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> I live in a country where if you film any act of humiliation or torture, and if the victim is a woman, the film is both entertainment and it is protected speech.
>
> - Andrea Dworkin[1]

Introduction

The debate over pornography continues to divide the feminist movement. There is little consensus about whether pornography should be criminalized: some call the regulation of pornography censorship,[2] others denounce the very existence of pornography as a violation of the civil rights of women,[3] and there are numerous varying positions along this continuum.

This article introduces a viable alternative method for eliminating one aspect of the pornography industry,[4] pornographic film. A carefully drafted prostitution statute directed at the process of pornographic filmmaking could circumvent First Amendment con-

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1. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY 199 (1986) [hereinafter, "MEESE COMMISSION REPORT"].

2. *See infra* note 11 and accompanying text.

3. *See infra* note 19 and accompanying text.

4. [Hereinafter, "the industry"]. In 1977, the revenues of the pornography industry were estimated at four billion dollars a year. Caryn Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5,6 (1984) *(citing* KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 84 (1979)). In 1978, a weekly audience of two and a half million people saw hardcore films. *Id.* at 7 (*citing* BARRY, at 84). In 1978, 400,000 pornographic video cassettes were sold to private consumers. *Id.* Pornography is now available on cable television, in pornographic video games, through home computer programs, and on the internet.

cerns[5] and arbitrary line-drawing[6] that other attempts to regulate pornography have failed to adequately address, while at the same time shifting the focus of the problem to the filmmakers themselves and the conditions under which films are produced, and away from the women employed in the industry.[7] For meaningful change, those in power within this industry must be deterred.

Section I of this article explains why the reduction of pornography is a desirable goal. Section II analyzes current methods of dealing with pornography and exposes them as insufficient. Section III discusses the cases that have attempted to apply prostitution statutes to pornographic film and theater. Section IV details proposed legislation which would accomplish my goal while acknowledging the limitations of this legislation. In sum, this proposal presents an alternative that could be implemented by simply extending current prostitution law to the growing pornography industry.[8]

Section I: What's wrong with Pornographic Film?

The desire to attack the pornographic film industry is based on a variety of beliefs. Many believe that the industry as a whole should be eradicated because its product, pornographic media, is undesirable.[9] Others believe that the process by which pornography is created is undesirable.[10] However, for some, the eradication of pornography is not an obvious or desirable goal.[11]

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5. *See infra* notes 21-46 and accompanying text.

6. By "line-drawing," I mean that process of deciding what is and is not pornography or obscenity—essentially, drawing the line between what is and is not acceptable film or behavior. For a discussion of obscenity *see infra* notes 21-28 and accompanying text.

7. A discussion of the reasons women enter the industry is beyond the scope of this article. However, I wish to acknowledge that I am operating on the assumption that a large percentage of women in the industry are "coerced" into it, whether for economic reasons, or by actual one-on-one coercion. *See infra* note 76 and accompanying text for a discussion of consent.

8. *See supra* note 4 and accompanying text for information regarding the size of the industry.

9. *See infra* note 13 for a discussion of the alleged effects of pornography on society.

10. *See infra* notes 15-18 for a discussion of conditions on the sets of pornographic film. There may be significant overlap between these groups.

11. *See generally* Nadine Strossen, *A Feminist Critique of 'The' Feminist Critique of Pornography*, 79 Va. L. Rev. 1099 (1993) (arguing that there is no sound evidence that pornography leads to violence against women, and the anti-pornography movement is an assault on civil liberties).

Evidence supports the contention that both the process of producing pornography[12] and pornographic media[13] harm women. The

12. *See infra* notes 15-18 and accompanying text. In her autobiography, *Ordeal*, Linda Marchiano, the former Linda Lovelace and star of the immensely successful pornographic film *Deep Throat*, describes being both physically and psychologically abused by her husband, who coerced her through abduction, systematic beatings, surveillance and torture. When she tried to leave, her husband threatened both her life and the lives of her family members. She was forced to ask his permission to use the bathroom, and while she did, he watched her. Upon her escape and recapture, she was horribly tortured. She was forced at gunpoint to have sex with a dog. Her husband prostituted her and those who beat her received her services for free. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 10 (1987) (*citing* LINDA LOVELACE AND MICHAEL MCGRADY, ORDEAL (1980)). She appeared in *Deep Throat* under conditions of heavy beatings. Though she tried to escape her husband many times, she was unsuccessful. Jacobs, *supra* note 4, at 21 (*citing* LOVELACE AND MCGRADY, ORDEAL (1980)).

13. Research surrounding the effects of pornography on the men and women who use it has been the source of much controversy. However, studies do show a consistent link between violent pornography and violent behavior by its consumers.

Dr. Edward Donnerstein demonstrated how exposing men to aggressive erotic films increased their willingness to react violently and to inflict pain upon women. Jacobs, *supra* note 4, at 10 (*citing* Edward Donnerstein, *Aggressive Erotica and Violence Against Women*, 39 J. PERSONALITY AND SOC. PSYCHOL. 269-77 (1980)).

Men exposed to pornography which contained a combination of both sex and violence were found to be more likely to be sexually aroused by the idea of rape and less likely to be sympathetic to rape victims. Jacobs, *supra* note 4, at 10 (*citing* Feschbach & Malamuth, *Sex and Aggression: Proving the Link*, PSYCHOL. TODAY, Nov. 1978, at 111, 116).

When polled regarding the direct effects of pornography on their lives, ten percent of the women responding answered that they had experienced and been upset by a man's attempts to get them to do what he had seen in pornographic books, pictures, or movies. Jacobs, *supra* note 4, at 11 (*citing* Diana E.H. Russell, *Pornography & Violence: What Does the New Research Say?, in* TAKE BACK THE NIGHT 224 (Laura Lederer ed. 1980)). "Many of these women had been asked to participate in sado-masochistic behavior and, in fifteen percent of the cases, had been physically forced to participate in acts that their partners wanted to imitate after having viewed pornography." *Id.* (*citing* Russell at 259).

Women testifying before the Meese Commission reported similar experiences.

> When I first met my husband, it was in early 1975, and he was all the time talking about . . . *Deep Throat*. After we were married, he on several occasions referred to her performances and suggested I try to imitate her actions . . . . Last January . . . my husband raped me . . . . He made me strip and lie on our bed. He cut our clothesline up . . . and tied my hands and feet to the four corners of the bedframe. (All this was done while our nine month old son watched.) While he held a butcher knife on me threatening to kill me he fed me three strong tranquilizers . . . . [H]e beat my face and my body. I later had welts and bruises. He attempted to smother me with a pillow . . . . Then he had sex with me vaginally, and then forced me to give oral sex to him.

