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Appraising the Impact of *Toward a Feminist Theory of the State*: Consciousness-Raising, Hierarchy Theory, and Substantive Equality Laws

Max Waltman[†]

Introduction

As an undergraduate in the early 2000s, reading *Toward a Feminist Theory of the State*¹ for the first time, its visionary analysis and blueprint for changing the status quo made a profound impression. The approach was problem-driven,² presenting empirically grounded theories that could actually be put into practice in policy and law, in contrast to much social theory popular at the time. Thus, *Toward a Feminist Theory of the State* became formative for me in showing how consciousness-raising of subordinated groups could be merged with critically informed scholarship and transform the world. As a comprehensive political theory of the relationship between male dominance and the state, one of the book's central features was to draw from consciousness-raising as a feminist research method to further ground its approach to equality, particularly in its prescription for substantive equality laws. This Article will illustrate how such central concepts have influenced real changes

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1. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) [hereinafter TFTS].

2. As Ian Shapiro describes, a problem-driven political science “start[s] with a problem in the world,” as opposed to analyzing a problem “in ways that are . . . mere artifacts of the theories and methods that are deployed to study it.” Ian Shapiro, *Problems, Methods, and Theories in the Study of Politics, or What’s Wrong with Political Science and What to Do About It*, 30 *POL. THEORY* 596, 598 (2002).

in the world, specifically using legal challenges to pornography and prostitution as examples.

Parts I and II will demonstrate how *Toward a Feminist Theory of the State* departed from conventional epistemologies, in part explaining its revolutionary appeal to students, practitioners, and scholars. Part III continues the analysis by using real world applications of its approach to pornography and prostitution, beginning with the anti-pornography civil rights ordinances drafted by Catharine A. MacKinnon and writer Andrea Dworkin in 1983, six years before the publication of *Toward a Feminist Theory of the State*. Part III illustrates how the ordinances mobilized MacKinnon's same cutting-edge approach to advancing women's legal substantive equality about which she later theorized. A similar approach was instrumental in grounding a substantive equality prostitution law, proposed by MacKinnon in a public speech in Stockholm, Sweden, November 2, 1990, situating that law within her broader approach to equality.³ The Swedish national umbrella organization for women's shelters, ROKS, lobbied for the law and rallied other actors to support it,⁴ precipitating its passing in Parliament in 1998, with the law taking effect in 1999.⁵ Similar laws have now been adopted by many more countries, attesting to MacKinnon's extraordinary influence as a legal and social theorist,⁶ but not until ten years or

3. MacKinnon's speech was translated into Swedish. See Catharine A. MacKinnon, *Pornografi och jämställdhet [Pornography and Gender Equality]*, in *PORNOGRAFI: VERKLIGHET ELLER FANTASI? [PORNOGRAPHY: REALITY OR FANTASY?]* 58 (Amanda Golert & Pia Laskar trans., 1991). For an edited English version, see CATHARINE A. MACKINNON, *On Sex and Violence: Introducing the Antipornography Civil Rights Law in Sweden*, in *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* 91 (2006) [hereinafter MACKINNON, *Law in Sweden*]. More obscure attempts occurred during the 1980s to introduce a similar law, though none gained any traction until MacKinnon's speech in November 1990. Max Waltman, *Prohibiting Sex Purchasing and Ending Trafficking: The Swedish Prostitution Law*, 33 *MICH. J. INT'L LAW* 133, 137 (2011) [hereinafter Waltman, *Ending Trafficking*].

4. See Yvonne Svanström, *Criminalizing the John—A Swedish Gender Model?*, in *THE POLITICS OF PROSTITUTION: WOMEN'S MOVEMENTS, DEMOCRATIC STATES AND THE GLOBALISATION OF SEX COMMERCE* 225, 236 (Joyce Outshoorn ed., 2004).

5. Proposition [Prop.] 1997/98:55 Kvinnofrid [government bill] (Swed.); Justitieutskottets betänkande [Bet.] 1997/98:JuU13 Kvinnofrid [parliamentary committee report] (Swed.).

6. For examples of laws modeled after Sweden's law that criminalize buyers of prostituted persons and decriminalize the latter, while supporting prostituted persons to exit prostitution, see *Almindelig borgerlig Straffelov (Straffeloven)* [General Civil Penal Code] ch. 19, § 202(a) (Nor.); *Protection of Communities and Exploited Persons Act*, S.C. 2014, c 25, § 20 (Can.) (consolidated at Criminal Code, R.S.C. 1985, c. C-46, § 286.1). Unlike Sweden's law, Canada's law still criminalizes

more after Sweden's law, making Sweden's unique data availability a "revelatory case."⁷ Part III will conclude by analyzing its comparative impact in terms of reducing sexual exploitation and abuse and offering an exit for people in prostitution, thus promoting substantive equality.

I. Consciousness-Raising and Critique of Objectification as Method

Toward a Feminist Theory of the State scrutinizes conventional epistemologies from the point of women's subordination. By contrast, the standard approach presumes neutrality, objectivity, and detachment of the scientific observer, and does not recognize that social power and point of view determine neutrality under the guise of objectivity, for instance, in influencing the observer's choice of research questions, theories, and data. Yet it was only when women came together in separate groups, engaging in consciousness-raising without being interrupted by men's disbelief, objections, or otherwise, that the reality of gender-based violence finally became a strong public policy concern: sexual harassment, domestic and child sexual abuse, rape, and many other previously hidden practices.⁸ The

prostituted persons who solicit in a public place "that is or is next to a school ground, playground or daycare centre," or who obstruct public traffic when soliciting. Protection of Communities and Exploited Person's Act, *supra*, cl. 15. See also Criminal Law (Sexual Offenses) Act, 2017 §§ 25–27 (Act No.2/2017) (Ireland) [<https://perma.cc/ELR5-XDT7>]; cf. Emma Batha, *Ireland Passes Law Making it a Crime To Buy Sex*, THOMSON REUTERS (Feb. 23, 2017), <http://www.reuters.com/article/us-idUSKBN1621UB>. See also Comm. on the Elimination of All Forms of Discrimination Against Women, Response to the Recommendations Contained in the Concluding Observations of the Committee Following the Examination of the Fifth and Sixth Periodic Reports of the State Party on 8 July 2008, U.N. Doc. CEDAW/C/ICE/CO/6/Add.1 (May 27, 2011) (describing Iceland's law); Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality, EUR. PARL. DOC.P7_TA (2014) 0162 (Feb. 26, 2014) (urging Member States to pass similar prostitution laws as Sweden); Chris Kilpatrick, *Stormont Bans Paying for Sex as Bulk of our MLAs Support Clause*, BELFAST TELEGRAPH (Oct. 21, 2014), <http://www.belfasttelegraph.co.uk/news/northern-ireland/stormont-bans-paying-for-sex-as-bulk-of-our-mlas-support-clause-30680156.html>; James McAuley, *France Declared War on Prostitution. Not on Prostitutes*, WASH. POST (Apr. 9, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/04/09/france-declared-war-on-prostitution-not-on-prostitutes/?utm_term=.b02aa38d51ff.

7. See ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS 52 (5th ed. 2014).

8. See Tfts, *supra* note 1, at 89–90 (discussing gender-based violence previously hidden not only from public view, but, in a sense, from women themselves, who, until early women-only consciousness groups, tended to experience those acts in isolation from the wider context of male dominance); Mala Htun & S. Laurel Weldon, *The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005*, 106 AM. POL.

fact that it took such efforts to effectively reveal these abusive situations necessarily puts the ideal of a point-of-viewless observer in doubt.

Following MacKinnon, consciousness-raising has been a method for generating knowledge “into an intrinsically social situation, into that mixture of thought and materiality which comprises gender in the broadest sense.”⁹ As members of a specific group that is particularly exposed to gender-based violence, women may be provided with such knowledge that is partly hidden to other groups.¹⁰ Yet this is not to say that the knowledge is hidden to the men who, for instance, contribute to gender-based violence and sexual exploitation. Rather, it is the knowledge of it as a *harm* that is hidden or ignored.¹¹

Women practicing consciousness-raising began to ask different questions than conventional male researchers did, such

SCI. REV. 548, 553 (2012) (finding that “strong, autonomous women’s movements were the first to articulate the issue of violence against women and were the key catalysts for government action,” and explaining that “[w]hen women come together to discuss their priorities as women, the problem of violence comes to the fore. This is why the issue of [violence against women] was first articulated by and diffused from women’s autonomous organizing.”) (internal citations omitted).

9. TFTS, *supra* note 1, at 83.

10. Cf. Htun & Weldon, *supra* note 8, at 553 (describing “oppositional consciousness” of knowledge in women’s organizations reflecting their distinct priorities, as opposed to being subordinated to other “imperatives” in more general settings). This is not to say that women as a group do not also harbor other internally conflicting social interests on racial, economic, ethnic, age, or other grounds. As MacKinnon observes, “[a]ll women possess ethnic (and other definitive) particularities that mark their femaleness; at the same time their femaleness marks their particularities and constitutes one.” TFTS, *supra* note 1, at xii.

11. For instance, in a study of 110 men who buy prostituted women for sex (“johns”) in Scotland, 50% acknowledged that prostituted persons “are victimized by pimps,” “73% noted that women prostitute strictly out of economic necessity, and 85% acknowledged that women did not enjoy the sex of prostitution.” Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, 3 PSYCHOL. TRAUMA: THEORY, RES., PRACTICE, & POL’Y 369, 372–73, 376 (2011) [hereinafter Farley et al., *Scotland*]. In Boston, Massachusetts, two-thirds of 101 johns who were surveyed observed that “a majority of women are lured, tricked, or trafficked into prostitution.” Melissa Farley et al., *Comparing Sex Buyers with Men Who Do Not Buy Sex: New Data on Prostitution and Trafficking*, J. INTERPERSONAL VIOLENCE 1, 16 (Pre-Print, Aug. 31, 2015), <http://prostitutionresearch.com/wp-content/uploads/2015/09/Comparing-Sex-Buyers-With-Men-Who-Do-Not-Buy-Sex.pdf>. Similar responses came from 113 johns in Chicago, Illinois: 57% admitted they believed the majority of prostituted persons had experienced childhood sexual abuse. RACHEL DURCHSLAG & SAMIR GOSWAMI, CHI. ALL. AGAINST SEXUAL EXPLOITATION, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX 20 (2008), <http://www.slaverynomore.org/wp-content/uploads/2011/07/Deconstructing-the-Demand-for-Prostitution.pdf>.

as: what role does pornography have in women's subordination?; how is abortion linked to women's position of vulnerability and inequality to men?; why does the law favor the rapist's state of mind—that is, what he thinks he is doing—over how his victim is harmed by his behavior? Almost no one else asked such questions before feminists started asking them. Accordingly, the conventional view called pornography either obscene and not for public view, or celebrated it as sexual liberation; rarely was it called exploitation of vulnerable women, inspiration to rape, and a cause of systemic gender discrimination.¹² Similarly, abortion was framed either as women's private choice, or as an irresponsible act of feticide; conservatives did not call it an outcome of unequal conditions making women lose control of access to their bodies; and the left did not recognize how use of contraceptives (or abortion) could stigmatize women as sexually available, thus targeting them for rape.¹³ And originally, of course, rape was perceived as a crime only if another man was offended.

Toward a Feminist Theory of the State elegantly demonstrated how many of those perspectives that purported to be neutral and objective in existing law and policy were, in fact, viewpoints from the position of dominance in a system, whether left- or right-wing, that subordinated women. This dominance, masquerading as neutrality in law and purporting objectivity in scholarship, is what MacKinnon often refers to as objectification as scientific method.

If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or ungendered perspective. . . . In this context, objectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it

12. For a discussion of this tension, see MacKinnon's critique of pornography, morality, and politics. TFTS, *supra* note 1, at 195–214. For a more detailed critique of obscenity law from the perspective of feminist anti-pornography analysis, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 146–62 (1987).

13. See TFTS, *supra* note 1, at 184–85 (“Abortion's proponents and opponents share a tacit assumption that women significantly control sex. Feminist investigations suggest otherwise. Sexual intercourse . . . cannot simply be presumed coequally determined The more intimate one is with one's accused rapist, the less likely a court is to find that what happened was rape Under these conditions, women often do not use birth control because of its social meaning, a meaning women did not create. Using contraception means acknowledging and planning the possibility of intercourse, accepting one's sexual availability, and appearing nonspontaneous.”).

apprehends by defining as knowledge the reality it creates through its way of apprehending it.¹⁴

Drawing on the consequences of her critique of objectification as method and male dominance in scholarship, and from consciousness-raising and the new empirical research it stimulated, MacKinnon also illuminated how the social construction of sexuality is inseparable from male dominance:

In feminist terms, the fact that male power has power means that the interests of male sexuality construct what sexuality as such means, including the standard way it is allowed and recognized to be felt and expressed and experienced, in a way that determines women's biographies, including sexual ones. Existing theories, until they grasp this, will not only misattribute what they call female sexuality to women as such, as if it were not imposed on women daily; they will also participate in enforcing the hegemony of the social construct "desire," hence its product, "sexuality," hence its construct "woman," on the world.¹⁵

In contrast to existing theories, a feminist theory had to account for how sexuality is constructed "in its experienced empirical existence, not just in the texts of history (as Foucault does), in the social psyche (as Lacan does), or in language (as Derrida does)."¹⁶ Committing to this paradigm meant accounting for a large body of empirical research on gender-based violence and its determinants that had emerged clearly by that time—footnoted, for example, in *Toward a Feminist Theory of the State's* chapters on sexuality, rape, and pornography laws¹⁷—much of which would never have been done without feminists taking women seriously and asking the questions.

