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STATEMENT OF PURPOSE

The *Wisconsin Journal of Law, Gender & Society*, originally the *Wisconsin Women's Law Journal*, grew out of two traditions: the University of Wisconsin Law School's "law in action" approach and the interdisciplinary design of gender studies. Through "law in action" we look beyond the statutes and cases to study the practical effects of the law on both individuals and communities. The interdisciplinary approach offers different perspectives through which to expand and challenge our understanding of the law.

The Journal, one of the earliest in the nation devoted to the study of women and the law, has strived to contribute insightful scholarship to this evolving field of study. Recognizing that women are a diverse group with differing beliefs and interests, and moreover that gender stereotyping of any kind inhibits each individual's full equality under the law, we encourage articles that examine the intersection of law and gender with issues of race, ethnicity, socioeconomic status, and sexual orientation.

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THE POLITICS OF LEGAL CHALLENGES TO PORNOGRAPHY: A COMPARATIVE ANALYSIS

Max Waltman^{†*}

Abstract

Pornography production exploits social disadvantages, often while using prostituted people who have endured poverty, childhood sexual abuse, race and/or sex discrimination. Over time, consumers become more sexually aggressive, adopt more attitudes supporting gender-based violence, and buy more sex than non-consumers. This study finds that challenges to pornography's harms will be more successful in democracies that better recognize substantive equality, and where the harmed groups' perspectives and interests are centered in law. Civil rights appear more responsive and remedial than state-implemented criminal laws, with similar implications for other problems disproportionately affecting disadvantaged populations.

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INTRODUCTION

The subject of pornography produces divergent opinions. Critics point to sexual violence and exploitation, defenders to freedom of expression. While radicals within the women's movement began the fight against pornography in the 1970s,¹ scientific evidence of pornography's harms has grown exponentially since then. The impact of public education, social protest, and civil disobedience have nevertheless been negligible, making legal change imperative. Yet the politics of legally challenging pornography constitute an amalgam of thorny, seemingly intractable, obstacles.

A self-administered representative survey conducted in the United States in 2014 estimated that 46% of men and 16% of women aged 18–39 consumed pornography in an average week.² In a similar survey with a more precise questionnaire, the Public Health Agency of Sweden in 2017 estimated that 41% of men and 3% of women aged 16–29 consumed pornography three times or more per week.³ Research further shows that consumers become desensitized to pornography over time, and thus require more extreme and violative materials to be aroused.⁴ The sex industry readily adapts. Natalie Purcell's 2012 content analysis of 110 of the roughly 250 "most popular, best-selling, critically

1. CAROLYN BRONSTEIN, *BATTLING PORNOGRAPHY: THE AMERICAN FEMINIST ANTI-PORNOGRAPHY MOVEMENT, 1976–1986* at 2–5, 50 et seq. (2011); SUSAN BROWNMILLER, *IN OUR TIME: MEMOIR OF A REVOLUTION* 295–325 (1999); SUSAN COLE, *PORNOGRAPHY AND THE SEX CRISIS* 72–79 (1989); DONALD ALEXANDER DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* 30 (1989).

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

3. FOLKHÄLSOMYNDIGHETEN [PUBLIC HEALTH AGENCY OF SWEDEN], *SEXUELL OCH REPRODUKTIV HÄLSA OCH RÄTTIGHETER I SVERIGE 2017: RESULTAT FRÅN BEFOLKNINGSUNDERSÖKNINGEN SRHR2017* at 20 (2019) [<https://perma.cc/9YJB-2494>].

4. See Dolf Zillmann & Jennings Bryant, *Shifting Preferences in Pornography Consumption*, 13 COMM. RES. 560, 568–69, 575 (1986). The study shows that two weeks after a six-week exposure period to common nonviolent pornography for one hour each week, non-student men chose to spend on average over 13 minutes viewing pornography with violence or bestiality compared to 1 minute and 42 seconds for control subjects; 9 seconds viewing nonviolent pornography compared to over 3 minutes for controls; and 13 seconds viewing G-rated or nonpornographic R-rated materials compared to over 6 minutes for controls ($p < .05$; $n = 40$). *Id.* at 575 tbl.2. Notably, the effects were similar for student men ($n = 40$), and similar, though weaker, for females of both genders ($n = 80$). *Id.* at 573, 575. The 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 COMPUTERS IN HUMAN BEHAVIOR 257, 260 (2016) (surveying 434 adult men in Belgium who conducted "online sexual activities," 99% of whom reported watching pornography, while finding that 49% of consumers also admitted searching for sexual materials or being involved in online sexual activities they previously thought were uninteresting or "disgusting"); Jodie L. Baer, Taylor Kohut, & William A. Fisher, *Is Pornography Use Associated With Anti-Woman Sexual Aggression? Re-examining the Confluence Model with Third Variable Considerations*, 24 CANADIAN J. HUMAN SEXUALITY 160, 164 (2015) (surveying 211 adult males and finding a significant positive correlation between higher self-reported frequencies of pornography consumption and the proportion that was explicitly violent ($r = .20$, $p < .01$)).

acclaimed, and influential hardcore pornographic movies”⁵ of the prior 40 years found that aggressive and degrading elements that were “unheard of 20 years before” had become mainstream by the 2000s.⁶ Nearly every popular movie of the 2000s featured women performing oral sex on men directly after the men’s anal penetrations (“ass-to-mouth”), and women gagging during throat penetration (“gagging”).⁷ Another study, this one involving 304 scenes randomly selected from the most sold/rented pornographic movies in the U.S. from December 2004 to June 2005, found that 53.9% of the scenes showed women being gagged, 27.6% showed women being choked, and 41% performing ass-to-mouth.⁸

This article examines pornography’s harms and the obstacles to redressing them and explains why and how democracies can, and should, rethink the nature and impact of their legal politics. It demonstrates that targeting pornography through mechanisms such as criminal obscenity laws enforced by the state produces ineffective results, instead advocating that states provide assistance to those harmed and a forum for the engagement of civil society where civil rights laws could empower those harmed. The representatives of the victimized groups seem better informed and more strongly incentivized to create and use effective laws. This analysis can inform similar political problems where harmful contested practices disproportionately affect disadvantaged groups.

PRODUCTION-RELATED HARMS

Whom can pornographers recruit as performers? Research exposes crucial associations between pornography and prostitution. Forty-nine percent of 854 prostituted people in nine countries reported being used in prostitution to make pornography.⁹ Correspondingly, 23% of 271 female pornography performers in Los Angeles reported off-camera prostitution during the past three months.¹⁰

Prostituted people generally suffer multiple disadvantages that are easy to exploit. Poverty is the most common reason for entering prostitution in both the developing and industrialized worlds.¹¹ Fully 50% of 134 female pornography

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

6. See *id.* at 115 for the quote; and *id.* at 179–85 for the content analysis’ methodology.

7. *Id.* at 118.

8. Ana J. Bridges et al., *Aggression and Sexual Behavior in Best-Selling Pornography Videos: A Content Analysis Update*, 16 *VIOLENCE AGAINST WOMEN* 1065, 1074–75 (2010).

9. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, 2 *J. TRAUMA PRACTICE* 33, 46 (2004) [hereinafter Farley et al., *Nine Countries*].

10. Marjan Javanbakht et al., *Transmission Behaviors and Prevalence of Chlamydia and Gonorrhea Among Adult Film Performers*, 44 *SEXUALLY TRANSMITTED DISEASES* 181, 182–83 (2017).

