lm5Jxx83 (reporting civil suit by prostituted woman lodged against legal Nevada brothel owner for failure to intervene against violent trick).


1982 See supra note 268 (citing and quoting sources).


men in Nevada (the only state among them with legal brothels), the latter men normalized and accepted sexual violence (e.g., via rape myths), sexual exploitation, and prostitution to a significantly higher extent than the former men.\textsuperscript{1985} Hardly surprising considering the increased approval once it is legal, legalization of some prostitution does not drive away other illegal forms of prostitution from the market. There are accounts in Victoria, Australia, and similar indications in Nevada as well, suggesting that prostituted women and minors are regularly moved between legal and illegal venues by pimps for reasons appearing to include money laundering, changed demand, avoiding law enforcement scrutiny, and because minors would be paid more by johns and easier to control.\textsuperscript{1986} Similarly, a prostitution survivor with experience from legal brothels in Nevada remarked in 1989 that they deliberately did not verify age among young recruits.\textsuperscript{1987}

Additionally, evidence suggests that legalization or decriminalization will not improve the stigma for prostituted women. For instance, the New Zealand Prostitution Law Review Committee reported in 2008 that “[d]espite decriminalization, the social stigma surrounding involvement in the sex industry continues.”\textsuperscript{1988} For many prostituted persons in the Netherlands, getting social security through registering with authorities and paying taxes is not a realistic option—particularly if they have children in schools or other relatives who do not know about their involvement in prostitution, in which case the prostituted persons do not want it recorded anywhere.\textsuperscript{1989} Similarly, the German federal government report in 2007 found that although possibilities “to create the legal framework” for social insurance has existed, “few” prostituted persons have “made use of this option.”\textsuperscript{1990} Additionally, frequently accompanying legalization or decriminalization are zoning policies attempting to reduce some of prostitution’s harmful secondary effects, such as harassment and assaults against residents (often women and children) in areas where the market thrives, or lowered property values. However, these policies often put persons who are in prostitution into more remote areas, leading to an increased rather than decreased risk for “physical danger” to them, thus coercing many to continue in illegal venues.\textsuperscript{1991}

Some have attempted to claim that legalization of prostitution, especially third parties, promotes better safety and well-being to prostituted persons. In a recent case (\textit{Canada v. Bedford}, 2013)\textsuperscript{1992}, Canadian courts misrepresented a number of social science studies and/or failed to observe crucial flaws in them in order to claim that benign actors in the sex industry would facilitate the safety and well-being of prostituted persons if only the laws were rewritten or invalidated, or that indoor prostitution was safer than street prostitution.\textsuperscript{1993} The trial court specifically cited only five

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\textsuperscript{1989} Daley, “New Rights, But No Gain.”
\textsuperscript{1990} Ger. Fed. Gov’t, \textit{Legal Situation of Prostitutes}, 79.
\textsuperscript{1991} See, e.g., Farley, “‘Bad for the Body,’” \textit{supra} chap. 5, n. 675, at 1094.
\textsuperscript{1993} Waltman, “Assessing Evidence in \textit{Bedford v. Canada},” \textit{supra} chap. 2, n. 311.
studies that either purported (or was claimed to by the court) to support their decision to invalidate laws against sexual exploitation that targeted third parties; yet none of these studies exhibited a reliable strategy to control for bias in interview responses from people that are currently exploited by third parties, from which their data were often based upon.\textsuperscript{1994} For example, in one study that was made in legal brothels in Nevada and cited by the Ontario trial court,\textsuperscript{1995} the authors had even admitted that they gained access to respondents through the Nevada Brothel Association, brothel attorneys, or directly through brothel management.\textsuperscript{1996} Other researchers are regularly denied entry.\textsuperscript{1997} But the court did not question why all forty prostituted women that were interviewed in this particular study claimed they felt protected, only one reported experience of violence, and managers and brothel owners conveniently saw “themselves as protecting women from violence on the streets by providing a legal alternative.”\textsuperscript{1998} This information dramatically clashes with numerous other studies and reports from Nevada.\textsuperscript{1999} If prostituted persons report unsafe sex, drug use, management abuse, or overly exploitative conditions to outsiders or government agencies, such information would threaten the legality of the brothels where they were interviewed. This is a known problem of underreporting that should have cautioned the court from relying heavily on such evidence.\textsuperscript{2000}

Another British study cited by the trial court on legal indoor prostitution in London apartments showed a very different image than that painted in the trial court’s summary of that study.\textsuperscript{2001} For instance, the prostituted women reportedly had to sexually service about ten men before even starting to earn anything themselves because of first having to pay the rent, the receptionist’s fee, advertising, utilities bills, and so on (some days yielded them no earnings at all).\textsuperscript{2002} These conditions create incentives for unsafe sex, as tricks pay more for then.\textsuperscript{2003} Predictably, all prostituted women who were interviewed said that unsafe sex was often practiced at these apartments, but since the interviewer was an official health practitioner and such information could incriminate their brothels, it is unsurprising that none admitted outright that they did so themselves.\textsuperscript{2004} Moreover, there were a number of reports of assault, rapes, and robberies in the flats where the authors found that the women “have to develop their own protective strategies” and that any role that the “maid” (receptionist) could “play in containing actual situations of violence” was decidedly “minimal.”\textsuperscript{2005} None of the above facts were mentioned in the trial court’s misleading summary. Instead, that summary erroneously claimed that the London study had “found that working in a flat was safer” and harbored less unsafe sex than on the

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\item\textsuperscript{1994} Id. at Part II.
\item\textsuperscript{1996} Brents and Hausbeck, “Legalized Brothel Prostitution in Nevada,” 294 n.1.
\item\textsuperscript{1997} \textit{See supra} note 298 (researchers denied entry in about half of brothels in two different studies).
\item\textsuperscript{1998} Brents and Hausbeck, “Legalized Brothel Prostitution in Nevada,” 271.
\item\textsuperscript{1999} \textit{See supra} notes 1974–1987 and accompanying text.
\item\textsuperscript{2000} \textit{See, e.g., supra} pp. 76–83 (discussing problems of reliability when interviewing persons who are currently prostituted, exemplifying with a recent journal article that reported a study that drew on data from a health clinic funded by the pornography industry).
\item\textsuperscript{2001} \textit{Bedford}, 2010 ONSC 4264 ¶ 325(d) (citing Whittaker and Hart, “Indoor Sex Work,” 399–414).
\item\textsuperscript{2002} Whittaker and Hart, “Indoor Sex Work,” 404–05.
\item\textsuperscript{2004} Whittaker and Hart, “Indoor Sex Work,” 405. \textit{See also} ibid., 402 (describing Dawn Whittaker’s “dual role” as a health practitioner, doing drop-in visits at the apartments, in addition to interviewing them for the research study).
\item\textsuperscript{2005} Ibid., 408 (first quote), 409 (second quote).
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streets, despite that the article’s summary made clear that the study contained no control group from the streets to validate such comparative claims with.

The Canadian courts also misinterpreted data from two large survey studies than did not only lack a strategy to counter underreporting of criminal activities among brothel respondents, but also did not control for alternative predictors to the supposedly more frequent abuse that was surveyed on streets compared to the brothels. The studies noted that street women were younger, more inexperienced, and reported more drug use than women indoors. Such a situation likely exposes street women to more abusive men who take advantage of the relative inexperience and vulnerability of younger women compared to older women. However, none of the two large survey studies cited by the court controlled whether current age (as opposed to age at entry in prostitution), nor experience, where mediating variables in predicting the variance in violence. By contrast to the fashion with which the trial court erroneously cited these studies, they could not show whether it was the indoor environment per se that reduced violence in prostitution, or whether other mediating factors did.

Some commentators have attempted to suggest that abusive and destitute preconditions are a less common cause for entering prostitution among those who are prostituted indoors as compared to those prostituted outdoors in “street” prostitution. For example, a review article from 2009 made this claim, but only supporting it by citing two empirical studies. Both the cited studies used poor and unreliable data, failed to meet reliable scholarly standards in general; for example, one study, in addition to lacking a control group from street prostitution, did not analyze the reasons for a missing response rate over 80% in their survey, while failing to reveal other important information and exhibiting many common problems in the methodology of

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2006 Bedford, 2010 ONSC 4264 ¶ 325(d).
2007 When comparing different studies the lack of a control group makes it very difficult to account for the bias of specifics, such as interviewers and their techniques, geographic location, population samples, survey wordings, and other particulars.
2008 Whittaker and Hart, “Indoor Sex Work,” 399 (“[W]e report on the flat-working women’s employment of protective strategies, such as co-working with ‘maids’. . . .”); cf. ibid., 406 (“Not described here is our concurrent work with street-working women.”).
2011 Cf. Whittaker and Hart, “Indoor Sex Work,” 406 (noting that their study of indoor prostitution in London flats found older women being more “experienced and skilled at managing interactions with clients” while younger women seemed to work longer hours, saw more tricks, and knew “considerably less” about condom safety).
2012 Plumridge and Abel, “Sex Industry in NZ,” 80–81; Church et al., “Prostitutes in Different Settings,” 525. For more detailed analysis, see Waltman, “Assessing Evidence in Bedford v. Canada,” Part II.D.
2013 Bedford, 2010 ONSC 4264 ¶¶ 325 & (a) & (b).
Such facts should caution the reader whenever prostitution studies purport to show low levels of abuse or trauma. Moreover, the claim appears more unlikely when considering that numerous studies show that many people in prostitution are prostituted both indoors and outdoors during their lives. For instance, a team of researchers studying 1022 prostituted women in Colorado Springs observed in 1990 that “the same woman may work in different settings, simultaneously or sequentially. Rigid stratification of prostitutes into ‘high-class’ or lower categories is not meaningful, either socially or ecologically, for Colorado Springs prostitutes.”

Several more recent studies, with sample sizes ranging from 23 to 222, also suggest that many prostituted persons drift between indoor and outdoor venues. Based on these studies, it is plausible that when women have been in prostitution for a number of years, a majority may have experienced both indoor and outdoor venues. Such conditions make it unlikely that preconditions would change across venue, because most of the women being prostituted in different venues are the same women.

Moreover, in Mexico, where the nine-country study previously mentioned that found very high levels of PTSD, it obtained sufficiently large groups for international comparison among 123 prostituted women and was thus able to control specifically for venue. Here, no statistically significant differences were found among prostitution in brothels, massage parlors, strip clubs, or on the street with respect to PTSD severity (nor with respect to time in prostitution, childhood abuse, rape in prostitution, number of types of lifetime violence experienced, or percentages who openly wanted to escape prostitution). Similarly to some extent, a Swiss study of 193 prostituted persons found that the “burden of sex work” and “mental disorders” did not generally differ across different venues, but were rather correlated with other factors such as particular vulnerabilities caused by immigrant status, drug use, and exposure to “open violence.” The Mexican and Swizz samples, although differing slightly in observed correlations, nonetheless converge in showing that it is unlikely that a population primarily prostituted indoors would typically come from less desperate or better preconditions. If less desperate, presumably they would have more alternatives to prostitution and thus be in a better position to ascertain their interests and avoid harmful situations, such as prostitution, that cause psychological damage and mental disorders, which these persons that were prostituted indoors apparently were not able to. Taken together with the finding that many prostituted persons shift between venues over time, these studies suggest that it is less likely that preconditions correlate with venue except in exceptional cases.

The Swedish Government and Parliament in 1998 apparently realized that one cannot fight gender inequality and keep prostitution as a viable option for women without resources. As long as prostitution is viewed as a viable situation and “work,”

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2020 See supra notes 2016–2017 and accompanying text.
particularly for women, it would keep a large group of multiply disadvantaged persons trapped in forms of sexual exploitation tantamount to slavery, from which they can rarely escape (cf. 55–64 above). Prostitution as such is antithetical to social equality. Just as apartheid couldn’t exist alongside social equality, prostitution cannot either. From the point of hierarchy theory then, reducing the number of persons in prostitution is imperative if promoting substantive equality. As will be shown, the Swedish law has accomplished such a reduction in addition to reducing the demand for prostitution.

**Comparative Impact of Swedish Prostitution Laws**

In 1995, the Swedish 1993 Prostitution Inquiry estimated that there were approximately 2500 to 3000 prostituted women in Sweden, of whom 650 were regularly prostituted on the streets. In contrast, a Nordic research study published in 2008 estimated that approximately 300 women were prostituted on the streets, while 300 women and fifty men were found in prostitution being advertised online in Sweden. One of the authors notes that a number of studies show that persons are often prostituted in several arenas though, suggesting some of these 650 persons may have been counted more than once. On the other hand she believes some persons may have been missed due to how the social work related to these estimations was organized and what arenas were examined. However, considering the need to be visible to attract potential tricks, it is hardly likely that any extensive prostitution would occur without being detected. Thus, although there have been a few reports of, for example, very small prostitution operations in more closed ethnic communities in Sweden where advertisements were spread with cards or by word of mouth, nonetheless these activities apparently did get reported to the police. Moreover, no data suggest that such forms of less publicly visible prostitution are occurring more extensively in Sweden per capita than elsewhere among the Nordic Neighbors. In any event, comparable methods with similar limitations have been used in Denmark and Norway (see below) to approximate the population of prostituted persons. Particularly considering the enormous national differences in quantity of prostitution suggested by these estimations below, and the fact that prostitution increased in Denmark and Norway since the 1990s while it decreased in Sweden during the same period, for purposes of rough national comparisons the numbers appear sufficiently valid.

Hence, by contrast to the observed decrease in Sweden from 1999 to around 2007 (see above), in Denmark where purchase of sex is legal an increase was observed from 3,886 persons visibly prostituted in 2002 to 5,567 visibly prostituted persons in

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2023 Ibid.; cf. supra note 2017 (citing studies showing persons often drift between venues).
2024 Cf. SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 118.
2026 Cf. SOU 2010:49 En utvärdering [gov’t report series] 120.
Among those prostituted in Denmark in 2007, approximately 1,415 were on the streets. Sweden’s total prostitution population was thus approximately a tenth of its neighbor Denmark’s about eight years after Sweden’s new prostitution laws entered into force, even though Denmark only had a population of 5.4 million, while Sweden had 9.2 million. A so-called sex workers organization in Denmark attempted to claim that the number on street prostitution in Copenhagen was over-reported by 1000 persons by a nongovernmental organization named Reden that works with prostituted women in outreach programs. However, indoor prostitution numbers, such as the so-called “clinic prostitution” that on its own accounted for as many as 3,278 persons, were based primarily on advertising and not on any information from Reden. Thus, even if the claim about underreporting were entirely accurate, Denmark’s prostitution population as a whole would still be twelve times larger than Sweden’s per capita—as opposed to about fifteen times larger when assuming no over-reporting.

Norway is a neighboring country to Sweden in the West that had about 4.7 million people in 2007. The number of persons in prostitution increased there during the beginning of the new millennium, especially with regards to an influx of foreign women on the streets. Using similar methods of approximation as were used in Sweden and Denmark, when purchasing sex was still legal in Norway in 2007, there were 2654 prostituted women of whom 1157 were on the street—that is, almost nine times more per capita compared to Sweden’s 600 women. Although the numbers from Denmark, Norway, and Sweden should not be seen as exact measurements, in the form of comparative approximations they are more than sufficient when considering the staggering different prevalence of prostitution in these three jurisdictions.

According to both NGOs and government agencies in Stockholm, Gothenburg, and Malmö, “the sex trade virtually disappeared from the street” briefly after the law’s enactment, although it did later return “albeit to a lesser extent.” In Stockholm, the number of purchasers was reported by police to have decreased by almost

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2037 Ibid. Among those not on the street in Norway, the numbers of prostituted persons were based on those who sought support from social agencies or whose advertisement was found on the internet or in a newspaper. Ibid; see also Holmström and Skilbrei, “Nordiska prostitutionsmarknader i förändring,” 13.

80% in 2001.\textsuperscript{2039} As reported in 2007, social workers in Stockholm encountered only 15 to 20 prostituted persons per night, whereas they encountered up to 60 per night prior to the law (SoS, *Prostitution* 2007 p. 33). In Malmö, social workers encountered 200 women a year prior to the law, but a year after the law, they encountered 130, and in 2006, only 66 (p. 33). In Gothenburg, data indicate that street prostitution declined from 100 to 30 persons a year between 2003 and 2006 (p. 34).

Despite the misinformation (discussed further below) spreading what is sometimes simply rumors of how, after the law’s enactment, there was a stronger move from street prostitution to Internet or other indoor, allegedly “hidden” prostitution venues in Sweden as compared to elsewhere, no information, empirical evidence, or other research suggests that this has actually occurred.\textsuperscript{2040} Concurring with these observations, the National Criminal Investigation Department stated in 2009 that its telephone interceptions show that international traffickers and pimps have been disappointed with the prostitution market in Sweden.\textsuperscript{2041} Consequently, the latter’s clandestine brothels in Sweden are fairly small enterprises, with police operations rarely finding more than three or four prostituted women at one time,\textsuperscript{2042} compared to the 20 to 60 women commonly included in certain criminal activities in the rest of Europe.\textsuperscript{2043} These international traffickers and pimps avoid conducting prostitution for too long in any one apartment or location in order to calm customers’ fears of getting caught.\textsuperscript{2044} This “necessity” for “several premises” has been corroborated in telephone interceptions, testimonies from prostituted women, police reports in the Baltic States, and in almost all preliminary investigations of procuring or trafficking charges.\textsuperscript{2045}

Moreover, the passing of the law, in and of itself, seems to have changed public sentiment. In 1996, only 45% of women and 20% of men in Sweden were in favor of criminalizing male sex purchasers.\textsuperscript{2046} In 1999, 81% of Swedish women and 70% of the men were in favor of criminalizing the purchase of sex; in 2002, 83% of women and 69% of men were in favor; and, in 2008, 79% of women and 60% of men favored the law.\textsuperscript{2047} While the drop-out rate was considerably high in the 2008 survey, which had been sent to 2500 persons, with only 43% of men and 57% of women responding ($n = 1134$), its results nonetheless are consistent with the other surveys conducted in 1999 and 2002, and with a study done in 1996 before the law took effect.\textsuperscript{2048} The young adult population (age 18–38) is most in favor of the law; particularly women age 18–38, of whom 84% wish to retain it.\textsuperscript{2049}

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\item SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 118, 152.
\item Rikspolisstyrelsen, *Lägesrapport 10*, at 10.
\item SOU 2010:49 En utvärdering [gov’t report series], 122.
\item Rikspolisstyrelsen, *Situation Report no. 5*, at 34.
\item Ibid. The use of several premises is observable by reading individual case-opinions from Swedish courts.
\item Månsson, “Commercial Sexuality,” supra p. 1 n.4, at 249.
\item Ibid., 363.
\end{itemize}
\end{footnotesize}
Furthermore, the number of men who reported, in the national population samples, having purchased sex seems to have dropped from 12.7% in 1996\textsuperscript{2050} (before the law took effect) to 7.6% in 2008.\textsuperscript{2051} Asked about the law’s effects on their own purchase of sex in 2008, respondents stated they had not increased their purchase of sex, had not started purchasing sex outside of Sweden, and had not begun purchasing sex in “non-physical” forms.\textsuperscript{2052} Although the drop in number of men who report having purchased sex in 2008 compared to 1996 is possibly an overestimation when considering that a large proportion of the male population was the same at both times, the method used for approximation (i.e., self-reported anonymous crime surveys) has repeatedly been proven reliable in a number of scientific reviews.\textsuperscript{2053} It is therefore reasonable to assume that there has been a large drop in purchases in Sweden, though the relative drop in number of men who have ever bought sex is likely smaller than suggested by these statistics.\textsuperscript{2054}