For instance, a study of 930 randomly selected adult females in San Francisco, published seven years before *Toward a Feminist Theory of the State*, found that 44% of respondents reported rape or attempted rape according to contemporaneous legal standards at least once in their lives, with half of them reporting it more than once.¹⁸ In another study published in 1987 with over 3,000 respondents in a weighted sample of American 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

14. *Id.* at 114.

15. *Id.* at 129.

16. *Id.*

17. *Id.* at chs. 6, 9, & 11.

18. Diana E. H. Russell, *The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females*, 7 VICTIMOLOGY: AN INT'L J. 81, 84, 91 (1982).

reported by 15.4% and attempted rape by 12.1% of respondents.¹⁹ Studies such as these and many others—including studies on the exploitative and abusive production of pornography, and its effect on consumers' likelihood to sexually aggress—led MacKinnon to conclude that the sexuality available for women is largely imposed on them through a system of dominance and terror. MacKinnon wrote:

Given the effects of learning sexuality through force or pressure or imposition; given the constant roulette of sexual violence; given the daily sexualization of every aspect of a woman's presence—for a woman to be sexualized means constant humiliation or threat of it, being invisible as human being and center stage as sex object, low pay, and being a target for assault or being assaulted. Given that this is the situation of all women, that one never knows for sure that one is not next on the list of victims until the moment one dies (and then, who knows?), it does not seem exaggerated to say that women are sexual, meaning that women exist, in a context of terror.²⁰

Considering the context of intimidation and fear MacKinnon describes, it is not surprising that a study published in 1991 reported that virtually all American women worried about being raped—two-thirds consciously, and the remaining unconsciously but nonetheless visible through their sometimes elaborately cautious behavior.²¹ The fact that gender-based violence or the fear of such violence is so prevalent in women's lives is part of what underlies the first sentence in *Toward a Feminist Theory of the State*: “Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away.”²²

II. Hierarchy Theory and Substantive Equality Laws

In order to rectify women's subordination to men—from unequal pay to sexual violence and terror—MacKinnon faced the reality of her social diagnosis and invented an approach to substantive equality in law that she refers to as a theory of “hierarchy.”²³ Under it, a law is an equality law only if it promotes

19. Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 166, 167 tbl.3, 169 tbl.4 (1987).

20. TFTS, *supra* note 1, at 150–51.

21. MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE* 21 (1991).

22. TFTS, *supra* note 1, at 3.

23. See Catharine A. MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman*, 14 INT'L J. CONST. LAW 739, 740 (2016) (arguing that “[s]ocial hierarchy” is the “identifying principle” of substantive equality law); *cf. id.* at 740–

substantive equality, hence contributes to non-hierarchy in social, economic, political, and other tangible terms (as distinguished from formal equality).²⁴ Hierarchy theory is a shift from standard equality laws that, as demonstrated by MacKinnon, follow Aristotle's principle of treating likes alike and unlikes unlike—an approach that does not promote substantive equality.²⁵

As MacKinnon explained, when a woman claims sex discrimination under the Aristotelian approach, in order to assess whether equality has been violated, the law looks for a “similarly situated” person to compare with, typically based on a male (often white) standard.²⁶ Yet this means looking for persons who are not

41 (arguing that concepts such as disadvantage, equal opportunity, stereotyping, difference, or dignity do not support substantive equality without “a pre-existing grounded hierarchy test,” since by themselves they do not identify social hierarchy such as white supremacy, male dominance, or homophobia).

24. This analysis is most clearly spelled out in *Toward a Feminist Theory of the State's* last two chapters. TFTS, *supra* note 1, at 215–49, chs. 12 & 13. The same labels were not used then, but the concepts are there, occasionally with similar wording. *Id.* MacKinnon has also championed the Canadian constitutional framework as an improvement by its promotion of substantive equality compared to the lack thereof in U.S. equality law. Compare CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 54–57 (2005) [hereinafter WOMEN'S LIVES] (discussing Canada's approach) with Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011) (discussing the U.S. approach). More recently in Canada, their approach to equality is explicitly referred to as “substantive equality” in case law opinions. See, e.g., *Withler v. Canada* (Att'y Gen.), [2011] 1 S.C.R. 396, 397 (Can.) (“An analysis based on formal comparison between the claimant group and a ‘similarly situated’ group promotes formal, not substantive equality.”); *Alberta (Aboriginal Affairs & N. Dev.) v. Cunningham*, [2011] 2 S.C.R. 670, 690 (Can.) (explaining that the Canadian Charter's equality guarantee's “goal is to enhance substantive equality” in two ways: first by §15(1), which is “preventing discrimination on grounds such as race, age and sex”; second, by §15(2), which is “permitting governments to improve the situation of members of disadvantaged groups that have suffered discrimination in the past . . . affirming the validity of ameliorative programs that target particular disadvantaged groups, which might otherwise run afoul of 15(1) by excluding other groups”) (emphasis in original); *R. v. Kapp*, [2008] 2 S.C.R. 483, 501 (Can.) (saving a law granting aboriginal bands particular fishing rights against challenges by commercial fishers claiming race-based discrimination, noting that “[s]ubstantive equality, as contrasted with formal equality . . . does not necessarily mean identical treatment and . . . the formal ‘like treatment’ model of discrimination may in fact produce inequality”) (internal citations omitted).

25. See TFTS, *supra* note 1, at 215–34; CATHARINE A. MACKINNON, SEX EQUALITY 5–13 (3rd ed. 2016) [hereinafter SEX EQUALITY]; WOMEN'S LIVES, *supra* note 24, at 44–54.

26. WOMEN'S LIVES, *supra* note 24, at 53 (arguing that the Aristotelian method of treating likes alike/similarly, unlikes unlike/differently entails the “embedding of hierarchy in relations that do not attract equality scrutiny,” with a “predictable” outcome when “applied in legal systems. Sex equality for the ‘similarly situated’ best provides equality for whoever is ‘the same as men.’ Actually, these people have been men: white men have brought most of the leading [U.S.] Supreme Court sex discrimination cases. Next in line are women whose biographies most closely

women situated similarly in the social hierarchy, such as having a similar job with similar qualifications and pay, which itself often may not exist due to sex discrimination that, *inter alia*, includes: a gender-segregated job market where “employers see the worth of predominantly female jobs through biased lenses” and pay lower wages than for men’s comparable work;²⁷ includes more part-time work and uncompensated house work for women than for men;²⁸ and includes numerous other factors contributing to women’s subordination.²⁹ If women are deemed not similar in such respects, but “different” from the male standard, under the Aristotelian approach they could either be left in the subordinated situations they are in without remedy, or their situations could warrant unlike treatment, which may include worse treatment.³⁰

The Aristotelian equality approach revolves around the concept of sameness and difference, where sameness with the dominant group’s standard entitles compensatory relief for discrimination, while perceived difference—which mostly provides disadvantages and very few, usually questionable, benefits for women—does not.³¹ MacKinnon criticized this framework for

approximate those men, elite women with privileges (white skin, money, education, and so on.)” (internal citation omitted).

27. Paula England, *The Gender Revolution: Uneven and Stalled*, 24 GENDER & SOC’Y 149, 153–54 (2010); *cf.* Asaf Levanon et al., *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950–2000 U.S. Census Data*, 88 SOC. FORCES 865, 865 (2009) (finding substantial evidence, when using longitudinal data controlling for education and skill/experience, that “[o]ccupations with a higher percent female generally pay less than those with a lower percentage”).

28. *See, e.g., Balancing Paid Work, Unpaid Work and Leisure: [Fig.2] Time Spent in Unpaid Work and Leisure*, OECD (Mar. 7, 2014), <http://www.oecd.org/gender/data/balancingpaidworkunpaidworkandleisure.htm> (comparing time spent on unpaid work or leisure for men and women in ten countries).

29. *See, e.g., SEX EQUALITY*, *supra* note 25, at 171–82 (citing studies and data on the economic realities for women, including accounting for racial and other multiple disadvantageous factors).

30. *Cf. WOMEN’S LIVES*, *supra* note 24, at 49 (concluding an analysis of historical examples by noting that Aristotle’s equality concepts of alike/sameness and unlike/difference have been squared to fit various legal standards, from the “Nazi’s ‘special treatment,’ a euphemism for extermination, to arguments that women’s weakness and incapacity require ‘special protection’”); *id.* at 50 (concluding that “[i]f ‘same treatment’ for sameness has offered an illusory equality, ‘different treatment’ for differences has been demeaning and dangerous, at times catastrophically so”).

31. At best, the difference standard may, for example, permit protections sustaining empowering women-only colleges and similar institutions, but it may also produce worse outcomes. *See* TFTS, *supra* note 1, at 225–26 (discussing how perceptions of women’s “different” rapability precluded equal employment opportunities, and contrasting the effects of these views with the idea that considering rape non-inevitable and addressing it effectively might eliminate sex discrimination at work); *cf. supra* note 30 and accompanying text.

“considering gender a matter of sameness and difference,” while covering “up the reality of gender as a system of social hierarchy, as an inequality”:³²

Differences are inequality’s post hoc excuse, its conclusory artifact, its outcome presented as its origin, its sentimentalization, its damage that is pointed to as the justification for doing the damage after the damage has been done, the distinctions that perception is socially organized to notice because inequality gives them consequences for social power.³³

MacKinnon’s critique illustrates why the legal outcomes of standard equality laws tend to mirror society’s existing social hierarchies, providing remedy only to those exceptional individuals who “but for” some presumed arbitrary factor would have been “similarly situated” to the dominant social group that sets the standard. Standard equality laws put the onus on women alleging sex discrimination to prove their exception, to convince the skeptics as to why they in particular deserve a “man’s share” when few other women do—this in a world where women are otherwise structurally subordinated to men economically,³⁴ politically,³⁵ and culturally.³⁶ In spite of manifest inequalities, MacKinnon wrote, it is assumed “that equality generally exists,

32. TFTS, *supra* note 1, at 218.

33. *Id.* at 218–19.

34. Among full-time wage and salary workers, women’s *median* “usual weekly earnings” have since 2004 been between 80% and 83% of men’s. U.S. BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN’S EARNINGS IN 2015 1–2 & chart 1, 9 tbl.1 (2016), <https://www.bls.gov/opub/reports/womens-earnings/2015/pdf/home.pdf>. On a global level, the *average* gender difference in 2006 was estimated at 27.5% in Canada, 22.4% in the United States (in 2007), 22% in Germany, 16% in Sweden, and 11% in France. CATHERINE CHUBB ET AL., INT’L TRADE UNION CONFEDERATION, THE GLOBAL GENDER PAY GAP 21–22 (2008), http://www.wageindicator.org/documents/publicationslist/publications_2008/gap-1.pdf.

35. Women comprise only 23.33% of parliamentarians in the world. *Parliamentarians at a Glance: Women Parliamentarians*, INTER-PARLIAMENTARY UNION, www.ipu.org/parline-e/WomenInParliament.asp?REGION=All&typesearch=1&LANG=ENG (last visited May 18, 2017). U.S. female legislators amount to 19.3% of the Representatives and 21% of the Senators. *Women in National Parliaments*, INTER-PARLIAMENTARY UNION (Mar. 2017), <http://www.ipu.org/wmn-e/classif.htm>.

36. For instance, women made up just 9% of directors of American “top 250 domestic grossing films of 2012,” the male-female ratio of directors was 4 to 1 among 3,100 prime-time television episodes under review, women’s representation in newspaper newsrooms was exactly the same in 2012 as in 1999—i.e., 36.9% women, 63.1% men—and women were otherwise systematically underrepresented as well as commonly segregated into stereotypical roles in the media. Diana Mitsu Klos, *The Status of Women in the U.S. Media 2013*, WOMEN’S MEDIA CTR. 5–6, 10 (2013), http://wmc.3cdn.net/51113ed5df3e0d0b79_zzzm6go0b.pdf.

and that each challenged instance is an exception, mak[ing] it almost impossible to produce equality by law.”³⁷

The sameness/difference approach fails to promote equality in situations where women are most subordinated to men; for example, in prostitution where a majority of women are poor and have no other option for survival,³⁸ in female-dominated occupations where women are underpaid compared to male-dominated occupations,³⁹ or during child custody decisions when income levels, or seeming identification with sexual abusers or batterers, are decisive.⁴⁰ It disguises such social hierarchy and discrimination as “difference,” so that these situations are not seen as sex discrimination. This locates the injury outside the bounds of equality law despite, as MacKinnon demonstrated, the fact that people “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.”⁴¹ To address these crucial obstacles to women’s equality, *Toward a Feminist Theory of the State* identified a range of linchpin social practices that a feminist hierarchy theory and jurisprudence of substantive equality laws must confront, one of which was pornography.⁴² MacKinnon showed how pornography molds the social construction of sexuality and its association to gender-based violence and sexual exploitation (more below). As discussed above, the social construction of sexuality was identified as intrinsically related to women’s subordination to men,⁴³ thus warranting new substantive equality laws challenging practices such as pornography and prostitution, given the empirical evidence of their harm.

III. Substantive Equality in Legal Challenges to Pornography and Prostitution

In 1983, Catharine A. MacKinnon and Andrea Dworkin drafted anti-pornography civil rights ordinances in response to a crisis in Minneapolis, Minnesota. Residents in the Central and

37. TFTS, *supra* note 1, at 231.

38. *See infra* notes 86–88 and accompanying text.

39. *See supra* note 27 and accompanying text.