11. 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 highlighting poverty-related socioeconomic predictors of entry into prostitution); CECILIA KJELLGREN ET AL., *UTVÄRDERING AV SAMTALSBEHANDLING MED FÖRSÄLJARE AV SEXUELLA TJÄNSTER*

performers contacted in 2008 and 2009 through U.S. databases or websites advertising employment in pornography reported living in poverty at some point in the previous twelve months.¹² Moreover, 24% received welfare during childhood compared to only 12% of controls.¹³

There is evidence from studies indicating that 60–90% of prostituted people have been subjected to child sexual abuse.¹⁴ Such abuse often precipitates entry into prostitution.¹⁵ Likewise, 37% of the 134 female performers compared to 13% of controls reported “forced sex” during childhood (a restrictive definition of child sexual abuse).¹⁶ Furthermore, 21%, versus 4% of controls, had been placed in foster care by authorities.¹⁷ Studies indicate that roughly half of the

(FAST): DELRAPPORT 5 UR PROSTITUTION I SVERIGE 21 (2012) [<https://perma.cc/4RC8-36M5>] (finding that, among 34 prostituted persons in Sweden, the most commonly stated reason for entry was the need for money to survive ($n=14$), sometimes specified as for paying the rent or bills, while earning money for drugs was second ($n=10$)); CHANDRÉ GOULD, SELLING SEX IN CAPE TOWN: SEX WORK AND HUMAN TRAFFICKING IN A SOUTH AFRICAN CITY 115 (2008) (finding “that the majority of sex workers [surveyed] . . . enter the industry as a result of ‘financial need,’” financial need being defined as the inability “to meet pressing financial obligations or to meet basic needs”); PORNOGRAPHY AND PROSTITUTION IN CANADA: REPORT OF THE SPECIAL COMMITTEE ON PORNOGRAPHY AND PROSTITUTION IN CANADA, VOL. 2, at 376 (1985) (finding that “[o]verwhelmingly, 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) [hereinafter Silbert & Pines, *Entrance Into Prostitution*] (finding among 200 adult and juvenile females prostituted in San Francisco that the “predominant reason given for” initial involvement was money: “[b]asic financial survival was mentioned by three-quarters of all subjects, by over 80% of the current prostitutes, and by close to 90% of the juveniles”).

12. Corita R. Grudzen et al., *Comparison of the Mental Health of Female Adult Film Performers and Other Young Women in California*, 62 PSYCHIATRIC SERVICES 639, 640–42 (2011) [hereinafter Grudzen et al., *Performers and Women in California*]; cf. FINAL REPORT OF THE ATTORNEY GENERAL’S COMMISSION ON PORNOGRAPHY 231 (Michael J. McManus ed., 1986) (finding that what “chiefly” motivated entry among performers into the pornography industry was “financial need”).

13. Grudzen et al., *Performers and Women in California*, *supra* note 12, at 641–42.

14. See, e.g., Farley et al., *Nine Countries*, *supra* note 9, at 43, 57; Chris Bagley & Loretta Young, *Juvenile Prostitution and Child Sexual Abuse: A Controlled Study*, 6 CANADIAN J. COMMUNITY MENTAL HEALTH 5, 12–14 tbl.2 (1987); Silbert & Pines, *Entrance Into Prostitution*, *supra* note 11, at 479–80. In-depth studies of survivors show higher frequencies of childhood sexual abuse. See, e.g., Susan Kay Hunter, *Prostitution Is Cruelty and Abuse to Women and Children*, 1 MICH. J. GENDER & L. 91, 98–99 (1993); Evelina Giobbe, *Confronting the Liberal Lies About Prostitution*, in LIVING WITH CONTRADICTIONS: CONTROVERSIES IN FEMINIST SOCIAL ETHICS 120, 126 n.10 (Alison M. Jaggar ed., 1994).

15. See 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, 942–43 (2009) (finding that women subjected to child sexual abuse by “a significant other” reported entering prostitution significantly earlier than did other prostituted women); Ronald L. Simons & Les B. Whitbeck, *Sexual Abuse as a Precursor to Prostitution and Victimization Among Adolescent and Adult Homeless Women*, 12 J. FAM. ISSUES 361, 375–76 (1991); Bagley & Young, *supra* note 14, at 17 tbl.4; Mimi H. Silbert & Ayala M. Pines, *Sexual Child Abuse as an Antecedent to Prostitution*, 5 CHILD ABUSE & NEGLECT 407, 410 (1981).

16. Grudzen et al., *Performers and Women in California*, *supra* note 12, at 641–42.

17. *Id.*

population in prostitution enter prostitution before age 18, often as teenage run-aways.¹⁸ Lacking education and job training, they are highly vulnerable to exploitation by pimps, pornographers, or other people.

Prostituted people are also oppressed by racism, which intersects with sexism in prostitution and undermines equal employment and other opportunities. For instance, Black women are overrepresented in U.S. prostitution,¹⁹ First Nations women are overrepresented in prostitution in parts of Canada,²⁰ and foreign nationalities are overrepresented in Swedish prostitution.²¹

18. *E.g.*, JODY RAPHAEL AND DEBORAH L. SHAPIRO, SISTERS SPEAK OUT: THE LIVES AND NEEDS OF PROSTITUTED WOMEN IN CHICAGO 13–14, 16 (2002) [<https://perma.cc/LH6K-N566>]; Bagley & Young, *supra* note 14, at 14, 17–18 tbl.4; Silbert & Pines, *Entrance Into Prostitution*, *supra* note 11, at 483, 485; *cf.* Farley et al., *Nine Countries*, *supra* note 9, at 40 (finding that 47% of the 854 persons reported being under age 18 when entering prostitution).

19. *See, e.g.*, DEMAND ABOLITION: WHO BUYS SEX? UNDERSTANDING AND DISRUPTING ILLICIT MARKET DEMAND 7–8, 15 (2018) (updated March 2019) [<https://perma.cc/SP9M-XKW3>] (surveying 8,201 men across the U.S. of which 6.2% reported buying sex within the last year and 20.6% within their lifetime, their responses’ further suggesting that the people they buy for sex in the United States are “overwhelming young females, and disproportionately Black”); JENNIFER JAMES, ENTRANCE INTO JUVENILE PROSTITUTION: FINAL REPORT 17, 19 (1980) (finding that African American girls constituted 25% of the sample ($n=136$) of prostituted girls interviewed in the Seattle area, where only 4.2% of the population was Black). Interviews conducted with over 3000 “streetwalking prostitutes” for an outreach project in New York City found approximately half were African American, one-quarter Hispanic, and the remaining quarter white. Barbara Goldsmith, *Women on the Edge*, NEW YORKER, Apr. 26, 1993, at 65.