The changed circumstances in Sweden after the law’s enactment, especially compared to its neighbors, highlight the strong deterrent effect of the law, even if conviction rates have not been staggering. Convictions went from 10 in 1999 to 29 in 2000, 38 in 2001, 37 in 2002, 72 in 2003, 48 in 2004, 105 in 2005, 114 in 2006, 85 in 2007, 69 in 2008, 107 in 2009, 326 in 2010, 436 in 2011, 310 in 2012, and 236 in 2013.\textsuperscript{2055} The high conviction rates in 2010 and 2011 relate to a dramatic increase in crimes reported to the police, the customs authority, and the prosecution service in 2010, when 1277 sex purchases were reported (the previous highest annual number were in 2005, when there were 460 reported crimes).\textsuperscript{2056} In 2010, there were also 231 reported “purchases of a sexual act from a child” (under age eighteen), a crime for which the maximum penalty is two years.\textsuperscript{2057} The reasons for this increase in 2010 appear to be due to particular funds allotted by the Government’s Action Plan against “prostitution and trafficking” that year, and to one large, local case of organized pimping in Jämtland in northern Sweden.\textsuperscript{2058}

From the perspectives of international jurisdictions, the Swedish law’s effects are notable. Studies suggest that with legalization comes an increased demand for more

\textsuperscript{2050} Månsson, “Commercial Sexuality,” 238.
\textsuperscript{2051} Kuosmanen, “Attitudes & Perceptions in Sweden,” supra chap. 2, n. 317, at 256 tbl.5.
\textsuperscript{2052} Kuosmanen, “Tio år med lagen,” 372–73.
\textsuperscript{2053} The reliability of well-worded anonymous crime surveys is well-corroborated in the literature. See sources cited supra note 105.
\textsuperscript{2054} For further detailed analysis, see Waltman, “Sweden’s Law’s Potential,” supra p. 26 n.75, at 460 & n.7.
\textsuperscript{2055} BRÅ [Swedish Nat’l Council for Crime Prevention], Nat’l Criminal Statistics Database, Sweden, \textit{available} at \textit{http://www.bra.se} (under “Brott och statistik,” follow “Statistik,” then “Personer lagförda för brott,” select year under “Sammantliga lagföringsbeslut. Årsvis: Lagföringsbeslut efter huvudbrott och huvudpåföljd”). The numbers include orders for summary penalty and district court sentences, but not appeals and not persons simultaneously convicted for offenses with a higher penalty (i.e., the “primary crime”). See “Personer lagförda för brott 2013,” \textit{Statistics Sweden SCB} (Stockholm: BRÅ, 2013), 5–6, \textit{archived} at \textit{http://perma.cc/TT52-4Y3B}. Before April 1, 2005, the Sex Purchase Law was not inserted into the criminal code but was cited as a special law: Lag om förbud mot köp av sexuella tjänster (Svensk författningssamling [SFS] 1998:408) (Swed.), \textit{superseded by statute}, BrB [Criminal Code] 6:11. There were some differences in wordings between the two.
\textsuperscript{2056} Nat’l Criminal Statistics Database, supra note 2055 (under “Brott och statistik,” follow “Statistik,” then “Anmällda brott,” select custom-made table of statistics under “Databas över anmällda brott”). Of course, reports do not necessarily result in convictions.
\textsuperscript{2057} See BrB 6:9 (Swed.). For reported numbers, see Nat’l Criminal Statistics Database.
Moreover, to meet the increased demand for prostitution, there is often a corresponding increase in cross jurisdictional movement of people in prostitution. This situation was also indicated in the differences between Nordic countries where according to observers there were no such reported large groups of foreign women being prostituted visibly in Sweden as there were in Norway, Denmark, and Finland around 2008. Such indication of the demand for foreign prostituted women in countries where prostitution is legal is corroborated in other countries such as the Netherlands. In 1999, half of all prostituted persons in the Netherlands were estimated to be foreign born. Previously, in 1994 and 1995, the Amsterdam police had also estimated that approximately seventy-five percent of all prostituted persons “behind windows” in De Wallen (a so-called red light district) were foreigners, and that 80% of all these persons were residing in the country illegally.

More recent reports from the Netherlands suggest that over 75% of Amsterdam’s 8,000 to 11,000 prostituted persons are from Eastern Europe, Africa and Asia. Not surprisingly, Amsterdam’s mayor told the New York Times that legalization did not result in more transparency or protection to women but rather the opposite. “‘We realize that this hasn’t worked, that trafficking in women continues,’ he said. ‘Women are now moved around more, making police work more difficult’” (Simons, A10). A similar demand for cross jurisdictional movement can be seen, for example, in interstate trafficking within the United States For instance, among a sample of 45 women in legal Nevada brothels, 32 had moved there from another state in the United States, and 58% had been in prostitution in other states. Not surprisingly, the president of the Nevada Brothel Owners Association has said in 1994 that 90% of prostituted persons in the legal brothels in Storey, Nye, and Lyon counties were not Nevada residents. Other observations from around the world suggest that legalization of some forms of prostitution promotes cross-jurisdictional trafficking as well as illegal forms of prostitution, including child prostitution. In contrast to countries that have legalized various forms of prostitution, other countries have followed Sweden’s legal approach to prostitution, including Norway in 2009, Iceland in 2010, Canada as of November 6, 2014, and France as well as Northern Ireland most likely will soon. Moreover, the European Parliament urged the rest of its

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2061 SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 163
2065 See Kuo, Prostitution Policy, supra chap. 2, n. 233, at 80.
2066 See, e.g., supra notes 1986–1987 and accompanying text.
2068 Comm. on CEDAW, “Response to State Party (Iceland),” supra p. 25 n.73.
2069 Bill C-36, Protection of Communities and Exploited Persons Act, 2nd Sess., 41st Parl., 2014 (Royal Assent, Nov. 6, 2014) (Can.).
member states in a recent resolution to take similar action.\textsuperscript{2071} To some extent, South Korea has a similar but not identical law,\textsuperscript{2072} and the United Kingdom have also adopted aspects of the Swedish model law.\textsuperscript{2073} The same model law was also proposed by the Government of India in 2005,\textsuperscript{2074} although it is yet to be passed there.

\section*{The Importance of Specialized “Exit Programs”}

In 2012 a national evaluation of the specialized social service units that treat prostituted persons and provide support for those who wish to escape prostitution was published by a group of researchers affiliated with Linköping University.\textsuperscript{2075} The units exist only in the city municipalities in Sweden’s three metropolitan areas of Stockholm, Gothenburg, and Malmö. Their evaluation showed that at least within these three very specialized units, the result of treatment programs aiming for reintegration of prostituted persons into society so they can escape the sex industry were substantively successful (more below). A clinical study was made with 34 persons who begun treatment at these units, of which 26 was still in treatment at a follow-up after one year (Primary Report, 8–9).\textsuperscript{2076} All respondents in the beginning of the treatment period reported severe mental health problems, measured by various psychological scales; their health problems were not only significantly worse compared to mental disorder and/or substance abuse patients surveyed in other Swedish clinical studies, but even “considerably” more severe.\textsuperscript{2077} For the female prostituted persons, their symptoms were higher or similar to a group of women who had sought group therapy treatment for childhood sexual abuse.\textsuperscript{2078} In other words, the persons who sought treatment at these clinics appear similar to the global population of prostituted persons, who have been found to have symptoms of mental disorders at similar levels as Vietnam veterans seeking treatment, survivors of state organized torture, and battered or raped women.\textsuperscript{2079}

With regards to the program’s result, 80\% were not in prostitution at all during the follow-up (Primary Report, 9). Those 20\% who were still prostituted at the follow-up reportedly were prostituted less often, and reported a wish for further change (p. 9). More than 90\% of all respondents experienced that the counseling sessions had “been a support” for their own decisions to stop “selling sex” (p. 9). The majority reported better self-esteem and improved life quality after the treatment. Those who still reported engaging in prostitution after the treatment (20\%) were “signifi-

\begin{footnotesize}
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\item \textsuperscript{2071} “Resolution on Prostitution,” Eur. Parl. Doc. (Feb. 26, 2014), supra p. 25 n.73 (passed 343 to 139, 105 abstentions) (urging governments in those Member States who deal with prostitution in other ways to review legislation in the light of success achieved by Sweden’s type of laws).
\item \textsuperscript{2074} See “Anti-Prostitution Laws Revamp,” Times of India, supra note 1174.
\item \textsuperscript{2075} Svedin et al., Prostitution i Sverige: Huvudrapport, supra p. 26 n.75. Further citations in text.
\item \textsuperscript{2076} The drop-out group of 10 persons had reported a significantly higher use of drugs than the followed-up group. Ibid., 9.
\item \textsuperscript{2079} See, e.g., Farley et al., “Prostitution in Nine Countries,” supra chap. 1, n. 115, at 56. See also supra pp. 67–72 (discussing and analyzing various studies on mental health problems in prostitution made in different countries).
\end{itemize}
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cantly older” and had been prostituted during a “significantly longer time” than the others in the group (p. 9). Consequently, the number of years in prostitution is mentioned by the researchers as a factor that may influence how much time it takes to stop being prostituted (p. 9).

After being one year in treatment, more persons among the sample were living alone and without a partner than before treatment (p. 9). A majority reported that the counseling sessions had given them support to end destructive relations and improve relations with others (p. 9). The respondents reported that at the follow-up they were significantly more satisfied with people that they had close relationships with in their lives than they were previously (p. 9). Additionally, more persons were working or studying at the follow-up (72%) than previously (52%), and also reported that their counseling sessions during treatment had influence this area of their life. The respondents were also significantly more satisfied with these activities at the follow-up (p. 9). In addition, a majority of respondents reported more satisfaction with leisure time apart from work or studies, some reporting that they had started to nurture a hobby (p. 36).

A post–evaluation study of clients who had ended their treatment contact with the prostitution units since on average three years illustrates the need for specialized services, as distinguished from more general agencies. A common theme expressed by these former clients was that the “accurate type of support had been a necessity to survive” (p. 10). The importance of “the specialized unit, the importance of a supportive relation to a specialized treatment professional, and the recognition from the fact that others with the same type of problems have contact with the units” were said to be paramount (p. 10). Indeed, the call for better access to these specialized units was also voiced in 2008 Prostitution Inquiry’s final report from 2010. There, prostituted persons and survivors noted that there was insufficient access across the country to specialized care and treatment, and a common absence of necessary and adequate knowledge among other more general professionals in the social services sector that these persons had encountered. Several of the prostituted or formerly prostituted persons consulted stated how “it occurs that those who seek help encounter an inadequate response by the professionals who are working with these issues.” Reiterating this criticism, the survivors interviewed in the later post-evaluation study from 2012 also report negative experiences when having had to talk about their prostitution at other treatment facilities than the specialized units. “The interview respondents describe the difficulty of getting access to the specialized units if one lives in another municipality. This underscores the need to create more access to the specialized units also outside the metropolitan regions,” the report concludes in its recommendations.

As a control, the evaluation conducted a third interview survey with 11 women age 15–25 who had been prostituted through online venues, but who were not part of the Prostitution Units’ treatment programs (Primary Report, 13). This survey corroborated the conclusion that specialized units were imperative to delivering adequate support:

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Kjellgren, Pribe, and Svedin, Utvärdering av samtalsbehandling (FAST), 36.
SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 232.
Ibid.
Ibid.
All informants in the study had been involved in the social welfare services and/or child psychiatry programs but rarely told that they sold sexual services. All of them could describe meetings with social services, the judicial system, or the psychiatry programs where they felt themselves overrun, misunderstood, and that they had not been given an opportunity to tell that they had sold sexual services. (p. 14)

During contacts with non-specialized agencies, these interviewees also commonly said that they “felt” as they were “in the way, that they took up someone’s time if they talked, that the people in their proximity reacted with despair,” and that such people “did not know how to handle the situation when the young person confessed” about her prostitution (p. 17). Parents reportedly expressed feelings such as “not now again” regarding their child’s self-destructive behavior or the psychologist “said that she/he was not competent to talk about precisely those things that the youngster had started to tell them about” (p. 17). Such accounts contrast sharply with those of the respondents in the Prostitution Unit’s treatment study and the post-treatment evaluation study above.

A conclusion when comparing the interviews with those who were treated with those who had not been treated at the units, but elsewhere, appears to be that the Prostitution Units, as the only specialized programs, should be expanded in Sweden and be made more equally accessible across the country. Conversely, such programs that are specializing on the needs of people in prostitution can also be assumed to work better in other countries than general social services.

**Misinformation on Sweden’s Law**

Despite its substantial impact in terms of reducing prostitution in Sweden, there are still obstacles to overcome for the law to reach its full potential, further dealt with below (pp. 486–491). However, there is also some biased information and criticism about the law, dealt with here. Regarding scholarly criticism of the law in Sweden, one of the more dominant voices belongs to an author of a history of ideas dissertation from 2009, Susanne Dodillet.\(^\text{2085}\) She probably received additional attention in Sweden because her scholarly work was specialized on prostitution laws, as opposed to that of other Swedish scholars who might have been critical of the law. Criticizing also the German law that legalizes certain forms of prostitution for its political motivations and lack of explicit gender perspective, but not for decriminalizing prostitution, which she prefers (see, e.g., Dodillet, 550–54), her thrust of argument supports models like the German one over the Swedish approach. In her dissertation she tries to argue that indoor prostitution was less documented by the 1993 Prostitution Inquiry than outdoor venues, implying that this alleged problem weakens the Inquiry’s findings sufficiently to undermine the law’s justification.

For instance, in conjunction with saying that the knowledge obtained from social workers and police mostly covers women in street prostitution, the Inquiry’s final report further had stated the following: “We also know that many women in massage parlors and in other indoor prostitution have formerly been active in street prostitution and that the description therefore may be valid also for them.”\(^\text{2086}\) Dodillet omitted this latter crucial statement in her dissertation by selecting a quote from a shorter

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statement in the summary, attempting to convey the impression that the Inquiry’s evidence was almost exclusively based on populations prostituted on the street (Dodillet, 367; quoting SOU 1995:15 p. 11). In retrospect it is important to consider that legislators had recognized that it is common for women in prostitution to drift between venues, and that this evidence particularly suggests that preconditions for women’s entry into prostitution overlap whether they are found outdoors or indoors. Such shifting between venues has long been widely known in the international scholarly community, and was also corroborated in research on Swedish prostituted women published at the time of the Sex Purchase Law’s passage. These same findings have also been repeatedly corroborated in more recent research.

Furthermore, the 1993 Inquiry recognized that indoor venues exhibited similar dangers of violence and abuse toward prostituted persons as those in outdoor venues, referring to research and testimonial evidence obtained by professionals (see SOU 1995:15 p. 143). Swedish researchers at the time, who had studied prostitution, found no venue to be less harmful, safer, or better for the women than the other. These findings are also consistent with the more recent Mexican and Swizz studies that controlled specifically for, and found no significant differences in symptoms of mental disorders, such as PTSD, related to whether primary prostitution venue was indoors or outdoors. Additionally, the 1993 Inquiry referred to a 1992 report from Gothenburg about women with experience from indoor “sex clubs” (SOU 1995:15 p. 139). The report “described various psychic damages that these women have received from their activities, which converge with those that prostitution causes. The difference between optic (sex-shows, posing), and physical prostitution is also marginal, and the work in sex clubs is therefore often a way in to prostitution proper for many young women” (p. 139). Contrary to Dodillet’s analysis that indoor prostitution was not sufficiently accounted for by the legislature, the decision made by Parliament appears to have relied on a reasonable apprehension of harm. Apart from Dodillet’s attempt to present the legislative findings as having been incomplete at the time, her treatment of the Swedish legislation lacks an expected and indeed necessary political discussion of all the new research in support of the legislature’s decision. Particularly considering the high stakes involved for women currently in prostitution, such research should not be disregarded simply because one is doing a work on the history of ideas. Its absence from her account undoubtedly gives the impression that her analysis—rather than openly examining whether a pioneering, even bold, or simply a reasonable decision was made by the legislature—is predetermined early on to show otherwise, thus biased.

Other unfounded rumors have circulated internationally about Sweden’s law, surprisingly often attributed to one Swedish prostitution commentator, Petra Östergren, and an old unpublished English-language piece of hers available online. For instance, the Sex Worker Education and Advocacy Taskforce (SWEAT) promulgated her claims to the South African Law Reform Commission (SALRC) in 2009, but

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2088 Hedin and Månsson, Vägen ut!, supra note 2017, at 28.
2089 See supra note 2017 (citing studies).
2090 Hedin and Månsson, Vägen ut!, 120
never referred to any published research from Sweden. Östergren argued, inter alia, that “[a]ll of the authorities say that there is no evidence that prostitution was lower overall” and that “hidden prostitution had probably increased” (Östergren, n.d.). However, none of the reports Östergren cites were published more than two years after the law took effect. Data before and after the law took effect, as well as comparative data from other Nordic countries, undoubtedly show Östergren’s claims are not correct (cf. 479–486 above). Moreover, Östergren claims that women in street prostitution faced a tougher “time” after the law’s enactment with, inter alia, more demands for unsafe sex and more violent tricks (Östergren, n.d.). Women in legal prostitution also claim that legalization increases competition and demands for unsafe and dangerous sex acts, and there is research corroborating their observations. Not surprisingly, the National Board of Health and Welfare’s 2000 report that Östergren cites is, according to the Board’s own homepage, “not valid anymore.” Already in 2003, the Board expressed doubts about such claims:

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

Additionally, in a 2007 report, the Board noted that opinions vary among prostituted women, with some still preferring the street over restaurants, nightclubs, and the Web. One woman likened “making contact online” to “buying a pig in a poke” while another said it makes dismissing an unwanted purchaser harder. Although Östergren may have been correct that some purchasers stopped testifying against traffickers once they were criminalized (Östergren, n.d.), the Gothenburg Police report having “received anonymous tips from clients who suspect human trafficking.” Östergren also argues that it is difficult for prostituted persons to cohabit, implying their partner could be charged for pimping under procuring laws, but no such real cases (as opposed to hypothetical ones) are mentioned (Östergren, n.d.).

Furthermore, few people outside of Sweden appear to know how Östergren selected her sample of twenty prostituted women-interviewees to whom she refers frequently. Clues are given in a book published by her in Swedish in 2006. There, Östergren explicitly says she did not attempt to contact or hold interviews with “sellers of sex” who had “primarily bad experiences of prostitution.” Rather, she intentionally sought out women with “completely different experiences” since the

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2097 Socialstyrelsen, Prostitution in Sweden 2007, supra note 2038, at 28.

2098 Ibid., 48.

former, she claims, were “the only ones heard in Sweden.” Similarly, her 2003 graduate thesis refers to interviews with fifteen female “sellers of sex” of which “most . . . have a positive view of what they do.” Thus, when she mentions “informal talks and correspondence with approximately 20 sex workers since 1996” in her English-language piece (Östergren, n.d.), she apparently refers to respondents who were selected precisely because they had positive views of the institution of prostitution. When writing that “[m]ost of the sexworkers I have interviewed reject the idea that there is something intrinsically wrong with their profession” (ibid.), evidently she should have informed the reader that the interviewees were selected precisely because they had this view, and that critics were excluded.

Not only activists but also scholars outside Sweden have repeatedly cited Östergren’s English piece (omitting the Swedish ones) and other sources of biased information without noticing any of the problems above. Among others, Jane Scoular have referred to “Östergren’s interviews with women, who reported experiencing greater stress and danger on the streets” after the 1998 law took effect, but without mentioning Östergren’s bias in selection of interviewees. Furthermore, in 2010 Scoular put forward a number of claims contrary to the substantial amount of research made in the years preceding her article. For instance, she claims that no Swedish report “has provided a straightforward comparison” before and after the law’s enactment (Scoular, 18). Then, apparently contradicting this claim, she writes that “the consistent message across a number of evaluations and sources . . . is of a temporary reduction in street sex work, leading to the displacement of women and men into more hidden forms of sex work and the worsening of conditions for those who remain” (p. 18; emphasis added). Among the five citations Scoular provides to support these claims are two reports published just one year after the law was enacted, and one published just two years after its introduction (p. 19 n.27). Moreover, without referring to any specific page therein she cites two of the National Board of Health and Welfare’s reports (ibid.) quoted above, which, contrary to her conclusions, expressed serious doubts regarding claims of such a worsening situation.