MEESE COMMISSION REPORT, *supra* note 1, at 200 (*citing* Anonymous letter to the Pornography Resource Center forwarded to the Attorney General's Commission on Pornography). Another woman testified that she was staying at a man's house when, "He tried to make me have oral sex with him. He said he'd seen far-out stuff in movies, and that it would be *fun to mentally and physically torture a woman*." *Id.* (emphasis added).

conditions under which women work in the industry,[14] without any consideration of the effects of the end-product, support the elimination of the industry. Women work long hours[15] and are paid in cash with no hope of job security.[16] Experiencing multiple partners on a daily basis puts the actors at serious risk of infection and disease.[17] The testimony of women in the industry supports this assertion.[18]

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14. Men also "act" in the industry. However, because the large majority of subjects of pornography are women, and women experience a unique exploitation as workers in the industry, I use "women" exclusively throughout the article to indicate all those who "act" in pornographic film.

Further, homosexual pornography exists and may not implicate the same concerns as traditional pornography (targeted to a heterosexual audience). Because prostitution law does not make any distinctions based on the gender of its actors, or the audience targeted, I have also chosen not to distinguish on these grounds.

15. A typical work day is 12 to 14 hours long and models can expect to engage in at least two sex scenes a day. MEESE COMMISSION REPORT, supra note 1, at 235.

16. Women are paid by the number and type of sex acts they perform. Some may make up to $250 dollars a day. They receive no benefits and have no control over the end product of their work. Further, there is no guarantee that they will be employed again. *Id.*

17. Any one model may have twenty-four to thirty-two sexual partners every month through contacts at work alone. *Id.* at 236. If every person one comes in contact with has also been in contact with as many partners, contracting a sexually transmitted disease seems inevitable. Condoms are not an option, and only the "stars" have any input into decisions regarding their partners. MEESE COMMISSION REPORT, *supra* note 1, at 235.

One former model considered herself lucky that she only experienced a herpes infection that "hung on for years," because she, unlike her friend, did not have dozens of open sores on her vagina. The model considered such infections an "occupational hazard." Laura Lederer, *Then and Now: An Interview with a Former Pornography Model, in* TAKE BACK THE NIGHT 66, ed. note (Laura Lederer ed. 1980).

Another model testified:

> At the end of . . . the day, I was often exhausted and sometimes in tears. Sometimes I . . . would show up on location and have to leave. I lost two jobs because I refused to wear the costumes. They were crusty with vaginal secretions and sperm. Women who work in the pornography business always have vaginal trichomoniasis or some infection from the working conditions, which run from bad to simply intolerable. At one point there was an epidemic of hepatitis . . . .

Id. at 66.

18. A former model explains her first job:

> [T]here was a woman who had just had a baby two days prior to the assignment. She was bleeding. She was doing the movie to try to get the kid out of the hospital. She had this tampon-or two of them-in her to try to stop the bleeding, even though she wasn't supposed to use tampons right after birth.

Id. at 61. The same model described posing for an album cover. The picture was a "crotch shot of me leaping in the air to simulate flying." To obtain that shot, she was required to jump eighty-seven times off a coffee table onto a "hard mat." To successfully obtain the shot she had to resist her natural impulse to break her fall until that last possible moment. *Id.* at 62.

The interviewee described going to a set where she was drugged and raped by an alleged photographer. After raping her in his bedroom, he went to a picture on the wall, lifted it, and added another tally mark to his apparent list of women he had "had." *Id.* at 67.

In addition to the physical, mental and emotional harm to which pornography contributes, the existence of pornography is considered, by some, to be a violation of women's civil rights. Andrea Dworkin and Catharine MacKinnon argue that pornography prohibits women from exercising their First Amendment rights[19] by reinforcing and institutionalizing sexism. While people continue to contend that the First Amendment protects their access to pornography, Dworkin and MacKinnon argue that pornography silences women and impedes *their* full participation in society.[20]

The woman recalled a model who broke her leg trying to pose in a movie of a nude circus act, a woman who received rope burns from a pose requiring her to slide up and down a rope, and a woman who suffered a severe allergic reaction to having her body sprayed with paint. The entire top layer of her skin peeled off as a result of being painted and because she could not be photographed that day, she received no compensation. *Id.* at 66. She also testified about an "agency in Los Angeles [that] sent a woman out on an assignment with a man who took pictures of how he tortured her." *Id.* at 69.

When asked about finally leaving the industry, the woman said, "I was exhausted. I wasn't sleeping at night. I was having nightmares and throwing up. I was physically sick from the long hours of work, and I was getting bladder infections from the work conditions and the general uncleanliness." *Id.* at 67.

In addition to the physical risks of such work, women in the pornography industry experience a myriad of emotional harms. Former models describe themselves as "commodities" and being treated like a "piece of meat." Women were even referred to as "fresh meat" and considered themselves "garbage." Jacobs, *supra* note 4, at 22.

19. In her book, *Pornography: Men Possessing Women* (1981), Dworkin proposes that pornography keeps women from exercising the rights protected by the First Amendment. Dworkin and MacKinnon define pornography as "a practice of sex discrimination, a violation of women's civil rights, the opposite of sexual equality," wherein women's pain and inferiority do not outweigh men's sexual pleasure. Catharine A. MacKinnon, *Frances Biddle's Sister: Pornography, Civil Rights, and Speech*, *in* FEMINISM UNMODIFIED 163, 175 (1987).

Lauren Robel succinctly summarizes this complex theory: "The assumption underlying the civil-rights approaches to pornography is that pornography is a cause of sex discrimination in all the areas, such as employment, housing, and access to public accomodations, with which civil-rights legislation is traditionally concerned." Lauren Robel, *Pornography and Existing Law*, *in* FOR ADULT USERS ONLY: THE DILEMMA OF VIOLENT PORNOGRAPHY 178, 179 (Susan Gubar and Joan Hoff eds. 1989).

Dworkin and MacKinnon assert that the First Amendment operates on the assumption that adults are autonomous, equal, freely acting individuals, and, as such, are guaranteed freedom of speech. MacKinnon, *supra*, at 181. However, because pornography sexualizes rape, battery, harassment and child sexual abuse, it eroticizes dominance and submission. *Id.* at 171. It eroticizes hierarchy and inequality while institutionalizing male supremacy as something sexual. *Id.* By making women into objects, pornography silences them. Objects do not speak. *Id.* at 182. In this context, the free speech of men silences the free speech of women, thereby violating women's rights. *Id.* at 156. This concept is perhaps best clarified by MacKinnon's query: has "the speech of the Nazis . . . historically enhanced the speech of the Jews[?] Has the speech of the Klan expanded the speech of the Blacks?" *Id.* at 209.