40. *See* Joan S. Meier & Sean Dickson, *Mapping Gender: Shedding Empirical Light on Family Courts’ Treatment of Cases Involving Abuse and Alienation*, 35 LAW & INEQ. 311 (2017).

41. TFTS, *supra* note 1, at 233–34 (emphasis in original).

42. *Id.* at 195.

43. *Id.* at 150–51.

Powderhorn Park neighborhoods—at that time poor, working class areas, largely comprised of people of color—were disproportionately exposed to pornography theatres and stores, contributing, among other harms, to the sexual harassment of women and children by men from all over the greater Minneapolis area.⁴⁴ Extensive public hearings were held; neighborhood activists, community organizers from women's shelters, rape crisis centers, and other neighborhood groups, social workers, other authorities, and individual survivors of pornography production, and, of gender-based violence, and other harms related to its consumption testified in support of the ordinance.⁴⁵ Opposition was also heard throughout the hearings.⁴⁶

The first ordinance was passed by the Minneapolis City Council on December 30, 1983, but Mayor Donald Fraser, who did not attend the hearings, vetoed it on January 5, 1984.⁴⁷ An identical ordinance was passed a second time on July 13, 1984 and also vetoed by Mayor Fraser.⁴⁸ Similar ordinances were then passed by the Indianapolis City Council in 1984 and by referendum in Bellingham, Washington, in 1988, but both laws were invalidated by federal courts.⁴⁹ Some elements of the

44. Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 614 (1987); Brief for the Neighborhood Pornography Task Force as Amicus Curiae Supporting Appellant, *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *reprinted in* IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 321, 322–23 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM'S WAY]; *cf.* Alicia M. Turner, *Feminist Resistance: An Oral History of the Dworkin-MacKinnon Anti-Pornography Civil Rights Ordinance* 26 (Winter 1997) (unpublished B.A. thesis, Kalamazoo College) (on file with Kalamazoo College), <https://cache.kzoo.edu/handle/10920/29011> (describing locally organized meetings in Minneapolis precipitating the ordinances' drafting, including testimonies of "concerns of sexual harassment and rape in conjunction with the pornography stores").

45. Brest & Vandenberg, *supra* note 44, at 620. For a complete transcript of the Minneapolis hearing, *see* IN HARM'S WAY, *supra* note 44, at 39–268.

46. *See* IN HARM'S WAY, *supra* note 44, at 39–268.

47. Brest & Vandenberg, *supra* note 44, at 644; Proposed Ordinance § 1, to amend MINNEAPOLIS, MINN. CODE OF ORDINANCES §§ 139.10–141.60, 1st Reading (Nov. 23, 1983) [hereinafter Proposed Minneapolis Ordinance (1983)], *reprinted in* IN HARM'S WAY, *supra* note 44, at 426–32.

48. *See* Brest & Vandenberg, *supra* note 44, at 653.

49. INDIANAPOLIS, IND. CODE ch. 16 § 16-3(q) (1984) [hereinafter INDIANAPOLIS CODE (1984)], *invalidated by* *Am. Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *reprinted in* IN HARM'S WAY, *supra* note 44, at 438–57; Margaret A. Baldwin, *Pornography and the Traffic in Women: Brief on Behalf of Trudee Able-Peterson, et al., Amici Curiae in Support of Defendant and Intervenor-Defendants, Village Books v. City of Bellingham*, 1 YALE J. L. & FEMINISM 111, 112 (1989) (reporting that sixty-two percent of voters in Bellingham, Wash., approved the ordinance in the city's referendum); ANDREA DWORKIN, *LIFE AND DEATH* 92 (1997);

proposed ordinance have later been adopted under other laws regulating sexual harassment and child pornography, either through judicial interpretation or by legislation.⁵⁰ However, the complete ordinances offer a much more effective challenge. The updated empirical evidence describing the associations between pornography, sexual exploitation, and gender-based violence warrants their reconsideration even further.

The Swedish prostitution law was passed in 1998, took effect in 1999, and criminalizes the persons buying prostituted persons for sexual use, so far largely with fines, though imprisonment could technically be used.⁵¹ The persons who are bought are not criminalized, but third-party profiteers and enablers are.⁵² Under the new law, the government can more effectively support persons to escape prostitution while these people simultaneously seemed to have acquired a bargaining advantage toward the purchasers, who are the only ones vulnerable to criminal charges.⁵³ As shown below, both the ordinance and the prostitution law applied the substantive equality principles advanced in *Toward a Feminist Theory of the State*.

a. Supply, Demand, and Consumption

Already in the 1980s, research showed how consumers quickly become desensitized and demand more extreme pornography to be aroused—a process documented in

Turner, *supra* note 44, at 136. The Bellingham ordinance was invalidated in 1989 by a federal district court, which cited the Seventh Circuit's (another circuit's) appellate opinion from 1985. *Village Books v. City of Bellingham*, No. C88-1470D (W.D. Wash. Feb. 9, 1989) (unreported), http://mediacoalition.org/files/Village_Books_Bellingham_DistrictCourt_opinion.pdf. This district court also cited the Supreme Court *summary affirmance* of the circuit opinion. *Id.* See *Hudnut v. Am. Booksellers Ass'n*, 475 U.S. 1001 (1986) (6-3) (summary affirmance without opinion), *reh'g denied* 475 U.S. 1132 (1986). Summary affirmances on direct appeal, as here, have been made largely impermissible by federal legislation passed in 1988. See *SEX EQUALITY*, *supra* note 25, at 1757. Summary affirmance is in any event technically binding only within the specific circuit of the appeal. *Id.* at 1757 (citing ROBERT L. STERN ET AL., *SUPREME COURT PRACTICE* 215–21 (7th ed. 1993)). It is unclear what a summary affirmance is precedent for, not the least since no opinions or reasons are given. See *id.* at 1757.

50. See *infra* notes 127–128 & 134 and accompanying text.

51. See *Brottsbalken [BrB] [Penal Code] 6:11 (Swed.)*; *Statens Offentliga Utredningar [SOU] 2016:42 Ett starkt straffrättsligt skydd mot köp av sexuell tjänst och utnyttjande av barn genom köp av sexuell handling, m.m. [government report series] 22 (Swed.) [hereinafter SOU 2016:42]* (noting that despite a code penalty increase in 2011, it is still “very unusual” to receive another penalty than fines).

52. See *BrB 4:1a (human trafficking)*, 6:12 (procuring) (Swed.).

53. See *infra* notes 156–158 and accompanying text.

psychological experiments and reflected in naturalistic studies.⁵⁴ Therefore, it is not unexpected that in 2012, Natalie Purcell's content analysis of over 100 of the roughly 250 "most popular, best-selling, critically acclaimed, and influential hardcore pornographic movies of the past 40 years" found "arguably violent, abusive, and/or coercive encounters in nearly all."⁵⁵ Similarly, in Ana Bridges and associates' random sample of 50 of the 275 best-selling/most-rented U.S. pornography films from December 2004 to June 2005, 88.2% among 304 scenes showed physical aggression and 48.7% showed verbal aggression, both with overwhelmingly female targets.⁵⁶ Furthermore, 41% of scenes also contained so-called "ass-to-mouth" (ATM), that is, a woman performing oral sex on a man right after he penetrated a woman anally.⁵⁷ Purcell found "nearly every" popular movie in her 2000s sample featured

54. For example, two weeks after a six-week exposure period to common non-violent pornography, exposed nonstudent men spend over thirteen minutes compared to one minute and forty-two seconds for controls viewing pornography with violence or bestiality, nine seconds compared to over three minutes for controls viewing nonviolent pornography, and only thirteen seconds compared to over six minutes for controls viewing G-rated or R-rated materials. See Dolf Zillmann & Jennings Bryant, *Shifting Preferences in Pornography Consumption*, 13 COMM. RES. 560, 568–69, 575 (1986). These statistically significant findings are reflected in more recent naturalistic studies. See, e.g., Aline Wery & J. Billieux, *Online Sexual Activities: An Exploratory Study of Problematic and Non-Problematic Usage Patterns in a Sample of Men*, 56 COMP. HUM. BEHAV. 257, 259–60 (2016) (finding that among 434 adult men where 99% reported watching online pornography, 49% reported sometimes searching for sexual materials or being involved in online sexual activities they previously thought uninteresting or disgusting); cf. Bryan Y. Park et al., *Is Internet Pornography Causing Sexual Dysfunctions? A Review with Clinical Reports*, 6 BEHAV. SCI. 1, 12–14 (2016) (reviewing studies and clinical reports indicating pornography consumption increases demand for more novel and extreme materials).

55. NATALIE PURCELL, VIOLENCE AND THE PORNOGRAPHIC IMAGINARY: THE POLITICS OF SEX, GENDER, AND AGGRESSION IN HARDCORE PORNOGRAPHY 179–81 (2012).

56. Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 VIOLENCE AGAINST WOMEN 1065, 1075–76 (2008). In terms of proportion of scenes, most commonly occurring physical aggression were spanking (75.3%), gagging (53.9%), open hand slapping (41.1%), hair pulling (37.2%), and choking (27.6%), while verbal aggression most commonly entailed name calling such as "bitch" or "slut." *Id.* at 1075 & tbl.1. Only 9.9% of scenes showed "positive behaviors"—e.g., kisses, laughter, caresses. *Id.* at 1077.

57. *Id.* at 1072, 1074. Ass-to-mouth (ATM) scenes significantly predicted more aggression, being over eight times more likely than the average to contain physical aggression. *Id.* at 1077–79, tbls.3 & 4. Consumers seem to take much pleasure from the obvious degradation, revulsion, and feelings of disgust that women, according to fans' online comments, display in the films. GAIL DINES, *PORNLAND* 68–69 (2010). See also Rebecca Whisnant, *From Jekyll to Hyde: The Grooming of Male Pornography Consumers*, in *EVERYDAY PORNOGRAPHY* 114, 118–19 (Karen Boyle ed., 2010).

ATMs as well as “throat sex,” and many new movies with men penetrating women’s throats were “filled with gagging, retching, choking, gasping, and—less often—vomiting.”⁵⁸

An anonymous self-administered representative population survey done in 2014 estimated that 46% of American men and 16% of women age eighteen to thirty-nine use pornography any given week, and 56% of men and 26% of women any month.⁵⁹ Prior surveys often asked respondents to state the exact frequency devoted to pornography, raising suspicions of underreporting due to social desirability.⁶⁰ To avoid such “recall bias,” the 2014 survey only asked respondents when was the *last time* they “intentionally looked at pornography,” to which 14% among *the men* reported “today,” 13% “yesterday,” 14% “2–4 days ago,” and 5% “5–6 days ago.”⁶¹ These responses enabled calculations of weekly estimates. Attesting to their accuracy, several previous population-based surveys present fairly similar, if only slightly lower frequencies.⁶²

Studies also find that women more than men report that their pornography consumption was initiated by partners or acquaintances, and that men more often report consuming alone,⁶³ with indications of longer durations.⁶⁴ Although women are affected similarly to men in some respects,⁶⁵ because men’s

58. PURCELL, *supra* note 55, at 118, 135.

59. Mark Regnerus et al., *Documenting Pornography Use in America: A Comparative Analysis of Methodological Approaches*, 53 J. SEX RES. 873, 878 tbl.4 (2016).

60. *Id.* at 874, 878.

61. *Id.* at 878.

62. The authors of the 2014 survey calculated that weekly consumption rates based on another survey, the New Family Structures Study (NFSS), would lie between 27% and 40% for men and between 9% and 16% for women. *Id.* at 878 tbl.4. Other surveys report similar proportions, some higher and some lower depending on sample characteristics, countries, or methods. *See, e.g.*, Jason S. Carroll et al., *Generation XXX: Pornography Acceptance and Use Among Emerging Adults*, 23 J. ADOLESCENT RES. 6, 18 tbl.1 (2008); Gert Martin Hald, *Gender Differences in Pornography Consumption Among Young Heterosexual Danish Adults*, 35 ARCHIVES OF SEXUAL BEHAV. 577 (2006); Mohsen Janghorbani & Tai Hing Lam, The Youth Sexuality Study Task Force, *Sexual Media Use by Young Adults in Hong Kong: Prevalence and Associated Factors*, 32 ARCHIVES OF SEXUAL BEHAV. 545 (2003); Bente Træen et al., *Attitudes and Use of Pornography in the Norwegian Population 2002*, 41 J. SEX RES. 193 (2004); Carl-Göran Svedin & Ingrid Åkerman, *Ungdom och pornografi—hur pronografi i media används, upplevs och påverkar pojkar respektive flickor*, in KOLL PÅ PORR-SKILDA RÖSTER OM SEX, PORNOGRAFI, MEDIER OCH UNGA 87 (Ann Katrin Agebäck ed., 2006);

63. *See, e.g.*, Hald, *supra* note 62, at 582; Svedin & Åkerman, *supra* note 62, at 92.

64. *See* Hald, *supra* note 62, at 582 (reporting male consumers’ weekly average at 80.8 minutes (*sd*=98.1) compared to female consumers’ 21.9 minutes (*sd*=46.3)).