20. *See, e.g.*, CHERRY KINGSLEY & MELANIE MARK, SACRED LIVES: NATIONAL ABORIGINAL CONSULTATION PROJECT 4, 8 (2010), [<https://perma.cc/S97R-4PA2>] (noting that Aboriginal children and youth comprise over 90% of “visible sex trade” in some areas of Canada where the Aboriginal population constitutes less than 10% of the whole); Melissa Farley et al., *Prostitution in Vancouver: Violence and the Colonization of First Nations Women*, 42 *TRANSCULTURAL PSYCHIATRY* 242, 242 (2005) (finding that 52% of 100 prostituted women were of First Nations Aboriginal descent, a group making up only 1.7–7% of Vancouver’s total population); Cecilia Benoit et al., *In Search of a Healing Place: Aboriginal Women in Vancouver’s Downtown Eastside*, 56 *SOC. SCI. & MED.* 821, 824 (2003) (citing studies estimating that 70% of prostituted persons in Vancouver’s Downtown Eastside are Aboriginal women); JULIE COOL, PARLIAMENTARY INFO. & RESEARCH SERV., PROSTITUTION IN CANADA: AN OVERVIEW 3 & n.5 (2004) [<https://perma.cc/AH29-G7FF>] (citing CONSEIL DU STATUT DE LA FEMME, GOUVERNEMENT DU QUÉBEC, LA PROSTITUTION: PROFESSION OU EXPLOITATION? UNE RÉFLEXION À POURSUIVRE 68 (2002) (observing an overrepresentation of First Nations Aboriginal and other ethnic minority women in Montréal prostitution)); SPEC. COMM. IN CANADA, *supra* note 11, at 347 (“On the prairies . . . most of the prostitutes are young native women . . .”).

21. *E.g.*, BROTTSFÖREBYGGANDE RÅDET (BRÅ), SWEDISH NAT’L COUNCIL FOR CRIME PREVENTION, THE ORGANISATION OF HUMAN TRAFFICKING: A STUDY OF CRIMINAL INVOLVEMENT IN SEXUAL EXPLOITATION IN SWEDEN, FINLAND, AND ESTONIA 8, 37 (2008) [<https://perma.cc/6TPL-RCFS>]. Swedish surveys also indicate that foreign nationality predicts a higher vulnerability to prostitution among youth populations. *See* Ungdomsstyrelsen [Swedish Nat’l Bd. for Youth Affairs], *Erfarenheter av sexuell exponering och sex mot ersättning*, SE MIG: UNGA OM SEX OCH INTERNET 148, 158 (Ungdomsstyrelsen ed., 2009) [<https://perma.cc/Y37H-VFVJ>].

Beyond what is revealed in the materials themselves, pornography production is often physically abusive off-camera.²² Among the respondents in the nine-country study, the 49% of respondents used in pornography exhibited “significantly more severe” PTSD symptoms than the rest.²³ This finding is particularly notable since 68% of all subjects satisfied the clinical criteria for PTSD, on average at the level of treatment-seeking Vietnam veterans, torture victims, battered women seeking shelter, and rape survivors.²⁴ When controlling for relevant predictors (e.g., childhood abuse or physical assault), a “ceiling effect” occurred whereby the only statistically distinguishable PTSD predictor was pornography.²⁵

No empirical evidence validates the notion that amateur, homemade, or alternative pornography—all common marketing terms²⁶ that industry insiders describe as a ruse²⁷—are produced under non-coercive circumstances. In her research, Rebecca Whisnant found no evidence to corroborate the claims of the self-proclaimed feminist pornographer Tristan Taormino that her performers “decide who they have sex with, when, where, and what they do” and “set their own pay rates.”²⁸ Rather, consistent with other evidence, Taormino’s films and public statements suggest she caters to market demands for violence and degradation.²⁹

22. See, e.g., Corita R. Grudzen et al., *Pathways to Health Risk Exposure in Adult Film Performers*, 86 J. URB. HEALTH: BULL. N. Y. ACAD. MED. 67, 74 (2009) (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); FINAL REPORT OF ATT’Y GENERAL’S COMM., *supra* note 12, at 200, 204–06 (reporting about pornography survivors who testified in public hearings about being tortured or forced into anal intercourse to increase the pornography’s market value).

23. Melissa Farley, “Renting an Organ for Ten Minutes”: *What Tricks Tell Us about Prostitution, Pornography, and Trafficking*, in PORNOGRAPHY: DRIVING THE DEMAND IN INTERNATIONAL SEX TRAFFICKING 144, 146 (David E. Guinn & Julie DiCaro eds., 2007) [hereinafter Farley, “Renting an Organ”].

24. Farley et al., *Nine Countries*, *supra* note 9, at 44–48, 56.

25. Farley, “Renting an Organ,” *supra* note 23, at 146.

26. E.g., Gail Dines & Dana Bialer, *Comment: The Porn Industry Isn’t Dying; It’s in Rude Health: Thanks to the Internet, the Adult Sector is Increasingly Mainstream, Legitimate, and Profitable*, THE GUARDIAN, June 8, 2012, at 36.

27. Benjamin Wallace, *The Geek-Kings of Smut*, N.Y. MAGAZINE, Jan. 28, 2011 (interviewing a pornography website operator who described terms such as “amateur” as a “put-on” for materials produced by professionals).

28. Rebecca Whisnant, “But What About Feminist Porn?” *Examining the Work of Tristan Taormino*, 2 SEXUALIZATION, MEDIA, & SOC’Y 1, 3 (2016) (citation omitted).

29. *Id.* at 2–10. Indeed, a comparative study of the best-selling/most rented pornographic movies in the United States from late 2004 through mid-2005 examined 122 randomly selected female- versus male-directed scenes, finding that scenes directed by women contained similar rates of degrading and aggressive acts against women as those directed by men. 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).

HARMS CAUSED BY CONSUMERS

Is the abusive exploitation of pornography production reflected in the actions of consumers? A meta-analysis of 33 experiments with a combined total of 2,042 human subjects indicates so: pornography showing nonviolent, as well as violent sexual behavior, contributed significantly to increased aggression.³⁰ A meta-analysis of 16 experiments involving 2,248 human subjects exposed to movies, written materials, and audio recordings likewise found that both violent and nonviolent pornography significantly exacerbated attitudes supporting violence against women.³¹

What mechanism leads pornography, especially nonviolent material, to produce these outcomes? Psychologists have determined that men generally stereotype women into dichotomous categories such as “whore”/Madonna and naughty/nice.³² Pornography then makes women seem more “promiscuous,” which “mediates callous dispositions toward the sexual victimization of women.”³³ Empirical observations of 200 prostituted females in San Francisco,

30. Mike Allen et al., *A Meta-Analysis Summarizing the Effects of Pornography II: Aggression After Exposure*, 22 HUM. COMM. RES. 258, 271, 274 (1995). A subset of the materials—still photographs with nudity or semi-nudity including only one person “not engaged in a sexual activity”—reduced aggression significantly. *Id.* at 267, 271. Yet an experiment with more sensitive measures found that subjects exposed to such photographs in *Playboy* administered longer electric shocks than controls. Edward Donnerstein et al., *Erotic Stimuli and Aggression: Facilitation or Inhibition*, 32 J. PERSONALITY & SOC. PSYCHOL. 237, 242 (1975). However, these effects were only “marginally” significant. *Id.* at 242 (p<.10). Later experiments with non-explicit sexually objectifying print advertising significantly increased attitudes supporting violence against women though, 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), thus casting doubt on the validity of previous nudity aggression experiments. *Cf.* Michael A. Milburn et al., *The Effects of Viewing R-rated Movie Scenes That Objectify Women on Perceptions of Date Rape*, 43 SEX ROLES 645, 645–664 (2000) (finding that R-rated Hollywood movies, which sexually objectified women, produced a significant increase in attitudes supporting violence against women). For a naturalistic study, 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 frequent exposure to reality TV, men’s magazines that objectify women, and pornography were all three separately and 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”).