20. *See supra* note 19 and accompanying text for an explanation of this position.

Section II: Inadequate Attempts at Regulation

Means currently employed which attempt to curb the use production, distribution, and location of pornography, while important contributions to the battle against it, have only begun to deal with the problem. This section examines some of those attempts and their limitations.

Labeling a work as "obscene" is one way courts have tried to limit the availability of pornography. If something is obscene, it is no longer entitled to First Amendment protection.[21] In *Miller v. California*,[22] the Supreme Court set forth the following criteria for determining whether something is obscene:

> (a) whether the average person,[23] applying contemporary community standards[24] would find that the work, taken as a whole, appeals to the prurient interest . . .;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[25]

There are many reasons why this formulation is troublesome. The Court stated that its intention was "to define obscenity in a manner that would aid in the prosecution of individuals producing or distributing obscene material."[26] However, the application of the

21. Lori D. Hutchins, *Pornography: The Prosecution of Pornographers under Prostitution Statutes: A New Approach,* 37 SYRACUSE L. REV. 977, 978 (1986) (*citing* Roth v. United States, 354 U.S. 476, 485 (1987), in which the Court stated that "obscenity is not within the area of constitutionally protected speech or press").

Hutchins' article introduces the idea of using pornography statutes to regulate pornographic film. It differs from this article in that it makes no significant attempt to support such regulation as a worthwhile goal, and presents neither a model statute nor an acknowledgement of the possible shortcomings such a statute may have.

22. 413 U.S. 15 (1973).

23. *See infra* note 27 for an explanation of how the use of the "average person" standard is problematic.

24. *See infra* note 27 and accompanying text for further discussion of this requirement.

25. Hutchins, *supra* note 21, at 979-80 (*citing Miller*, 413 U.S. at 39).

26. *Id.* at 980 (*citing Miller*, 413 U.S. at 25-29).

test has been difficult,[27] and has resulted in a decrease in such prosecutions.[28]

Public nuisance statutes are also used to regulate pornography. These statutes make it possible to enjoin materials which have been judicially determined to be obscene.[29] A violation of an order enjoining the pornography results in a contempt charge.[30] Prosecutors find such statutes attractive because (1) the burden of proof is lower than that required for prosecution under obscenity statutes,[31] (2) a jury is not constitutionally required because this cause of action is grounded in equity,[32] (3) defendants are not subject to

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27. The *Miller* test is ambiguous. "The average person" may or may not be interested in pornography. While I may find the Victoria's Secret lingerie catalogue obscene, a man who regularly uses pornography may be hard-pressed to admit that the most hard-core pornography is obscene.

"Community standards" are also difficult to define. One must ask, which community? In *Hamling v. United States*, 418 U.S. 87, 125 (1974), the Court held that the determination of what is obscene as decided by an average person applying " 'contemporary community standards,' lies solely in the opinion of each juror and not in the opinion of the community as a whole." Hutchins, *supra* note 21, at 980 n.23. In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the Court held that the "community" need not be state-wide. A state legislature may determine the geographic area, but need not specify a particular community. If no such area is specified, the juror may determine the community. Hutchins, *supra note* 21, at 980 n.23.

Because of these ambiguities, appellate review is difficult. Since the trier of fact is applying community standards as she believes them to be, it is difficult to overturn a ruling. In *United States v. Various Articles of Obscene Material*, 709 F.2d 132, 135-36 (2d Cir. 1983), the court stated that an appellate court would only reverse a lower court's decision "if there is a terrible abuse of discretion on the part of the fact-finder." Hutchins, *supra* note 21, at 980 (*citing* 709 F.2d at 135-36).

Determining whether something has "serious" value is also an exercise in personal preference and cultural relativism. One must wonder, important to whom?; of value to whom? Whether something is obscene, then, ultimately depends on the personal preference of twelve people selected for jury duty, or on the opinion of the Supreme Court. Since those in power make the laws, and have access to courts, and have voices that are heard, it is easy to see how such a relativist definition merely reinforces the status quo. The fact that the pornography industry is still a multi-billion dollar industry further supports this assertion.

28. Studies show that the number of jurisdictions prosecuting under the statute, and the total number of obscenity prosecutions has declined since this decision. Hutchins, *supra* note 21, at 981 (*citing* Harold Leventhal, Project, *An Empirical Inquiry Into the Effects of Miller v. California on The Control Of Obscenity,* 52 N.Y.U. L. REV. 810, 858 (1977)).

29. Hutchins, *supra* note 21, at 981. The *Miller* standard is applied here to determine obscenity. "When speech is found to be obscene and thus a public nuisance, the usual penalty is an injunction against further similarly obscene speech. However, some statutes will permit more severe penalties." *Id.* (*citing* Thomas A. McWatters, III, Note, *An Attempt to Regulate Pornography Through Civil Rights Legislation: Is it Constitutional?,* 16 U. TOL. L. REV. 231, 253 n.113 (1984)).

30. *Id.* at 981-82 (*citing* McWatters, *supra* note 29, at 253).

31. *Id.* at 982 (*citing* McWatters, *supra* note 29, at 254 (stating that the burden of proof when seeking an injunction need only be "a preponderance of the evidence," not "beyond a reasonable doubt")).

32. *Id.* (*citing* McWatters, *supra* note 29, at 254-55).

severe criminal sanctions[33] and (4) civil actions are viewed as less likely to chill speech and implicate First Amendment concerns.[34]

The Supreme Court delineated the following test for use in determining whether a public nuisance statute is unconstitutional:[35]

> First, the burden of proving that the [material] is unprotected expression must rest on the censor.
>
> Second, only a procedure requiring a judicial determination suffices to impose a final valid restraint.
>
> Third, the procedure must also assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license.[36]

This test has also encountered problems in its application. Fear of chilling speech due to overbreadth,[37] vagueness[38] and the prior restraint doctrine[39] has limited the utility of public nuisance statutes.

Zoning ordinances are another means used to limit the availability of pornography.[40] While the scope of such ordinances is narrow,[41] pornography need not be declared obscene to be regulated by this method.[42] These ordinances will only be found unconstitutional if they are "clearly arbitrary and unreasonable, [and] hav[e] no sub-

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33. *Id.* at 982 n.42 (*citing* Miller v. California, 413 U.S. 15, 43-44 (1973) (Douglas, J. dissenting), in which Justice Douglas commented that sending people "to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a nation dedicated to fair trials and due process").

34. *Id.* at 982 (*citing* McWatters, *supra* note 29, at 257 n.131.) The assumption is that if sanctions less severe than criminal penalties exist, more vendors will be willing to "risk it" and therefore less speech will be chilled.