Nonetheless Scoular’s article’s main stipulation is inferred from all this biased information, namely that “apparently contrary legal positions produce similar results on the ground . . . in part, due to law’s involvement in wider forms of governmentality that operate to support a wider neo-liberal context” (Scoular, 38).

Ronald Weitzer, in turn, cited one of Scoular’s pieces along with another unpublished author’s work to support his statement that “[i]ndependent assessments indicate that Sweden’s law has not had the salutary effects claimed by advocates.” In the same way, Janet Halley and her co-authors cited Östergren’s English piece along with that of another activist to support the claim that prostitution became more hidden and dangerous after the law took effect. They claimed that “it is clear that

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2100 Ibid., 169.
2103 See supra notes 2095–2098 and accompanying text.
the reform made the life of the remaining sex workers (local and migrant) much harder” (Halley et al., 397; emphasis added). Further, they second-handedly cited a Swedish “administrative report” from the city of Malmö from 2001 and “others” (i.e., reports) that were allegedly quoted in a Norwegian report from 2004 (see p. 397 n.209), but they omit the later more authoritative (and translated) National Board of Health and Welfare report quoted above that reached a different conclusion. The 2008 Prostitution Inquiry’s final report, of course, establishes that the claims about a worsening situation are baseless.

One thing one has to agree with Östergren on, however, is that Swedish politicians are not well informed if they, without qualification, claim that the law “protects” women who are prostituted (Östergren, n.d.). The courts unfortunately more or less eliminated these persons’ rights to be regarded as injured parties during the law’s first ten years (see further below). Contrary to the judiciary’s interpretation, the state should take affirmative responsibility for providing support and assistance to women wishing to leave prostitution, including by permitting them to seek reparations for the damage inflicted upon them from those who inflicted that damage, including tricks. This, the law has not yet accomplished, which is a failure that indirectly opens the door to advocates of other alternatives, such as legalization of prostitution across the board. Yet research suggests that such decriminalization, even if partial, exposes more people to sexual exploitation and may increase their abuse while in prostitution (cf. 471–486 above).

Regrettably, while Östergren notes that prostituted persons now have “neither the rights of the accused or the victim” (Östergren, n.d.), she does not conclude that they should have the rights of a “victim,” including an assessment of damages. In fact, in the debate she has done the opposite. Responding to the question of what she thought about a right to damage claim assessments for women in prostitution, to be paid for by the tricks who exploited them, Östergren was quoted by a journalist saying she “had difficulties imagining that these women (who were interviewed in the course of working with the book) would regard this to be a good proposal.” The journalist did not indicate that Östergren’s interviewees were selected precisely because they said they had positive experiences of prostitution, and that those with negative experiences were deliberately excluded.

The fact that Östergren as well as other sources of biased information have so often been uncritically cited without noticing their obvious flaws, particularly outside Sweden, is symptomatic. Prostitution is a powerful industry supported by apologists such as researchers and social commentators, who in turn influence public opinion whether their information is accurate or not. This also happened to the U.S. 1985 Attorney General’s Commission on Pornography, which was surrounded by false rumors that were repeatedly parroted in the media until they became so-called conventional wisdom (pp. 349–351 above).

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2106 Socialstyrelsen, Prostitution in Sweden 2003, at 34
2109 Compare ibid., with supra notes 2099–2101 and accompanying text.
**Potential of a Civil Rights Approach**

**Issues of Interpretation**

Considering the law’s judicial interpretation after its enactment, there are some substantial obstacles to effective implementation. Contrary to much of the biased information about the Swedish law, its case law has not been sufficiently highlighted either in international media or in scholarly debate. Until those victimized are compensated and helped further, and enabled to leave the sex industry, the situation will not be fully addressed. Here, the law could be more strengthened, consistent with its intent. A logical corollary suggested by the evidence presented so far is to recognize that tricks, by exploiting the coercive circumstances that push persons into the sex industry (see 55–64 above), harm those persons by making them perform sex for money, hence should be liable for recompense. Civil damages thus put the accountability where it belongs: among the tricks, who take advantage of the power imbalance in prostitution to purchase other persons for sex, and so violate these persons’ rights to humanity, equality, and dignity. Taking into account that many tricks usually have money, such civil liability provides an economic opportunity to change prostituted persons’ situations that the public does not have to pay for directly, although the perpetrators will.

If the law would be interpreted consistently to allow for civil damages from tricks to prostituted persons accordingly, the Swedish prostitution law would entail a civil rights approach similar to the cause of action for “coercion into pornographic performance” as envisioned under the Minneapolis antipornography ordinance (cf. 308–309 above). That is, civil damages would recognize the coercive circumstances inherent in prostitution, attribute accountability accordingly to tricks (and pimps), and empower prostituted persons to lodge lawsuits against them whether within the criminal or within a separate civil proceeding (more below). Such an application of the law recognizes substantive inequality and the perspectives and interests of those harmed in prostitution more clearly than a mere criminal law that only grants the government a right to fine or jail tricks.

As recalled, there were problems observed in Canada, since their pornography law is so far restricted to a criminal law, even though it is premised on the promotion of substantive equality; the criminal law framework typically provided little representation of the perspectives and interests of those harmed in the sex industry during legal applications in Canada (pp. 392–437 passim). By comparison, a Swedish prostitution law that more strongly would entail civil damages would address similar problems as those observed in Canada by strengthening sex industry survivors in the legal proceeding. Such a law provides survivors more initiative to use as well as benefit from prostitution legislation.

To a certain extent, as will be shown further below the Swedish government and its 2008 Prostitution Inquiry acceded to some of the suggestions on civil damages above that have been lobbied for since 2006. Moreover, the parliamentary Com—

2110 *Cf.* Waltman and MacKinnon, “Suggestions to Government’s Review” (Sweden), *supra* chap. 4, n. 613, at 21
2111 *Cf.* ibid., 3.
mittee on Justice’s majority has recently emphasized that existing law already provides various venues for prostituted persons to claim damage awards from tricks that have not previously been noted. Some of the available venues for claiming damages, further described below, will entail more practical obstacles than others. However, by emphasizing all of them Parliament has now illuminated what previously seems to have been regarded as hypothetical rather than real options, and thus were not effectively used. Following such statements from the legislature, these hitherto dormant options have a potential to be regarded as more desirable by practicing lawyers in order to strengthen prostituted persons’ rights.

Civil proceedings are often intertwined with criminal proceedings in the Swedish legal system, although they can be separately instigated or separated from the criminal trial later on. Under the Swedish Code of Judicial Procedure (RB) a right to present damage claims and get them judicially assessed usually follows by default for a person, so far as she/he is considered the party “against whom the offense was committed or who was affronted or harmed by it” (RB 20:8(4)). In such cases s/he is referred to as the “injured party” (målsägande) (id.) and his or her claims are partially represented by the prosecutor (RB chap. 22) and (at least for provisions falling under the Criminal Code’s Chapter 6 on Sexual Offenses) by a victim’s legal counsel. This standing as injured party is not technically necessary for a person to be able to claim and prove the amount of their damages; that is, to get the claim judicially processed. However, the prosecutor has no formal obligation to support claims by other than the injured party (see RB 22:2).

2113 See Justitieutskottets betänkande [Bet.] 2010/11:JuU22 Skärpt straff för köp av sexuell tjänst [parliamentary report/proposal, Committee on Justice] at 11–12 (Swed.) (May 12) (passed 282 to 1, 66 absent). These further clarifying observations by Parliament were quite likely in part a response to more pressures by parliamentary minorities. See Mot. 2010/11:Ju10 med anledning av prop. 2010/11:77 Skärpt straff för köp av sexuell tjänst [parliamentary motion] pp. 1–2 (Swed.) (March 22) (Social Democrats’ Committee-Motion); Mot. 2010/11:Ju11 med anledning av prop. 2010/11:77 Skärpt straff för köp av sexuell tjänst [parliamentary motion] pp. 1–3 (Swed.) (March 22) (Left Party’s Committee-Motion); Mot. 2010/11:Ju323 Lagarna om köp av sexuell tjänst och människohandel [parliamentary motion] at 1–2 (Swed.) (Oct. 26) (Carina Hägg et al.; Social Democrats); Mot. 2010/11:Ju293 Trygghet mot brott [parliamentary motion] at 2, 6 (Swed.) (Oct. 25) (Morgan Johansson et al.; Social Democrats); Mot. 2009/10:Ju393 [parliamentary motion], supra note 2112, at 1–3. Likely, public opinion registered at the end of the recent legislative process to amend the Swedish law against purchase of sex also had an impact. See, e.g., Gudrun Schyman et al., “Prostituerade är brottsoffer” [Prostituted Persons are Crime Victims], op-ed, SvD Opinion-Brännpunkt, Apr. 9, 2011, http://www.svd.se/6077511.svd, archived at http://perma.cc/T7S3-R6M8.


2115 1 § Lag om målsägandebiträde [Act on Victim’s Legal Counsel] (Svensk författningssamling [SFS] 1988:609) (Swed.).


2117 For instance, children who witnessed crimes committed against a parent have received damages without being regarded as the injured party. Diesen, “Målsägande,” 122–24. Such an “intermediate” standing raises issues that may pose practical obstacles for the person claiming damages. Cf. ibid., 124. For example, will s/he get a legal counsel publicly appointed, or will s/he have to proceed pro se (i.e., on their own) or through a private counsel? Furthermore, how should compensation for counseling be determined, including for the opposing party in cases of a lost trial? Nonetheless, as an alternative venue it extends the options to seek awards for damages to a larger number of persons. Still, the fact that no prostituted person has ever received damage awards under the Sex Purchase Law since its enactment suggests that existing law might need further improvements for any civil venues to be effectively used. Cf. Carina Hägg et al., “Stärk prostituerade persons möjlighet att kräva skadestånd” [Strengthen Prostituted Persons’ Possibilities to Demand Damages], op-ed, Göteborgs-Posten, May 10, 2011, archived at http://perma.cc/J8A2-3VM4. It should also be noted that under the Swedish Tort Liability Act, there appear to
An unfortunate judicial decision in the application of the Sex Purchase Law that concerned the above was made in 2001. The Swedish Supreme Court, in a cursory opinion consisting of four sentences, affirmed rulings from lower courts that interpreted the protected interest under the law in the context of determining the penalty for a man who had purchased a woman to perform oral sex on him in a parked car. This was deemed “a standard case” by the two higher courts. The district as well as court of appeals had argued in detail (although differing on the exact level of penalty) that the so-called “consent” from the prostituted person suggests the offense is committed “primarily” against the “public order,” more than against her as a “person” (NJA 2001-07-09 pp. 529, 532). The implication was that she would not genuinely consent to a crime against herself as a person. However, none of the legislative findings (pp. 282–286 above) or contemporary research on the sex industry (chapter 2) documents a condition of freedom required for the “consent” on which these courts relied to be meaningful. These courts literally ignored that prostituted persons’ alleged consent is overwhelmingly fictional; exploiting someone’s desperate position, lack of options, or prior abusive conditions that season them for prostitution (cf. 55–64 above) is not a situation to which a person can legitimately consent.

The judicial decision in 2001 appears to ignore most of the legislative history from the 1990s that suggested prostitution to be a form of sex inequality related to gender-based violence, and the prostituted person to be effectively victimized by the trick (pp. 282–286 above). Put otherwise, the underlying reasoning of the judicial decision in 2001 was not based on substantive equality whereas the legislative history clearly was (cf. 294–298). The 2001 judicial decision also runs contrary to principles emphasized as late as 2005, when Parliament amended the criminal code’s chapter on sexual offenses to include purchase of sex (the latter having been a free-standing statute from 1999 until then). Here, it was stated that the “legislation on sexual offenses is a legislation to protect against sexual violations, and shall not be premised on archaic notions of adult people’s voluntary sexual life.” The 2001 Court appears thus not only to ignore many facts about prostitution, but also to express precisely such archaic notions when assuming that a prostituted person’s consent is genuinely voluntary. In the District Court it had further been remarked that the prosecutor had only called the woman in the capacity of witness (NJA 2001-07-09 p. 529), as opposed to calling her as an injured party. Together with the fact that no damages were sought, even though they technically could have been regardless of her procedural status (see above), this decision suggests that prosecutors are impli-

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2120 Just as consent to prostitution appears to not be genuinely valid, it would be equally wrong to say that prostituted people are contributing to their own exploitation when being subjected to the coercive circumstances overwhelmingly documented as preconditions for entry into prostitution. Cf. supra pp. 55–64 (prostitution on-camera and off-camera). Doing so is to incorrectly blame the persons victimized, as is arguing that prostituted people generally are liable to gross negligence under the Swedish Tort Liability Act, which, according to this theory, would diminish their entitlement to damages. SkadestL 6:1(1) (“Damage awards due to personal harm may be adjusted, if the injured person themselves intentionally or by gross negligence have contributed to the harm.”).
2121 Prop. 2004/05:45 En ny sexualbrottslagstiftning [government bill] at 22 (Swed.).
cated as well in the interpretation of sex purchase as a more or less “victimless” crime.

Not surprisingly, similarly as with Canada’s law against pornography (cf. 392–437 above) the criminal judicial process governing the application of Sweden’s Sex Purchase Law has so far not provided sufficient representation of the perspectives and interest of survivors or those harmed in prostitution, with a resulting deficit in substantive equality. Following this trend in a more recent case that otherwise improved some applications of the law, the Court of Appeals for Western Sweden in 2007 convicted tricks and imposed conditional sentences and fines and recognized certain circumstances in prostitution as coercive under the law.2122 These circumstances, together with other factors, justified the higher level of sanctions, but the tricks were not ordered to pay damages. After a completed sexual act, one of them had introduced an acquaintance when the prostituted person, in the court’s words, was “in such a subordinate position against the two men that it must have appeared as a near-impossibility for her to refuse the other man intercourse, or to otherwise affect the situation. This [the defendants] have understood and exploited.”2123 The prostituted person was here understood to be in a situation in which genuine consent was not possible. In prostitution, this is usual. Nonetheless the prostituted person was not regarded as an injured party, nor were damages merited by such exploitation and victimization awarded. Thus, it appears as if the judicial system has not yet regarded prostituted persons as being victimized or exploited by tricks, contrary to what the legislative history (pp. 282–286 above) and more recent research suggest (chapter 2).

As additional effect of the Supreme Court decision in 2001 was to establish the judicial view of sex purchase as a crime of low priority, although the doctrine has subsequently changed somewhat with the appeals decision from 2007 referred to above. In 2001 though, the District Court had argued that a crime directed primarily against the public order per se entailed a lower punishment than crimes against persons (NJA 2001-07-09 p. 529). Although the penalty was slightly raised in the higher courts, the trick was nonetheless only subject to monetary fines (id. at 532–33). Many law enforcement officers and prosecutors subsequently regarded the sex purchase law as having comparably low priority when assigning resources to enforce it. They explicitly referred to the penalty level as determining their priorities. Consequently, the 2008 Prostitution Inquiry reported in 2010 how police stated they could bring “many times more” legal cases against tricks if enforcement were prioritized; prosecutors agreed, with both partly blaming the low penalty level for their not doing so.2124 Apparently, one problem mentioned by anti-trafficking police in Gothenburg is that, traditionally, the police evaluate success in terms of total jail time and number of convictions.2125 Not surprisingly then, National Criminal Detective Inspector Kajsa Wahlberg admits that a “higher penalty would perhaps also make the police prioritize these crimes more.”2126 Although the legislative raise of penalty maximum from six months to one year imprisonment that took effect from July 1, 2011 may suggest such a development,2127 a raise among the annual numbers of con-

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2123 Hovrätten för Västra Sverige, B 3065-07, slip op. at 9–10.
2124 SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 217.
2127 See Bet. 2010/11:JuU22 [parliamentary report], supra note 2113.
dictions was also seen in the period preceding this raise. However, it is difficult to assess whether the raise of maximum penalty had the effect by itself of increasing the conviction rates without more probing.

Since the law’s enactment only five persons had in 2009 been sentenced to anything more than fines, such as conditional sentences. At that point, none had been imprisoned under the sex purchase law itself, despite the fact that its maximum penalty has so far been 6 months. However, since 2011 there have been two prison sentences handed out directly under it: one in 2011 and one in 2013; in addition, there have been conditional sentences (7 in total during the period 2011–2013). A notable individual conviction was made in 2005, when a Supreme Court Justice was caught in May for purchase of sex from a male prostituted person, then fined approximately US$6,000. The Justice managed to keep his appointment, which may appear surprising. The fact that the law’s application leaves much to ask for is not an argument against criminalizing purchase of sex, of course, but an argument for interpreting the Swedish law more strongly, including as a crime primarily against the person, and not primarily against the public. Some initiatives have been underway, recently from the government (see below), but also by some members of Parliament who have voiced particular concern in this regard.

Civil Remedies as a Support for Escape
Under the Swedish Criminal Code the “fines accrue to the State,” as opposed to civil damage awards that go directly to persons who have been harmed. There is no current scheme for redirecting the fines collected from individual tricks to any particular program for relief or support to prostituted persons in need. In other words, under the current case law there is a lack of individual accountability from the trick to the person the trick has exploited through his/her purchase. If the government decides to help or support prostituted persons it may do so using the public budget which, at least up until now, has been a political decision as opposed to a legal obligation. As implied by the National Board of Health and Welfare in their referral response to the government regarding the 2008 Prostitution Inquiry’s final report, legally recognizing prostituted persons as injured parties would strongly affirm the notion that they should be covered under the Social Welfare Service Act’s provision.

2128 See supra note 2055-2058 and accompanying text.
2130 Nat’l Criminal Statistics Database, supra note 2055. It should be noted though that it is possible that the first prison sentence in 2011 was handed out before the new penalty maximum of one year took effect on July 1, since there was already a penalty maximum of six months imprisonment prior to that date.
2133 See, e.g., Mot. 2009/10:Ju393 [parliamentary motion], supra note 2112, at 1–3 (Swed.); Mot. 2010/11:Ju10 [parliamentary motion], supra note 2113, at 1–2 (Swed.); Mot. 2010/11:Ju11 [parliamentary motion], supra note 2113, at 1–3 (Swed.); Mot. 2010/11:Ju323 [parliamentary motion], supra note 2113, at 1–2 (Swed.); Mot. 2010/11:Ju293 Trygghet mot brott [parliamentary motion] supra note 2113, at 2, 6 (Swed.).
for “Crime Victims.” This national provision imposes duties for the Local Social Welfare Boards, including the duty “to promote that anyone who has been subjected to crime, and her or his closely related ones, receive support and help.”

Considering prostituted persons as crime victims under the Social Welfare Service Act shifts the support to those who want to exit prostitution from being primarily based on political decisions to being based on Swedish law, even if only on a more general and less specific level. For example, the Social Welfare Service Act does not specify exactly what standard of support crime victims are entitled. Nevertheless, support becomes less subject to the whims of democratic majorities.

In order to understand the apparent discrepancy between on one hand the legislative history and research on prostitution, on the other hand the judicial interpretation of the Sex Purchase Law, it is necessary to consider that Sweden is still dealing with some of the myths about consensual prostitution encountered everywhere. Certainly, the 2008 Prostitution Inquiry correctly concluded that “a consequence of the Swedish view on prostitution is that it is not possible to make any distinction between so-called voluntary and involuntary prostitution.” Yet contrary to such statements and the research evidence on prostitution in general (cf. chapter 2 above), many law enforcement officers have expressed views contending that domestically prostituted women are often meaningfully consenting, as opposed to foreign women who, assisted by third-party profiteers, are often believed to be coerced. For instance, in a press interview one prosecutor who was even hired as an expert in the 2008 Prostitution Inquiry effectively distinguishes, along with a concurring police officer, voluntary from involuntary prostitution by stating there are “persons who prostitute themselves who do not do this under coercion, hence it may therefore be viewed as less serious,” implying by their discussion that those who do so under coercion are usually foreign nationals.