31. Mike Allen et al., *Exposure to Pornography and Acceptance of Rape Myths*, J. COMM. 45 (1), 5, 18–19 (1995).

32. Dolf Zillman & James B. Weaver, *Pornography and Men’s Callousness Toward Women*, in PORNOGRAPHY: RESEARCH ADVANCES 95, 109–15 (Dolf Zillman & Jennings Bryant eds., 1989) (summarizing research).

33. *Id.* at 119. *Cf. id.* at 120 (documenting their original experiment’s finding that “nymphomania” in “the total absence of coercive or violent action” produced “the strongest trivialization of rape overall” compared to other pornography categories); *See also* 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

of whom 73% reported being raped within or outside the context of prostitution,³⁴ apparently confirmed this correspondence: 24% of those raped revealed, spontaneously during interviews, that rapists consistently referred to pornography suggesting that the victim enjoyed rape and other forms of extreme violence.³⁵ Efforts to calm assailants by offering a “free trick” resulted in more severe victimization.³⁶ Information about prostitution seemingly fed perpetrators’ stereotypical conceptions of “promiscuous” women as legitimate targets of rape.

Population surveys demonstrate the ecological validity of the experiments. A meta-analysis of twenty-two naturalistic studies with 20,820 subjects found a significant positive association leaving “little doubt” that more pornography consumption “on average” predicts more “acts of sexual aggression.”³⁷ No moderation was found based on consumers’ age, sex, country, study year (pre-/post-internet), or whether the research was cross-sectional, longitudinal, published or unpublished.³⁸ The longitudinal studies rejected the reverse-causation hypothesis that assumes correlations are explained by aggressive individuals consuming pornography that conforms to their predispositions.³⁹ Correspondingly, a longitudinal study using six data waves from 2006 to 2012 involving 361 males aged 14–21 found that those reporting previous violent pornography exposure (likely the more frequent pornography consumers) exhibited adjusted odds that were several times higher for later committing their first sexual aggression.⁴⁰ Even when both male and female violent pornography consumers were included (2010–2012), their adjusted odds for later committing a first act of rape, sexual coercion, or sexual harassment were, on average, fourfold or higher.⁴¹ Another longitudinal study published in 2009 similarly found that more general

sexually inhibitory remarks or no remarks, or compared to unexposed male controls; and finding that men under higher provocation aggressed significantly more against the woman making no remarks compared to the woman making inhibitory remarks and unexposed controls).

34. Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857, 863 (1984) [hereinafter Silbert & Pines, *Pornography & Abuse*] (noting that 73% of the 200 respondents reported 193 cases of rape and that 60% of the 200 respondents reported 178 cases of “juvenile sexual abuse”).

35. *Id.* at 863–65.

36. *Id.* at 864–65.

37. 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, 201 (2016).

38. *Id.* at 193–95. Consistent with this study’s findings, another naturalistic meta-analysis of nine studies with 2,309 subjects that investigated attitudes supporting violence against women concluded that increased pornography consumption significantly predicted an average increase in such attitudes. Gert Martin Hald et al., *Pornography and Attitudes Supporting Violence Against Women: Revisiting the Relationship in Nonexperimental Studies*, 36 AGGRESSIVE BEHAV. 14, 18 (2010).

39. Wright et al., *supra* note 37, at 199.

40. Michele L. Ybarra & Richard E. Thompson, *Predicting the Emergence of Sexual Violence in Adolescence*, 19 PREVENTION SCI. 403, 410 tbl.2 (2018) ($p < .01$).

41. *Id.* at 409, & 410–11 tbls.2–3.

pornography consumption predicted significantly more sexual harassment perpetration after two years.⁴²

Multiple studies show that higher pornography consumption also significantly predicts a higher frequency of sex purchases.⁴³ Surveys that probed this association further found that 52% of 101 sex purchasers in Boston and 71% of 133 purchasers in Cambodia explicitly acknowledged imitating pornography.⁴⁴ Moreover, 79% of 110 purchasers in Scotland and 48% of 113 purchasers in Chicago admitted buying sex they would either not dare to ask their regular partners to perform or that others simply refused (e.g., sadism, water sports, or anal sex).⁴⁵ Unsurprisingly, then, 47% of the 854 prostituted persons in nine countries reported being upset by attempts to imitate pornography.⁴⁶

Underscoring the association between pornography consumption and more extreme violence, in Cambodia, 41% of sex purchasers acknowledged participating in gang rape.⁴⁷ Several sex purchasers indicated that pornography causally

42. Jane D. Brown & Kelly L. L'Engle, *X-Rated: Sexual Attitudes and Behaviors Associated with U.S. Early Adolescents' Exposure to Sexually Explicit Media*, 46 COMM. RES. 129, 142 tbl.3, 143 (2009). The study controlled for various relevant predictors at "baseline," including sexual harassment perpetration among 12-to-14-year-old boys in wave one. *Id.* at 135–38.

43. A number of studies have found a significant association whereby sex purchasers who consume more pornography are more likely to buy more sex than are sex purchasers consuming less pornography. *See, e.g.,* Melissa Farley et al., *Attitudes and Social Characteristics of Men Who Buy Sex in Scotland*, 3 PSYCHOL. TRAUMA: THEORY, RES., PRACTICE, & POL'Y 369, 374 (2011) [hereinafter Farley et al., *Scotland*] ($r=.26$, $p=.006$; $n=110$); MELISSA FARLEY ET AL., *A THORN IN THE HEART: CAMBODIAN MEN WHO BUY SEX* 26 (2012) [<https://perma.cc/KU76-5FT5>] [hereinafter FARLEY ET AL., *CAMBODIA*] ($r=.39$, $p<.0001$; $n=133$); *id.* at 26 n.6 (reporting a similar association among sex purchasers in Boston ($r=.29$, $p=.004$; $n=97$)). A study of 11,219 migrant workers in southern India found comparable associations, adjusted to account for socio-demographic factors, where migrant workers who reported consuming pornography exhibited a significant increased adjusted odds ratio of 4.2 (95% CI: 3.7–4.8) of buying sex compared to non-pornography-consuming migrant workers. Bidhubhusan Mahapatra & Niranjana Saggurti, *Exposure to Pornographic Videos and Its Effect on HIV-Related Sexual Risk Behaviours among Male Migrant Workers in Southern India*, PLOS ONE, 5, 8 tbl.3 (2014), <https://doi.org/10.1371/journal.pone.0113599>.

44. MELISSA FARLEY ET AL., *COMPARING SEX BUYERS WITH MEN WHO DON'T BUY SEX* 30–31 (2011) [<https://perma.cc/LX9L-2VK2>] [hereinafter FARLEY ET AL., *BOSTON*]; FARLEY ET AL., *CAMBODIA*, *supra* note 43, at 25–26.

45. Farley et al., *Scotland*, *supra* note 43, at 376; RACHEL DURCHSLAG, SAMIR GOSWAMI, & CHI. ALL. *AGAINST SEXUAL EXPLOITATION, DECONSTRUCTING THE DEMAND FOR PROSTITUTION: PRELIMINARY INSIGHTS FROM INTERVIEWS WITH CHICAGO MEN WHO PURCHASE SEX* 12 (2008) [<https://perma.cc/5V4Q-PH32>]. A man surveyed in the Boston study plainly stated that when people with whom he wanted to imitate pornography refused, he began purchasing sex from prostituted persons. FARLEY ET AL., *BOSTON*, *supra* note 44, at 30. Responding to a similar question, a sex purchaser in Scotland stated that "[s]ome guys watch a lot of pornography and expect their partners to perform certain acts. They'll either pressure their partner to a certain point or then go and get what they want." Farley et al., *Scotland*, *supra* note 43, at 374. Comparable responses were also found in a London study. *See* MELISSA FARLEY, EAVES LONDON, ET AL., *MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW* 21, 26 (2009) [<https://perma.cc/QSU2-7AQV>].