35. *Id.* at 982 (*citing* Freedman v. Maryland, 380 U.S. 51, 58-59 (1965)).

36. *Id.* at 982-83 (*citing Freedman*, 380 U.S. at 58-59) (footnotes omitted).

37. A statute that fails to define precisely what speech is prohibited may ultimately stifle speech when a person errs on the side of not speaking rather than risking penalty. If conduct were specifically defined, the risk of chilling constitutionally protected speech would be significantly reduced.

38. A public nuisance statute is considered unconstitutionally vague if it does not meet the requirements outlined in *Miller*. Hutchins, *supra* note 21, at 983 n.52. *See supra* text accompanying notes 22-25 for the *Miller* requirements.

39. A prior restraint is one "imposed before the communication takes place, as distinguished from restrictions of speech imposed by subsequent punishment." A. GUNTHER, CONSTITUTIONAL LAW 1374 (10th ed. 1979) *(cited in* Hutchins, *supra* note 21, at 983 n.53).

40. Hutchins, *supra* note 21, at 984 (*citing* McWatters, *supra* note 29, at 265). Zoning ordinances allow governments to prohibit pornography shops from locating in certain areas or "zones."

41. *Id.* The scope of application is narrower because while zoning ordinances allow control of the areas where pornography may be sold, they do not limit amounts or content. *Id.* at n.59.

42. *Id.*

stantial relation to the public health, safety, morals or general welfare."[43]

Such ordinances have made distribution and sale more difficult for pornographers. However, they merely reaffirm the attitude that as long as the industry is not somewhere where it can be seen, it is not harming the community.[44] Rather than sending a message that the production of pornography is wrong or harmful, the statutes reinforce stereotypes about the people who use pornography[45] while really only saying "it is not alright to do that *here*" rather than saying "it is not alright to do that."[46]

In 1983, Catharine MacKinnon and Andrea Dworkin drafted an ordinance based upon their assertion that pornography is a civil rights violation.[47] Proposed as an amendment to the Minneapolis Civil Rights Code, this ordinance would have allowed a person to bring a civil suit against the producer, seller, exhibitor or distributor of pornographic material.[48] Although the Minneapolis City Council passed the statute, the Mayor vetoed it. A similar ordi-

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43. *Id.* (*citing* Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)). The Supreme Court reaffirmed such ordinances in Renton v. Play-Time Theaters, Inc., 475 U.S. 41 (1986), *reh'g denied*, 475 U.S. 1132 (1986) (stating that zoning ordinances are "valid governmental . . . response[s] to the serious problems created by adult theaters," while still satisfying the dictates of the First Amendment). Hutchins, *supra* note 21, at 984-85.

44. Such ordinances really only call for the relocation of the industry. Viewing this method as a solution ignores the reality that pornography affects society, regardless of whether it is visible. It also ignores the harm done to the women working in the industry.

45. Such ordinances are motivated by the feeling that "we don't want those people in our neighborhood." This reinforces the idea that only "other people" use pornography, not my husband, doctor, lawyer, neighbor, lover. This contributes to the unwillingness to really attack the problem at a systemic level.

46. *See supra* notes 44 and 45 for further explanation.

47. *See supra* note 19 and accompanying text for a discussion of this theory.

48. The ordinance defined pornography as:

> [T]he sexually explicit subordination of women, graphically depicted, whether in pictures or in words that entails one or more of the following:
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> (i) women are presented dehumanized as sexual objects, things or commodities; or
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> (ii) women are presented as sexual objects who enjoy pain or humiliation; or
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> (iii) women are presented as sexual objects who experience sexual pleasure in being raped; or
>
> (iv) women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or
>
> (v) women are presented in postures of sexual submission
>
> (vi) women's body parts—including but not limited to vaginas, breasts, and buttocks—are exhibited such that women are reduced to those parts; or
>
> (vii) women are presented as whores by nature; or
>
> (viii) women are presented being penetrated by objects or animals; or

nance, based on the Minneapolis Ordinance, was passed in the city of Indianapolis. It was found unconstitutional.[49]

The limited effectiveness of these methods indicates that if something is going to be done to curtail or criminalize pornography, it must be something new. My recommendation calls for a penalization of pornographic film-makers by extending the scope of prostitution statutes. This approach avoids the problems of unconstitutionality, vagueness, and fear of prosecution that the above methods have encountered.[50]

Section III: Precedent

Prosecuting pornographic film-making as prostitution has received little attention in the courts, but pornography and prostitution have been recognized by the non-legal world as inextricably linked.[51] While some pornographers have been successfully prosecuted under prostitution statutes, the case of *People v. Freeman*[52] slowed such prosecution, at least in California,[53] ignoring and overturning precedent which held to the contrary.[54]

(ix) women are presented in scenarios of degradation, injury, abasement, torture, shown as filth or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

Hutchins, *supra* note 21, at 985 n.73 (*citing* proposed amendment to MINNEAPOLIS CODE OF ORDINANCES TIT. 7, CHS. 139, 141 (1982) (passed December 30, 1983; vetoed January 5, 1984)).

49. *See* American Booksellers Ass'n v. Hudnut, 598 F. Supp. 1316 (S.D. Ind. 1984), *aff'd*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

50. *See supra* notes 21-49 and accompanying text for a discussion of the ways in which other methods are insufficient.

51. One former model articulated this connection when she said, "A prostitute is just being more honest about what she's doing . . . . We called what we were doing 'modeling' or 'acting.' Pornography models have the *illusion* that they're not hooking. It's called acting instead of sex." Lederer, *supra* note 17, at 64.

Another model stated, "anybody in the industry knows you are paid per sex act and not for acting." MEESE COMMISSION REPORT, *supra* note 1, at 238 (*citing Los Angeles Hearing*, Vol. 1, George, at 84-85). Models admit that thin story lines are merely vehicles for filming sex. One stated that the movie she was most proud of was one with "acting in it, a story to it . . . it wasn't an excuse to have sex." *Id.* (*citing Interview: Traci Lords*, ADULT VIDEO NEWS, Aug. 1985 at 34).

After considering the testimony presented before it, the Meese Commission stated, "It seems abundantly clear from the facts before us that the bulk of commercial pornographic modeling (that is, all performances which include actual sexual intercourse), quite simply is a form of prostitution . . . . [This was] effectively denied by no one." MEESE COMMISSION REPORT, *supra* note 1, at 242.

52. 46 Cal. 3d 419 (1988), *cert. denied*, 489 U.S. 1311 (1989).

53. The focus on California law occurs because that is where courts have addressed this issue. The case law cited in this article is all that exists on the topic.