Although the above law enforcement persons thought foreign nationals were often coerced, some particular categories of foreign prostituted adult women appear to spark little law enforcement activity. To cite personal experience, when I passed a large casino in Stockholm three evenings in a row in June, 2010, usually three or more adult women of South Asian origin—apparent ages ranging from 25 to 60, and with excessively fashionable clothes—waited at the entrance. They had similar tired facial expressions as prostituted women I encountered on the streets of Cape Town in April 2010. Not surprisingly, the 2008 Prostitution Inquiry reports that “[l]aw enforcement in Stockholm, Gothenburg, and Malmö . . . . suspect that purchases of sex occur in restaurants, casinos, and on the regular ferry transports to and from Sweden.

2136 Socialtjänstlagen [SoL] [Social Welfare Service Act] 5:11 (Swed.). Although there appears to be no legally agreed upon definition of “crime victim” in Sweden, in a resolution from 1985 the U.N. General Assembly defined victims of crime to mean “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering . . . through acts or omissions that are in violation of criminal laws operative within Member States.” Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶ 1, U.N. Doc. A/RES/40/34 (Nov. 29, 1985). The evidence of prostitution’s harm compellingly shows that tricks, at a minimum, inflict mental injury or emotional suffering, and clearly violate the Swedish criminal laws on prostitution. It is to be noted that the Swedish Instrument of Government was amended in 2011 with an explicit (as opposed to implied) recognition of Sweden’s membership in the U.N. See Regeringsformen [RF] [Constitution] 1:10 (Swed.).

2137 SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 249. Further citations in text.


However, any regular surveillance against purchasers of sex in these venues is not made” (SOU 2010:49 p. 194). Similarly, law enforcement report “suspicions” but are not conducting any “regular” activities against prostitution in conjunction with “pornography/strip clubs and so-called speakeasies in their area” (id. at 194). The various distinctions effectively made by law enforcement could indicate an implicit categorization of prostituted persons according to the implied voluntary/involuntary division, in order to decide what prostitution is harmful as opposed to harmless and to prioritize resources accordingly. Other considerations, such as substantial variation in the degree of obstacles to enforcement encountered in various venues, may be present of course. Nonetheless, no such clear rationale for these distinctions emerges. This situation suggests that some prostitution is patently ignored, indicating there is discrimination among different prostituted populations.

Further judicial decisions symptomatic of the apparent discrepancy between the legislative perspective and that of practitioners in the judicial system have appeared. In the Stockholm Administrative Court of Appeal’s ruling from 2007, tax authorities were given permission to tax a prostituted person based on income she was assumed to have had from prostitution, but which she never reported. As the complainant pointed out, following the decision’s logic “prostituted persons, in order to be able to pay taxes, are coerced to continue.” This court decision is remarkable in light of the fact that jurisdictions such as Nevada that has legalized prostitution in certain counties, in spite of its harms, refused to make it worse by taxing the abuse. Considering the Swedish legislature’s recognition that tricks know or should know that their purchase of sex is “destructive” to the prostituted persons, and given the imperative to help prostituted persons to get away from prostitution, decisions such as the Stockholm Administrative Court of Appeal’s appear highly counterproductive. At a minimum, the reasons generally for entry into prostitution are coercive circumstances such as desperation and lack of viable options (see 55–64 above on females; cf. 73–75, on males). Under these conditions, a discretionary taxation does not constitute any deterrent function. Rather, it looks more like public exploitation of their prostitution. Decisions on damages, in contrast, would offer a stronger incentive for the victim of crime to testify against individual tricks, hence deter the latter from purchasing sex.

When deciding who is the injured party, the Swedish Code of Judicial Procedure’s statement that it is the one who is harmed or affronted by the offense (RB 20:8(4)) effectively entails that if a law is ambiguous, an inquiry should be made into its underlying reasoning regarding the interests that the law is meant to protect. The experiences from the Swedish courts in this regard suggest that any country considering the Swedish law preferably should not copy the statutory wordings defining prostitution as “purchase of sexual service” (BrB 6:11), even though these wordings have never been referred to by any court in their interpretation of the law’s protected interest. The wordings were also only subject to limited disagreement in the legislative process regarding possible alternatives. They are also not determinative regarding who is considered the injured party according to the Code of Judicial Procedure (RB 20:8), and in some cases damages can even be paid out regard-
less of who or what is regarded as the injured party.\footnote{2146} Evidence nonetheless suggests that prostitution is either abuse in itself (cf. 67–72 above, on PTSD in prostitution), or, at a minimum, sexual exploitation of vulnerable and destitute people (cf. 55–64, 73–75), hence not an acceptable “service” provided on the market. Therefore, one could instead use statutory wordings for the tricks’ purchases in prostitution as “the purchase of a person for sex.”\footnote{2147} This would more clearly indicate that prostitution is not a regular business service for taxation purposes, or primarily a crime against public order as opposed to a crime against a person.\footnote{2148}

The Legislative Clarifications of 2011

The government’s reading of the law, which follows their Inquiry on this point, suggests that some cases of sex purchase may be a crime against a person simultaneously as they are also a public harm (e.g., because prostitution promotes sex inequality), but the issue of whether both are protected interests has to be individually assessed in each and every case.\footnote{2149} This assessment becomes very important because it influences what legal support may be offered to a prostituted person who intends to claim damages. However, the 2008 Inquiry’s final report (SOU 2010:49) never offered a systematic review of the literature on preconditions to, and trauma and harm in prostitution, which would further have illuminated the issue of who is the injured party or who shall be entitled to claim damages under the law. The issue of the prostituted persons’ legal standing under the law was to be investigated according to the Inquiry’s charter.\footnote{2150} Some newer findings on the Swedish situation in these regards were accounted for by the Inquiry though. For instance, the 2008 Inquiry stresses strong associations between being prostituted in Sweden and having a prior history of child sexual abuse, neglect, and serious mental health problems, citing more recent studies (see, e.g., SOU 2010:49 pp. 96, 116–17, 121). These findings clearly corroborated those that were available when the legislature passed the Women’s Sanctuary bill in 1998. As a whole, however, the Inquiry’s research review mainly included studies on the “occurrence” of prostitution in Sweden, and the judicial application of the law—not preconditions to, nor conditions while being prostituted in Sweden.

When the Inquiry attempts to answer the question of what the law’s protected interests are, and hence the legal standing of the prostituted person, instead of looking to social evidence about the conditions of prostitution they extensively discuss legal doctrines and scholarship on the abstract concept of a protected interest. Even such far-fetched analogs as bankruptcy law and criminal falsification, with 1930s scholarship being key sources of the doctrine, are invoked in its analysis.\footnote{2151} This approach avoids asking the right research questions by relying on literature that is indifferent as to whether prostituted persons are injured or not. Furthermore, certain questions,
particularly regarding entrenched social discrimination and inequality, cannot be adequately addressed by existing doctrines because the existing doctrines are themselves part of the problem.

For instance, when the U.S. Supreme Court made their groundbreaking decision in *Brown v. Board of Education* (1954), the Court realized that although existing doctrines “cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.” Therefore, the U.S. Supreme Court finally decided on the empirical evidence rather than legal doctrine: “Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding [that segregation is harmful and inherently unequal] is amply supported by modern authority [n.11].” Two years earlier, that same court had explicitly recognized that neither “history” nor “practice” previously regarded group libel to be unprotected expression, but decided in *Beauharnais v. Illinois* to create this new doctrinal category nonetheless. Not surprisingly then, the Swedish 2008 Prostitution Inquiry concludes “that neither legal text nor doctrine gives any clear and unambiguous answer to the question of who is an injured person” under the Sex Purchase Law (SOU 2010:49 p. 250). Rather than deciding that this question is further to be decided by courts in legal applications, it had been preferable if the government had taken a more proactive stance that clearly recognized that purchase of sex is primarily a crime against the person who is bought, and that any other interpretation is the exception rather than the rule to which the burden of proof generally falls upon the defendant.

As the U.S. Supreme Court did in *Brown* and *Beauharnais*, the Swedish government could have abandon previous doctrines and more decisively recognize and represent the perspectives and interests of those who are harmed in prostitution. Now, the issue of who is the injured party in each case is still in a state of limbo and dependent on the views of the courts, prosecutors and law enforcement. According to the Swedish Code of Judicial Procedure (RB), the prosecutor has the responsibility for stating information in the summons application about any potential injured parties; that is, those who could be plaintiffs in a civil proceeding that is intertwined with the criminal trial (RB 45:4(2)). The prosecutor is also usually obliged to represent such an injured party (RB 22:2(2)). In addition, either law enforcement or the prosecutor, depending on who has initiated the preliminary investigation (see RB 23:3), has an obligation to recognize and represent the injured party before the summons application is submitted: “If the director of the investigation or the prosecutor during investigation of an offence finds that a private claim may be based upon the offence, he shall, if possible, and in sufficient time prior to the institution of the prosecution, notify the aggrieved person about this situation” (RB 22:2(2)).

According to the government’s new view it appears to be the prosecutor or law enforcement personnel who initially, in each and every criminal case, shall try whether or not the prostituted person is an injured party. Yet one may doubt their capacity to change their disinterested treatment of prostituted persons without a more decisive push from the government. As recalled in chapter 11, there were problems also in Canada when applying their criminal pornography law even though it is premised on the promotion of substantive equality just as Sweden’s prostitution law. Inadequate evidence was often presented by Canadian prosecutors, and prejudicial

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2153 Id. at 494 & n. 11 (citing a number of scientific sources).
assumptions were not infrequently expressed by their judges without being rebutted or confronted accurately (pp. 392–437 above, passim). By contrast, in the Canadian Butler case (1992) where a particular government program operated that supported “court challenges” by disadvantaged groups, it enabled the intervention of a well-organized women’s organization in the case—hence, the evidence and arguments were more accurately represented (see 400–419). Indeed, the criminal law framework typically seems to provide little representation of the perspectives and interests of those harmed in the sex industry, unless there are such particular measures as the “Court Challenges Program” to amplify them. Criminal law is usually dominated by other actors such as police, prosecutors, and their expert witnesses. These conditions suggest that Sweden should have strengthened prostituted persons’ civil rights under the law—either by a clearer statement in the legislative history that they are the primary injured parties that should be summoned by courts, or by a special program that supports their representation, perspectives, and interests in legal proceedings, preferably built from survivor’s legitimate autonomous organizations (cf. 153–168).

Deeming from Swedish courts’ neglect of the prostituted persons’ perspectives and interests in applying the law, it is not surprising that Swedish legal scholarship attempting to analyze what is the protected interest under the Sex Purchase Act (regardless whether favoring a civil remedy or not) has so far also not adequately considered the kind of social evidence of harm accounted for in this dissertation (e.g., chapter 2). Rather, the approach is almost exclusively to consult legal doctrines, as the 2008 Prostitution Inquiry’s (SOU 2010:49 pp. 42, 247–51). An example of such an approach is Per Ole Träskman, who in an article implied that prostituted persons themselves are not a protected interest under the law:

In the government’s bill, prop. 1997/98:55 [the Women’s Sanctuary bill], purchase of sex was equated . . . with violence in general. This may, however, be perceived as a rather exaggerated opinion that hardly has public support, and it does therefore not entitle the conclusion that the protected interest of the criminalization is individual in the same sense as the interest that is protected through the criminalization with respect to crimes against life and health, bodily integrity, or the sexual integrity.\footnote{See, e.g., Diesen,”Målsägande,” supra chap. 9, n. 1180; Per Ole Träskman, “Går det att tygla lustan? Om straffbar pornografi, pedofilia och prostitution” [Can Lust be Curbed? On Criminal Pornography, Pedophilia, and Prostitution], 134 (3–4) JFT [Finn. L. Ass’n Rev.] 352, 352–73 (1998); Per Ole Träskman, “’Den som betalar för sex är en brottsling’: Om den svenska kriminaliseringen av sexköp som ett medel för att motverka prostitutionen” [‘Whoever Pays for Sex is a Criminal’: Swedish Criminalization of the Purchase of Sexual Services as a Means of Combating Prostitution], Nordisk Tidsskrift for Kriminalvidenskab [Nordic J. Criminology] 92, no. 1 (2005): 73–92; Claes Lernestedt and Kai Hamdorf, “Sexköpskriminaliseringen—till skydd av vad?—del I” [The Sex Purchase Criminalization—For the Protection of What?—Part I], Juridisk tidsskrift vid Stockholms universitet (JT) [Stockholm Univ. L. Rev.] no. 4 (1999/00): 846–58; “Sexköpskriminaliseringen—till skydd av vad?—del II [Part II], JT, no. 1 (2000/01): 111–31; see also Mårten Schultz, Kränkning: Studier i skadeständsrättslig argumentation [Violation: A Study in Tort Law Reasoning] (Stockholm: Jure Förlag, 2008), 93–125 (discussing primarily trafficking/procuring and tort law, not sex purchase law).}

The lack of empirical basis for these claims is apparent in the fact that Träskman’s article never presents any alternative analysis of all the social evidence suggesting that prostitution in fact is a form of sex inequality related to gender-based violence, exploiting and harming the prostituted person. Such evidence informed the conclusions made in the Women’s Sanctuary bill in 1998 (cf. 282–286 above), suggesting that existing laws against gender-based violence were inadequate to protect women in prostitution from exploitation and harm. The coercive circumstances leading to entry into prostitution as well as the conditions while there (cf. 55–75), which were
recognized by the Swedish government (pp. 282–286), appear to make the sex purchase similar to a form of “paid rape”—an analogy for prostitution consistently used by survivors and tricks alike.\textsuperscript{2157}

Furthermore, Träskman’s article never presents any data indicative of his alleged lack of public support for what he refers to above as “equating” prostitution with “violence in general.” Public opinion polls have consistently showed strong public support for the sex purchase law since it took force in 1999.\textsuperscript{2158} In my experience, many people who support the law also wonder, when told about it, why prostituted persons are not regarded as the injured party or why they have not yet received damages under it. Hence, a substantial part of the public support for the law reasonably views prostitution as a form of sex inequality related to gender-based violence that harms the prostituted person, fully consistent with the law’s legislative history.\textsuperscript{2159} With such a view the protected interest arguably is individual in the same sense as for other crimes like trafficking, sexual harassment, sexual coercion, and rape; that is, the law is intended to stop the harms tricks are causing to prostituted persons when exploiting these persons’ coercive circumstances to purchase them for sex, thereby also violating their right to humanity, equality, and dignity.\textsuperscript{2160}

\textbf{Political Obstacles to Substantive Equality}

It is unfortunate that neither the 2008 Inquiry, nor the ensuing government bill in 2011 considered strengthening the venues for seeking damage awards in all cases under the Sex Purchase Law. Granted, the specific amount in each particular instance could still have to be judicially assessed on a case by case basis. However, such a development appears to be obstructed considering that when the government and their 2008 Inquiry proposed the general raise of the penalty maximum to 1 year, they qualified it by the statement that the raise “is not meant to change the choice of sanction for all sex purchase crimes,” and that if “there isn’t any aggravating circumstance the penalty level would, for many sex purchases . . . still stay on daily fine-level.”\textsuperscript{2161} The current practice of handing out daily fines as opposed to imprisonment was established when courts interpreted the crime as primarily committed against the public order, which lower courts said entailed a lower punishment than crimes against persons (NJA 2001-07-09 p. 529). When the government makes this statement indicating that many cases could (or even should) be sentenced similarly in the future, they appear to accept the prior interpretations for many cases holding the law as “primarily not” concerning a crime against a person (\textit{id.} at 530). Thus, the government itself complacently lends legitimacy to current prosecutorial practices of not calling prostituted persons as injured parties and only as witnesses in such cases. Similarly, these unfortunate statements lend indirect support to a generally unsup-

\textsuperscript{2157} See supra notes 674–675 and accompanying text (quoting prostituted persons and tricks).

\textsuperscript{2158} See supra notes 2046–2049 and accompanying text.

\textsuperscript{2159} Kuosmanen in 2008 found that among those men (60%) and women (79%) wanting to retain the prohibition, 8% of the women and 16% of the men “agreed, either wholly or in part” with a statement formulated as “‘State-run brothels ought to be introduced in Sweden.’” Kuosmanen, “Attitudes & Perceptions in Sweden,” supra chap. 2, n. 317, at 254, which might appear slightly contradictory. However, these numbers were quite small and do not come close to resembling such a tacit public opinion assumed to exist by Träskman. See Träskman, “‘Den som betalar,’” 79. Moreover, these numbers do not \textit{per se} suggest that even these few respondents could not \textit{also} consider prostitution a form of gender-based violence. One hypothesis suggested by Kuosmanen is that such respondents might simply “desire” to “control” prostitution through criminalization in some settings, state supervision in others. Kuosmanen, “Attitudes & Perceptions in Sweden,” supra chap. 2, n. 317, at 254–55.


\textsuperscript{2161} SOU 2010:49 En utvärdering [gov’t report series], supra note 1901, at 245 (emphasis added); cf. Prop. 2010/11:77 Skärpt straff [gov’t bill], supra note 2149, at 11. Further citations in text.
portive judicial attitude toward assessing damages, even though technically the latter is possible without calling any injured party in the proceedings. The fact that no prostituted person has received damages under the Sex Purchase Law through any venue since its enactment suggests a need for more judicial support, in whatever forms available.

It is to be noted that the 2008 Inquiry was under no constitutional or other obligation barring them from questioning previous judicial decisions, just as the U.S. Supreme Court was free to revise and abandon the doctrines in their seminal decisions in Brown (1954) and Beauharnais (1952). Similarly, the protected interest could be both public and person at the same time, which is reflected when the courts say “primarily” in their decisions (NJA 2001-07-09 pp. 529, 532), and also explicitly recognized by the government (Prop. 2010/11:77 pp. 14–15). The 2008 Inquiry, for example, exemplified this duality of protected interest with an analogy to the child pornography offense that, despite being found among “Crimes against Public Order” in the Criminal Code’s Chapter 16, nonetheless can recognize children as injured parties with a corresponding right to damage claims (SOU 2010:49 pp. 250–51).

Furthermore, the 2008 Inquiry’s own statement that the Sex Purchase Law “is more of a crime against a person than a crime against the public order, even if its background has elements of both” (id. at 81) appears inconsistent with their belief that after their proposed amendments many sex purchases would “still stay on daily fine level” (id. at 245). Thus, the Sex Purchase Law may prove to be more open for damage claims if prosecutors or the prostituted persons themselves simply started to claim damages under it.

Swedish lawyers have so far appeared uninterested in interpreting and applying this law, as well as other provisions regulating prostitution, in ways favorable toward prostituted persons. Nevertheless, the thrust of the legislative history, for damage purposes, effectively points at coercive circumstances leading to persons’ entry into prostitution, and at the exploitation of their profoundly difficult and unequal situation. The exploiters, that is, pimps and tricks, thus contribute more harm to those who are already suffering. Such is the case whether or not any additional aggravating factors exist. Harming a person this way by purchasing them for sex should be recognized as a violation of their right to humanity, equality, and dignity; that is, as a crime against the person in itself, and not primarily as an offense against the public interest of promoting gender equality, or any other public order interest. An individual who was bought for sex and did herself/himself not experience being harmed by the act would probably not seek such damage awards from the trick. A tacit argument sometimes occurs implying that since these civil rights would deter potential tricks, they would infringe the rights of a hypothetical group of persons to “sell sex.” However, any legislature or judiciary should balance the rights, interests, and imperatives at stake. When considering the compelling interests of those being harmed and exploited in prostitution and their need for a means of escape, of which the evidence accounted for in this dissertation is overwhelming, such arguments appear profoundly unbalanced and detached from the documented realities of prostitution.