65. Many studies cited throughout this article show similar consumption

consumption is so much greater, it has more serious consequences for sex inequality by inspiring and trivializing their gender-based violence—a conclusion already evident when *Toward a Feminist Theory of the State* was written, primarily documented in the chapters on sexuality and pornography.⁶⁶

Meta-analyses of nearly fifty psychological experiments now show that exposure to violent as well as nonviolent pornography causes men to be more aggressive against women and to adopt more attitudes that promote and trivialize sexual aggression than otherwise.⁶⁷ Male and female subjects in simulated rape trials who were exposed to common nonviolent pornography during five hours over six weeks recommended almost half the penalty recommended by control groups.⁶⁸ The underlying mechanisms have been explained by psychologists and validated by survivor testimonies: nonviolent pornography that objectifies, degrades, or dehumanizes, which commercial pornography

effects, but some studies show significant gender-differences. See, e.g., Mike Allen et al., *The Connection Between the Physiological and Psychological Reactions to Sexually Explicit Materials: A Literature Summary Using Meta-Analysis*, 74 COMM. MONOGRAPHS 541, 551–53 (2007) (finding that men were more physiologically/sexually aroused than women when consuming pornography and that women exhibited stronger negative mental affect from pornography consumption, even while some relative arousal suggested otherwise).

66. See TFTS, *supra* note 1, chs. 6, 9, & 11.

67. See Mike Allen, et al., *Exposure to Pornography and Acceptance of Rape Myths*, 45 J. COMM. 5, 18–19 (1995) (finding meta-analysis of experiments with pornographic movies, written materials, and audio recordings produced significantly more attitudes supporting/trivializing violence against women relative to controls, with no indications of moderators); see also Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMM. RES. 258, 267, 271 (1995), whose meta-analysis demonstrated that both nonviolent and violent pornography increased laboratory aggression with no indications of other moderators and no significant differences in strength, *id.* at 274, while nude or seminude still photographs, including “a single person . . . not engaged in a sexual activity,” reduced aggression. Yet the meta-analysis included one experiment using more sensitive measurement instruments, which found that subjects exposed to nude/seminude *Playboy* photographs administered electric shocks for longer durations than controls did. Edward Donnerstein et al., *Erotic Stimuli and Aggression: Facilitation or Inhibition*, 32 J. PERSONALITY & SOC. PSYCHOL. 237, 242 (1975). These effects were “marginally” significant, but later experiments with non-explicit sexually objectifying printed advertising without violence significantly increased attitudes supporting violence against women, indirectly raising questions about the validity of prior nudity experiments on aggression. Kyra Lanis & Katherine Covell, *Images of Women in Advertisements: Effects on Attitudes Related to Sexual Aggression*, 32 SEX ROLES 639, 639 (1995); Nathalie J. MacKay & Katherine Covell, *The Impact of Women in Advertisements on Attitudes Toward Women*, 36 SEX ROLES 573, 573 (1997).

68. Dolf Zillman & Jennings Bryant, *Pornography, Sexual Callousness, and the Trivialization of Rape*, 32 J. COMM. 10, 17 tbl.3 (1982).

invariably does,⁶⁹ even without express violence, contributes to men categorizing women according to notions of “whores” versus “Madonnas,” “wild” versus “virtuous girls,” and so on, where perceptions of promiscuity promote aggression.⁷⁰ To the consumer, it appears as if pornography objectifies women, thus robbing them of part of their human value, which legitimizes singling them out for inhumane abuses. Put another way, pornography *subordinates* women in society by its influence on consumers. MacKinnon’s work with Andrea Dworkin leading up to the public hearings of the ordinances, based on survivor reports and insights, consciousness-raising, and the many scientific studies available, foresaw these consequences of pornography consumption. Large portions of the conceptualization of harm in the ordinance relate to women who had talked to Dworkin for many years about such experiences of pornography-related abuse.⁷¹ Hence, the term “subordination” became key in the

69. Research shows that consumers quickly become desensitized and look for more violent and degrading materials—a process corroborated by the most popular categories in demand. *See supra* notes 54–57 and accompanying text. Thus, it is unsurprising that researchers searching for contrary presentations of mutually pleasurable and affectionate explicit sex in order to construct experiments could not find even *one* such feature-length video that did not also contain dehumanizing or violent materials. James V.P. Check & Ted H. Guloiien, *Reported Proclivity for Coercive Sex Following Repeated Exposure to Sexually Violent Pornography, Nonviolent Dehumanizing Pornography, and Erotica*, in *PORNOGRAPHY: RESEARCH ADVANCES* 159, 163 (Dolf Zillman & Jennings Bryant eds., 1989). Hence, they had to cut and paste together edited excerpts. *Id.*

70. *See, e.g.*, Dolf Zillman & James B. Weaver, *Pornography and Men’s Callousness Toward Women*, in *PORNOGRAPHY: RESEARCH ADVANCES*, *supra* note 69, at 95, 109–21 (summarizing studies and documenting an original experiment’s finding that “nymphomania” in “the total absence of coercive or violent action” produced “the strongest trivialization of rape overall,” *id.* at 120, compared to other pornography categories); Kenneth E. Leonard & Stuart P. Taylor, *Exposure to Pornography, Permissive and Nonpermissive Cues, and Male Aggression Toward Females*, 7 *MOTIVATION & EMOTION* 291, 296–97 (1983) (documenting experiments where male subjects exposed to pornography slides aggressed significantly more against a woman making promiscuous remarks than against women making sexually inhibitory remarks or no remarks, or compared to unexposed male controls, and also finding that men aggressed significantly more under higher provocation against the woman making no remarks compared to the woman making inhibitory remarks and unexposed controls). This research’s results are mirrored in naturalistic settings where, e.g., of 73% of 200 prostituted female women and juveniles in San Francisco who reported rape, 24% made *unsolicited* remarks in interviews how rapists consistently referred to pornography, suggesting that the female enjoyed rape and extreme violence. Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 *SEX ROLES* 857, 863 (1984). Whenever females tried calming assailants by offering a “free trick,” it made their victimization much worse. *Id.* at 864–65. Information about prostitution thus seemed to feed stereotypical perceptions of promiscuous women, causing more aggression just as in the experiments.

71. Turner, *supra* note 44, at 30 (interviewing MacKinnon). Dworkin’s book

definition of pornography in the ordinances, since subordination on gendered grounds is a form of sex discrimination, incompatible with equality, and therefore in conflict with democratic values.

The experimental findings are also further mirrored in social reality: recent and prior meta-analyses of naturalistic studies show that persons in the normal population who report higher pornography consumption also report more sexual aggression and more attitudes that promote rape than low-consuming persons report.⁷² Similarly, several survey studies with battered women found that those who reported that their male partners consumed pornography also reported more sexual abuse and controlling behaviors than women who stated that their male partners did not view pornography.⁷³ Similar knowledge has since long been reported by survivors, law enforcement, prosecutors, and other practitioners during public hearings, such as those held in

from 1974, *Woman Hating*, included a critique of pornography that apparently became known among survivors, thus helping her draw from their first-hand accounts for the ordinance. “The years of listening to the private stories had been years of despair. . . . Now, all the years of listening were knowledge, real knowledge that could be mined.” Dworkin, *supra* note 49, at 90.

72. See Paul J. Wright et al., *A Meta-Analysis of Pornography Consumption and Actual Acts of Sexual Aggression in General Population Studies*, 66 J. COMM. 183, 193–95 (2016). The meta-analysis, including data from seven countries, demonstrated a positive significant association between pornography use and actual sexual aggression with no moderation by gender, age, country, time of study (before/after Internet), and no difference whether it was a cross-sectional, longitudinal, or published study or not. A “marginally significant” stronger correlation for “violent” pornography use compared to “general” pornography use was found. *Id.* at 194. However, since the consumption frequency was not controlled for, an underlying confounding variable—higher consumption—might be responsible for this marginal difference when considering that consumers become desensitized and quickly move to more extreme materials. Cf. Zillman & Bryant, *supra* note 54. See also Gert Martin Hald et al., *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 18 (2010) (finding pornography consumption significantly predicting more attitudes supporting violence against women in meta-analysis of naturalistic surveys, and indicating stronger associations for violent materials but without controlling if frequency of consumption was the underlying confounding variable).

73. See, e.g., Janet Hinson Shope, *When Words Are Not Enough: The Search for the Effect of Pornography on Abused Women*, 10 VIOLENCE AGAINST WOMEN 63–66 (2004); Catherine A. Simmons et al., *Linking Male Use of the Sex Industry to Controlling Behaviors in Violent Relationships: An Exploratory Analysis*, 14 VIOLENCE AGAINST WOMEN 406, 411 (2008); cf. Elizabeth Cramer et al., *Violent Pornography and Abuse of Women: Theory to Practice*, 13 VIOLENCE & VICTIMS 319, 327 (1998) (finding among 198 women that the most severe violence was reported by victims whose abusers forced them to “look at, act out, or pose for pornographic scenes” (25.8%) compared to abusers not coercing victims into participation in use of violent pornography (20.2%) or reportedly not viewing it at all (54%)).

Minneapolis and elsewhere where the ordinances have been considered.⁷⁴

Male pornography consumers are statistically significantly more likely to buy persons for sex than other men.⁷⁵ Moreover, a majority of sex buyers (“johns”) may explicitly admit they want to imitate pornography, such as 52% of 101 johns in Boston, and 71% of 133 johns in Cambodia.⁷⁶ Further, half or more johns may admit, as did 79% of 110 johns in Scotland and 48% of 113 johns in Chicago, that they are buying sex they feel uncomfortable asking their partners for or which the latter simply refuses to perform,

74. See, e.g., Letter from Flora Colao to the Minneapolis City Council (Nov. 10, 1983), reprinted in *IN HARM'S WAY*, supra note 44, at 214–15 (writing in support of the proposed Minneapolis ordinance in her capacity as the founder and director of a sexual assault survivor program about meeting throat-rape survivors whose assailants referred to the pornographic movie *Deep Throat* prior to assault); *Hearing on Proposed H. Bill 5194, An Act to Protect the Civil Rights of Women and Children, Boston, MA* (Mar. 16, 1992) [hereinafter *Massachusetts Hearing*] (submission of Gail Kielson), reprinted in *IN HARM'S WAY*, supra note 44, at 361, 423–24 (estimating “conservatively” that half of a battered women’s organization’s clients’ abusers used pornography as part of abuse). Experienced prosecutors, clinical psychologists, and other representatives from women’s shelters have testified that pornography played a similar important role in literally hundreds of cases of sexual abuse. See *Hearing on Proposed Ordinance § 1 to amend Minneapolis, Minn. Code of Ordinances, Ch. 7 Before the Government Operations Comm.* (Dec. 13, 1983) [hereinafter *Minneapolis Hearing*] (testimonies of Gary Kaplan, Richelle Lee, Charlotte Kasl, and Sue Schafer), transcribed in *IN HARM'S WAY*, supra note 44, at 39, 165–68, 171–72, 172–75, 179; *Hearing to Consider an Amendment to Ch. XVI of the Indianapolis, Ind. City Code Before the Indianapolis City-County Council Administration Committee* (Apr. 16, 1984) [hereinafter *Indianapolis Hearing*] (testimony of Terry Hall), reprinted in *IN HARM'S WAY*, supra note 44, at 269, 279–80; *Massachusetts Hearing*, supra, at 411–12 (testimony of Betsy Warrior); FINAL REPORT OF THE ATT’Y GENERAL’S COMMISSION ON PORNOGRAPHY 208–09 n.817 (Michael J. McManus ed., 1986) [hereinafter *FINAL REPORT, ATT’Y GEN.*] (quoting letter from Harriet Tubman Women’s Shelter to Commission (1986)). There is also an abundance of individual testimonies from ordinary women and girls given at public hearings and elsewhere in the United States reporting how they have been abused by men who forced, or attempted to force, them to imitate pornography. See, e.g., DIANA E. H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 125–26 (1984); FINAL REPORT, ATT’Y GEN., supra, at 197–223; *Minneapolis Hearing*, supra, at 108–14, 145–47; *Massachusetts Hearing*, supra, at 370–425; *Minneapolis: Press Conference, July 25, 1984*, reprinted in *IN HARM'S WAY*, supra note 44, at 260–65.

75. See Farley et al., *Scotland*, supra note 11, at 374 (2011); Martin A. Monto & Nick McRee, *A Comparison of the Male Customers of Female Street Prostitutes with National Samples of Men*, 49 INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY. 505, 515 tbl.1, 520–21 tbl.2, 523 (2005).

76. MELISSA FARLEY ET AL., COMPARING SEX BUYERS WITH MEN WHO DON’T BUY SEX 30–31 (2011), <http://www.prostitutionresearch.com/pdfs/Farleyetal2011ComparingSexBuyers.pdf> [hereinafter *FARLEY ET AL., BOSTON*]; MELISSA FARLEY ET AL., A THORN IN THE HEART: CAMBODIAN MEN WHO BUY SEX 25–26 (2012), <http://www.prostitutionresearch.com/Cambodia%20Project%20Final.pdf> [hereinafter *FARLEY ET AL., CAMBODIA*].

such as oral and anal sex, sadism, and masochism.⁷⁷ Notably, the Boston study compared 101 johns with 101 non-johns, finding that johns reported masturbating significantly more to a greater variety of pornography genres than non-johns did, including multiple men penetrating a woman, anal sex, group sex, and groups of men ejaculating on a humiliated woman's face.⁷⁸ Unsurprising then, interviews with johns reveal frightening accounts of how many johns coerce and take advantage of the women's vulnerability, precisely to make them endure gang rape or imitate other "styles" they have seen in pornography.⁷⁹ Such situations have been reported by survivors in public hearings and government reports.⁸⁰ Prostituted persons often cannot refuse such acts being done to them, due in part to their multiple economic, racial, and age-based disadvantages.⁸¹

The pornography research paradigm shows that consumption is an independent factor causing more gender-based violence, and particularly severely so for battered and prostituted persons. As shown above, this conclusion is corroborated across reliable methods and valid measurements, by contrast to studies using less reliable methods and less validated measures, which are not uncommon, one example being the use of aggregated officially reported crime statistics.⁸² Consistent with the evidence as it

77. Farley et al., *Scotland*, *supra* note 11, at 376; DURCHSLAG & GOSWAMI, *supra* note 11, at 12.

78. FARLEY ET AL., *BOSTON*, *supra* note 76, at 31.

79. In Cambodia, forty-one percent of the 133 johns admitted participating in gang-rapes of prostituted women. FARLEY ET AL., *CAMBODIA*, *supra* note 76, at 30. One elaborated further: "We took turns to have sex" and "used different styles that we saw in the movie." *Id.* at 26. Johns further described how they "forced," "beat," and "threatened" prostituted women (sometimes with murder) to accept everything done to them in gang-rapes. *Id.* at 30-31. Although the interviews in Chicago might not have probed as far as in Cambodia, a Chicago john reported "a threesome" inspired by pornography. DURCHLAG & GOSWAMI, *supra* note 11, at 13.