46. Farley et al., *Nine Countries*, *supra* note 9, at 44.

47. FARLEY ET AL., *CAMBODIA*, *supra* note 43, at 30.

influenced their behavior.⁴⁸ One purchaser explained: “We had watched Thai sex movies about gang rape” and “wanted to follow their style.”⁴⁹ Another stated: “We took turns” and “used different styles that we saw” on film.⁵⁰ In public hearings, non-prostituted and prostituted survivors of gender-based violence, along with representatives of battered women’s organizations, prosecutors, clinical psychologists, and other professionals, have also testified about assailants seeking to force people to imitate pornography.⁵¹ Quantitative data reported from studies with battered women suggests that batterers who use pornography are significantly and substantially more likely to sexually aggress, coerce, control, and abuse women than batterers who do not use pornography and also to imitate pornography in the course of their abuse.⁵²

Evidence of the association between pornography and gender-based violence is consistent across reliable methods and validated measurements.⁵³ Yet inapposite indicators and methodologies are occasionally invoked to support different conclusions. A longitudinal study conducted within the territory of the current Czech Republic from 1971 to 2007 maintained that the increasing availability of pornography did not predict an aggregated increase of *reported* sex crimes.⁵⁴ Reports, however, are not equivalent to *prevalence*. If increased

48. The Cambodian questionnaire was amended to capture more details about the association between pornography and violence against women relative to the previous studies made by the same research group. *Id.* at 13.

49. *Id.* at 32.

50. *Id.* at 26.

51. See, e.g., IN HARM’S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 113–425 et passim (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter IN HARM’S WAY]; FINAL REPORT OF ATT’Y GENERAL’S COMM., *supra* note 12, at 197–223; DIANA E. H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 125–26 (1984).

52. See Catherine Moreau et al., *Capturing Sexual Violence Experiences Among Battered Women Using the Revised Sexual Experiences Survey and the Revised Conflict Tactics Scales*, 40 ARCHIVES SEXUAL BEHAV. 223, 227–28 (2015); 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, 411–12 (2008); Janet Hinson Shope, *When Words Are Not Enough: The Search for the Effect of Pornography on Abused Women*, 10 VIOLENCE AGAINST WOMEN 56, 63, 65 (2004); cf. Raquel Kennedy Bergen & Kathleen A. Bogle, *Exploring the Connection Between Pornography and Sexual Violence*, 15 VIOLENCE AND VICTIMS (2000) 227, 230; Elizabeth Cramer et al., *Violent Pornography and Abuse of Women: Theory to Practice*, 13 VIOLENCE & VICTIMS 319, 326 (1998); Elizabeth Cramer & Judith McFarlane, *Pornography and Abuse of Women*, 11 PUB. HEALTH NURSING 268, 270 (1994).

53. When the research results conceptually “align” across experimental, longitudinal, and cross-sectional methodologies—as they do in the body of literature on sexual aggression and pornography consumption—“the most powerful evidence of a media effect is demonstrated.” Paul J. Wright et al., *Pornography Consumption and Satisfaction: A Meta-Analysis*, 43 HUM. COMM. RES. 315, 322 (2017). The reason is the methods’ complementarity of each other’s strengths and weaknesses. *Id.* at 321–22.

54. Milton Diamond et al., *Pornography and Sex Crimes in the Czech Republic*, 40 ARCHIVES SEXUAL BEHAV. 1037, 1037 (2011) (stating that “rape and sex crimes did not increase” after pornography was allowed in the Czech Republic in 1989); *but see* Larry Baron & Murray A. Straus, *Four Theories of Rape: A Macrosociological Analysis*, 34 SOC. PROBS.

pornography consumption trivializes sexual abuse, the propensity to report may well decline. Furthermore, crime reports can be determined by many factors, arguably so during monumentally transformative social situations like the Velvet Revolution, the transition from communism to capitalism, and the two-state separation period that occurred in the early 1990s.⁵⁵ For similar reasons, the Czech study was criticized for “using and presenting aggregate data in isolation and then forming conclusions about individuals” that may be inaccurate.⁵⁶ Interpretations of the relationship between pornography consumption and reported sex crimes across time must be broached with extreme skepticism, for unlike controlled psychological experiments or naturalistic surveys of individuals, aggregated crime statistics are causally over-determined by numerous social phenomena, including changes in urbanization, proportion of young men, victims’ propensity to report, law enforcement efficiency, the prioritization of offenses, legal changes, and cultural shifts.⁵⁷

HIERARCHY THEORY

The evidence surmised have shown how the consequences of the production and consumption of pornography contribute to the subordination of multiply disadvantaged people. This outcome causes legal problems analogous to the intersectional discrimination facing Black women, who, in Kimberlé Crenshaw’s words, are “marginalized in the interface between antidiscrimination law and race and gender hierarchies.”⁵⁸ For example, survivors sometimes describe

467, 467 (1987) (finding that when analyzing “1980–1982 data on rapes known to the police in” the United States, among other factors, the “circulation of pornography” had an increasing “direct effect[] on the incidence of rape”); accord Joseph E. Scott & Loretta A. Schwalm, *Rape Rates and the Circulation Rates of Adult Magazines*, 24 J. SEX RES. 241, 246 (1988).

55. Diamond et al., *supra* note 54, at 1038, themselves mention the “major sociopolitical changes” that occurred at the time.

56. 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 SEXUAL BEHAV. 1045, 1045 (2011).

57. Cf. *id* at 1045–46 (identifying the “ecological fallacy,” “overly simplistic explanatory models,” and “over-determination” that “occurs when there are two or more sufficient and distinct causes for the same effect” as three 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, *supra* note 23, at 125, 137–42 (discussing similar methodological problems generally in aggregated studies). FINAL REPORT OF ATT’Y GENERAL’S COMM., *supra* note 12, at 259–61 (discussing and citing scholarly criticism voiced since the 1970s against longitudinal research on pornography and sex crime reports); Baron & Straus, *supra* note 54, at 472 (discussing “other antecedents of rape,” including various demographic factors); John H. Court, *Sex and Violence: A Ripple Effect*, in PORNOGRAPHY AND SEXUAL AGGRESSION 143, 154–55 (Neil M. Malamuth & Edward Donnerstein eds., 1984) (discussing various demographic rape predictors).

58. 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, 151 (1989) [hereinafter Crenshaw, *Demarginalizing the Intersection*].

prostitution essentially as paid rape.⁵⁹ They are caught in the liminal space between the oppressive conditions of prostitution and existing rape laws that do not encompass “paid for” rape. Rape law often requires violence or threats to establish non-consent.⁶⁰ Its non-intersectional perspective cannot comprehend the socially coercive circumstances compelling those in prostitution to enter pornography by purported consent.