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2162 See supra notes 2113–2117 and accompanying text.
2163 Hägg and Waltman et al., “Stärk prostituerade personers skadestånd.”
Democracy and Equality

This last empirical section on prostitution in Sweden confirms the initial theoretical hypotheses spelled out in chapter 4 on the level of “policy outcome” (as distinguished from “policy output”). There, hierarchy theory predicted that a stronger recognition of substantive inequality and representation of the perspectives and interests of disadvantaged groups in law would produce less social dominance—a hypothesis that can now be corroborated. Sweden passed its law recognizing substantive inequality in prostitution in 1999, where legislators represented the perspectives and interests of prostitution survivors by decriminalizing them and offering them support to leave prostitution while criminalizing the tricks and the exploitative profiters of prostitution (cf. 282–286, 294–298 above). Numerous empirical studies and official evaluations have been made since then, including comparative studies and evaluations from the other Nordic countries (primarily Denmark and Norway) as well as from socio-economically similar jurisdictions where contrasting policies exist such as Germany, the Netherlands, Nevada, Victoria (Australia), and New Zealand. The evidence in the second section of this chapter shows that after the law was passed, the prevalence of prostitution was reduced significantly compared to the Nordic neighbors Denmark and Norway, where the number of people in prostitution rather increased. Using similar methods of measurement as in Sweden, around 2007 Denmark had astonishingly 15 more persons in prostitution respectively than Sweden had per capita. Similarly, Norway had 8 times more persons in prostitution than Sweden per capita.

The “exit programs” in Sweden are documented to work as intended, facilitating the escape from prostitution for persons who wish to leave (pp. 484–486). In fact, if these programs were made more accessible, particularly outside the three large metropolitan municipalities, they would likely be even more effective. A shift in attitudes within the Swedish general population can also be seen, with a majority of both genders now being in support of the law whereas they were not prior to the law. Perhaps unexpectedly, young women are those most supportive. Furthermore, a lower percentage of men in Sweden purchase sex than before the introduction of the law. Additionally, there is now a palpable reluctance among traffickers to pimp prostituted persons to Sweden from abroad, as the law’s passage has made it more difficult to profit from organized prostitution in Sweden.

By contrast to unfounded rumors and erroneous claims made in the international literature and debate, the Swedish law did not make prostitution more “hidden,” dangerous, or unsafe for those who are still prostituted. The concept of hidden prostitution is in fact an oxymoron, as prostitution is dependent upon being visible in order to attract a steady flow of new tricks. Moreover, prostitution in jurisdictions with legal prostitution is documented to be demonstrably unsafe, dangerous, and highly exploitative, if not more so than prostitution in countries where it is illegal (pp. 471–479). This is to be expected, as prostitution is an inherently unequal and exploitative social practice driven by the interests of the tricks and their money—not by the interests of prostituted persons, who are typically in a vulnerable position vis-à-vis the former (cf. chapter 2 passim).

All in all, the policy outcome of the Swedish law in terms of promoting substantive equality has been measured and corroborated with regards to three dimensions: (1) a reduction of the prevalence of prostitution, qua prevalence of sexual exploitation; (2) a reduction and deterrence of buying and pimping sex, including cross-jurisdictional trafficking; and (3) an increase of a favorable public support for the

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2167 For the distinction between output and outcome, see supra note 76 and accompanying text.
law, including successful exit programs. The effects on these three policy outcome-measures are so substantial that they have compelled other countries to either adopt the Swedish model prostitution law, or at least to considering it for further adoption. Sweden’s experience with the law has thus caused policy diffusion to other jurisdictions such as Norway, Iceland, France, Northern Ireland, and several more states who consider it at current. The positive effects of the Swedish law from a comparative perspective in reducing sexual exploitation and supporting prostituted persons to escape it in Sweden are documented above.

Certainly, there have also been problems with legal interpretation where Swedish courts systematically reduced the potential impact of the law by viewing it primarily as an offense against the public order rather than against the person bought. But as was previously found in the chapter on Canada, the problems of judicial interpretation that have reduced the potential support that could have been offered to prostituted persons are linked to the criminal law approach rather than to an overemphasized legal recognition of substantive inequality and the perspectives and interests of prostituted persons (pp. 392–437 above). Hence, just as under Canada’s criminal law against pornography, Sweden’s judicial process under the Sex Purchase Law has so far been dominated by the perspectives and interests of law enforcement and prosecutors—not the perspectives and interests of survivors. As with Canada, the criminal law process is not typically favorable to recognize substantive inequality.

For instance, Swedish courts have not applied the Sex Purchase Law’s civil remedies. Prosecutors have only called prostituted persons as witnesses—not as “injured parties.” This procedural conduct entailed that courts have not tried civil damage claims on the behalf of prostituted persons. Courts also systematically refrained from using the full range of penalty under the law, handing out fines rather than imprisonment. This problem is also related to the interpretation of the offense as being against the public order rather than against the prostituted person and their equality and dignity; that is, public order offenses are typically regarded as less reprehensible than offenses against persons. A shift in perspective that would recognize prostituted persons’ civil rights under the law would, apart from support their exit with more monetary resources and increase penalties upon the tricks, also more unequivocally compel municipalities and other public agencies in Sweden to regard prostituted people as victimized by crime. This, in turn, would oblige such authorities to help and support them more. Moreover, such a progressive development strengthens the law’s deterrent function when tricks realize that any person they have bought for sex may later sue them for having severely exploited their difficult life circumstances when they were prostituted. Indeed, the overwhelming evidence of the harms related to the sex industry in general entails that buying someone in prostitution is a gross abuse of that person’s right to humanity (cf. chapter 2).

The judicial problems of interpretation also corroborate the concept of intersectionality in legal theory; there is a pattern-matching between its predictions and the obstacles to provide prostituted persons in Sweden with stronger civil rights. As recalled, several observations in this dissertation have shown that it is easier for courts to recognize a singular logic of discrimination, such as sexual harassment or persecution on such grounds as gender, race, or religion. But in prostitution there

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2168 Here, sexual harassment of women through forcing pornography on them at their workplace is already civilly actionable in the United States. See, e.g., Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991) (settled before appeal). However, this is a form of discrimination that has similarities with discrimination or harassment among men at work, e.g., along racial, religious, or political lines. Cf. supra pp. 331–333. Women who are subjected to sexual harassment on basis of their gender, qua sex discrimination, are in an otherwise “similarly situated” position to men at work. That is, “but for” their gender women would not be discriminated in those situations.
are usually multiple grounds of disadvantage at work simultaneously that precipitate exploitation—for example, extreme poverty, child sexual abuse and neglect, sex, or racial, or other additional discrimination (cf. 55–64). Many prostitution survivors as well as tricks describe the situation as “paid rape”; that is, prostituted persons literally have to accept sex that they hate because they are in need of money.2169 These prostituted persons are not “similarly situated” to those who are sexually harassed at the workplace; indeed, the latter are not explicitly paid for the harassment.

Although some sexual harassment may be premised on the informal assumption that women are paid for accepting such harassment, that is precisely the type of attitude and conduct that is civilly actionable under law. Such informal assumptions do not provide a carte blanche for continuing to harass, as the assumption that prostituted persons are paid for sex is often a carte blanche for continuing to exploit their coercive life circumstances in jurisdictions where buying sex is legal. Such informal assumptions do not either provide the harasser freedom from liability on the assumption that sexual harassment is an offense against public order rather than harassment against a person. By contrast, that is the unfortunately the view adopted with regards to prostitution, where the legal assumption has been that women (or men) are paid for accepting sex, and that such sex is typically not civilly actionable (unless exceptionally coercive) as a form of subordination in the same sense as sexual harassment.

Unfortunately, in MacKinnon’s words, when “the lack of similarity of women’s condition to men is extreme because of sex inequality,” discrimination laws and other equality guarantees typically do not “properly apply.”2170 Converging with Crenshaw, who argued that equality law needs more “‘bottom-up’ approaches”2171 that recognize such unequal groups, one could apply their reasoning analogously to the prostituted people group, “which, because of its intersectionality, is best able to challenge all forms of discrimination” (Crenshaw, 145). Indeed, the U.S. 1985 Attorney General’s Commission on Pornography also shared this view in the sense that they rejected that anyone “should have to engage in actual sex to get or keep his or her job,” and recognized that this was exactly the situation in prostitution for pornography.2172 Yet this situation is still not civilly actionable as they suggested, neither in the United States, nor in Sweden—even despite the latter’s more progressive substantive equality approach to prostitution (cf. 294–298). By contrast, sexual harassment at work that may entail informal prostitution (e.g., requirements for sex to keep a job) is often actionable, corroborating the theory of intersectionality that more singular grounds of discrimination are easier to rectify.

The more complex intersectional forms of subordination (qua discrimination) in prostitution apparently made it more difficult for Swedish courts to recognize and in their interpretation of the law understand that even though prostituted person’s consent to the payment, they do not genuinely consent to the conduct as such. As recalled, the Swedish Supreme Court in 2001 more or less summarily affirmed lower courts’ who had effectively argued that because of the prostituted person’s consent, the offense could not be regarded as committed against them as persons. Taking this view, they regarded buying sex only as an offense against the public order. But the very reason for criminalizing the trick and not the prostituted person, despite the latter’s superficial consent to having sex for remuneration, was that the legislature in 1998 recognized that prostitution was typically not a consensual activity between two equal parties (cf. 282–286 above). Although the legislature in 1998 decided to

2169 See supra notes 674–680 and accompanying text.
criminalize only the tricks (not the prostituted persons) on the recognition that multiple disadvantages underlie the consent for payment in prostitution, the courts apparently failed to do this in their interpretation when determining the penalty. Hence, Crenshaw’s legal theory of intersectionality matches the pattern of observations in this dissertation throughout: it is typically less difficult to make legal reforms that recognize singular forms of disadvantage and discrimination, and harder to make reforms that recognize intersectional discrimination based on multiple forms of disadvantages as is present among persons who are prostituted.
Conclusions

The main findings of the dissertation, including the postmodern critique and potential implications for other politico-legal contexts are summarized and extended here.

Initially, with political theorist Ian Shapiro’s problem driven political science in mind, the empirical reality of pornography’s harms was analyzed: sexual exploitation and gender-based violence. These harms promote gender inequality, and cause indefensible abuses, in particular of populations that suffer from multiple disadvantages such as poverty, childhood abuse, and race and gender discrimination. Given that the harms are compelling (see chapters 1–3 above), existing democracies appear insufficient to their own ideals of equality when they permit such a system of social dominance to go unchecked and unremedied. This deficit of equality calls out to be addressed in theory as well as in practice. The objective thus became to inquire into what facilitates and obstructs addressing the problems of pornography in democracies, and to explore alternatives.

A comparative case study design was chosen for Parts II and III on basis of the empirical harms analyzed in Part I, and democratic theory that addresses social dominance in analogous situations. Three demographically and culturally similar countries with democratic systems that had experienced substantial legal challenges to pornography were selected. They exhibit diverse legal frameworks (e.g., liberal or balancing constitutions) and diverse results (e.g., retaining traditional obscenity laws or supplanting them with more harms-based equality-inspired laws). The empirical patterns were matched with the predictions of the democratic theories regarding conditions that facilitate or obstruct successful legal challenges. Democracies that recognize the imperative of substantive (not formal) equality in law, and facilitate a stronger legal and political representation of the perspectives and interests of groups that are particularly harmed by pornography, are more favorable to legal challenges to pornography. These findings suggested that more victim-centered civil rights approaches to the harms of pornography would produce more focused and efficient responses, while state-initiated approaches such as criminal obscenity law would produce less tangible results.

Challenging Inequality, Ideology, and Law

The consumption of pornography is widespread, with a majority of young adult men in industrialized countries regularly consuming it alone, ranging from on a daily basis to a few times per month (pp. 33–37). Women, by contrast, rarely consume it alone, and when encountering it, it is usually coincidental and on initiative from someone else (e.g., partners or friends) (ibid.). Initially this dissertation analyzed evidence showing that pornography is related to gender-based violence, and as such a linchpin in a system of social dominance where women are subordinated to men in a

number of political, social, cultural, and economic spheres. Subsequently, chapter 3 analyzed over forty years of social science studies, showing how pornography consumption causes sexual aggression and attitudes supporting violence against women. Using a panoply of methods and measurements to triangulate the analysis of evidence, numerous studies have corroborated that consumption of both nonviolent and violent materials make normal men, even those with the lowest predispositions, significantly and substantially more likely to sexually aggress against women, to trivialize sexual abuse (e.g., recommend lower penalties for rape), and to believe in rape-myths (e.g., that “only ‘bad’ girls get raped,” or that women want to be sexually coerced) (pp. 89–122). The consequences of sexual aggression and such attitudes supporting violence against women are especially severe for prostituted persons, of which a majority already suffer multiple disadvantages such as extreme poverty, childhood sexual abuse and neglect, and discrimination on basis of gender, race, ethnicity, or other grounds that makes them particularly vulnerable (pp. 55–64; cf. 64–72).

Tricks and prostituted women’s real world accounts confirm the causal path shown in experimental laboratory research on pornography: that is, male tricks often persist, frequently by using force, in making prostituted women imitate specific gender-based violence or other dangerous acts shown in pornography, for example, gang-rape, sadomasochism, and unprotected anal sex (pp. 124–129). Similar reports of forcing nonprostituted persons to imitate pornography come from those victimized, inter alia, by domestic abuse or rape (e.g., 122–124). In order to produce sexually explicit materials, the evidence further showed that pornographers typically, and with various forms of coercion, exploit prostituted persons as performers (chapter 2). These persons, as mentioned, belong to some of the most destitute, vulnerable, and abused groups of people in the world (pp. 55–64; cf. 64–72). No reliable evidence shows that substantial numbers of members of any other groups perform to any meaningful extent in pornography under non-coercive conditions of reasonable social equality, except potentially some male performers, pimps, or some tricks that pay to participate (cf. 72–75). The evidence further shows that the production often entails highly abusive and unsafe conditions, generally causing tremendous harm to performers. These injuries beyond the physical include exceptionally high incidence of mental disorders, such as posttraumatic stress (PTSD), that are statistically significant even after controlling for other relevant predictors (pp. 64–72). All in all, the empirical evidence of harm shows that pornography is a social practice of inequality that, tantamount to slavery, exploits multiple disadvantages, and causes gender-based violence and discriminatory attitudes supporting women’s subordination to men in society.

Gender-based violence is already known as one of the linchpins that keep women in a state of fear and subordinate position relative to men by creating an environment in which they must protect themselves from potential abuse due to a tangible and statistically significant risk of being victimized (pp. 4–7). This problem is internationally recognized and condemned in numerous human rights instruments and applications, but no end is yet in sight (pp. 4–7). A political theory that can explain how to challenge pornography more successfully would contribute to the fight against gender-based violence and sex inequality. It would also contribute insights to opposition to similar and analogous intractable political problems. This dissertation therefore further inquired what obstructs and what enables legal challenges to the production and consumption harms of pornography. The most difficult hurdle to

\textsuperscript{2174} For example, in government, at work, in the media, and by income, women’s influence or power is systematically unequal to men’s. See supra pp. 7–9.
overcome for legal challenges to pornography has been the purported conflict with freedom of expression typically raised by those resisting change. The analysis of legal challenges to pornography in Canada, Sweden, and the United States shows that many opponents who resisted them professed to rely on officially enforceable rules laid down in law, although in fact their positions were often merely supported by ideologies that relied on rhetorical persuasion more than law.\footnote{For an analytical distinction between law and ideology, see supra pp. 180–181.}

That said, existing legal frameworks also impacted on the potential success of legal challenges, and not superficially so. As predicted in chapter 4 and in Part II, “hierarchy theory” proved correct in the events studied in Part III: that is, balancing constitutional frameworks that support “positive rights” were more conducive to legal challenges to pornography than were classic liberal frameworks that more strongly support “negative rights.” Such balancing frameworks that support a substantive equality approach to social disadvantages (as opposed to a more narrow and superficial formal equality approach) recognized more clearly the perspectives and interests of those who are particularly harmed by pornography. This included a stronger acknowledgement of how such people’s often multiple disadvantages are more complex to challenge legally than singular problems of disadvantage are. In this sense, legal challenges to the sex industry are consistent with the concept of intersectionality, as created by legal scholar Kimberle Crenshaw.

One more detailed empirical question concerned the potential of traditional approaches to regulate pornography. Seen through the lens of hierarchy theory, obscenity law was hypothesized to be generally unreliable, vague, and open to misuse. Yet lacking better practical alternatives, it was left an empirical issue to what extent obscenity law could be used to legally challenge pornography, with or without adopting some of the imperatives of substantive equality and the perspectives and interests of those harmed. Accordingly, some applications of traditional obscenity law pursued under both the Obama and prior Bush administrations in the United States have charged producers and distributors of demonstrably harmful materials that are violent, dehumanizing, and degrading, even though obscenity law in the United States does not expressly target such materials, and embraces so-called “contemporary community standards of tolerance.” Another empirical question concerned Sweden’s prostitution law that asymmetrically criminalizes tricks and decriminalizes prostituted persons. This law was hypothesized as offering a potential for more efficient challenges to pornography production, as it is explicitly based on a substantive equality rationale. The law in this form has existed longer in Sweden than in any other country. Sweden’s prostitution law was—in part for such reasons—also identified as a particular “crucial case”\footnote{For the underlying methodological assumptions when selecting a “crucial case,” see Gerring, Case Study Research, supra p. 17 n.56, at 115–21.} for testing hierarchy theory in general. Here, if the evidence had shown that Sweden’s law did not reduce sexual exploitation and harm in prostitution, a situation overlapping considerably with pornography, contrary to what the evidence eventually showed (pp. 471–503 above), such a finding would have weakened the validity of hierarchy theory to explain legal challenges to sexual exploitation within as well as outside the pornography industry. The evidence in Part III in particular showed that the main responsible culprits for obstructing efficient legal challenges to pornography and sexual exploitation were the concepts of “negative rights,” obscenity law, and criminal (as opposed to civil) law. The analysis here showed how a stronger civil rights framework amplified the perspectives, interests, and knowledge by relevant actors of survivors of the pornography industry and others harmed by pornography. By contrast, criminal and obscenity law frameworks
obstructed those who were harmed from influencing the development of the law, while amplifying the perspectives of law enforcement, prosecutors, and the “consensus” within public opinion instead, the views of whom were not encouraged, in some instances not permitted, by those frameworks to be informed by the expertise and experience of survivors.

The dissertation’s general findings are well illustrated by the relative ease with which Canada’s harms-based equality pornography law, which proscribed violent and dehumanizing sexually explicit presentations, was saved from constitutional challenges on expressive grounds. Canada stands out in contrast to similar challenges in the United States, where the obstacles were significantly stronger. It will be recalled, in R. v. Butler (1992) the Canadian Supreme Court held that even if “obscenity” (the law still used the term, though it was not a traditional obscenity law) was regarded as constitutionally protected expression, the law’s restrictions on freedom of expression did not outweigh the importance of the legislative objective to prevent harm and to promote equality. This is all the more significant given that “obscenity” was not categorically exempted from expressive protections in Canada, as it is in the United States. Indeed, the Canadian Charter of Rights and Freedoms adopted in 1982 made it possible for pornographers, their distributors, or others to challenge that law on freedom of expression grounds. Yet because obscene materials were found to cause harm and undermined equality, rather than because they were traditionally unprotected (as in the United States), obscenity as defined under Canada’s law lost its constitutional protection in the balance against competing interests. A legal challenge similar to that against the Canadian harms-based equality law was mounted in the United States in American Booksellers Ass’n v. Hudnut (1985). There, a civil rights antipornography equality ordinance that, as in Canada, targeted violent, degrading, and dehumanizing materials but defined them differently—as “graphic sexually explicit subordination,” and including at least one additional sub-definition—was successfully challenged on expressive grounds (see 319–344 above). In both the Canadian and American cases, the value of substantive equality was pitted against expressive freedoms. Only in Canada was a harms-based equality law found constitutional, and a criminal law at that.