80. *See, e.g.*, FINAL REPORT, ATTY GEN., *supra* note 74, at 204 (quoting a witness at a public hearing in Washington, D.C., who described how pimps forced prostituted women to service "stag" parties at which pornographic films were shown and that such films often set the tone for the kinds of acts the women were expected to perform); *cf.* SOU 1995:15 *Könshandeln: Betänkande av 1993 års prostitutionsutredning* [government report series] 96-97 (Swed.) (describing police investigations of "sex clubs" where groups of paying male guests could participate in filming pornography, coercing vulnerable young women beyond the prostitution contract in situations resembling gang rapes but charged as "sexual exploitation").

81. *See infra* notes 86-93 and accompanying text.

82. Two aggregated cross-sectional comparisons in the fifty U.S. states of reported rapes during the years 1980-82 support conclusions drawn here, but a longitudinal aggregated study in the Czech Republic from 1971 to 2007 purports otherwise. Compare Larry Baron & Murray A. Straus, *Four Theories of Rape: A Macrosociological Analysis*, 34 SOC. PROBS. 467, 467 (1987) (finding that when

already existed then, the Indianapolis and Minneapolis City Councils in 1983 and 1984 found pornography to be “central in creating and maintaining sex as a basis for discrimination.”⁸³ Indeed, pornography contributes to sex discrimination and—as the City Councils concluded—promotes “rape, battery . . . and prostitution and inhibit[s] just enforcement of laws against such acts.”⁸⁴ The empirical research and evidence above show even more convincingly today that pornography promotes gender-based violence, inspires johns to purchase sex, and inhibits enforcement of laws by trivializing sexual violence, in rape juries among other places.

b. Production and Exploitation

The legislative findings of the ordinances further recognized pornography’s role in subordinating women by promoting and trivializing gender-based violence and prostitution, thus showing that women’s substantive equality was at stake. Pornography was therefore called “a systematic practice of exploitation and

analyzing “1980–1982 data on rapes known to the police in” the U.S. that, among other factors, “circulation of pornography” had an increasing “direct effect[] on the incidence of rape”), and Joseph E. Scott & Loretta A. Schwalm, *Rape Rates and the Circulation Rates of Adult Magazines*, 24 J. SEX RES. 241, 246 (1988) (finding “a statistically significant [positive] relationship between rape rates and adult magazine circulation rates by state” using data from 1982), with Milton Diamond et al., *Pornography and Sex Crimes in the Czech Republic*, 40 ARCHIVES OF SEXUAL BEHAV. 1037, 1037 (2011) (finding that “rape and sex crimes did not increase” after the Czech Republic enacted a law that allowed pornography for the first time). However, official crime reports are influenced by many factors, especially over time, and particularly for the Czech Republic, which experienced the Velvet Revolution, a transformation from communism to capitalism, and division into two states during the study period. See *id.* at 1038. Singling out any individual factor as a cause for a reported crime decrease under such a period of time is extremely complicated, thus the “aggregated” method is regarded as highly unreliable. See Drew A. Kingston & Neil M. Malamuth, *Problems with Aggregate Data and the Importance of Individual Differences in the Study of Pornography and Sexual Aggression: Comment on Diamond, Jozifkova, and Weiss (2010)*, 40 ARCHIVES OF SEXUAL BEHAV. 1045, 1045–46 (2011) (identifying “using and presenting aggregate data in isolation and then forming conclusions about individuals,” the “ecological fallacy,” “overly simplistic explanatory models,” and over-determination as being pertinent methodological criticisms against the Czech study); Neil M. Malamuth & Eileen V. Pitpitan, *The Effects of Pornography Are Moderated by Men’s Sexual Aggression Risk*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 125, 137–42 (David E. Guinn & Julie DiCaro eds., 2007) (discussing similar methodological problems generally in aggregated studies).

83. INDIANAPOLIS CODE (1984), *supra* note 49, ch. 16, § 16-1(a)(2); see also Proposed Minneapolis Ordinance (1983), *supra* note 47, Title 7, ch. 139, § 139.10(a)(1) (using slightly different language).

84. INDIANAPOLIS CODE (1984), *supra* note 49, ch. 16, § 16-1(a)(2); see also Proposed Minneapolis Ordinance (1983), *supra* note 47, § 139.10(a)(1).

subordination.”⁸⁵ This recognition makes sense considering that pornographers in their production exploit and subordinate more vulnerable populations who, as shown below, are least similarly situated with more privileged social groups. For instance, a study published in 2011, surveying 134 female adult film “performers” contacted via U.S. databases or Internet sites advertising for jobs in the pornography industry, found that 37% of the performers, compared to 13% of a demographically-matched Californian control group, reported experiencing “forced sex” before age 18 (a restrictive definition of child sexual abuse); 21% compared to 4% of controls reported being moved into foster child care by authorities (implying serious neglect); 24% compared to 12% of controls reported their household received social welfare; and 50% of performers reported living in poverty in the last twelve months.⁸⁶

The 2011 survey showed with quantitative data what other comprehensive investigations before it had shown by more qualitative research:⁸⁷ performers share similar vulnerable backgrounds as prostituted persons, of whom the most common stated reasons for entering the sex industry is poverty,⁸⁸ of whom a majority have been subjected to both sexual and other physical abuse during childhood,⁸⁹ and of whom a majority also experience

85. INDIANAPOLIS. CODE (1984), *supra* note 49, ch. 16, § 16-1(a)(2); *see also* Proposed Minneapolis Ordinance (1983), *supra* note 47, § 139.10(a)(1).

86. Corita R. Grudzen et al., *Comparison of the Mental Health of Female Adult Film Performers and Other Young Women in California*, 62 PSYCHIATRIC SERVS. 639, 641–42 (2011) [hereinafter Grudzen et al., *Comparison*].

87. *See* FINAL REPORT, ATT’Y GEN., *supra* note 74, at 231 n.983 (concluding that personal backgrounds among pornography performers were similar to those in other studies of prostitution); SOU 1995:15, *supra* note 80, at 136 (stating that often the women performing in pornography are the same women bought in prostitution).

88. *See, e.g.*, Alice Cepeda, *Prevalence and Levels of Severity of Childhood Trauma Among Mexican Female Sex Workers*, 20 J. AGGRESSION, MALTREATMENT & TRAUMA 669, 671–72 (2011) (citing research from both industrialized and developing regions); CECILIA KJELLGREN ET AL, *UTVÄRDERING AV SAMTALSBEHANDLING MED FÖRSÄLJARE AV SEXUELLA TJÄNSTER (FAST)* 21 (2012), <http://liu.diva-portal.org/smash/get/diva2:506278/FULLTEXT01.pdf> (finding that among thirty-four prostituted persons, the most common reason stated for entering prostitution was a need for money for survival ($n = 14$), sometimes specified as for paying the rent or bills, while earning money for drugs was second place ($n = 10$)); CHANDRÉ GOULD & NICOLE FICK, *SELLING SEX IN CAPE TOWN* 115 (2008); SPECIAL COMM’N ON PORNOGRAPHY & PROSTITUTION IN CANADA, 2 REPORT ON PORNOGRAPHY AND PROSTITUTION 376 (1985) (“Overwhelmingly, prostitutes cite economic causes as the reason they are on the streets.”); Mimi H. Silbert & Ayala M. Pines, *Entrance Into Prostitution*, 13 YOUTH & SOC’Y 471, 486 (1982) (finding among 200 prostituted women/girls in San Francisco that the predominant reason stated for entering prostitution was money, and over three-quarters “reported having no other options” at that point) [hereinafter Silbert & Pines, *Entrance*].

89. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An*

homelessness, which may often be caused directly by childhood abuse and neglect.⁹⁰ Moreover, there is an over-representation, many times relative to their general population size, of disadvantaged minorities among prostituted people.⁹¹ Hardly surprising then, among a larger survey of 854 prostituted persons in nine countries who were not explicitly seeking help, as many as 49% said they had been prostituted for pornography.⁹²

Update on Violence and Posttraumatic Stress Disorder, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33, 43 (Melissa Farley ed., 2003) [hereinafter Farley et al., *Nine Countries*]; Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse: A Controlled Study*, 6 CAN. J. COMMUNITY MENTAL HEALTH 5, 12–14 tbl.2 (1987) (finding 73% of 45 female prostitution survivors were subjected to child sexual abuse, compared to 28% of 36 women among community controls of similar age, and that 100% of the prostitution survivors had been subjected to either sexual or physical abuse, compared to only 35% of the controls); Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS 120, 123, 126 n.10 (Alison M. Jaggar ed., 1994); Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 99 (1993); Jennifer James & Jane Meyerding, *Early Sexual Experience as a Factor in Prostitution*, 7 ARCHIVES OF SEXUAL BEHAV. 31, 31–35 (1977); Silbert & Pines, *Entrance*, *supra* note 88, at 479.

90. SOU 1995:15, *supra* note 80, at 104; Farley et al., *Nine Countries*, *supra* note 89, at 43–44 (stating that 75% of 854 prostituted persons reported experiencing homelessness); Bagley & Young, *supra* note 89, at 14 (reporting that three-quarters of 45 prostitution survivors left homes “riven by strife, drunkenness, and abuse” by age 16, compared to none of 36 community control women of similar age, and that sexual abuse was the most frequent reason given for leaving home among prostitution survivors); Silbert & Pines, *Entrance*, *supra* note 88, at 485, 488–89; Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 410 (1981); Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 J. FAM. ISSUES 361, 362 (1991).

91. See, e.g., BROTTSFÖREBYGGANDE RÅDET [SWEDISH NATIONAL COUNCIL FOR CRIME PREVENTION], THE ORGANISATION OF HUMAN TRAFFICKING: A STUDY OF CRIMINAL INVOLVEMENT IN SEXUAL EXPLOITATION IN SWEDEN, FINLAND AND ESTONIA 8, 37 (2008), http://bra.se/download/18.cba82f7130f475a2f1800023448/1371914733517/2008_21_human_trafficking.pdf (“[T]rafficked women and foreign women in prostitution are often members of an ethnic minority”); JENNIFER JAMES, ENTRANCE INTO JUVENILE PROSTITUTION: FINAL REPORT 17, 19 (1980) (finding Black girls were 25% of 136 prostituted girls interviewed in the Seattle area, although only 4.2% of the entire population in the area were Black); CHERRY KINGSLEY & MELANIE MARK, SACRED LIVES: NATIONAL ABORIGINAL CONSULTATION PROJECT 4, 8 (2010), http://www.gov.mb.ca/fs/traciustrust/pubs/sacred_lives.pdf (noting that Aboriginal children and youth comprise over 90% of “visible sex trade” in some Canadian areas where Aboriginal population is less than 10%); Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 TRANSCULTURAL PSYCHIATRY 242, 242 (2005) (finding 52% of 100 prostituted women being of First Nations descent, despite First Nations comprising only 1.7–7% of Vancouver population); Barbara Goldsmith, *Women on the Edge*, NEW YORKER, Apr. 26, 1993, at 64, 65 (finding that of 3,000 interviewed “streetwalking prostitutes,” roughly half were Black and a quarter Hispanic).

92. Farley et al., *Nine Countries*, *supra* note 89, at 46.

Pornographers appear to exploit any inequalities and vulnerabilities they find to make performers accept being subjected to increasingly abusive conduct that consumers apparently demand, and this seems just as true in the purportedly glamorous Los Angeles pornography industry as in gay male pornography production.⁹³ Challenging pornography would thus mean doing something for those groups affected by multiple disadvantages such as child abuse, poverty, and racial and other forms of discrimination making them particularly vulnerable to be exploited in or harmed by the consumption effects of pornography.