In contrast to substantive equality laws, traditional equality laws do not recognize subordination caused by pornography as discrimination, in part because they do not demand a more searching inquiry into a law’s socially contextualized consequences.⁶¹ To promote substantive equality generally, the political theorist Iris Marion Young recommends ensuring that the perspectives and interests of subordinated groups are better represented.⁶² Ian Shapiro also advocates strengthening subordinated groups in deliberative processes where their “basic interests” are threatened and improving their “bargaining power.”⁶³ Likewise, Jane Mansbridge suggests that when dominant groups “intentionally” obstruct the efforts of oppressed groups “to represent themselves,” or where the latter face deep-seated prejudice, they are entitled to greater representation.⁶⁴ Indeed, prostituted people commonly face prejudice, stigma, and criminalization that impede their ability to represent their shared interests. These democratic theorists agree on the need for disadvantaged group representation to counter established social hierarchies. This position will be termed “hierarchy theory.”⁶⁵ It will be used as an

59. See Giobbe, *supra* note 14, at 121 (noting that survivors describe prostitution as “like rape”). In a study of legal brothels in Nevada, one prostituted woman said prostitution was “like you sign a contract to be raped”; another explained that she “cried all the time” during her first six months in legal prostitution. MELISSA FARLEY, PROSTITUTION AND TRAFFICKING IN NEVADA: MAKING THE CONNECTIONS 34 (2007). Likewise, when a survivor from Nevada brothels was asked how she truly felt about being a prostituted person, she responded that “[t]he first words that come to mind are: degraded, dehumanized, used, victim, ashamed, humiliated, embarrassed, insulted, slave, rape, violated.” ALEXA ALBERT, BROTHEL: MUSTANG RANCH AND ITS WOMEN 221 (2001).

60. See, e.g., CATHARINE A. MACKINNON, SEX EQUALITY 956–57 (3rd ed., 2016) [hereinafter MACKINNON, SEX EQUALITY].

61. Traditional antidiscrimination laws follow Aristotle’s principle of treating likes alike and unlikes unlike. E.g., *id.* at 5–13; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 215–249 (1989) [hereinafter MACKINNON, TFTS]; CATHARINE A. MACKINNON, WOMEN’S LIVES, MEN’S LAWS 44–54 (2005). MacKinnon terms this the “sameness/difference approach” to equality, MACKINNON, TFTS *supra*, at 220. It does not promote equality in situations where women are most subordinated to men because the 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.” *Id.* at 233–34.

62. E.g., IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 121–53 (2000); IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 183–191 (1990).

63. IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 48–49 (2006).

64. Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes,”* 61 J. POLITICS 628, 639 (1999).

65. The term is derived in part from the scholarship of Catharine MacKinnon, who frequently uses the term “hierarchy” to describe the problem her feminist theory addresses. See, e.g., MACKINNON, TFTS *supra* note 61, at 214–249 (using terms similar to hierarchy throughout); Catharine A. MacKinnon, *Substantive Equality Revisited: A Reply to Sandra Fredman,*

umbrella term that comprises several of the theoretical elements discussed, which have the potential to inform solutions to problems like pornography, where harmful, yet politically contested, practices disproportionately affect disadvantaged groups.

Hierarchy theory is empirically testable. For example, a study with longitudinal panel data from seventy nations covering the period 1975–2005, shows that the strength of autonomous feminist mobilization, which is related to its public representation, significantly predicted which governments adopted more progressive policies to combat violence against women.⁶⁶ Other potential predictors, including women in government, “left” party presence, and modernization, were of marginal significance.⁶⁷ Moreover, feminist movements long predated the advent of progressive policies combatting violence against women,⁶⁸ indicating the direction of causal influence. In discussing causation, the study’s authors argue that the multidisciplinary expertise survivor groups need to redress violence against women effectively “cannot be developed in more generally focused organizations” or in settings where their representation “must be subordinated” to other imperatives.⁶⁹ Survivors of prostitution are also marginalized in more general movements, hence requiring independent organizations to develop the “oppositional consciousness,”⁷⁰ including through consciousness-raising,⁷¹ which is necessary to challenge their subordination successfully.

NEGATIVE-RIGHTS LIBERALISM AND POSTMODERNISM

Official policies promoting the representation of disadvantaged groups are implicitly based on their “positive right” to government intervention.⁷² Fearing the government’s abuse of power, classic liberalism views such rights suspiciously, preferring instead to emphasize the separation of powers, formal

14 INT’L J. CONST. LAW 739, 740 (2016) [hereinafter MacKinnon, *Substantive Equality Revisited*] (arguing that “[s]ocial hierarchy” is the “identifying principle” of substantive equality law); *cf. id.* at 740–41 (arguing that concepts like 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).

66. Mala Htun & S. Laurel Weldon, *The Civic Origins of Progressive Policy Change: Combating Violence against Women in Global Perspective, 1975–2005*, 106 AM. POL. SCI. REV. 548, 548, 564 (2012).

67. *Id.* at 563–64.

68. *Id.* at 560.

69. *Id.* at 553.

70. *Cf. id.* at 553 (noting that women who self-organize as a social group develop “an oppositional consciousness” that is important for representing their interests effectively).

71. Catharine A. MacKinnon, *Consciousness Raising*, in TFTS, *supra* note 61, at 83–105.

72. *Cf.* HILARY CHARLESWORTH & CHRISTINE CHINKIN, THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS 231–44 (2000) (discussing the three “generations” of rights, the first directed against state or public action aligned with the concept of negative rights, the second and third directed toward private or group rights aligned with the concept of positive rights).

equality, and checks and balances, including broad expressive freedoms.⁷³ These are considered negative rights meant to prevent majoritarian tyranny or the “violence of faction” that pursues interests “adverse to the rights of other citizens or . . . the community.”⁷⁴ Postmodernists regard the allocation of positive rights to subordinated groups even more suspiciously. For example, Judith Butler argues that laws proscribing pornography or hate speech will not only be “inevitably misappropriated by the state,” but also impose injuries on subordinated groups like those such laws were intended to rectify.⁷⁵ Similarly, Wendy Brown alleges that legal recognition of groups subordinated by pornography constitutes an “abetting rather than contesting” of their circumstances, and will ultimately “discursively renaturalize” the distribution of social power.⁷⁶

Crenshaw criticizes postmodern theories that challenge “categorization” (e.g., sexist stereotypes) but not its “social and material consequences” (e.g., female sexual exploitation).⁷⁷ Such “vulgar constructionism” amounts to saying “that since all categories are socially constructed, there is no such thing as, say, Blacks or women, and thus it makes no sense to continue reproducing those categories by organizing around them.”⁷⁸ When Brown asserts that group rights recognizing subordination caused by pornography will entrench “constitutive injuries” rather than “discursively deny” subordination,⁷⁹ she is essentially saying that hierarchy theory reproduces rather than challenges hierarchy. Following Crenshaw, Brown’s dystopian theory leaves no “room for identity politics” that can challenge group subordination.⁸⁰ Neither negative rights liberalism nor postmodernism offers an effective means of combatting pornography’s real harms, only complacent defeatism.

QUALITATIVE COMPARATIVE CASE STUDIES

A Note on Methodology

Pattern matching is a social science term for analyzing whether empirical data in a case study⁸¹ conforms to theoretically predicted patterns.⁸² In simple

73. On classic liberalism, see, e.g., DAVID HELD, *MODELS OF DEMOCRACY* 56–95 (3rd ed., 2006).

74. THE FEDERALIST NO. 10 at 40–41 (James Madison) (Terence Ball ed., 2003) (ebook).

75. Judith Butler, *Sovereign Performatives in the Contemporary Scene of Utterance*, 23 CRITICAL INQUIRY 350, 376 (1997).

76. WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 133 (1995).

77. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1297–98 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

78. *Id.* at 1296.