54. "To the extent that *People v. Fixler*, [56 Cal. App. 3d 321 (1976)], *People ex rel. Van De Kamp v. American Art Enterprises, Inc.*, [75 Cal. App. 3d 523 (1977)], and *People v. Zeihm*, [40 Cal. App. 3d 1085 (1974)], hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication

Defendant Freeman was the president of a video production company in the business of producing and marketing "adult films."[55] Freeman was convicted of five counts of pandering (a/k/a "prostituting")[56] for his production of a pornographic film, in which he paid actors and actresses to engage in "various sexually explicit acts, including sexual intercourse, oral copulation and sodomy."[57] Freeman appealed his conviction, first to the California Court of Appeals which affirmed,[58] and ultimately to the California Supreme Court, where his conviction was overturned.[59]

Finding that the conduct did not come within the definition of prostitution,[60] the court stated, "it is clear that in order to constitute prostitution, the money or other consideration must be paid for the purpose of sexual arousal or gratification . . . and [t]here is no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors."[61] Refusing to recognize that the payment of money alone is dispositive was this court's first fundamental error.

The fact that money was offered by non-participants was dealt with more satisfactorily in the earlier case of *People v. Fixler*,[62] overturned in *Freeman*. Here the defendants were convicted of pandering (under the same statute at issue in *Freeman*)[63] for photographing women engaging in various types of sexual activ-

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constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering . . they are disapproved." *Id.* at 428 n.6. *See infra* notes 62-72, 91 and accompanying text for an explanation of the aforementioned case law.

55. *Id.* at 422. The court failed to define "adult films."

56. *Id.* The relevant portion of the California Penal Code provides, "Any person who: (a) procures another person for the purpose of prostitution . . . is guilty of pandering." CAL. PENAL CODE § 266(i) (West 1988). "Prostitution includes any lewd act between persons for money or other consideration." CAL. PENAL CODE § 647(b) (West 1988 & Supp. 1995).

The court relied on a precedential definition of prostitution. "[F]or a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of sexual arousal or gratification of the customer or the prostitute." *Freeman*, 46 Cal. 3d at 424 (emphasis omitted) (*citing* People v. Hill, 103 Cal. App. 3d 525, 534-35 (1980)).

57. *Freeman*, 46 Cal. 3d at 422.

58. *Id.*

59. *Id.*

60. *See supra* note 56 for a definition of prostitution.

61. *Freeman*, 46 Cal. 3d. at 424-25. By comparison, the Meese Commission defined pornography as "material that is predominantly sexually explicit and intended *primarily for the purpose of sexual arousal.*" MEESE COMMISSION REPORT, *supra* note 1, at 7 (emphasis added).

62. 56 Cal. App. 3d 321 (1976).

63. *See supra* note 56 for text of the statute.

ity.[64] Using the same definitions of prostitution and pandering used in *Freeman*, the *Fixler* court stated:

> There is nothing in statute or case law which would remove this conduct from the ambit of the statute simply because the money was provided by nonparticipants in the sexual activity or because the defendants' primary motivation was to photograph the activity. It seems self-evident that if A pays B to engage in sexual intercourse with C, then B is engaging in prostitution and that situation is not changed by the fact that A may stand by to observe the act or photograph it.[65]

Not only did the *Freeman* court ignore the *Fixler* analysis, it ignored the possibility that the film-makers may be aroused by the content of the films, operating on the assumption that non-participation precludes arousal. If non-participatory observation did preclude arousal, the entire pornographic film industry would be bankrupt. The market for such films lies in the very fact that they do arouse their audiences. Further ignored was the possibility that the actors were aroused.[66] The problem with measuring or proving arousal was not even mentioned.[67]

The *Freeman* court engaged in a First Amendment analysis of the defendant's conviction.[68] Since the film at issue was not determined to be obscene, the court concluded that it was protected by the First Amendment.[69] Again, the court ignored precedent and failed to make a distinction fundamental to an accurate analysis of the issue at hand: the *content* of the film was not being regulated by the prostitution statute, rather, the *process* of its production was being penalized.[70]

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64. *Fixler*, 56 Cal. App. 3d at 324.

65. *Id.* at 325 *(citing* People v. Zeihm, 40 Cal. App. 3d 1085 (1974)).

66. It is probably imperative that the actors are aroused in order that the requisite sex acts are performed successfully.

67. *See infra* note 92 and accompanying text for a discussion of this problematic aspect of the statute as written.

68. "However, even if defendant's conduct could somehow be found to come within the definition of 'prostitution' literally, the application of the pandering statute to the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values." *Freeman*, 46 Cal. 3d. at 425.

69. *Id. See supra* text accompanying notes 23-25 for the definition of "obscene."

70. The *Fixler* court cited the United States Supreme Court's opinion in *U.S. v. O'Brien* for the helpful proposition that, "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. 391 U.S. 367, 376 (1968)," *Fixler*, 56 Cal. App. 3d at 326. *See supra* notes 15-18 and accompanying text for a discussion of the conditions on the set of a pornographic film.

People v. Souter, 125 Cal. App. 3d 563 (1981), cites *Fixler* for the same proposition, stating "[h]ere we are not faced with questions which would require scrutiny under the First Amendment. Instead, our attention is directed to the manner in which the material incorporated in the film was originally obtained." *Id.* at 563. *See*

There is ample support in the case law for this distinction.[71] It was addressed in *Fixler*, when the court stated:

> The prosecution . . . . [is] based on conduct and [is] not aimed at prohibiting any communication of ideas. The matter of obtaining the [works] and the ultimate use to which those [works] might be put are separate and unrelated issues . . . . [W]here a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it . . . . The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the primary motivation was to capture the crime on film.[72]

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also People v. Kovner, 96 Misc. 2d 414, 418 (N.Y. Sup. Ct. 1978) ("While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against prosecution for a crime committed during the origination of the act.").

The United States Supreme Court recognized this distinction as applied to child pornography in the case of *New York v. Ferber*, 458 U.S. 747 (1982), which dealt with the prosecution of a bookstore proprietor under a statute prohibiting persons from knowingly promoting a sexual, but not obscene, performance by a child under age sixteen. *Id.* The relevant statute read:

> A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age.

N.Y. PENAL LAW § 263.15 (McKinney 1982). In upholding the statute, the court identified the pornography as a permanent record of the child's participation in sexual abuse. Jacobs, *supra* note 4, at 37.