To address multiple layers of disadvantages found in prostitution, the hierarchy theory advanced in *Toward a Feminist Theory of the State* suggests similar legal challenges as intersectionality theorist Kimberlé Crenshaw later theorized regarding women whose discrimination is caused by multiple disadvantages such as gender, race, ethnicity, class, and sexuality. That is, both suggest that laws should take a “bottom-up” rather than a “top-down strategy of using a singular ‘but for’ analysis,”⁹⁴ thus including those least similarly situated and most unequal to men.⁹⁵ The least similarly-situated persons must, by default, include multiply disadvantaged people, including people in prostitution. Considering the similarity of the populations used in prostitution and in pornography, it is actually more accurate to view the latter as a subset of the former, who are bought and exploited for sex. Indeed, even though its frequency was “unclear,”

93. Such exploitative conditions are also implied when considering that among eighteen women and ten men performing in Los Angeles, many openly admitted being forced to accept obviously dangerous unprotected sex to get paid, and that acts such as anal sex and sex with multiple partners, which put them at a higher risk for contracting HIV, were paid more. Corita R. Grudzen et al., *Pathways to Health Risk Exposure in Adult Film Performers*, 86 J. URBAN HEALTH: BULL. N. Y. ACAD. MED. 67, 69, 72–73, 75 (2009) [hereinafter Grudzen et al., *Pathways*]. Similar exploitative conditions were indirectly indicated by two recent quantitative content analysis of gay male pornography. See Martin J. Downing Jr. et al., *Sexually Explicit Media on the Internet: A Content Analysis of Sexual Behaviors, Risk, and Media Characteristics in Gay Male Adult Videos*, 43 ARCHIVES OF SEXUAL BEHAV. 811, 814 (2014) (sampling 302 videos randomly at 5 representative free websites and finding highly unsafe sex acts, such as unprotected anal intercourse in 36% of videos, “rimming” (oral-anal contact) in 17% of videos, and unprotected oral sex in 99.5% of videos); Sharif Mowlabocus et al., *What We Can't See? Understanding the Representations and Meanings of UAI, Barebacking, and Semen Exchange in Gay Male Pornography*, 61 J. HOMOSEXUALITY 1462, 1465–66 (2014) (sampling 125 gay male pornography scenes on “popular Web Sites and DVDs,” finding 47 of the 95 anal sex scenes showed unprotected anal intercourse).

94. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 145, 151 (1989).

95. TFTS, *supra* note 1, at 233–34.

eighteen female performers interviewed in the Los Angeles pornography industry reportedly “worked as escorts” and had sex “off-camera in exchange for money or other favors.”⁹⁶ Another study of 271 female adult film performers in Los Angeles, recruited at clinics closely proximate to the pornography industry, reported that twenty-eight percent did “sex work, such as escorting in the past three months.”⁹⁷

Among the 854 prostituted persons in nine countries, those 49% reporting having been used for pornography exhibited “significantly more severe symptoms” of post-traumatic stress disorder (PTSD) than the other 51% did.⁹⁸ When controlling for other relevant predictors such as child sexual abuse, rape, or physical assault, a statistical “ceiling effect” occurred where the only distinguishable PTSD-predictor was pornography,⁹⁹ suggesting that prostitution for pornography is particularly harmful. PTSD is a psychological measure of harm resulting from extreme violence to oneself or witnessing it inflicted on others.¹⁰⁰ Sixty-eight percent of the 854 persons exhibited similar PTSD-levels as treatment-seeking Vietnam veterans and people victimized by domestic violence or torture;¹⁰¹ other studies show that PTSD and/or other mental illness in prostituted persons is significant, even after controlling for childhood abuse, rape, prostitution venue, or other causes of PTSD and similar mental illness.¹⁰² This means that prostitution in itself is a predictor of PTSD, and that being used for pornography in combination with other prostitution predicts even more severe PTSD.

96. Grudzen et al., *Pathways*, *supra* note 93, at 69.

97. Marjan Javanbakht et al., *Transmission Behaviors and Prevalence of Chlamydia and Gonorrhea Among Adult Film Performers*, 44 *SEX. TRANSM. DIS.* 181, 182–183 (2017). Considering that reporting prostitution could incriminate the pornography industry, this number may be an underestimation.

98. Melissa Farley, “Renting an Organ for Ten Minutes”: What Tricks Tell Us about Prostitution, Pornography, and Trafficking, in *PORNOGRAPHY: DRIVING THE DEMAND*, *supra* note 82, at 146.

99. *Id.*

100. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS* 271 (5th ed. 2013).

101. Farley et al., *Nine Countries*, *supra* note 89, at 47, 56.

102. See Wulf Rössler et al., *The Mental Health of Female Sex Workers*, 122 *ACTA PSYCHIATRICA SCANDINAVICA* 143, 150 (2010); Hyunjung Choi et al., *Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse*, 15 *VIOLENCE AGAINST WOMEN* 933, 935–36, 942, 945–46 (2009); Bagley & Young, *supra* note 89, at 21–23 tbl.7. For such a separate statistical analysis of Mexican data in the nine-country study, see Farley et al., *Nine Countries*, *supra* note 89, at 49.

The PTSD among prostituted persons in pornography production may be seen in light of the demand for more abusive materials among the consumers discussed above.¹⁰³ Indeed, similar to testimony at public hearings when U.S. anti-pornography ordinances were considered during the 1980s and in Swedish police investigations reported to government inquiries on prostitution in the 1990s,¹⁰⁴ a 2009 study of the Los Angeles pornography industry reported frequent incidences of violence in front of and behind the cameras.¹⁰⁵ A 2013 study argued, by contrast, that Los Angeles performers had better health and well-being than a demographic control group, contrary to findings in the above 2011 study.¹⁰⁶ The 2013 study failed, however, to present reliable evidence and was produced in collaboration with the sex industry itself, thus having strong incentives to present the situation as harmless.¹⁰⁷ Moreover, no tangible empirical evidence validates the idea that so-called feminist, amateur, homemade, alternative, or female-directed pornography is

103. See *supra* notes 54–58 and accompanying text.

104. For instance, pornography survivors testified in public hearings about being tortured or forced into anal intercourse in order to increase the pornography's market value. See FINAL REPORT, ATTY GEN., *supra* note 74, at 200, 204–06. Swedish law enforcement reported pornography movie production where coercion resembling gang rapes occurred, though charged as “sexual exploitation.” SOU 1995:15, *supra* note 80, at 96–97.

105. Grudzen et al., *Pathways*, *supra* note 93, at 74 (reporting that six out of eighteen female performers in Los Angeles openly admitted to being injured on the set resulting in anal tears, bruises, etc., while six others admitted such things happened, and some reported being coerced into sex with violent persons in order to get hired).

106. See James D. Griffith et al., *Pornography Actresses: An Assessment of the Damaged Goods Hypothesis*, 50 J. SEX RES. 621, 626 (2013) (reporting that pornography “actresses” had higher self-esteem and quality life compared to a control group). *But see* Grudzen et al., *Comparison*, *supra* note 86, at 643 (finding that “female adult film performers were more likely than other young women in California to be depressed and to have significantly worse mental health”).

107. See Griffith et al., *supra* note 106, at 623–25 (describing methods and sampling while failing to analyze the causes for and consequences of the fact that only 177 respondents, i.e., less than 15% of the estimated 1,200 client population, responded to the survey despite that several occasions to do so were offered over four months); *id.* at 630 (admitting that it “is certainly possible that there was a self-selection bias” but without probing its determinants further). Moreover, the study was made in collaboration with the Los Angeles pornography industry's own clinic for sexually transmitted diseases. *Id.* at 623. This facility was eventually shut down by health authorities due protocol violations. See Molly Hennessy-Fiske & Rong-Gong Lin II, *Porn Industry Clinic Comes Under Fire for its Handling of HIV Case*, L.A. TIMES (Oct. 15, 2010), <http://articles.latimes.com/2010/oct/15/local/la-me-porn-hiv-20101015>; Molly Hennessy-Fiske, *Porn Industry Clinic in Sherman Oaks is Closed by L.A. County*, L.A. TIMES (Dec. 10, 2010), <http://articles.latimes.com/2010/dec/10/local/la-me-porn-hiv-20101210>.

produced under other non-coercive circumstances.¹⁰⁸ Evidence suggests even male performers—both in heterosexual and gay pornography—are socially disadvantaged in many similar respects as female performers.¹⁰⁹ Considering that many prostituted persons are used in pornography production, or are forced by johns to imitate it off-camera, it is not surprising that 89% of the 854 prostituted persons from nine countries explicitly said they wanted to escape prostitution.¹¹⁰

c. The Anti-pornography Civil Rights Ordinances

MacKinnon and Dworkin's ordinances defined pornography as the "graphic sexually explicit subordination of women,"¹¹¹ since pornography subordinates women in society by making producers and consumers treat women as sexual objects that can be legitimately abused and exploited. Men, children, and transgender persons were also covered by the proposed definition and could prove injury in the same way as women could.¹¹² The definition of pornography also included sub-definitions and the materials challenged had to fit one of these definitions, such as women presented as sexual objects enjoying rape, or as sexual

108. See Rebecca Whisnant, "But What About Feminist Porn?" *Examining the Work of Tristan Taormino*, 2 *SEXUALIZATION, MEDIA, & SOC'Y* 1, 2–4, 5–10 (2016) (attempting but finding no evidence to support Taormino's claims that her performers "decide who they have sex with, when, where, and what they do" and "set their own pay rates," *id.* at 3, rather than having to abide by the market logic demanding more extreme violence and degradation suggested by the overwhelming evidence, including from Taormino's own films and contradicting statements elsewhere) (internal citations omitted); Chyng Sun et al., *A Comparison of Male and Female Directors in Popular Pornography: What Happens When Women are at the Helm?*, 32 *PSYCHOL. WOMEN Q.* 312, 317–21 (2008) (finding female-directed top-selling pornography movies contained as much, if not more, abusive and degrading acts directed against women as did top-selling male-directed pornography). See also Benjamin Wallace, *The Geek-Kings of Smut*, *N.Y. MAGAZINE* (Jan. 30, 2011), <http://nymag.com/news/features/70985/>, who interviewed Farrell Timlake, a pornography website operator who described terms such as "amateur" as ruses. Terms like those are also used for marketing purposes. See Gail Dines & Dana Bialer, *Porn Is in Rude Health*, *GUARDIAN* (June 8, 2012), <https://www.theguardian.com/commentisfree/2012/jun/07/porn-rude-health-louis-theroux>.

109. See, e.g., CHRISTOPHER N. KENDALL, *GAY MALE PORNOGRAPHY* 69–86 (2004) (discussing abuse and exploitation of performers in gay male pornography); FINAL REPORT, *ATT'Y GEN. supra* note 74, at 228–45 (investigating the situation for male and female performers in commercial pornography); Grudzen et al., *Pathways, supra* note 93 (indicating exploitative conditions of men due to requirements of unsafe heterosexual sex); Downing Jr. et al., *supra* note 93 (implying exploitative conditions due to highly unsafe sex in gay male pornography); Mowlabocus et al., *supra* note 93 (finding similarly in another gay male pornography sample).

110. Farley et al., *Nine Countries, supra* note 89, at 51, 56.

111. INDIANAPOLIS CODE (1984), *supra* note 49, ch. 16 § 16-3(q).

112. *Id.* at ch. 16, § 16-17(b).

objects for conquest, or use.¹¹³ These sub-definitions only included presentations that research showed actually subordinated women—such as violent or dehumanizing/degrading presentations—and not materials only containing sexually explicit presentations characterized by mutuality and equality, such as those edited by researchers for an experiment and whose exposure effect on attitudes supporting violence against women was not statistically significant.¹¹⁴ Nor would the ordinances have applied to sexist advertising or objectifying motion pictures without explicit sex despite studies, both experimental and naturalistic, finding that such materials also produce/predict at least some attitudes significantly promoting violence against women.¹¹⁵

Accordingly, the ordinance only targeted *provably* harmful materials, avoiding borderline cases. Its definition has been applied more reliably by law students in experiments where, by contrast, existing U.S. obscenity law was found overbroad and

113. The full definition 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, abasement, 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.

Id. at ch. 16, § 16-3(q).

114. Check & Guloien, *supra* note 69, at 171 tbl.6.1.

115. For experiments, see Michael A. Milburn et al., *The Effects of Viewing Rated Movie Scenes That Objectify Women on Perceptions of Date Rape*, 43 SEX ROLES 645, 645 (2000); Lanis & Covell, *supra* note 67, at 639; MacKay & Covell, *supra* note 67, at 573. For naturalistic studies, see Paul J. Wright & Robert S. Tokunaga, *Men's Objectifying Media Consumption, Objectification of Women, and Attitudes Supportive of Violence Against Women*, 45 ARCH. SEX. BEHAV. 955, 960 (2016) (finding that (1) frequent exposure to reality TV, (2) men's magazines that objectify women, and (3) pornography were all three significantly "associated with stronger notions of women as sex objects," and that those notions in turn significantly predicted "stronger attitudes supportive of violence against women").

applied more vaguely.¹¹⁶ Similarly, research subjects participating in exposure experiments with edited excerpts of different categories of sexually explicit media had no trouble distinguishing harmful materials from those not producing harm.¹¹⁷

The ordinances were drafted as civil rights laws that provided civil remedies for four types of injuries: (1) subordination caused by dissemination of pornography; (2) coercion to perform in pornography; (3) specific assault or injury caused by pornography; and (4) injury from another forcing the complainant to view pornography.¹¹⁸

The *first* cause of action, “trafficking in pornography,”¹¹⁹ enabled any woman to sue for injuries caused by *dissemination* of pornography “as a woman acting against the subordination of women.”¹²⁰ Even with small individual damage amounts, an endless stream of individual lawsuits or a larger class action lawsuit would push a major pornography distributor/seller toward bankruptcy. This was consistent with hierarchy theory since it would have given the power to use the law to those who are subordinated, rather than putting that power in the hands of the dominant groups within the criminal justice system.

The *second* cause of action was provided for anyone who had been *coerced* into performing for pornography.¹²¹ Conceptualizing coercion inclusively, the ordinance addressed substantive inequality and intersectional discrimination by enumerating impermissible defenses that otherwise make existing sexual offenses inapplicable to pornography production when there is no “similarly situated person” (e.g., a non-prostituted or non-acquaintance rape victim). The coercion provision thus deemed it irrelevant whether “the person is or has been a prostitute[d person]; . . . has attained the age of majority; . . . is connected by

116. See James Lindgren, *Defining Pornography*, 141 U. PENN. L. REV. 1153, 1187–91 (1993).

117. Check & Guloien, *supra* note 69, at 168–69.

118. INDIANAPOLIS CODE (1984), *supra* note 49, ch. 16 §§ 16-3(g)(4)–(7), 16-17(a)(6)–(7), (b), (c).

119. *Id.* at § 16-3(g)(4) (“Trafficking in pornography: [t]he production, sale, exhibition, or distribution of pornography.”).