79. BROWN, *supra* note 76, at 134.

80. Crenshaw, *Mapping the Margins*, *supra* note 77, at 1296 n.180.

81. The term “case study” is used in the social science sense here.

82. For pattern matching, see MATTHEW LANGE, *COMPARATIVE-HISTORICAL METHODS* 53–55 (2013); ROBERT K. YIN, *CASE STUDY RESEARCH: DESIGN AND METHODS* 143–47 (5th ed. 2014). Pattern matching is sometimes referred to as the “congruence method.” See Yin,

terms, pattern matching “involves using a case study to test a pre-established theory by checking to see if the case follows the predictions of the theory.”⁸³ The “causal implications” of hierarchy theory can thus be tested via pattern matching.⁸⁴ Changes in pornography laws are one viable dependent variable to measure when testing hierarchy theory. A measure of their empirical outcome would also be persuasive (e.g., changes in levels of consumption). To the extent that prostitution laws are implemented more efficiently than pornography laws, their outcomes are easier to control. The empirical evidence surmised suggests that prostituted people and pornography performers belong to similar overlapping demographic groups, and that pornography contributes to shaping the sex purchasers’ demand for specific acts. If a law that targets the pimps and the buyers of people for sex could be demonstrated to reduce the prevalence of prostitution and its associated harms, a similar law targeting the producers of pornography might contribute to similar outcomes. In these senses, the outcomes of prostitution laws may serve as indirect measures of potential challenges to pornography production.

In social science terminology, this qualitative comparative-historical case study analyzes “covariation” with multiple observations across and within each case/unit of analysis over time.⁸⁵ The aim is “analytical” rather than “statistical generalization.”⁸⁶ Although the insights are largely ideographic (i.e., conclusions mainly apply to particular cases), nomothetic insights that apply universally can be strengthened in structured small-*N* research designs where less than a handful of cases are compared, including the most similar systems design.⁸⁷ The rationale for selecting cases or units of analysis within a most similar systems design dictates that the researcher relies on accumulated knowledge to compare two or more units that are similar in many theoretically *relevant* aspects of the independent variables, but differ on the dependent variable to be explained (here, the outcome of legal challenges to pornography).⁸⁸ The objective is to hold constant and rule out as many of the independent variables as possible while seeking to identify the remaining variable(s) that may explain the different dependent outcomes.⁸⁹

supra, at 143 (citing Alexander L. George & Andrew Benet, *The Congruence Method*, in CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCE 181, 181–204 (2004)).

83. LANGE, *supra* note 82, at 53.

84. John Gerring, *What Is a Case Study and What Is It Good For?*, 98 AM. POL. SCI. REV. 341, 348 (2004).

85. *See id.* at 342–44, for a brief explanation of this methodological framework.

86. YIN, *supra* note 82, at 40–44.

87. LANGE, *supra* note 82, at 112–114.

88. *See id.* at 95–96, 108–12 (The most similar systems design is referred to in this source as John Stuart Mill’s logic of difference, which may cause initial confusion.).

89. However, unlike large-*N* comparisons, Mill’s small-*N* comparative methods offer little insight *unless* they are combined with other methods, including a pattern matching or a process tracing in each unit of analysis. LANGE, *supra* note 82, at 110. As applied to qualitative social science research, Mill’s methods are therefore appropriately understood as *selection techniques* for determining what cases/units to compare. *Cf.* Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative*

Since hierarchy theory predicts that stronger constitutional substantive equality enables more successful legal challenges to various practices of subordination,⁹⁰ a comparative selection of cases/units in a most similar systems research design can be structured along this independent variable. Canadian equality law expressly recognizes substantive equality, rejecting the “sterile similarly situated test focused on treating ‘likes’ alike”⁹¹ since it “does not assure . . . the elimination from the law of measures that impose or perpetuate substantial inequality.”⁹² Indeed, U.S. case law also recognizes substantive equality in some situations and imposes limitations to First Amendment freedoms.⁹³ Compared with Canada, however, those instances are more limited and regarded as exceptions to a negative rights framework prioritizing expression, not systemic features of a positive rights framework where expression is balanced against substantive equality.⁹⁴

The analysis of the outcomes of different prostitution laws is pursued in part separately from the Canadian–U.S. comparison and provides particular insights to potential legal challenges to the production of pornography. Sweden has criminalized purchasers since 1999, while no offense is ascribed to those prostituted.⁹⁵ As the first of its kind, Sweden’s sex purchasing law provides a

Options, 61 POL. RES. Q. 294 (2008). Properly applied, they can afford vital explanatory leverage, but cannot, in isolation, be considered a comprehensive method of inquiry. *Id.*

90. Perhaps the most well-known proponent of this constitutional theory is MacKinnon. See, e.g., MACKINNON, *SEX EQUALITY*, *supra* note 60; MacKinnon, *Substantive Equality Revisited*, *supra* note 65; Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

91. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, para. 15 (Can.) (saving an affirmative program that granted fishing licenses to aboriginal bands against a challenge by commercial fishers, some of whom alleged discrimination on the grounds of race).

92. *Withler v. Canada* (Att’y Gen.), 2011 SCC 12, [2011] S.C.R. 396, para. 40 (Can.); cf. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 164 (Can.) (MacIntyre, J., dissenting in part) (“[E]very difference in treatment between individuals under the law will not necessarily result in inequality and . . . identical treatment may frequently produce serious inequality.”); *id.* at 154 (Wilson, J.) (stating that “the position that every distinction drawn by law constitutes discrimination is rejected” and asserting that Canada’s constitutional equality rights are “designed to protect those groups who suffer social, political and legal disadvantage in our society”); *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1333 (Can.).

93. For example, U.S. courts have acknowledged that disseminating pornography in the workplace can contribute to sexual harassment, which impacts negatively on sex equality. See *infra* note 122 and accompanying text. To counter such practices, restrictions on First Amendment freedoms are permissible. *Id.*

94. For a thorough comparative constitutional analysis of US and Canadian law in these respects, see, for example, MACKINNON, *SEX EQUALITY*, *supra* note 60, especially at 13–41, 155–67, 1750–822; MacKinnon, *Substantive Equality Revisited*, *supra* note 65.

95. Sweden first passed its law as a special statute. LAG OM FÖRBUD MOT KÖP AV SEXUELLA TJÄNSTER (Svensk författningssamling [SFS] 1998:408) (Swed.) (“A person who obtains a casual sexual relation in exchange for payment shall be sentenced . . . for the *purchase of sexual services* to a fine or imprisonment for at most six months.”). It was codified in the penal code on April 1, 2005, with minor changes in wording. See Proposition [Prop.] 2004/2005:45 En ny sexualbrottslagstiftning [government bill] 106 (Swed.) (amending BROTTSBALKEN [BRB] [PENAL CODE] 6:11 (Swed.)). In 2011, the code was amended with an increased maximum penalty of one year’s imprisonment. Proposition [Prop.] 2010/2011:77

“revelatory case,”⁹⁶ generating unique data of its impact and potential where it originated and has been implemented and studied the longest.⁹⁷ The outcome-data associated with prostitution laws in other countries or jurisdictions will, therefore, be analyzed more informally than under a most similar systems design—a procedure that is “warranted” when the relevant comparisons are “obvious or generally accepted.”⁹⁸ In the text of the original bill that creates the sex purchase law, Sweden’s government acknowledges that prostitution is related to men’s violence against women, which it deems unacceptable in a gender-equal society.⁹⁹ It rejects criminalizing prostituted individuals since “most often” they are “the weaker party exploited by others.”¹⁰⁰ Instead, it endeavors to “encourage” them to seek assistance and escape prostitution, a stance that militates against “any form of sanction.”¹⁰¹ Because this law recognizes and addresses substantive inequality between purchasers and prostituted people, it is predicted to reduce exploitation and abuse while supporting those in prostitution. If this outcome is proven true, it would indicate that a similar law applied to pornography production can reduce exploitation and abuse.