71. People *ex rel.* Van de Kamp v. American Art Enters., 75 Cal. App. 3d 523 (1977), also dealt with this issue head on, finding that hiring models to engage in sexual activity in front of a camera was prostitution. The court found there was really no speech issue at all, stating, "[n]o creative communication is involved in the hiring of hundreds of male and female 'models' to engage in depraved and perverted sex acts. The character of that activity is not altered by the pretense of photographing it." *Id.* The court cited *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968), for the proposition that there is not a limitless variety of conduct that can be labeled 'speech' simply because the person engaging in the conduct intends to express an idea. Thus, both the *Fixler* and *People ex rel Van de Kamp* courts found that this activity (production, not product) was not speech and there was no need to engage in a balancing test or other analysis of First Amendment concerns.

This analysis is wholly consistent with the existence of prostitution statutes. Society has decided that it is illegal to hire people to have sex for money, and likewise, have decided that such conduct is not speech. The fact that this same conduct is done in front of a camera does not entitle it to special protection, it merely serves as a record of the illegal activity. The *Freeman* court failed to see this and engaged in a lengthy discussion of First Amendment concerns. *See supra* notes 56-68 and accompanying text for the *Freeman* court's analysis.

72. 56 Cal. App. 3d at 325-26.

The *Freeman* court ignored the *Fixler* type analysis[73] and again set out on its own course of First Amendment analysis.[74] The *Freeman* court alleged that finding the defendant guilty would constitute an impingement of free speech.[75] The court then attempted to distinguish the case from a situation in which one hires another to commit murder, rape[76] or robbery for the purpose of photographing or filming the act, activities which the court conceded could not be done lawfully.[77]

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73. "The bald conclusion reached by *Fixler*, and reiterated in the related case of *People ex rel Van de Kamp* (citations omitted) . . . . simply ignores the First Amendment considerations that compel our contrary conclusion here." *Freeman*, 46 Cal. 3d at 428.

74. The court utilized the standards set forth in *U.S. v. O'Brien*, 391 U.S. 367 (1968), to determine the constitutional propriety of governmental regulation of "conduct" which also contains elements of speech. These are 1) whether the regulation is within the constitutional power of the government, 2) whether the governmental interest is important or substantial, 3) whether the governmental interest is unrelated to the suppression of free expression, and 4) whether the incidental restrictions on alleged First Amendment interest is not greater than is essential to the furtherance of the interest. *People ex rel. Van de Kamp*, 75 Cal. App. 3d at 530 (*citing O'Brien*, 391 U.S. at 377). They found that the situation before them did not pass the test because "the application of section 266i in the manner advocated would clearly run afoul of the requirement that the governmental interest be unrelated to the suppression of free expression." *Freeman*, 46 Cal. 3d at 427. In applying the *O'Brien* test the court failed to explain what elements of speech were present in the conduct at issue. They merely stated that the speech/conduct distinction referred to in prior cases was "untenable." *Id.* Once again, the court ignored precedent and proceeded down an irrelevant and arbitrary road.

75. *See supra* note 68.

76. This analysis ignores the possibility that the making of pornographic films is rape, because women are not consenting in the usual sense of the word. To say that one consents assumes that one has a free range of choices, and assumes the one consenting is independent of the constraints of fear, desperation or emergency.

Caryn Jacobs explores this conceptualization of consent in *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 HARV. WOMEN'S L.J. 5, 20 (1984). She asserts that those opposed to criminalizing pornography believe that models enjoy their work because it "easy" and they are well-paid. She argues that this understanding of work in the industry assumes a "freedom of contract" which is absent in the pornography context. This freedom assumes that "women, with the freedom and capability to bargain, advantageously contract with a film producer or pornographic model agency, simply exchanging the use of their bodies for money." But, she argues, when you consider the experiences of the models, this view is not supported. *See supra* notes 15-18 for a discussion of models' experiences. Her disagreement with the free contract—or free consent analysis—is further supported by research findings indicating women are recruited into sexual exploitation by "physical force, psychological coercion, economic exigencies, and social circumstances" and by the fact that economically strapped women, teenage runaways, illegal aliens, women addicted to drugs and prostitutes constitute the majority of women working in the industry. *Id.* at 21.

77. "Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. Murder, rape and robbery . . . are crimes independent of and totally apart from any payment for the right to photograph the conduct." *Freeman*, 46 Cal. 3d at 429.

The *Freeman* court asserted that the alleged "prostitution" in the instant case was not independent of, and apart, from payment for the right to photograph the performance.[78] The court based that analysis on the fact that had there been no money exchanged, such filming would have been legal. This line of reasoning ignores the fact that prostitution, by definition, depends upon the payment of money. Indeed, all acts which are penalized under prostitution statutes are wholly dependent on the exchange of money. Without money, "typical prostitution" (that done beyond the reach of cameras) would not be prostitution either.

The court attempted to distinguish all of the cases upon which the prosecution relied before finding the defendant not guilty. The court distinguished *State v. Kravitz*,[79] which involved the owner of an "adult entertainment" theater showing pornographic movies and live sex shows.[80] The defendant was found guilty of promoting prostitution[81] by hiring a male and a female to engage in sex acts before an audience.[82] The *Freeman* court distinguished this case on the weak ground that it involved "sexual conduct between a member of the audience and a performer at the defendant's entertainment establishment."[83] The case itself reports the facts as the hiring of one male to engage in sex acts with one female.[84] Further, the relevance of the distinction between a live audience and a film-maker is unclear. Unfortunately, the court made no attempt to elaborate.

The *Freeman* court distinguished *People v. Maita*[85] on the same ground.[86] There also the defendant was convicted for pimping and pandering by hiring[87] women to have sex with "members of the

78. *Id.* at 429.

79. 511 P.2d 844 (Or. Ct. App. 1973).

80. *Id.*

81. Defendant was prosecuted under Oregon Statute 167.012(1)(d) which states:

(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, he knowingly:

(d) Engages in any conduct that institutes, aids or facilitates an act or enterprise of prostitution.

ORS 167.002(2) defines a prostitute as "a male or female person who engages in sexual conduct for a fee[,]" while ORS 167.007 provides that "[a] person commits the crime of prostitution if he engages in or offers or agrees to engage in sexual conduct in return for a fee."

82. State v. Kravitz, 511 P.2d 844, 845 (Or. Ct. App. 1973).

83. *Freeman*, 46 Cal. 3d at 430. Apparently, that is as opposed to engaging in sexual conduct for a fee in front of a camera.

84. *Kravitz*, 511 P.2d at 845.

85. 157 Cal. App. 3d 309 (1984).

86. *Freeman*, 46 Cal. 3d at 429.

87. An undercover informant sought employment at defendant's theater. She was told that employment at the theater would require both nude dancing and real sex acts on stage, and that these sex acts would include "orally copulating with the customers and having the customer orally copulate her." She could work four forty

audience," who were also hired by defendant. This case is not distinguishable from *Freeman*. In both cases, persons were hired to have sex in front of others. In *Freeman* the audience was the filmmakers and the potential film viewers, while in *Maita* it was the live audience, without cameras.