120. *Id.* at § 16-17(a)(6), (b) Men, children, or transgender persons proving similar harm could also file a complaint. *Id.* at § 16-17(b). Libraries were exempted except if putting up pornography on “special display.” *Id.* at § 16-3(g)(4).

121. *Id.* at § 16-3(g)(5) (“Coercion into pornographic performance: [c]oercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography”). This provision enabled lawsuits against perpetrators, makers, sellers, exhibitors, or distributors. *Id.* at § 16-17(a)(6).

blood or marriage to anyone involved; . . . has previously posed; . . . [has] actually consented; . . . demonstrated no resistance or appeared to cooperate actively; . . . signed a contract; . . . [or] was paid or otherwise compensated” and made it irrelevant that “no force, threats, or weapons were used in the making of the pornography.”¹²² People abused in pornography may have signed a contract out of economic necessity.¹²³ Additionally, they may lack a proper education or job skills due to domestic childhood sexual abuse, causing them to run away at an early age.¹²⁴ By enumerating age of majority and these other factors as impermissible defenses for pornographers, the ordinances would have provided a safety net for children that did not receive a remedy earlier in life.

The *third* cause of action was for *assault* or *injury* caused by specific pornography,¹²⁵ such as when johns force prostituted persons to imitate specific pornography, as documented many times in studies and in the survivor testimony during the public hearings.¹²⁶ If an assailant consumed specific material that exhibited behavioral consistency with the attack, a civil preponderance of evidence standard might be sufficient for damages, though among the four causes of actions this one had the highest burden of proof.

The *fourth* cause of action existed for persons *forced* to view pornography.¹²⁷ This idea has been judicially incorporated into federal workplace sexual harassment law, where employers permitting pornography in work areas can be found liable for contributing to a hostile and sex discriminatory environment—a claim that has so far withstood First Amendment challenges.¹²⁸

122. *Id.* at § 16-3(g)(5)(a).

123. *See supra* notes 86–88 and accompanying text.

124. *See supra* notes 89–90 and accompanying text.

125. INDIANAPOLIS CODE (1984), *supra* note 49, at ch. 16, § 16-3(g)(7) (defining the injury as “the assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography”). This provision enabled lawsuits against perpetrators, makers, sellers, distributors, and exhibitors. *Id.* at ch. 16, § 16-17(a)(6).

126. *See supra* notes 74–80 and accompanying text.

127. INDIANAPOLIS CODE (1984), *supra* note 49, at ch. 16, § 16-3(g)(6) (“The forcing of pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.”). This provision enabled lawsuits against perpetrators and/or institutions. *Id.* § 16-17(a)(7).

128. *See, e.g.,* Robinson v. Jacksonville Shipyards Inc., 760 F. Supp. 1486 (M.D. Fla. 1991). A female shipyard employee sued her employer for sexual harassment because of “extensive pervasive posting of pictures depicting nude women, partially nude women, or sexual conduct and the occurrence of other forms of harassing behavior perpetrated by her male coworkers and supervisors.” *Id.* at 1494. The

However, no legislature has extended this law outside of the work environment, showing MacKinnon was right in that standard equality protections only provide remedies for women most “similarly situated” to men, meaning women at work and not women in the private sphere or prostitution.¹²⁹

Although the Indianapolis ordinance was invalidated in the Seventh Circuit on purported expressive grounds,¹³⁰ the court could have sustained the ordinance based on a number of theories if it wished to do so. First, “a compelling governmental interest” in eradicating sex discrimination has, at times, outweighed First Amendment interests.¹³¹ Second, when a regulation of expressive conduct furthers an “important governmental interest” such as preventing sex discrimination or harm, it can be upheld under the First Amendment even without a compelling interest in some situations.¹³² Third, pornography could also be viewed as

district court required the employer to create and enforce a sexual harassment policy, noting that “[t]he [F]irst [A]mendment guarantee of freedom of speech does not impede the remedy of injunctive relief.” *Id.* at 1534.

129. See TFTS, *supra* note 1, at 234 (“The deepest problems of sex inequality do not find women ‘similarly situated’ to men.”).

130. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985).

131. The Supreme Court permits expressive “infringements” when balanced against more “compelling” governmental interests to eliminate sex discrimination against women, *not only* at workplaces but also regarding other “barriers to economic advancement and political and social integration that have historically plagued women.” *Robinson*, 760 F. Supp. 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)). Such balancing requires “narrowly tailored” laws. *E.g.*, *Citizens United v. FEC*, 558 U.S. 310, 340 (2010); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Indeed, the ordinances were constructed to reach only *provably* harmful materials, and were not difficult to apply. See *supra* notes 111–117 and accompanying text. The Indianapolis ordinance was further narrowed under the trafficking/dissemination provision, exempting nonviolent materials and requiring that respondents “know” materials are pornography. *Am. Booksellers Ass’n*, 771 F.2d, at 324–26.

132. *United States v. O’Brien*, 391 U.S. 367, 377 (1968). Indeed, the ordinances were “viewpoint-neutral” in that they did *not* prevent expressing “viewpoints” in speeches, newspapers, or movies alleging women enjoy being sexually degraded or tortured. They only targeted underlying *conduct* that *subordinates* people, which pornography provably does, and that is “unrelated to the suppression of free expression.” *Id.* Because viewpoints endorsing subordination can be expressed without doing what pornography does, laws regulating pornography accordingly should be sustained if “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.” *Id.* The ordinances were narrowly tailored and there were ample alternative venues for expressing any incidentally restricted views. *Id.* at 382. *Cf.* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983) (upholding restrictions excluding a rival union from the inter-school mail system in part due to “the substantial alternative channels that remain open for union-teacher communication”).

analogous to other unprotected expressions such as group libel, obscenity, insulting or “fighting words,” all of which require only a “legitimate” state interest to sustain judicial review.¹³³ Attesting to their effectiveness, federal legislation on child pornography today offers a route seemingly modeled after the anti-pornography civil rights ordinances, bypassing police and prosecutors to bring civil actions against producers, distributors, and even consumers of child pornography on the Internet.¹³⁴

d. The Substantive Equality Prostitution Law

When Professor MacKinnon introduced the ordinances in Sweden in 1990 during a public speech and parliamentary seminar, she offered not only a civil remedy for pornography but also suggested reforms to Sweden’s prostitution law; the latter were enacted nine years later.¹³⁵ MacKinnon’s speech criticized prostitution laws that criminalized both those bought for sex and those buying people for sex because there is a *hierarchy* at work: one is exploited and abused, the other is exploiting and abusing.¹³⁶ The law should recognize that this is an unequal, exploitative, and abusive practice of victimization, as forty years of empirical

133. See *United States v. Orito*, 413 U.S. 139, 143 (1973); *Beauharnais v. Illinois*, 343 U.S. 250, 256 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–73 (1942). In *American Booksellers*, the Seventh Circuit recognized that the Supreme Court “sometimes balances the value of speech against the costs of its restriction” under this standard of review. See *Am. Booksellers Ass’n*, 771 F.2d at 331–32. However, citing law reviews, it was alleged that the Court does “this by category of speech and not by the content of particular works,” and that Indianapolis “created an approved point of view” that preempted this route. *Id.* at 332. Assuming this reasoning, arguendo, certainly the Court created an “approved point of view” against race discrimination when upholding Illinois’s group-libel law, which targeted de facto discrimination through speech, while noting that a person’s “job . . . educational opportunities, and . . . dignity . . . may depend as much on the reputation of the racial and religious group” to which they “willy-nilly” belong, as on their “own merits.” *Beauharnais*, 343 U.S. at 263. In *Beauharnais*, the Court’s “approved point of view” was to *disapprove* certain views that portray “depravity, criminality, unchastity, or lack of virtue of a class of citizens.” *Id.* at 251. Moreover, this new group libel category had neither in history nor in practice previously been defined as unprotected. *Id.* at 258. Thus, the Court necessarily based this balancing opinion on “content of particular works” under consideration in the case, contrary to what the Seventh Circuit claimed. See *Am. Booksellers Ass’n*, 771 F.2d at 332.

134. 18 U.S.C. § 2259(b)(1) (2014) (allowing for a restitution order under which “the defendant [is directed] to pay the victim . . . the full amount of the victim’s losses” due to child pornography). Consumers of child pornography are liable for damages, apportioned to their proven contribution to the harm, even if only relatively modest. See *Paroline v. United States*, 134 S. Ct. 1710, 1727 (2014).

135. MACKINNON, *Law in Sweden*, *supra* note 3, at 100–01; see also *supra* notes 3–5 and accompanying text.

136. MACKINNON, *Law in Sweden*, *supra* note 3, at 100–01.

evidence on prostitution, whether off-camera or not, compellingly shows.¹³⁷ Hence, decriminalizing prostitution across the board would similarly promote inequality, MacKinnon argued,¹³⁸ legal prostitution, as such, would give existing exploitation the benefit of doubt, thus presumptively making pimps into legitimate businessmen and johns into ordinary customers. MacKinnon argued that in a *substantively unequal* world, laws should target those who buy and not the people being bought. “Subordination cannot be ended by assuming a symmetry that does not exist,” MacKinnon explained. “It can be ended by laws directed to ending group-based, top-down social relations, [such as] ending hierarchy on the basis of sex.”¹³⁹ Thus the law should support prostituted people exiting the sex industry.

Sweden’s law has largely since been adopted and recommended in a number of other countries.¹⁴⁰ A comparative research study published in 2008 for the Nordic Council of Ministers used relatively uniform measurements and methods to compare prostitution in Sweden, Norway, and Denmark.¹⁴¹ Researchers counted advertisements for prostitution as well as street prostitution, which at the time were two fairly robust measurements of the prevalence of prostitution from a comparative perspective, especially considering the huge differences found.¹⁴² Thus, in Denmark, prostitution by these

137. *See supra* notes 54–110 and accompanying text.

138. MACKINNON, *Law in Sweden*, *supra* note 3, at 101 (criticizing a public inquiry’s report for viewing it as a “practical and ethical problem” only to criminalize the johns, as if both parties were substantially equal in prostitution).

139. *Id.*

140. *See supra* note 6 and accompanying text.

141. *See* NORDISKA MINISTERRÅDET, PROSTITUTION I NORDEN: FORSKNINGSRAPPORT (Charlotta Holmström & May-Len Skilbrei eds., 2008), http://www.nikk.no/wp-content/uploads/NIKKpub2008_prostitution_Forskningsrapport.pdf. For an abbreviated English version, see NORDIC COUNCIL OF MINISTERS, PROSTITUTION IN THE NORDIC COUNTRIES (2008), <http://norden.diva-portal.org/smash/get/diva2:701621/FULLTEXT01.pdf>.

142. NORDISKA MINISTERRÅDET, *supra* note 141. Considering the need to be visible to attract potential johns, it is hardly likely that any extensive prostitution would occur without being reflected in these indicators. *See* Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering [Prohibiting the Purchase of Sexual Services: An Evaluation] 1999–2008 [government report series] 120 (Swed.), <http://www.regeringen.se/49bb8a/contentassets/2ff955c847ed4278918f111ccca880dd/forbud-mot-kop-av-sexuell-tjanst-en-utvardering-1999-2008-sou-201049>. Moreover, no evidence suggests that low-intensity prostitution without visible advertisement occurs more often in Sweden than in Denmark or Norway (or elsewhere). *Id.* at 118, 152 (finding no evidence suggesting prostitution moved indoors in Sweden relatively more than it did in Denmark or Norway between 1998 and 2008). *Cf.* ENDRIT MUJAJ & AMANDA NETSCHER, LÄNSSTYRELSEN STOCKHOLM, PROSTITUTIONEN I SVERIGE 2014: EN

measures increased from 3,886 people in 2002 to 5,567 people five years later.¹⁴³ Prostitution in Norway increased in similar ways (especially for women from abroad), with a total of 2,654 women estimated in 2007.¹⁴⁴ By contrast, street prostitution in Sweden decreased from 726 in 1998 to about 300 in 2007, and in online advertisements roughly 300 women and 50 men were additionally found.¹⁴⁵ Since then, street prostitution in Sweden has decreased even further to about 200 to 250 in 2014, while there is no evidence suggesting an increase in indoor prostitution.¹⁴⁶ When ads and other information were taken into account around 2007, female prostitution per capita was thus almost sixteen times higher in Denmark and almost nine times higher in Norway than in Sweden.¹⁴⁷ Sweden's law hence demonstrably reduced prostitution, contributing to more substantive equality by eliminating considerable sexual exploitation and abuse.

Specialized public social service exit programs for prostituted persons in Sweden were subjected to a comprehensive research evaluation in 2012, and the evaluation concluded that 80% of the

OMFATTNINGSKARTLÄGGNING [PROSTITUTION IN SWEDEN 2014: A SCALE MAPPING] 10 (2015), <http://www.lansstyrelsen.se/stockholm/SiteCollectionDocuments/Sv/publikationer/2015/prostitution-kartlaggning-2014.pdf> (concluding that while technological changes since 2007 made online prostitution more difficult to estimate due to overlapping, duplicating, or inactive ads, no tangible evidence suggest a physical increase in Sweden).