The predictive capability of hierarchy theory is thus supported in showing the way stronger recognition of constitutional substantial equality reduced legal obstacles to challenging pornography, indeed permitted those challenges to occur in courts on harm grounds. Hierarchy theory can also be confirmed here in more detailed analysis, for instance when considering that although the women’s antipornography movement had been relatively weaker in Canada, a stronger outcome in legal discourse on harm in the Canadian challenges occurred, compared with U.S. challenges. Analysis of legal proposals in the United States during the 1980s and early 1990s showed that not only local American politicians, but also some United States Senators adopted the ideas of the women’s movement against pornography, seemingly with little hesitation. By contrast, in the proposals put forward by federal public inquiries and the Canadian Parliament during approximately the same period, the Canadian women’s antipornography movement appears to have had less influence on legislators than their American counterparts. Thus, their movement’s ideas were virtually never followed by those in Canadian government, who rather proposed traditional strategies such as criminal (as opposed to civil) law

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2179 American Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).
and remedies; or the government suggested broad and sweeping legal definitions that focused on explicitness per se, rather than focusing on the more narrow form of graphic sexually explicit subordination of women that empirical research shows causes sexual aggression and attitudes supporting violence against women.

Contemporaneous observers in Canada also suggested that their women’s antipornography movement was less legally focused than those in America were in the 1980s. Accordingly, Canadian “feminist strategies for reform of obscenity law” showed “a lack of strategy,” providing “an emotional purge for all women who are sickened by the extent of violent and degrading pornography” rather than focusing on “the specifics of law reform.” After Butler, some version of the civil rights antipornography law would clearly be constitutional, yet none has been introduced, leaving pornography’s victims in the hands of the criminal justice authorities. As the pornography law in Canada after Butler nonetheless supported their position more strongly than was the case after Hudnut in the United States, the relative weakness of the Canadian movement further supports the hypothesis that balancing constitutional approaches that use substantive equality are especially important in independent variables in legal challenges to pornography. In this light, it is no coincidence that the United States Court of Appeals for the Seventh Circuit (but not Canadian courts) shoehorned the civil rights antipornography approach into the First Amendment viewpoint neutrality doctrine that traditionally regulated “symbolic speech” or its “secondary effects.” Yet the civil rights ordinances did not regulate such “viewpoints.” They did not target anyone for expressing the view that women (or men) should be subordinated sexually, however reactionary such views might be. The ordinances only targeted the actual subordination of production and consumption of pornography. The ordinances were narrowly tailored to reach only the use of coercion in production of pornography, or the circulation and exhibition of materials proven to cause harm, such as sexual aggression and attitudes supporting violence against women according to scientific standards of evidence. By contrast to the United States, there were no requirements in Canada that the legislature draft a pornography law according to liberal concepts such as viewpoint neutrality. Moreover, distinguished from the U.S. judicial review, Canadian judicial review also did not require the pornography law to conform to traditionally recognized unprotected legal categories such as low-value speech, fighting words, or defamation. In the United States, such traditional categories were referred to by the Seventh Circuit in Hudnut, which declined to accept that a harms-based equality approach to pornography deserves its own category, as group libel once had in 1952, when the Supreme Court created such a new category by interpretation, or child pornography did in 1982, and New York v. Ferber.

The same doctrinal straightjacket applied by the Seventh Circuit court in Hudnut that emphasized negative rights, i.e., freedom from government intervention, was applied even more strongly on ideological, as opposed to legal grounds when Sweden’s government dismissed legal challenges to the production of pornography. In the Swedish case, attempts had been made within the executive and legislative branches to make amendments that would clarify that Sweden’s laws against profiting from the prostitution of others also covered pornography production. In terms of Sweden’s constitutional architecture for regulating dissemination of expression,

2180 Johnson, Canadian State, supra chap. 11, n. 1621, at 53.
2181 Ibid., 97 n.43 (quoting Rhodes, “Silencing Ourselves?,” supra chap. 11, n. 1642, at 134).
2184 For a definitional distinction between law and ideology, see supra pp. 180–181.
Sweden had a liberal framework that since the 1960s gradually became more demanding in requiring extensive constitutional amendments for laws regulating distribution of media that might otherwise make some categories of expression constitutionally unprotected. Exceptions without constitutional amendments were still valid for a number of laws regulating expression. Examples include applying procuring laws to advertisements for prostitution where newspaper editors become liable for profiting from the prostitution of others; misleading advertisements that have a purely commercial relationship to things; counterfeiting; and possibly antitrust laws (though less certainly) that are applied to media corporations, e.g., in the publishing, news, and television industries. But when laws only concern the conditions of production, it is apparent from various legal sources that there is no constitutional requirement for an amendment before a general law can be applied to conduct that is otherwise integral to the production of expressive materials.

For instance, a serious artist of the higher arts, Anna Odell, was convicted in a high profile case for violent resistance and dishonest conduct when staging a suicide attempt, despite the fact that her conduct was integral to the production of a movie intending to contribute to the public debate on how Sweden treats people with mental disorders. Her case concerned the core form of protected expression in liberal democracies: participation in public discourse on political, social, and cultural issues. Yet her conduct during production was not free from legal scrutiny simply by being integral to producing such otherwise protected expression. Similarly, several criminal cases against various sex offenders who filmed their offenses with video cameras or cell phones, not rarely with artistic ambitions, were decided without any defendant ever raising a freedom of expression defense. Neither was any sentence mitigated because of such expressive elements of their case. Thus, there appears to be no apparent legal rationale, as opposed to ideological rationales, for granting pornographers a carte blanche to violate valid sexual offenses legislation in the course of producing their (otherwise potentially protected) expressive materials. Important objectives of the procuring and trafficking laws are easily as valid in pornography production as in off-camera prostitution for the purpose of preventing sexual exploitation of vulnerable persons suffering multiple disadvantages and to counter sex inequality in society. A Swedish government inquiry in 2001 even admitted that an application of the prostitution laws to pornography production would not “directly” target distribution of expressive media. Nonetheless, it was claimed that charging pornographers for profiting from prostitution of others caused “indirect” infringements of their expressive freedom. However, in light of the Anna Odell case as well as how the criminal code is otherwise applied to filmed sexual offenses, this position appears ideological rather than legally compelled. It should be challenged in courts.

The ideologically clouded perceptions of the legal issues raised when challenging pornography have given undeserved support to the pornographers, not just in Sweden but elsewhere. Those who exploit vulnerable populations for sex are often cast as political underdogs and dissidents in legal challenges to pornography—a position gained by misapplying legal doctrines derived from contextually different empirical situations, such as the infamous prosecutions for left-wing political views during the Red Scare (1920) and McCarthy (1950) eras, or the Vietnam War protests (1960–1970s). In such instances, those victimized by the production and consumption of pornography are equated with government censors. This inverts reality, turning the power and inequality of men over women, pornographers over prostituted persons, upside down. Here, Marx and Engels’ analogy of the “camera obscura,” where the
dominant ideology represents an inverse “upside-down” image of material reality, is not misplaced.

The legal challenges to pornography in the United States, Canada, and Sweden leave much room for more effective remedies, despite the fact that those resisting such change often do their best to present the law as “settled,” thus less amenable to change than it actually is. Even the most complex legal architectures, seemingly inhospitable to recognizing substantive equality, provide numerous routes for challenges. Thus, in systems dominated by the liberal concept of “negative rights,” the constitutions still harbor potential for legal challenges to pornography that would effectively further the perspectives and interests of those harmed, if not as readily as jurisdictions with recognition of “positive rights.” Possibly not as clearly as the Swedish 2001 Inquiry’s flawed analysis of the constitutionality of applying procuring laws to pornography, the Seventh Circuit’s analysis of the Indianapolis civil rights antipornography ordinance in 1985 in Hudnut nonetheless prematurely precluded a number of options for sustaining the law consistent with the First Amendment.

For instance, Hudnut erroneously presumed that the Supreme Court only balances interests competing with freedom of expression under rational review within predefined categories of speech, and not on basis of their “content.” Yet in other progressive cases, such as the group libel in Beauharnais v. Illinois (1952), the Court did in fact create new categories that were based on the very content they proscribed. Following the Seventh Circuit’s reasoning, not only would Beauharnais have been impossible. The groundbreaking decision of Brown v. Board of Education (1954) would also have been precluded, because it did not rely on existing doctrine. In Hudnut, the Seventh Circuit accepted the evidence showing that pornography causes gender-based violence and discrimination against women in virtually all spheres of society, conceding that it was “consistent with much human experience,” but nonetheless took the position that preexisting doctrine barred legislators granting women (or others similarly harmed) civil rights to sue those responsible for that harm. Similarly, at the time Brown was decided in 1954, no prior doctrines or legal categories suggested that racial segregation in education was unconstitutional, even in the face of psychological and other empirical evidence of harm. If the reasoning of Hudnut had been applied then, the racial segregation doctrine of “separate but equal” under Plessy v. Ferguson would still be law, despite that it caused discrimination against Blacks in virtually all spheres of society. By this logic, much can be done to challenge the harms of pornography—harms proven to be of compelling magnitude by the evidence reviewed in this dissertation.

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2185 Marx and Engels, German Ideology, supra chap. 5, n. 661, at 68.
2186 Beauharnais v. Illinois, 343 U.S. 250, 258 (1952) (recognizing that neither “history” nor “practice” provided any answer to whether or not group libel was unprotected expression).
2188 American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 329 n.2 (7th Cir. 1985).
2189 Brown, 347 U.S. at 489 (recognizing that even if existing doctrines “cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive”).
2190 Id. at 494–95 (“Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding [that segregation is harmful] is amply supported by modern authority.[n.11] Any language in Plessy v. Ferguson contrary to this finding is rejected.”) (citations in footnote omitted).
2191 Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (holding that although the “object of the [fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law . . . it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.”), invalidated in Brown v. Bd. of Educ., 347 U.S. 483 (1954).
Compared with Canada, in the United States and Sweden, where the liberal concept of negative rights is relatively more pronounced in legal architecture, the obstacles to challenging pornography are still to a considerable degree more ideological than legal, despite the way those defending the status quo argue. That said, the constitutional framework in Canada clearly creates fewer obstacles than in Sweden or the United States for legal challenges to pornography. The obstacles in Canada are more political than they are legal. That is, although there is a constitutional harms-based equality law against pornography production and distribution, recognition of which no ideology prevented, its remedies and potential applications can only go so far without further legislative action, which so far has been politically precluded. A civil rights antipornography law would highly likely be constitutional under Butler, but has yet to be proposed. Thus, under Canada’s pornography law, there are no rights to compensation for damages to those who are harmed by pornography, either for those exploited in production or for those harmed by consumption effects. Similarly, the law is hampered by the criminal approach that includes burdens of proof higher than they would be under a civil law. Perhaps most importantly, the Canadian law has until now been browbeaten by being mediated by the concept of “community standards of tolerance” when courts interpret harm, despite its inconsistency with equality and the fact that there is no requirement for such a relativistic standard in the legislative history or the statutory language. Canada has already moved away from a preoccupation with “morals” and “decency” when reinterpreting its obscenity law in the 1980s. Nothing prevents its courts from abandoning the community standards test in favor of the equality-based and more objective dehumanization and degradation test that is already applied in part. The related decision on indecency in R. v. Labaye (2005) already suggests that the role of community standards has been weakened, and now figures more or less as a proxy for evidence of harm to equality and other constitutional values (see 413–415 above). Given that Labaye is a case on prostitution under a statute that itself no longer exists, as well as given the scarcity of obscenity cases since 2005, sufficiently clear grounds do not exist for knowing to what extent this interpretation will apply to obscenity in Canada, compared with the treatment of community standards under previous cases after Butler. However, social science experiments suggest that such a harms-based standard can be reliably applied by lay persons and law students to distinguish harmful sexually explicit presentations from those that are not harmful.

Limitations of Criminal Laws

The potential but also the limitations of state-initiated laws are apparent in Sweden, among other places. After the Sex Purchase Law was passed in 1999 that criminalized the tricks and decriminalized prostituted persons—consistent with a substantive equality approach to prostitution laws—the prevalence of prostitution was drastically reduced compared with Sweden’s Nordic neighbors, where prostitution increased during the same period (pp. 479–484). The contrast was most dramatic when comparing with prostitution in Denmark, where in 2007 about 15 times more persons per capita were in prostitution than in Sweden. In Norway, almost 9 times more prostituted persons existed per capita than in Sweden at the same time. Moreover, in a comparative perspective, prostitution neither became more dangerous, unsafe nor more hidden.

Even though the Swedish substantive equality prostitution law worked in the sense of reducing prostitution, although exit programs supporting prostituted persons to leave prostitution should arguably be further expanded (pp. 484–486), the judici-
ary was still interpreting the law in a traditional sense that regarded prostitution more or less as a “victimless” crime, one directed primarily against public interests (pp. 491–503). Their perception seem to have been that the law’s objective was mainly to prevent sexual exploitation on an aggregate level, prevent secondary effects such as criminality and drug trade, and to promote sex equality in general (most persons bought for sex being women, while most buyers are men). An important Supreme Court case in 2001 thus practically dismissed the notion that prostituted persons could be the “injured party” who could raise damage claims for having been sexually exploited by the tricks. Yet empirical evidence overwhelmingly shows that persons bought for sex are typically in a state of severe vulnerability, with no real alternatives to prostitution (cf. 55–64 above). Apart from their largely desperate material circumstances, this situation is evident, inter alia, in the extremely high rate of mental disorders among most prostituted persons—symptoms on a level equal to those of Vietnam Veterans seeking treatment, and significant even after controlling for other relevant predictors (cf. 67–72). Arguably, under such traumatic conditions the humanity, equality, and dignity of prostituted persons are violated every time they are bought for sex. None of this empirical evidence was mentioned in the Swedish courts’ opinions around 2001 or later when they determined that the offensiveness of buying sex was primarily against the public. Likely the legal actors were unaware of these facts.

The Swedish government in 2011 clarified the law, stating that prostituted persons can try their damage claims as “injured party” against the trick. But their status as injured party has to be tried in each and every case—not simply the amount of damages owed by tricks, if any. This creates a double procedural presumption against the prostituted person that does not exist for plaintiffs under most other sexual offenses (e.g., sexual coercion, rape, or human trafficking). As yet, no such successful civil suit by a prostituted person against their former tricks has been reported in Sweden in law reports, legal databases, or in the literature, although technically there might be unreported cases. The rationale submitted by the Swedish courts around 2001 for not recognizing prostituted persons as victimized by purchase of sex was that they allegedly “consented” to the financial agreement. However, as when following Crenshaw’s intersectional analytical approach to legal analysis, it is important to note that prostituted persons are burdened by many additional disadvantages apart from their gender. These include, inter alia, poverty, child sexual abuse, homelessness, mental disorders, racial, ethnic, and other forms of discrimination. These persons also frequently lack education, job training, and employment history, often precisely due to their prostitution as such. Hence, they are forced to accept sex to survive due to their multiply disadvantaged circumstances and lack of other options—sex that more singularly disadvantaged persons would regard as rape. Their “consent” to this treatment, as envisioned by Swedish courts, is purely fictional and has usually no meaningful basis in facts. Indeed, some forthright tricks have described prostitution as “paid rape”—a description shared by many more prostitution survivors. Unfortunately, as Crenshaw and Catharine A. MacKinnon show more generally, law is rarely made from the perspectives and interests of those who are multiply disadvantaged, such as prostitution persons. More often, equality protections in law are available only for those persons who are most “similarly situated” to persons who are not disadvantaged by any discrimination—that is, people who are least in need of legal remedies.2192

How multiple disadvantages and their intersection often make prostitution and pornography laws inadequate in representing the perspectives and interests of those most directly harmed is further apparent in contrast to U.S. sexual harassment law, where the showing of pornography at work is regarded as sex discrimination. Women at work are often more “similarly situated” to men than women elsewhere are. “But for” the showing of pornography at work, those women would have been closer to equal to men (at least as much as possible in a culture of gender inequality). It is apparently comparatively easy for men to recognize that harassment and discrimination makes the workplace dysfunctional. To persuade judiciaries and public opinion about the need for effective laws against it is therefore likely not as difficult as persuading the same audiences that when pornography is shown and consumed in private, the harms that cause gender-based violence and attitudes trivializing violence against women need to be addressed. There are few effective laws against such harms, despite that maybe the worst harms of pornography arise in precisely such non-work settings, for example, in prostitution and domestic abuse. Here those who are harmed (usually women or children) are the least “similarly situated” to men, and would therefore need equality protections the most. Yet they receive no remedy despite the fact that those who are less unequal to men often receive it in the workplace. Their situation is almost, to borrow a metaphor from Crenshaw, as if a person was injured by a multiple car accident but was precluded from remedy if it was impossible to identify any one single person solely responsible for the injuries. Put otherwise, the complexity of multiple disadvantages and intersectional discrimination makes it harder to legally address for no good reason.

Returning to Sweden, where prosecutors and law enforcement are responsible at the initial stage for reporting whether or not there are any civil damage claims to be tried in a criminal trial, it is notable that they have not recognized prostituted persons as injured parties (plaintiffs) under the Swedish Sex Purchase Law since its adoption. No one has yet undertaken to represent the perspectives and interests of those most directly harmed by the sex purchase offense: prostituted persons. To represent them would have necessitated a thorough presentation of accurate evidence showing why their “consent” was mythic and fictional and why buying sex is arguably an offense against their humanity, equality, and dignity. A similar lack of interest among law enforcement personnel and prosecutors in representing the perspectives and interests of those most directly harmed by pornography has been seen in Canadian criminal pornography trials both prior to and after Butler was decided in 1992. There, prosecutors also not infrequently failed to present updated social science evidence of harm, as also occurred in Sweden under the Sex Purchase Law. They additionally failed to argue the constitutional equality interests at stake that recognize that those harmed by pornography belong to disadvantaged groups in Canada that merit consideration under the Canadian Charter of Rights and Freedoms. Not surprisingly, a number of factually ignorant opinions were decided by judges, in which they had not been provided accurate evidence and arguments. This is regrettably to be expected when none of the parties at the trial represents the interest of those most harmed.

Criminal laws typically give the initiative to prosecutors and law enforcement, even when amended and reinterpreted to account for equality and harm, as Canada’s obscenity law and Sweden’s prostitution laws have been. Prosecutors and law enforcement are naturally more disinterested, or at least less informed on the perspectives and interests of persons harmed by pornography than such persons themselves. By contrast with survivors, criminal justice authorities are professionals who are less

likely to have personally experienced sexual exploitation in pornography. Certainly, some may have experienced consumption harms such as gender-based violence, but then any woman in the general population may have. The evidence in this dissertation (chapters 1–3) suggests that the general population never experiences the harmful effects of pornography near the levels that prostituted persons do. The latter are doubly exposed, not only often via sexual exploitation in pornography production, but also to consumption harms, for example, through tricks who force them to reenact specific materials. Certainly, there are exceptions, as in more recent U.S. applications where federal prosecutors have been committed to targeting producers and distributors of the most violent, dehumanizing, and degrading materials imaginable (pp. 355–363 above). They have pursued their cases despite American obscenity law being substantially weaker than its Canadian counterpart on issues of equality and harm, but making no legal references to equality. Such partial exceptions notwithstanding, the general trend shown in the legal challenges studied is clear: unless specifically addressed by policies or otherwise, criminal laws emphasizes the perspectives, priorities, and interests of the government, which tends to be consistent with socially dominant groups, while civil rights laws would prioritize those of survivors and others harmed directly by pornography and prostitution (see 298–312), who overwhelmingly tend to be members of socially subordinated groups (cf. chapters 2-3). Indeed, despite the recent uptick in U.S. federal obscenity prosecutions, their law provides no civil remedies at all, such as damages or support for exit to those harmed by or exploited in pornography. The only outcomes can be incarceration, forfeiture, or in some instances fines.