Defendant contended that the activity[88] at the theater was protected by the First Amendment.[89] Relying on *Fixler*,[90] the court found him guilty. They argued that there was merit to neither the contention that this behavior was protected by the First Amendment,[91] nor to the contention that it was outside of the scope of the statute.[92] To the extent that other case law supported a finding of guilt in *Freeman*, the court overturned it.[93]

In conclusion, the *Freeman* court missed the point. Prosecuting pornography under prostitution statutes is a practical approach for the very reason that the difficult questions of First Amendment line-drawing are circumvented. Sex for money is sex for money. A camera does not protect otherwise illegal activity.

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minute shows a day, seven days a week. Defendant would pay her $12.40 per show and she was allowed to keep any tips she might earn. *Maita*, 157 Cal. App. 3d at 314.

88. This case was prosecuted under the same statutes utilized in *Freeman*. *See supra* note 56 for the text of the statute. The court noted that there was nothing in the statutes which excluded conduct performed before an audience. *Maita*, 157 Cal. App. 3d at 318.

89. *Id.* at 315. Like the films in *Freeman*, the shows at defendant's theater were also found to be non-obscene. *Id.* at 314.

90. "*Fixler* unequivocally stands for the proposition that the First Amendment is not a shield against prosecution under the pimping and pandering laws." *Id.* at 317.

91. After engaging in an *O'Brien* analysis, the court stated that the governmental interest in regulating prostitution was unrelated to speech. *Id.* at 316 *(citing* People *ex rel.* Van de Kamp v. American Art Enters., Inc., 75 Cal. App. 3d 523, 531 (1973)). *See supra* note 74 and accompanying text for a delineation of the *O'Brien* test. The court boldly stated: "No one seriously contends, however, that anything which occurs upon a stage is automatically immune from state regulation." *Id.* at 315.

92. Defendant asserted that the activity was outside the scope of the statute because there was no showing that the sexual behavior was for the purpose of arousal or gratification, as required by the statute. *See supra* notes 60-62 and accompanying text for further discussion of this requirement. The court dealt realistically with the issue, stating, "[a]ppellant's argument that there was no showing that the [sex] was for the purpose of sexual arousal or gratification merits little discussion. It is difficult to conceive what other purpose that activity serves, and appellant does not enlighten us." *Id.* at 381.

93. *See also* U.S. v. Roeder, 526 F.2d 736, 739 (10th Cir. 1975) (finding that transporting a woman across state lines to act in a pornographic film fell within the ambit of law prohibiting transporting women across state lines for the purpose of prostitution, since "the First Amendment does not constitute a license to violate the law"); People v. Zeihm, 40 Cal. App. 3d 1085 (1974).

Section IV: A Legislative Proposal

It is helpful to examine current law when considering a new statute. Because I am relying on Minnesota's prostitution statute as the basis for my proposal, I first address it in its current form.

Minnesota Statute 609.321 subd. 8 (1993) defines a prostitute as "an individual who engages in prostitution," whereas prostitution is defined as "engaging or offering or agreeing to engage for hire in sexual penetration or sexual contact."[94] Sexual contact is defined as any of the following acts ("if the acts can reasonably be construed as being for the purpose of satisfying the actor's sexual impulses"):

> (i) The intentional touching by an individual of a prostitute's intimate parts; or (ii) The intentional touching by a prostitute of another individual's intimate parts.[95]

Sexual penetration, as defined in the statue, means

> any of the following acts, if for the purpose of satisfying sexual impulses: sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion however slight into the genital or anal openings of an individual's body by any part of another individual's body or any object used for the purpose of satisfying sexual impulses. Emission of semen is not necessary.[96]

This statute is problematic for a variety of reasons. The statute is underinclusive[97] in two ways. First, it requires that hiring be "for the purpose of satisfying sexual impulses."[98] Second, by focusing on "contact" and "penetration," the statute does not reach a whole range of activity which would constitute prostitution as it is commonly understood. If the state's goal is to prohibit the sale of

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94. MINN. STAT. § 609.321, subd. 9 (1993).

95. *Id.* at subd. 10.

96. *Id.* at subd. 11.

97. An underinclusive statute is one which fails to fully encompass all those behaviors which it purports to prohibit. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S.Ct. 2217, 2251 (1993), the Supreme Court described an underinclusive statute as one which "fails truly to promote its purported compelling interest." The Court noted that a state may not create underinclusive statutes because "the fact that the allegedly harmful conduct falls outside the statute's scope belies a governmental assertion that it has genuinely pursued an interest of the highest order." *See infra* note 99 and accompanying text for specific examples of underinclusiveness.

98. While the *Maita* court dealt with this issue by asking for what other purpose would such behavior be (*see supra* note 92), it is important to recognize that there are other reasons why individuals solicit the services of a prostitute. Such reasons may include anger, the desire to make someone jealous, a 'gift' for someone else, etc. The reason for procuring a prostitute should not affect the illegality of the activity. In addition, the adoption of my proposal is made easier by simply removing this requirement. If courts respond to the requirement with the simple assertion that no other reasons exists for hiring a prostitute, then the requirement is superfluous.

women's bodies for sexual favors, it must demonstrate this by drafting a statute which would include all such behavior.

For example, a man who pays a prostitute for her sexual service (hereinafter "a john") may hire a woman and ask her to masturbate in his presence. If he merely witnesses this activity, regardless of his intent, and he does not touch her, nor she him, this "transaction" has failed to meet the statutory definition of prostitution. However, it is unlikely that this activity would be viewed as legal or as non-prostitution.[99] According to the *Freeman* court, if this particular john filmed this activity, however, it would be legal. This is where the weakness of the *Freeman* argument is clear and the statute is exposed as underinclusive.

Further, if one hires a prostitute for some non-traditional act that does not fall into the definition of sexual contact, then even if this activity is for the purpose of sexual arousal or satisfaction of one's sexual impulses, it does not fall within the definition of prostitution.

By removing the requirement of "satisfying the actor's sexual impulses" the conduct of filming or photographing persons engaged in sexual activity would clearly fall within the reach of the statute. Since this element of the statute has already been proven to be highly problematic, and an element which may or may not be adhered to in actual prosecution of prostitutes and johns,[100] the effects of its removal would only secure the prosecution of those already within the scope of the statute.