143. Jeanett Bjonness, *Holdninger til prostitution i Danmark*, in PROSTITUTION I NORDEN, *supra* note 141, at 101, 108.

144. Marianne Tveit & May-Len Skilbrei, *Kunnskap om prostitusjon og menneskehandel i Norge [Knowledge of Prostitution and Human Trafficking in Norway]*, in PROSTITUTION I NORDEN, *supra* note 141, at 213, 220–21.

145. Charlotta Holmström, *Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion [Prostitution and Human Trafficking for Sexual Purposes in Sweden: Scale, Prevalence, and Production of Knowledge]*, in PROSTITUTION I NORDEN, *supra* note 141, at 303, 314; EVA AMBESJÖ ET AL., SOCIALSTYRELSEN, PROSTITUTION IN SWEDEN 2003 23 (2004), <http://todaango.org.il/wp-content/uploads/2012/12/352.pdf> [hereinafter SoS, PROSTITUTION 2003]; *cf.* SOU 1995:15, *supra* note 80, at 22, 98–99 (estimating female street prostitution at 650 in 1993).

146. MUJAJ & NETSCHER, *supra* note 142, at 9–10.

147. For population statistics, see *Population and Population Changes 1749–2016*, STATISTICS SWEDEN (SCB), <http://www.scb.se/en/finding-statistics/statistics-by-subject-area/population/population-composition/population-statistics/pong/tables-and-graphs/yearly-statistics--the-whole-country/population-and-population-changes/> (last visited Apr. 11, 2017); *Population Statistics. Population April 1st 2007 and Changes in the 1st Quarter of 2007*, STATISTICS NORWAY (2007), https://www.ssb.no/a/english/kortnavn/folkendrkv_en/2007k1/kvart00-en.html; *Population Figures from the Censuses*, STATISTICS DENMARK <http://www.statbank.dk/> (select “Population and elections”; select “Population and population projections”; select “Population in Denmark”; select “Population figures from the censuses 1769–2017”; under the Year heading, select 2007 from the list; select “Show Table”).

sample of twenty-six clients who were still in the program after one year had left prostitution entirely, while the remaining 20% were prostituted less frequently and also wanted to leave prostitution entirely.¹⁴⁸ The respondents expressed that “the right kind of help” had been “a necessity for survival,” and appreciated the specialized knowledge, the feeling of familiarity, the realization that many similar people had been there before them.¹⁴⁹ Notably, when entering the program these people reported similar experiences with prostitution to those studied internationally, including lifelong trauma, abuse, mental health problems, and reasons for (or preconditions before) entering prostitution.¹⁵⁰ Their positive responses sharply contrast to how a control group of eleven other women prostituted via the Internet, who were not in the program, described experiences with social workers and/or child psychiatry: these women had “rarely mentioned” their prostitution, and “meetings with social workers, the justice system, or psychiatry” made them feel “run over” and “misunderstood.”¹⁵¹ Similar complaints against general non-specialized social services have been reported elsewhere, while the specialized exit programs are noticeably more appreciated by people wishing to leave the sex industry.¹⁵² Nonetheless, exit programs are not yet guaranteed under Swedish law, making them vulnerable to public decisions, including misplaced management interventions or budget cuts.¹⁵³ By contrast, France

148. CARL GÖRAN SVEDIN ET AL., PROSTITUTION I SVERIGE: HUVUDRAPPORT [PROSTITUTION IN SWEDEN: MAIN REPORT] 9 (2012), <http://liu.diva-portal.org/smash/get/diva2:506410/FULLTEXT01.pdf>.

149. *Id.* at 10.

150. Although ten clients did not feel well enough even to participate in the survey, or aborted/declined participation, even the remaining thirty-four reported having experienced on average 11.6 “potentially traumatic experiences” during childhood. See KJELLGREN ET AL., *supra* note 88, at 24–25. These traumatic childhood experiences included, inter alia, 67% being subjected to sexual acts, 76% being hospitalized, 58% being bullied, and 61% being beaten or injured by family adults. *Id.* at 26 tbl.5.9. The most commonly reported reason for entering prostitution was money (stated by 14 out of 34 respondents). *Id.* at 21. Respondents’ average symptoms from mental health problems were considerably more severe compared to another large study of patients with a range of psychiatric diagnoses and/or substance abuse (PTSD was not measured). *Id.* at 27. For comparisons with international prostitution studies, see *supra* notes 86–110 and accompanying text.

151. SVEDIN ET AL., *supra* note 148, at 14, 17.

152. SOU 2010:49, *supra* note 142, at 232.

153. See, e.g., Malin Jenstav et al., *Förstör inte stödet att lämna prostitution [Do Not Destroy the Support to Leave Prostitution]*, Opinion, SVT NYHETER (Dec. 8, 2016), <http://www.svt.se/opinion/article11443254.svt> (criticizing changes in the management of exit programs in Stockholm).

reportedly strengthened conditions for exit programs by a legal mandate in their version of Sweden's law.¹⁵⁴

Despite claims to the contrary, no reliable evidence exists that the prostitution that remains in Sweden is more dangerous and unsafe than in other countries.¹⁵⁵ To the contrary, prostituted persons now often report (including among them a significant proportion of LGBTQ persons) that after 1999, johns in Sweden have become much more careful in how they treat prostituted persons, now knowing they may be reported simply for buying sex by a mistreated prostituted person who needs no additional offense such as rape or robbery to lodge a complaint, in turn providing the latter a considerable bargaining advantage while risking no sanctions at all.¹⁵⁶ Put another way, the law reduces the social *hierarchy* between the parties, putting prostituted persons in a *more substantially equal* position than they were before.

Sweden's law, grounded in MacKinnon's hierarchy theory, has apparently strengthened the hand of prostituted persons in an otherwise extremely unequal social practice of dominance. This situation does not exist where buying sex is legal, and where men think, with reason, that nothing can stop them; at least fifty-five women were reported to have been murdered while engaged in prostitution in Germany between 2002—when Germany legalized prostitution—and 2015,¹⁵⁷ and many in New Zealand as well since

154. McAuley, *supra* note 6 (reporting France's new prostitution law allocates "funds" for alternative job training for former prostituted persons).

155. For analysis of misinformation, see Max Waltman, *Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential*, 34 WOMEN'S STUD. INT'L F. 449, 460–63 (2011) [hereinafter Waltman, *Law's Potential*].

156. SUZANN LARSDOTTER ET AL., RFSL OSYNLIGA SYNLIKA AKTÖRER: HBT-PERSONER MED ERFARENHET AV ATT SÄLJA OCH/ELLER KÖPA SEXUELLA TJÄNSTER [INVISIBLE VISIBLE ACTORS: LGBT PEOPLE WITH EXPERIENCE IN SELLING AND/OR BUYING SEXUAL SERVICES] 98–99, 245, 260 (2011), <https://alfresco.rfsl.se/share/s/40M0ziL6TcOP-iECiQTvWg>; NIKLAS ERIKSSON & HANS KNUTAGÅRD, RFSL RÅDGIVNINGEN SKÅNE, SEXMÄNSÄLJER.SE/X: NÖJE BLIR FUNKTION [SEXMENSELLS.COM/X: PLEASURE BECOMES FUNCTION] 54, 76 (2005), <http://www.diva-portal.org/smash/get/diva2:703677/FULLTEXT01.pdf>; cf. SOS, PROSTITUTION 2003, *supra* note 145, at 34 (mentioning an informant referring to several prostituted women who had "dared" to report sex purchasers for rape because the new sex purchase law was perceived to support them in those situations).

157. PROSTITUTION RESEARCH & EDUC., PROSTITUTION IN GERMANY: MURDERS AND ATTEMPTED MURDERS FROM 2002 (PROSTITUTION LEGALIZED) TO 2015, <http://prostitutionresearch.com/wp-content/uploads/2015/10/Prostitution-in-Germany-Murders.pdf> (linking to news reports about at least fifty-five prostituted persons murdered and twenty-nine murder attempts by sex purchasers or other persons in the prostitution milieu since 2002).

its full decriminalization there.¹⁵⁸ No woman in Sweden has been murdered in connection with prostitution since 1999.

The law in Sweden has not yet reached its full potential though, including making use of civil venues for prostituted persons that could support their exit by claiming damage awards directly from johns for the harms they cause. Although permissible under the law, this has not been realized; however, damages are sometimes acquired from third parties such as pimps.¹⁵⁹ Similarly, despite the fact that there seems to be no constitutional bar against applying Sweden's prostitution laws on pornographers in the course of their production, without targeting any resulting materials as under the anti-pornography ordinances, this has also not been tried.¹⁶⁰ Furthermore, the full range of penalties is not used. Despite prison terms having been included since 1999, to date it is "very unusual" for any john to be punished by more than fines.¹⁶¹

On the other hand, numerous studies and reports show that under other countries' laws, where men are free to buy sex from prostituted persons, the sex industry is not only many times larger, but also more dangerous, exploitative, and unsafe than in Sweden, contrary to the brothel lobby's marketing and popular opinion.¹⁶² This is not surprising considering that the johns'

158. Penny White, *Remembering the Murdered Women Erased by the Pro-Sex Work Agenda*, FEMINIST CURRENT (Nov. 3, 2015), <http://www.feministcurrent.com/2015/11/03/remembering-the-murdered-women-erased-by-the-pro-sex-work-agenda/> (detailing the murders of several women in prostitution since New Zealand—half the population size of Sweden—decriminalized prostitution in 2002).

159. For a critique and proposals for solving these problems under the Swedish law, see Waltman, *Law's Potential*, *supra* note 155, at 463–68; cf. Waltman, *Ending Trafficking*, *supra* note 3, at 153–57.

160. See Max Waltman, *Pornography and Men's Violence Against Women*, in PORNOGRAPHY AND PROSTITUTION: A REPORT ON EXPLOITATION AND DEMAND 31, 70–77 (Unizon ed., 2016), <https://ssrn.com/abstract=2846737> (analyzing the potential of applying prostitution laws in Sweden on pornography production). For more details, see Max Waltman, *The Politics of Legal Challenges to Pornography: Canada, Sweden, and the United States*, in 160 STOCKHOLM STUDIES IN POLITICS 1, 443–71 (2014), <https://ssrn.com/abstract=2539998>.

161. SOU 2016:42, *supra* note 51, at 22.

162. For instance, prostituted persons in Victoria, Australia reported that legalization led to increasing competition to secure tricks and more demands for unsafe sex, and that brothels mete out penalties for refusing abusive tricks while tacitly endorsing unsafe sex. MARY SULLIVAN, COAL. AGAINST TRAFFICKING IN WOMEN, AUSTRALIA, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 7, 20–21 (2005), <http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/What-happens-when-prostitution-becomes-work.pdf>; Priscilla Pyett & Deborah Warr, *Women at Risk in Sex Work: Strategies for Survival*, 35 J. SOC. 183, 186, 190 (1999) (reporting prostituted women openly admitting unsafe sex being encouraged or tacitly

money drives the business, of whom a majority seem to want to imitate pornography, including unsafe and harmful sex that others tend to refuse.¹⁶³ Thus, one can expect a tacit quid pro quo relationship between johns and brothels, where brothels receive money and johns are given an opportunity to do what they want. The needs of prostituted persons, whose vulnerable situations do not provide much leverage, have not been influential until recently, and then only in places such as Sweden where MacKinnon's ideas have taken root.

Conclusion

Before *Toward a Feminist Theory of the State*, no other work had clearly connected feminist practices such as consciousness-raising with a corresponding feminist political theory. There was even less in the way of a feminist jurisprudence concretely applicable to challenge linchpin practices that reinforce male dominance. MacKinnon's theory connected the dots between the empirically documented harms and unequal conditions of practices such as pornography, rape, unequal pay, reproduction, and abortion with the laws enabling or otherwise influencing those practices. MacKinnon showed how the state, through its laws, constitutes and reinforces women's inequality "in the interest of men as a gender" by treating women "the way men see and treat women"—hence, the "state's formal norms recapitulate the male point of view on the level of design."¹⁶⁴ Moreover, she offered a legal theory of how to effectively change this system.

Recalling my early encounter with *Toward a Feminist Theory of the State*, it appeared as a mystery for some years that no other theorist offered a similarly compelling analysis of gender inequality, politics, and law. I confronted professors and student peers with this puzzling lacuna and made critical comments in

condoned by some licensed brothels). In New Zealand, a government committee in 2008 reported that among prostituted persons and brothel operators, a "majority felt that the [2003 law] could do little about the violence that occurred [against women in prostitution]." NEW ZEALAND MINISTRY OF JUSTICE, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 57 (2008), <https://perma.cc/0dW66NBn2Ti>. Similar reports of severely exploitative conditions, lack of transparency, systemic demands to accept unsafe or harmful sex in legal indoor prostitution are reported from England, Germany, Nevada, and the Netherlands, among other places. See also Max Waltman, *Assessing Evidence, Arguments, and Inequality in Bedford v. Canada*, 37 HARV. J.L. & GENDER 459, esp. 466–510 (2014) (analyzing effects of legalizing or decriminalizing prostitution across the board).

163. See *supra* notes 76–80 and accompanying text.

164. TFTS, *supra* note 1, at 162.

over-worked papers, discussions, and course evaluations, trying to understand why. My efforts were to no avail until I realized that it is a groundbreaking work of its own kind—a contribution *sui generis*, meaning it is a classic whose significance we have not even fully realized. This is not only because MacKinnon transformed the world through merging consciousness-raising and critically informed scholarship, but also because her theory effectuated real legal change. Its influence will likely continue for a long and considerable time, outlasting all of us. The reason is simple. Anywhere in the world where male dominance and oppression of women exist, MacKinnon offers an effective blueprint for change. Few other theories do.