Additionally, obscenity law is governed by the ambiguous and in unequal societies inegalitarian “community standard of tolerance” test. The community standards test may lead to very different outcomes depending on how the community views sexual subordination. Recent American efforts against adult pornography have so far targeted what are, even today, perceived as the more extreme materials, which may explain their relative success. One case against a more “mainstream” producer was, unfortunately, dismissed in 2010 on technical grounds, leaving the reach of this strategy unclear. Nonetheless, other cases are still successfully pursued by the Obama administration. However, in Canada a judicial decision on obscenity in British Columbia invoked community standards to support an acquitted of a producer of abusive sadomasochistic materials as late as in 2004 under Butler law. The case relied on inadequate evidence and had no intervening party that represented prostitution survivors or others who are actually harmed by consumption or production harms of such materials. However, another case in Ontario in 2012 reached a very different conclusion, convicting a producer and distributor of materials that did not even present sexual activity, such as intercourse or fellatio—only explicit sexualized presentations that combined “sex and violence.”

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2195 See, e.g., United States v. Ira Isaacs, No. 13-50036 (9th Cir., March 5, 2014) (upholding obscenity conviction of four years imprisonment for pornographer that produced and distributed materials including, inter alia, women being used for sex with animals or with human bodily waste), archived at http://perma.cc/BB6T-WVA2; See also FBI, L.A. Div., “Ira Isaacs Sentenced,” supra chap. 4, n. 562 (describing details of Isaacs case); Kim, “Mistrial in L.A. Obscenity Case,” supra chap. 4, n. 562, at AA3 (reporting that Obama-appointed U.S. Attorney General Eric Holder touted “Isaacs’ prosecution as ‘a major case’” during a congressional hearing).
2197 See supra notes 1775–1786 and accompanying text (analyzing Price, 2004 BCPC 103).
produced by the criminal law framework of obscenity law, even in its modified Canadian version that accounts for subordination and harm in part, enable relatively unreliable challenges to pornography. Certainly the message to producers, who are driven by a major profit incentive, is unclear. Albeit the related indecency Labaye decision in the Supreme Court of Canada may have weakened the role of community standards since 2005 (see 413–415 above), the obscenity cases decided after Butler should discourage legislatures and courts from continuing to rely on community standards of tolerance, especially when community standards are allowed to mediate the determination of harm. Inequality will often be tolerated in unequal societies. Such applications build on a public opinion “consensus” of what is harmful, which is largely dictated by the powerful, rather than building on actual evidence and perspectives of survivors of pornography-related harms.

The problems of the criminal law approach and the benefits of a more survivor-centered approach are shown when considering how the Canadian government in 1992 offered support to disadvantaged groups to intervene in constitutional cases under their “Courts Challenges Program.” A women’s organization (LEAF) was able to intervene in the seminal Butler case and present an original and well-prepared sex equality argument including references to updated social science studies that supported, from a sex equality perspective, the harms-based obscenity law being challenged on expressive grounds. When the “Court Challenges Program” was cut by the government shortly thereafter, courts began anew to express prejudice and make unprogressive decisions on basis of the manipulated evidence, or lack of evidence, presented by prosecutors and defendants. Indeed, there were no intervening parties representing the perspectives and interests of those harmed more directly by pornography in those cases. The trajectory of the Court Challenges Program indicates that a more systematic effort to draft laws that represent their perspectives and interests, and provide civil remedies, would produce more effective legal challenges to pornography.

A similar pattern suggesting that representation of perspectives and interest of unequal groups is the key to success can be seen with regard to legislative challenges. For instance, whereas several American legislatures did propose theoretically and empirically consistent civil rights challenges to pornography (more below), being strongly influenced by the women’s antipornography movement, their Canadian counterparts failed to propose any effective legislation during the same period under a seemingly weaker influence from the women’s antipornography movement. Put otherwise, the strength of the representation of perspectives and interests of those most harmed has a significant impact on policy output. This finding is consistent with the literature on more general challenges to gender-based violence. A large cross-national comparison of 70 countries with panel data since 1975 showed that the strength of autonomous feminist social movements were by far the most significant and important cause of adoption of effective policies against violence against women. This factor was more important than the percentage of women in a country’s government, the wealth of countries, ratification of international law, and the presence or absence of religious or left-wing parties.2199 This dissertation thus shows that representation of the perspectives and interests of those most harmed by pornography in the politics of social movements is a key to effective legal challenges and to legal change.

Benefits of Civil Rights Laws

As an alternative approach to criminal law to the intersectional character of pornography's and prostitution's harms, the civil rights approach to pornography as a form of sex discrimination was attempted in the United States in several jurisdictions, including in parts on the federal level. The evidence showing how the criminal approach is improved when given input from those more directly affected, as under the Canadian Court Challenges Program in the early 1990s, suggests that a victim-centered or survivor-driven law would provide a more effective challenge. The civil rights approach gives the initiative to use and apply the law to those who are harmed, who are enabled to sue for damages in a court or in some other intermediate administrative body. No prosecution or law enforcement is involved, and there are no criminal penalties—only damages going directly to the plaintiffs, who have to prove their harms to receive them.

The civil rights approach to pornography was built upon the experiences, perspectives, and interests of those most harmed. It originated in Minneapolis in an environment where neighborhood activists had been exposed to the harms of pornography when the city zoned pornography stores, strip clubs, and so-called adult movie theatres into poor neighborhoods with relatively less political influence. This situation provided the activists with a special social consciousness of the harms that is rarely available to others than survivors of prostitution and gender-based violence—people who, eventually, also joined the movement. Together with the support from scholars and politicians, these activists took the challenge to the city council. From Minneapolis, the civil rights approach spread and was attempted in other jurisdictions, although it only passed into law in Indianapolis. There, the city was sued and the law invalidated in federal courts before anyone had the opportunity to use it, disposed of in a lawsuit were no one with standing under it was represented except among amici curiae.

The civil rights antipornography ordinances, according to the approach of hierarchy theory, are the most consistent legal challenges in light of that theory that have been pursued so far in history. By contrast to obscenity laws, criminal pornography laws, or other civil law approaches (e.g., sexual harassment laws at work that exclude non-work settings), all the key theoretical elements are present in the civil rights antipornography ordinances. The ordinances were drafted to promote substantive equality, to recognize disadvantaged groups (including multiple disadvantages and intersectional problems of legal application), and to represent the perspectives and interests of the groups demonstrably harmed by pornography according to the most accurate and updated evidence. The legislative finding that formed the basis of these legal challenges was consistent with (if not as updated as) the evidence assessed in this dissertation in chapters 1–3. It correctly identified pornography to be “central in creating and maintaining the civil inequality of the sexes,” as well as being “a systematic practice of exploitation and subordination based on sex which differentially harms women.”

This position clearly identifies the substantive equality issues at stake, and recognizes the disadvantaged group targeted by the production and consumption harms. Further details of the ordinances specifically addressed intersectional problems such as poverty, racial discrimination, childhood abuse, and lack of alternative incomes, for example, in specifying the impermissible defenses of consent when using the ordinance to sue for coercion into pornography (pp. 308–309 above).

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2200 Proposed Ordinance Sec 1., to add Minneapolis City Code, Minn., § 139.10(a)(1). 1st Reading, Nov. 23, 1983, archived at http://perma.cc/3229-ZN5B.
Compared with all the other challenges studied in this dissertation, the civil rights antipornography ordinances also had the scientifically most consistent and sound definition of pornography. It has been shown in experiments to be easily applied to harmful materials without overbroad or vague misattributions to harmless materials, in contrast to U.S. obscenity law and other alternatives that are far more difficult to apply as consistently.\textsuperscript{2201} The ordinance’s definition of actionable materials as the “graphic sexually explicit subordination of women” (or similarly subordinated children, transsexuals, or men) is also more refined than the Canadian violence, degradation, and dehumanization test, in part as it includes at least one additional concrete element of definition. For example, women “presented as sexual objects who enjoy pain or humiliation . . . who experience sexual pleasure in being raped . . . [or] presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”\textsuperscript{2202} There is reciprocity between such pornography definitions of the civil rights ordinances and the pornography categories demanded by consumers, the acts of abuse or subordination inflicted on women who must produce them, and the acts of abuse or subordination inflicted on women as a result of their consumption (\textit{cf.} 302–306 above). Put otherwise, the definition is corroborated by social science evidence and experiential accounts, and therefore consistent with social reality. This is to be expected, as the drafting of the ordinance build upon numerous firsthand accounts from survivors of pornography-related harms in hearings. Moreover, it was based on the most updated research at the time. In these senses, the ordinances \textit{represented} the \textit{perspectives} of those disadvantaged groups most harmed by the social practice of pornography.

Furthermore, by choosing the route of civil rather than criminal law, the ordinances would have put the power of the law in the hands of those most in need of it, as opposed to public representatives with many other priorities, perspectives, pressures, and interests than to use it for the benefit of those who are harmed. This shifting of the power of law is consistent with promoting substantive equality on the level of procedure, and also makes the pornographers directly accountable to those populations they harm rather than accountable to the state, as under criminal obscenity laws. No criminal penalties were to be applied, such as fines or imprisonment—only damage awards to the plaintiffs. The causes of action under the ordinances could only be used by someone demonstrably harmed by pornography—not by prosecutors or law enforcement. Hence, (1) “trafficking in pornography” was actionable because dissemination of pornography contributes to discrimination against women; (2) “coercion into pornography performance” was actionable because pornography production usually exploits multiple disadvantages under coercive circumstances that are tantamount to sexual coercion, rape, and sexual slavery; (3) “forcing pornography on a person” was actionable similar to sexual harassment, but including in non-work settings; (4) “assault or physical attack due to pornography” was actionable when it could be reasonably proven that an assault was inspired by pornography, such as when tricks force prostituted persons to imitate specific materials or when rapists repeatedly refers to them, as numerous studies and evidence have documented they do (\textit{cf.} 307–312).

Several other laws contain some elements of the civil rights approach to pornography, such as sexual harassment law at work in the United States, processes that allow disadvantaged groups to intervene in constitutional litigation in Canada, or sex-
ual offenses legislation under which civil damages can be claimed by plaintiffs, including technically under Sweden’s law against purchase of sex. Yet no jurisdiction has tried the civil rights approach to pornography fully developed, as envisioned in Minneapolis in 1983, or as passed in Indianapolis in 1984, then precluded by judicial intervention. This dissertation shows that there are no legal obstacles to doing so in most of the United States or Canada. A constitutional amendment might be needed in Sweden for the causes of actions that target dissemination, although not necessarily so. However, an amendment would not be needed to target pornography production, as the latter is already proscribable consistent with Sweden’s procuring laws, and such a strategy does not target media dissemination of existing potentially lawful materials. The civil rights ordinances, more than any other law, would have promoted the interests of those affected by the harms of pornography. For the first time, it would have given those harmed a voice in the legal process and a tangible incentive to publicly testify against the injuries caused by pornography. No such incentives exist today. Rather, the opposite situation holds. Survivors are often disbelieved, ridiculed, trivialized, reviled, or even persecuted for revealing their sexual abuse in public.

The Postmodern Critique

A theoretical alternative for challenging social dominance is the postmodern approach to legal challenges described in chapter 4, which takes issue with the proponents of hierarchy theory (see 168–175 above). Not surprisingly, representatives of postmodern theory have opposed the American civil rights challenges—not only against pornography, but also against hate speech during the 1980s and 1990s. As one example, Judith Butler argued that the civil rights approach to pornography, or similar laws against hate speech, might be “misappropriated” by the state. The civil rights approach to adult pornography has never been tried empirically. Butler’s suspicions of what in public policy implementation research would be called the civil rights legislation’s “policy outcome”—as opposed to “policy output”—thus rely

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2203 This determination depends on to what extent Sweden will return to the predominant expressive doctrine before the 1970s, when it was easier to regulate distribution of media without constitutional amendments so far as the legislative objective was unrelated to the suppression of free expression. See supra pp. 227–239, esp. 229–232 (discussing the “Alexanderson doctrine”); cf. supra pp. 449–455 (analyzing Swedish developments since the 1960s). For a change over time in Swedish legal scholarship on expressive freedoms, compare Axbérg’s Tryckfrihetens gränser (1984), supra chap. 7, n. 934 (taking a more absolutist position on expressive freedoms), with Persson’s Exklusivitetsfrågan (2002), supra chap. 7, n. 918 (taking a more balancing approach vis-à-vis other government interests).

2204 Butler, "Sovereign Performatives," supra p. 16 n.51, at 376. Further citation in text. Cf. Butler, Excitable Speech, supra chap. 4, n. 636, at 101. Despite her skepticism toward hate speech laws, in other instances Butler has claimed that pornography “cannot ‘threaten’ or ‘demean’ or ‘debase’ in the same way” as “the sign of racial violence” can. See Butler, Excitable Speech, 21 (emphasis added). Although such a statement could imply that the former is more vicious than the latter, it is actually unclear whether or not Butler believes that pornography can “demean” in other ways that are equally serious. Indeed, her ambiguous writing style rarely reveals any political position, which can be seen in her constant battery of skeptical questions or non-interactive sentences that occur even near the end of her pieces where one might expect a more decisive conclusion. Cf. Nussbaum, "Hip Defeatism of Butler," supra chap. 4, n. 641, at 38.

2205 Understanding the causes of change in policy or law is fairly uncomplicated (output) while measuring and understanding the causes for change in empirical “outcome” is more complex. See, e.g., Hill and Hupe, Implementing Public Policy, supra p. 26 n.76, at 9; cf. Holzinger and Knill, “Causal Factors & Convergence Expectations,” supra p. 26 n.76, at 31 (noting that “policy outcomes,” as opposed to “policy outputs,” are “usually affected by many intervening variables”).
on hypothetical scenarios and at best analogous evidence. In order to evaluate her critique of the civil rights approach, it is necessary to scrutinize the veracity and relevance of Butler's analogies and hypotheticals, especially as she is often regarded a primary exponent of postmodern feminist thought.

Butler mainly rests her argument on two empirical examples: an obscenity prosecution in 1990 and a policy of conduct in the military around the same time. In her first example—the obscenity prosecution against Black rap group 2 Live Crew in 1990—she provides no details for the reader about the events, presuming it is familiar case. Crenshaw provides more facts. Members of 2 Live Crew were arrested for an allegedly obscene performance in an “adults-only club” in Florida in June 1990. They were later acquitted of those charges. However, two days before their arrest, their album, As Nasty As They Wanna Be, had also been determined to be obscene, a ruling that stands (Crenshaw, 1283). Butler interprets the obscenity indictment on 2 Live Crew as an attack on African American vernacular culture and a governmental abuse of power. The rap genre “may not be recognizable to the court,” she argues (Butler, 354). Furthermore, she concludes that “arbitrary and tactical use of obscenity law” invests “the courts with the power to regulate such expression” and “produces new occasions for discrimination” (p. 354). However, Butler never mentions that the group’s appearances were saturated with a discourse in which Black women were presented as “‘cunts,’ ‘bitches,’ and all-purpose ‘hos’”—a fact pointed out by Crenshaw (pp. 1284–85). When “listening to Nasty, we hear about ‘cunts’ being ‘fucked’ until backbones are cracked, asses being ‘busted,’ ‘dicks’ rammed down throats, and semen splattered across faces,” quoted Crenshaw, from their albums, with reluctance for fear of reinforcing racist stereotypes about Black men.

Butler’s analysis is not intersectional; it recognizes only the racist elements of the government in going after them, ignoring the misogyny. That said, the selectivity in enforcing the obscenity law on a Black rap group, and not enforcing it on other white misogynistic artists—not to mention the many nude dancing or “adult bookstores” that sold pornography where the arrest took place in Florida—is suspicious (Crenshaw, 1285–86). Crenshaw notes that while 2 Live Crew was arrested, white comedy artist Andrew Dice Clay performed on HBO with lyrics such as “’Eenie, meenie, minee, mo / Suck my [expletive] and swallow slow,’ and ‘Lose the bra, bitch.’” Clay’s appearance on the show Saturday Night Live around the same time caused a female cast member and the artist Sinead O’Connor to withdraw from the show where they were both scheduled. He is also known for his blatantly racist jokes (Crenshaw, 1286 & n.150).

Using the prosecution against 2 Live Crew to supposedly show how the civil rights antipornography ordinances could be misappropriated and produce discrimination against others relies on a number of misunderstandings. First, the type of ex-
pression produced by 2 Live Crew cannot be usefully reduced to an “established African American genres of folk art” (Butler, 354) without more precision. As argued by Crenshaw, even though humor and irony can sometimes disarm oppression, as in popular culture, the identity of the performer in those cases matters:

Although one could argue that Black comedians have broader license to market stereotypically racist images, that argument has no force here. 2 Live Crew cannot claim an in-group privilege to perpetuate misogynist humor against Black women: the members of 2 Live Crew are not Black women, and more importantly, they enjoy a power relationship over them. (Crenshaw, 1293)

In part because the indicted speech was not only a form of irony and humor among oppressed groups, but also targeted Black women from above—a form of oppression—the example of 2 Live Crew does not show why a civil rights law against sex discrimination and oppression caused by pornography would not work as intended.

Second, 2 Live Crew was prosecuted under obscenity laws, not civil rights or other antidiscrimination laws. Obscenity as a legal concept has been criticized thoroughly in the literature, including the literature that created the civil rights claim against pornography. Moreover, the misappropriation claim by Butler is neither original nor integral to postmodernism (see chapter 6 above; esp. 199–206). Butler appears to be barking up the wrong tree. The antipornography civil rights ordinance was proposed as an alternative to obscenity laws, in part because of the possibilities of government misuse (cf. 302–307). Obscenity is a vague concept that is not victim-centered. American obscenity proscribes appeal to prurient interests and lack of other cultural value that is patently offensive to contemporary community standards. None of this was included under the civil rights antipornography ordinances. Indeed, one of the central reasons the ordinance was struck down in Hudnut was that it did not track obscenity law. The ordinances regulated the graphic sexually explicit subordination of women, with requirements for at least one additional element proven to cause sexual aggression and attitudes supporting violence against women (see, e.g., 302–306 above).

Third, the prosecution in 2 Live Crew is not the equivalent of a civil complaint under a discrimination or hate speech law. The obscenity law in the case was enforced by the state, not by an individual plaintiff who could prove harm. The state would not have that power. Only survivors, or those provably affected by sex discrimination, would. In sloppy legal analysis, Butler ignores these major distinctions. All in all, the use of 2 Live Crew as an example supposedly shedding light on potential government misuse of a civil rights ordinance aimed at either hate speech or pornography is tenuous at best, misleading at worst.

Butler’s second example is the policy in the military announced by President Clinton, July 19, 1993 (Butler, 355), colloquially referred to as “don’t ask, don’t tell.” None of this was included under the civil rights antipornography ordinances. Indeed, one of the central reasons the ordinance was struck down in Hudnut was that it did not track obscenity law. The ordinances regulated the graphic sexually explicit subordination of women, with requirements for at least one additional element proven to cause sexual aggression and attitudes supporting violence against women (see, e.g., 302–306 above).

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Butler’s second example is the policy in the military announced by President Clinton, July 19, 1993 (Butler, 355), colloquially referred to as “don’t ask, don’t tell.” The policy was disbanded by President Obama in July 2011, when he announced that it would not have any effect from September 20. This policy on its
face was the opposite of a civil rights law to empower socially disadvantaged groups. Put simply, “Don’t ask, don’t tell” discriminated against minorities. Gay persons could be discharged if found holding hands or kissing with service members of the same sex, on-base or off-base. They could be discharged for making “a statement” that they were “homosexual or bisexual,” or for making “a marriage or attempted marriage to someone of the same gender.”2214 Heterosexual persons were permitted to make such acts or statements in abundance. One of the underlying objectives appears to have been to protect heterosexual persons’ perceived interest in avoiding exposure to non-conformist sexual identities.2215 Heterosexual persons as a group have never been included among the protected “discrete and insular minorities” under the Fourteenth Amendment granted solicitude in Carolene Products.2216 Nor are heterosexuals otherwise similar to those vulnerable persons thought to be protected by hate speech legislation or the antipornography ordinance. “Don’t ask, don’t tell” was not really against discrimination; the policy itself discriminated against sexual minorities.