My proposed statute, based on the previously mentioned Minnesota Statute,[101] reads as follows:

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99. The lay understanding or conceptualization of prostitution supports this assertion. When Jimmy Swaggart was exposed for his patronage of prostitutes, no one questioned whether the activities he performed with the woman he hired constituted prostitution. The exchange of money was the defining characteristic. In fact, the prostitute, Debra Murphee, testified that Swaggart would "sit in his chair, and he'd masturbate . . . that's about it, most of the time; then he'd lay on his - his money on the table, and he'd leave." *T.V. Preachers to Settle War With Pricey Settlement*, CNN News, Feb. 9, 1994, *available in* LEXIS, News Library, CNN File, Transcript #625-5. This "exchange" would not meet the statutory definition of prostitution, yet the woman involved was still defined as a prostitute, and the man involved accused of soliciting the services of a prostitute. Swaggart himself stated that he "paid her to remove her clothes and masturbate in front of him." Nigel Andrew, *Another pray, another dollar,* THE SUNDAY TIMES, July 22, 1990, § 8, at 3. Since they did not touch one another, this would not fall within the statutory definition of prostitution. Later, a prostitute disclosed that Swaggart had "repeatedly photographed her in elaborately staged lewd poses." Michael Castleman, *Libidos in Overdrive*, CHI. TRI., Jan. 30, 1991, § 7, at 5. This demonstrates how the line between pornography and prostitution is a false construction.

100. *See supra* footnote 99 for examples of such inconsistent prosecution.

101. *See supra* text accompanying notes 94-96 for text of current statute.

1. *Prostitute Defined*: A prostitute is an individual who engages in prostitution.
2. *Prostitution Defined*: Prostitution is engaging, or offering, or agreeing to engage for hire, in sexual contact. Sexual contact is defined as, but not limited to, any of the following acts:
   (i) The intentional touching by an individual of a prostitute's intimate parts.
   (ii) The intentional touching by a prostitute of another individual's intimate parts.
   (iii) Sexual penetration, defined as any of the following acts: sexual intercourse, cunnilingus, fellatio, anal intercourse or any intrusion, however slight, into the genital or anal openings of an individual's body by any part of another individual's body or any object used for purposes of penetration as a substitute for any body part.
   (iv) Watching one masturbate, or masturbating in one's presence.
   (v) Observing two or more individuals engaged in any of the aforementioned activity.
3. *Defenses*:
   (i) Failure to become aroused or lack of intent to become aroused when performing or offering or agreeing to perform any of the above acts for hire does not constitute a defense.
   (ii) The fact that any of this conduct may be filmed or photographed and/or distributed either for personal or commercial use does not constitute a defense.

This statute is superior to the current Minnesota statute for three reasons. First, it more accurately encompasses the range of behaviors constituting sexual contact and thereby avoids the problems of vagueness[102] and underinclusiveness.[103] Second, it removes the cumbersome requirement that the behavior be for the purpose of "satisfying the actor's sexual impulses."[104] By clearly stating that the lack of sexual gratification or desire are not defenses, issues of defining or measuring sexual gratification are avoided. (As previously mentioned, this requirement may or may not be considered in current prosecution.) Removing that condition leaves little room for doubt about whether pornographic film-making is included: it is clearly within the scope of the statute. Third, and most obviously, the statute expressly states that filming such behavior does not exempt it from prosecution.[105]

102. *See supra* note 38 for a definition of vagueness.
103. *See supra* note 97 for an explanation of underinclusiveness.
104. *See supra* note 61 and accompanying text for a discussion of the role of this requirement in the *Freeman* case.
105. *See supra* notes 51-93 and accompanying text for an explanation of why the law supports such action.

These modifications are not drastic and they are not difficult. My proposal closes the gap which exists between the "sex for hire" which is presently legal and that which is not. By doing so, the statute provides adequate notice to those who may be engaged in the conduct it describes, while criminalizing those types of pornography which it encompasses. This statute is not without flaws, as discussed briefly below, but I believe it circumvents many of the problems that have made other attempts at regulating pornography unsuccessful.[106]

The opposition's arguments are easy to anticipate. Some will assert that applying this statute will require the same types of line-drawing[107] that make obscenity[108] and nuisance[109] actions untenable. While I concede that some line-drawing occurs, it is no more than the legislature has already done, and deemed necessary and acceptable, under existing prostitution statutes. The definition of prostitution is itself a "line." Prostitution statutes are not criticized for being vague[110]or overbroad because it is the exchange of money that defines the violation. Extending prostitution statutes to include pornography will also make money the identifying "hook."

Opponents may also argue that such a regulation will impinge upon mainstream film containing explicit sexual contact. This argument is simply a different version of the line-drawing argument discussed above. Prostitution statutes have already drawn lines for that which occurs off camera. The fact that lines are now being drawn for that which occurs on camera does not make the statute problematic for that reason alone.

It is also important to consider whether criminalizing pornographic film will actually make its production more or less likely to occur. The possibility is real that criminalization will only drive such work further underground, increasing both demand and the money involved. However, prostitution is already illegal. The thrust of my argument is that the lines between what occurs on and off camera are artificial. This same economic argument has been advanced by those in favor of decriminalizing prostitution, and rejected by our nation's lawmakers. Any debate on this point should be focused on the sale of women's bodies *per se*, and should not fo-

106. *See supra* notes 21-50 and accompanying text for an explanation of unsuccessful attempts at regulation.

107. *See supra* note 6 for a definition of line-drawing.

108. For a discussion of obscenity and its problems, *see supra* notes 23-28 and accompanying text.

109. For a discussion of nuisance actions and their problems, *see supra* notes 29-39 and accompanying text.

110. *See supra* note 38 for a definition of vagueness.

cus on a false distinction between those sales occuring off camera and those occuring in front it.

Even in light of the previous considerations, this statute is an improvement over the current law. By clearly stating that a camera does not protect an otherwise illegal activity, the statute sends a clear message that a bogus distinction between "protected speech" and "prostitution" will no longer be maintained. The statute takes established law prohibiting prostitution and extends it, employing exactly the same legal reasoning and moral assumptions, to pornography.

Conclusion

Pornography poses a threat to the safety of those employed in the industry and to the status of women in this country as a whole. While there have been varying attempts at regulation of both its production and distribution, none have made any significant progress toward its reduction. Women acting in pornographic films are being paid—legally—to have sex, while women who are paid for sex *outside* the scope of film are deemed prostitutes who, by defintion, break the law.

The law clearly states that paying someone for sex is illegal. Rather than perpetuating the false distinction between acceptable and unacceptable "prostitution," my proposal more accurately defines prostitution to include, even in the eyes of the law, pornographic film. Prostitution behind a camera is still prostitution. With simple modifications to currently existing law, modifications supported by precedent, we can ensure that the pornography industry no longer profits from the exploitation and trafficking of women, but rather is penalized for that very thing.