A policy that on its face discriminates against a vulnerable minority offers a particularly ill-chosen example of how another policy or law that intends to do the opposite might be misused by the state. Yet Butler asks: “As difficult and painful as it is to imagine, could the military have targeted this form of utterance as a codifiable offense without the precedent of sexual harassment law and its extension into the areas of pornography and hate speech?” (Butler, 355). Yes, the military could. And did. Such “utterances,” that is, coming out statements about sexuality, were targeted long before “don’t ask, don’t tell,” and certainly long before sexual harassment law existed. Gays had been officially banned from serving in the military fifty years prior to the policy.2217 During that prior era, the U.S. military could discharge gay people simply for being gay, even when they had not stated or “uttered” that they were. Investigations could be conducted to find out whether some employees were gay, even without any prior statement indicating such a fact.2218 Certainly openly stating one was gay had the same result.

Besides Butler’s erroneous legal terminology—a policy cannot create an “offense,” only criminal law does, and discharge is not a criminal sanction—if her question whether “don’t ask, don’t tell” would have been possible without sexual harassment or hate speech laws or the civil rights antipornography ordinances is not utterly irrelevant, it must presume that such a policy turned on whether someone caused an “utterance.” Official policies that discriminate against socially vulnerable groups have existed for a very long time, whether or not they proscribed utterances or conduct. Moreover, many countries criminalize utterances that reflect badly on the head of state, for instance. Needless to say, “utterances” were proscribed long before sexual harassment, hate speech, or pornography were, and definitely proscribed before any concept of civil rights laws had been invented. Again, Butler barks up the wrong tree. Don’t Ask Don’t Tell has an entirely different lineage as well as an antithetical theoretical basis. The association between a discriminatory policy against gays and civil rights laws against discrimination by pornography or hate speech is misleading at best, deceitful at worst.

2215 Cf. Rubenstein, “Don’t Believe It,” A19 (“The ‘don’t ask, don’t tell’ solution also concedes that gay people are not disruptive unless others know we are among them”).
2218 See, e.g., Friedman, “Chiefs Back Clinton,” A1 (noting that the new policy guidelines stated that “applicants for military service will no longer be asked or required to reveal’ their sexual orientation”); Rubenstein, “Don’t Believe It,” A19.
Just as the Seventh Circuit Court of Appeals misrepresented the Ordinance’s definition of pornography as targeting “depictions” and “viewpoints” rather than a social “practice” of “subordination” (pp. 333–338 above), Butler appears also not to have understood the civil rights approach to pornography. For instance, she claims that the drafters of the antipornography ordinances were “[r]elying on recently proposed hate speech regulation” (Butler, 352), without offering any citation to such regulation supposedly relied on.\textsuperscript{2219} No such proposed contemporaneous hate speech regulation emerged in my extensive research. Butler’s statement is factually false. She further states that MacKinnon (one of the drafters) “never makes clear how being depicted within pornography is the same as being addressed by it. The equation, however, is central to her argument to extend [Mari] Matsuda’s position to include the pornographic text” (Butler, 353). Butler here invents an argument that has never been made in support of the ordinances. Nowhere does the legislative history of the ordinances or MacKinnon refer to pornography as “text,” that “being depicted” or “being addressed” by pornography is the target of the legislation, nor “Matsuda’s position.” Butler should also have known that the ordinances were proposed in 1983. Matsuda’s work post-dated them.\textsuperscript{2220}

Beyond the misinformation, similar misunderstandings concerning the ordinances to Butler’s were exhibited in the Seventh Circuit’s opinion in \textit{Hudnut}, where it repeatedly equated pornography as defined by the ordinance with “speech” and “viewpoints” (cf. 333–338 above). Hitler did not need to exploit or abuse anyone to produce his “orations” (i.e., speech and viewpoints). The court’s analogy cast the ordinance as if it provided a cause of action when someone expressed the viewpoint that women should be sexually subordinated in a newspaper, on television, or at a public conference—something it did not do. The Ordinance does not regulate expression that is not graphic, explicit, or does not sexually subordinate as pornography provably does.\textsuperscript{2221} In legal terms, just as an ordinance that prohibits the destruction of public property, however politically motivated, the antipornography ordinance is “unrelated to the suppression of free expression” and its “incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”\textsuperscript{2222}

Yet by contrast to Butler, the Seventh Circuit’s opinion noted when discussing the ordinance that there existed a number of studies and testimonies that documented the harmful effects of pornography, including gender-based violence, discrimination, and sexual exploitation.\textsuperscript{2223} Certainly, these were not regarded as a “compelling interest” that could sustain the Ordinance (pp. 325–333 above), but they were at least acknowledged to exist. Butler never even considers them in her article. Not one single sentence of hers discusses what pogroms, rape, discrimination, and harassment mean concretely for those who are subjected to such practices (Butler, 350–77). To

\textsuperscript{2219} See also supra note 638 and accompanying text for a further discussion of Butler’s misunderstanding on this point.

\textsuperscript{2220} Otherwise, Butler provides no citation in support for her claims apart from a couple of indirectly related quotes taken out of context. See supra note 638.

\textsuperscript{2221} Moreover, to enable a civil cause of action, at a minimum one of the six sub-definitions had also to be included. Ind. Code Ch. 16 § 16-3(q) (1984), invalidated in Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985).

\textsuperscript{2222} United States v. O’Brien, 391 U.S. 367, 377 (1968); cf. id. at 375 (“The [First] Amendment does not distinguish between public and private destruction, and it does not punish only destruction engaged in for the purpose of expressing views. A law prohibiting destruction of Selective Service certificates no more abridges free speech on its face than a motor vehicle law prohibiting the destruction of drivers’ licenses, or a tax law prohibiting the destruction of books and records” (citation omitted)).

\textsuperscript{2223} American Booksellers Ass’n v. Hudnut, 771 F.2d 323, 328–29 (7th Cir. 1985). Further citations in text.
analyze whether or not hate speech or pornography laws could be misused by governments over twenty-eight pages, without mentioning any of the harmful effects of such practices that such civil rights laws were intended to stop, presents a strongly biased account. Her reasons for ignoring such concrete harms might be the conviction that racists and their targets both have equal power over speech. At least, this is what she implies: “if utterances can be the bearers of equivocal meanings, then their power is, in principle, less unilateral and sure than it appears. Indeed . . . words that seek to injure might well miss their mark and produce an effect counter to the one that is intended” (Butler, 365). But what if they “might well” not? If language was as ambivalent as Butler claims it is, Crenshaw must surely be wrong in saying that because “the members of 2 Live Crew are not Black women, and more importantly, they enjoy a power relationship over them,” it was inappropriate to equate their “misogynist humor against Black women” as being “just jokes” not “meant to injure or to be taken literally.”

All the empirical social science data that supports the injuries of these materials find their meanings not as equivocal as she does. Put otherwise, when Butler questions whether language may produce other than ambivalent meanings, she questions that there is such a thing as social power over speech in the sense argued by Crenshaw and supporters of hate speech laws. Here, Butler’s argument goes even further than the Seventh Circuit did in its trivialization of the harms that hate speech and pornography cause. The Seventh Circuit at least acknowledged that different groups have unequal power over speech: “Racial bigotry, anti-Semitism . . . influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. . . . At any time, some speech is ahead in the game; the more numerous speakers prevail” (Hudnut, 330–31). Even this grudging acknowledgment misses the mark, since more powerful speakers are not necessarily more numerous, their voices are simply more amplified by their power. In any event, following the liberal concept of “negative rights” (pp. 142–148 above), that court did not regard unequal access to speech as something for the government to intervene in. For instance, they claimed that the “Supreme Court has rejected the position that speech must be ‘effectively answerable’ to be protected by the Constitution” (Hudnut, 331). Yet it did not say that power over speech was equal, or that Nazi speech might produce pro-Jewish results. By contrast, Butler implies that there is no problem of unequal access to speech.

Although this dissertation has not taken as its task to fully review the postmodern theory’s approach to challenging gender-based violence and inequality, it is certainly notable that one of its most well-known advocates was unable to render the civil rights ordinances adequately and with veracity, but relied upon misinformed and deceptive analogies and factual errors. Butler’s account by no means minimizes the adequacy of the civil rights antipornography ordinances. Those laws would promote substantive equality, and are consistent with the social science evidence. As such, they are narrowly tailored to reach only harmful materials (as opposed to harmless materials) that cause gender-based violence and other forms of discrimination. The laws would further the interests of those directly injured with minimal impact on other expressive interests—more so than any other existing or imagined law.

Extended Implications

In light of the need to adopt efficient and effective policy responses to other problems of our times, it is also worthwhile to consider the more general insights gained from the legal challenges to pornography in Canada, Sweden, and the United States. This dissertation shows that to challenge some of the most intractable contemporary problems of inequality and social dominance, democracies need to rethink their legal approaches. There is nothing inherently idiosyncratic with the imperatives of substantive equality, nor with emphasizing the perspective and interests of disadvantaged groups. Those principles are applicable to many contemporary political problems. The criminal law approach, although having merit in areas where there exist no specific groups apart from the state who can legitimately claim the initiative, has been shown deficient in many ways. It has an equality deficit and problem of legitimacy when representing democratic perspectives and interests in contexts of group oppression and social hierarchy. In such situations, police, prosecutors, and other public authorities may, if not having a vested interest in continuing social dominance, nevertheless lack the necessary commitment to respond appropriately to its oppression. These situations call for a shift in legal authority away from the state, making it more accessible to those identifiable disadvantaged groups in civil society and their legitimate representatives in whom the commitment to address the problem is stronger. There are many such contexts that would seem to need a similar change in focus toward civil rights that represent groups in need of empowerment, and who are already organizing autonomously to end their oppression.

Groups affected by so-called hate crimes, systemic discrimination, or other gender-based violence such as rape and domestic abuse come to mind. The regular complaints reported in media about how law enforcement does not respond or act with sufficient determination with regard to such realities are instructive. Perhaps a general change in emphasis in democracies toward social groups, devolving power toward civil rights in civil society with support for autonomous litigation and organizing, with the state as helper and forum rather than powerbroker and fountainhead of decision-making, would be a more appropriate approach for the twenty-first century? At least this dissertation suggests such a conclusion. Moreover, when considering the overburdened prison complex in many democracies, a shift from criminal sanctions toward civil sanctions and remedies would seem, if not for the reasons stated above, at least practical when considering the political scarcity of public resources. Prisons or other confinement might be necessary when the culprits would otherwise cause serious harm outside or when there are no viable alternative sanctions, remedies, and injunctions that can be effectively enforced to stop the harm, as with repeat offenders, organized crime, and terrorists. Otherwise, imprisonment should perhaps be restricted to those situations when other sanctions cannot even approximately repair the harm (e.g., murder or manslaughter), or are otherwise disproportionate to the gravity of the offenses (e.g., crimes against humanity or genocide).

International approximations or equivalents to civil rights may also be appropriate for developing countries, as the present deliberative forms of decision making in international fora empower rich countries with, for example, in Ian Shapiro’s words, a veto against just compensation for their role in global warming simply “by virtue of the decision-making procedure.” As mentioned previously, “several rich countries,” including the United States and others, in March 2014 refused to accept the World Bank’s $100 billion annual estimate for offsetting the negative effects from

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2225 Shapiro, *State of Democratic Theory*, supra chap. 4, n. 592, at 44
climate change on poor countries who “had virtually nothing to do with causing global warming” compared with rich countries, but who “will be high on the list of victims as climatic disruptions intensify.”\textsuperscript{2226} Such underlying democratic problems, where there exist an arguably unjust requirement of making compromises to reach consensus among unequally situated groups—that is, those who dominate and those who are subordinated—are similar to the politics of legal challenges to pornography and gender-based violence studied here. Both problems amount to complex and intractable challenges to social dominance that face strong “vested interests” or “problematic existing norms” that reproduce harmful practices at the systematic expense of those harmed.\textsuperscript{2227} Such “vested” groups—rich countries, pornographers, and pornography consumers, respectively—are unwilling to change their “norms” that demonstrably contribute to indefensible injustice, including gender-based violence and humanitarian disasters, in spite of overwhelming evidence of their complicity in causing these injuries for their own benefit and profit. Not coincidentally, retiring NASA climate scientist James E. Hansen, now participating in lawsuits against the federal government among others, has during his career “repeatedly called for trying the most vociferous climate-change deniers for ‘crimes against humanity.’”\textsuperscript{2228} Indeed, when considering how their apparent reckless disregard for disinformation may impact on humanity, the idea to hold the most vociferous and influential climate-change deniers accountable is not entirely unprecedented. For instance, Julius Streicher, an infamous publisher of the well-circulated anti-Semitic publication \textit{Der Stürmer} (1923–1945), who in his “speeches and articles, week after week, month after month . . . infected the German mind with the virus of anti-Semitism and incited the German people to active persecution” by spreading lies, bigotry, and hatred, was accordingly convicted for Crimes Against Humanity and sentenced to death by hanging.\textsuperscript{2229}

Certainly many of us, confronted with undeserved privilege, might react by contesting the facts and denying any responsibility, just as deniers of the harms of pornography, global warming, or the Holocaust have done, at least initially. Yet for any such complex challenges to be addressed with sustainable and lasting impact, it is necessary for the public, decision-makers, and courts to face the facts squarely and in a more enlightened way. Indeed, we pride ourselves by distinguishing contemporary civilizations from times when western public authorities persisted in believing, or at least in spreading the patently false myths that Earth was flat and positioned at the center of the universe. However, considering the harms of pornography and climate change, and the actions necessary to tackle them, this distinction between present enlightenment and past credulity may be more exaggerated than we want to believe.

Global warming as a contemporary problem also has dimensions related to social dominance and multiply disadvantaged groups that will necessitate serious legal challenge in the future. Climate change is likely to affect populations asymmetrically and unequally across the globe. Developing nations have demanded compensation, particularly from the early industrializers to offset negative effects of global

\textsuperscript{2226} See, e.g., Gillis, “Panel’s Warning on Climate,” \textit{supra} p. 12 n.42, at A1
\textsuperscript{2227} Cf. Raymond et al., “Institutional Change to Address Intractable Problems,” \textit{supra} p. 12 n.41, at 197–211 (analyzing challenges to climate change and violence against women).
\textsuperscript{2228} Justin Gillis, “Climate Maverick to Quit NASA,” \textit{New York Times}, April 2, 2013, D1 (Westlaw). Hansen had also reportedly already taken vacation time from his work at NASA during later years to participate at climate protests and “allowing himself to be arrested or cited a half-dozen times.” Ibid.
warming that they caused while benefiting from cheap natural resources and laissez faire regulations of the emitters of so-called greenhouse gases. Need for such restitution is especially acute in the face of the tremendous sacrifices that may be needed by world populations to reverse as well as to protect themselves from the effects of global warming caused primarily by the early industrializers. Indeed, even the Pentagon, perhaps not known for being a vanguard in climate politics, reportedly concludes that the effects from global warming include “increased risks from terrorism, infectious disease, global poverty and food shortages,” as well as “rising demand for military disaster responses as extreme weather creates more global humanitarian crises.” Yet political representatives of nations who are in an economically, politically, and military superior position frequently seem more interested in contesting the extent to which their actions have contributed to developing countries’ vulnerability to climate-induced harms, producing few legal commitments for change in the future, far less in compensation for the past.

Presently the issues of global warming, as with issues of pornography, are governed by a detached deliberative politics of “consensus,” largely dominated by dominant groups and nations, taking place far from those most adversely affected. So far, the politics of deliberation and consensus has yielded little substance, as those contesting substantive legal challenges to pornography, be it pornographers and their consumers or governments and courts, often refuse to acknowledge that their resistance is based more on ideological than legal grounds. It will be recalled that numerous legal routes for challenging pornography much more efficiently have existed—none of which required constitutional amendments or complex doctrinal changes. In Sweden, the procuring laws could have been applied to pornography production. In the United States, a compelling governmental interest of pursuing gender nondiscrimination could be invoked to sustain the civil rights antipornography ordinance, which could be passed again at any time; or the latter’s definition of pornography could be regarded as a new unprotected expressive category, just as group libel was made one in 1952. Alternatively, intermediary scrutiny could have been applied, as the ordinances’ incidental restrictions on expressive freedoms were proportional to the interest of countering sex discrimination, and any “viewpoints” expressed were not the target of regulation—only the actual social practice of subordination were. Even in Canada, despite that no one appears to have proposed it squarely, the community standard of tolerance test could easily be abandoned wholesale by the courts, in favor of the more factually accurate dehumanization test.

And a civil law for pornography’s harms patterned on the civil rights ordinances would undoubtedly be constitutional as an equality-promoting remedy.

As shown in this dissertation, when the affected groups’ perspectives and interests are not systemically taken into account, the outcome invariably leads to useless obscenity laws, or inefficient legislation that either does not pass the legislature, or becomes invalidated on misinformed ideological grounds by courts. What exists, then, is a limited and ineffective state-initiated regulative regime, which includes criminal laws that are barely enforced; and when enforced, typically the most ex-

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Conclusions

Extreme cases are prosecuted that should be very difficult to lose—and losing them they nonetheless frequently do. In this sense, and certainly in this instance, state-driven legal approaches to challenging social dominance that ignore multiply disadvantaged groups are bound to be incomplete and inefficient. Taking this insight to the context of global warming, one may note that organizations such as the Pentagon and the World Bank—certainly laudable in their concern for the harmful effects of climate change—are not formally representing the most vulnerable and multiply disadvantaged populations. At least not for now. Rather, they represent an aggregate of various national or global interests, channeled through deliberative procedures within the federal or international governing bodies respectively that, not unlike the underlying dynamics of criminal obscenity laws and “contemporary community standards of tolerance,” strive for “consensus” and “compromise” among the already empowered. That is, these two organizations do not have the social consciousness, nor the perspectives or interests of those most adversely affected, to generate the most useful knowledge on how to make sustainable policy that supports such groups. And true to form, so far no serious positive steps have been taken in reality. But perhaps due to the lack of alternative remedies, these organizations have taken an enlightening position on global warming in highlighting the compelling challenges that lie ahead. Perhaps the reason is that climate change affects them, too. Nonetheless, to actually address those compelling concerns, a more empowering civil rights-focused legal challenge would appear needed.

Just as it is imperative to grant more power in climate negotiations to developing countries to offset the damage caused by richer countries—preferably laid down in international law rather than granted by the whims of temporary compromises and consensus-making—this dissertation shows that we need to accede real, substantial, and effective legal power to members of those groups most affected if the harms of pornography are to be addressed. This finding relies on empirical evidence of legal challenges in three diverse democracies—evidence further corroborated by other research on social movements fighting gender-based violence, as well as numerous distinguished political theories. It is the single most consistent implication of the dissertation that intractable problems of inequality of power, such as pornography and global warming, can only be suitably and sustainably countered by having the perspectives and interests of those most immediately affected at the law’s center. In the case of pornography, these are the same groups who historically have been largely excluded from law-making, including in democracies.

With regard to contemporary problems of prostitution and pornography, survivor-led social movements in the form of numerous nongovernmental organizations that are legitimate already exist; here, a public partnership seems appropriate (cf. 83–86 above). Moreover, the legal design of the civil rights antipornography approach is consistent with the empowerment of such organizations, as those groups could act as representatives and support to individuals who would otherwise face obstacles when attempting to enforce legal rights on their own. Indeed, the Canadian “Court Challenges Program” that supported interventions by disadvantaged groups in constitutional litigation in the early days of the 1982 Charter of Rights and Freedoms, though being a relatively primitive and rudimentary measure, nonetheless appears to have provided tangible results. Its underlying rationales of substantive equality and

representation of disadvantaged perspectives and interests were the same as those of the civil rights antipornography ordinances. The exploitation, abuse, and harm caused to disadvantaged groups in pornography production, and the sexual aggression, gender-based violence and bigoted attitudes pornography promotes in society, are compelling causes of democratic concern. Nothing short of recognizing this reality for what it is, while rethinking democracy’s mechanisms for representation and accountability and providing effective civil rights to the groups harmed, will change it.
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