United States

In 1983, poor neighborhoods in Minneapolis were disproportionately exposed to pornographic theatres and shops catering to the greater metropolitan area, which contributed to the sexual harassment of residents, prostitution, and pimping.¹⁰² A City Council committee invited Andrea Dworkin and Catharine MacKinnon to act as advisors; the two rejected zoning laws, instead introducing a civil rights approach that recognized pornography as a form of sex discrimination.¹⁰³ Subsequently, public hearings were conducted where grassroots activists, organizations, experts, and survivors testified on behalf of a civil rights law approach to pornography as sex discrimination.¹⁰⁴ Opposition was also heard.¹⁰⁵

Skärpt straff för köp av sexuell tjänst [government bill] (Swed.) (explaining the reasons for the amendment).

96. YIN, *supra* note 82, at 52.

97. The first country to imitate Sweden was Norway. LOV OM STRAFF (STRAFFELOVEN) 13. juni 2009 nr. 74 § 316 [<https://perma.cc/4BJL-GDAA>].

98. Gerring, *supra* note 84, at 344.

99. Proposition [Prop.] 1997/1998:55 Kvinnofrid [government bill] 22 (Swed.).

100. *Id.* at 104.

101. *Id.* at 104.

102. See, e.g., Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 608–09 (1987); Brief of the Neighborhood Pornography Task Force, *Amicus Curiae*, in Support of Appellant, Hudnut v. Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) (No. 84-3147), reprinted in IN HARM’S WAY, *supra* note 51, at 321–24.

103. CATHARINE A. MACKINNON, *Testimony on Pornography, Minneapolis*, in BUTTERFLY POLITICS 96, 96–98 (2017); Brest & Vandenberg, *supra* note 102, at 614–17; DOWNS, *supra* note 1, at 56–59.

104. Brest & Vandenberg, *supra* note 102, at 620–29. For a complete transcript of the Minneapolis hearing, see IN HARM’S WAY, *supra* note 51, at 39–268.

105. See IN HARM’S WAY, *supra* note 51, at 39–268.

The Minneapolis City Council twice passed a civil rights ordinance that was vetoed by the mayor on each occasion.¹⁰⁶ Indianapolis passed a similar ordinance in 1984, its legislature identifying pornography as being “central in creating and maintaining sex as a basis for discrimination,” and “a systematic practice of exploitation and subordination based on sex which differentially harms women.”¹⁰⁷ It further concluded that pornography promotes rape, battery, and prostitution while inhibiting “just enforcement of laws against such acts.”¹⁰⁸ These legislative recognitions that pornography contributes to women’s subordination imply that Indianapolis understood that substantive equality was at stake. Consequently, its legal definition of pornography centered on *subordination*:

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.¹⁰⁹

The Indianapolis definition was, among other things, influenced by the perspectives of women who had been harmed by pornography and whom Dworkin had talked with.¹¹⁰ The ordinance described acts that can be inflicted on pornography performers and victims of prostitution and gender-based violence. In this sense, the ordinance can be contrasted with the viewer-centered definition of

106. Brest & Vandenberg, *supra* note 102, at 644, 653.

107. INDIANAPOLIS, IND., CODE ch. 16 § 16-1(a)(2) (1984), *invalidated by* Am. Booksellers Ass’n v. Hudnut, 771 F.2d 323 (7th Cir. 1985) [<https://perma.cc/X6CY-LGMH>].

108. *Id.*

109. *Id.* § 16-3(q).

110. ANDREA DWORKIN, LIFE AND DEATH 87–91 (1997).

actionable material under U.S. obscenity law, which turns on “(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct . . . and (c) whether [it] lacks serious . . . value.”¹¹¹ This definition of obscenity ignores the fact that pornography creates its own “community standard” by desensitizing consumers, a sizeable subpopulation, leading them to demand materials they would previously have regarded as “offensive,” with the market adjusting accordingly.¹¹² Such mechanisms render the obscenity law ineffective.

In 1994, the U.N. Rapporteur on Violence Against Women referred to the civil rights ordinance as a “major breakthrough” compared to other legal approaches that fail to comprehend “that most pornography represents a form of violence against women and that the evidence shows that it is directly causative of further violence against women.”¹¹³ The ordinance is further distinguished from criminal obscenity laws by endowing those victimized with the right to sue for civil damages.¹¹⁴ Following hierarchy theory, those subordinated by pornography are predicted to represent their own interests more effectively than other actors within the criminal justice system.

The first cause of action under the Indianapolis ordinance was against “[t]rafficking in pornography: the production, sale, exhibition, or distribution of pornography.”¹¹⁵ It enabled any woman to file a complaint “as a woman acting against the subordination of women.”¹¹⁶ Men, children, and transgender people able to prove an analogous injury could also sue.¹¹⁷ This would have enabled numerous small lawsuits, potentially bankrupting some respondents. Libraries were exempt except for “special display presentations.”¹¹⁸

The second cause of action was against “[c]oercing, intimidating or fraudulently inducing any person, including a man, child or transsexual, into performing for pornography.”¹¹⁹ It addressed intersectional discrimination by enumerating impermissible defenses that could otherwise make existing sexual coercion

111. *Miller v. California*, 413 U.S. 15, 24 (1973) (citations omitted).

112. *See supra* notes 2–8 and accompanying text (providing key evidence of the prevalence of pornography consumption, its desensitizing effect, and its impact on the commercial demand).

113. Radhika Coomaraswamy, *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR Hum. Rts. Comm’n, 50th Sess., Prov. Agenda Item 11(a), ¶ 240, U.N. Doc. E/CN.4/1995/42 (Nov. 22, 1994).

114. The causes of action for trafficking, coercion, and assault, described at *infra* notes 115–120, 125–126 and accompanying text, would have enabled lawsuits against perpetrators, producers, sellers, exhibitors, and distributors. INDIANPOLIS, IND., CODE ch. 16 § 16-17(a)(6) (1984), *invalidated by* *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *reprinted in* IN HARM’S WAY, *supra* note 51, at 438–57. The cause for action pertaining to “forcing,” described at *infra* notes 121–124 and accompanying text, targeted both perpetrators and institutions. *Id.* § 16-17(a)(7)).

115. INDIANPOLIS, IND., CODE ch. 16 § 16-3(g)(4).

116. *Id.* § 16-17(b).

117. *Id.*

118. *Id.* § 16-3(g)(4)(a).

119. *Id.* § 16-3(g)(5).

laws inapplicable to disadvantaged people. Whether plaintiffs were, inter alia, adults, prostituted people, had “previously posed,” “actually consented,” “appeared to cooperate actively,” “signed a contract,” or were “compensated” for appearing in pornography was irrelevant.¹²⁰

The third cause of action was against “[f]orcing pornography on any woman, man, child or transsexual in any place of employment, in education, in a home, or in any public place.”¹²¹ This cause of action has been judicially recognized as sexual harassment in the workplace context since 1991, and affords the possibility of injunctive relief that the “First Amendment guarantee of freedom of speech does not impede.”¹²² However, women are arguably more “similarly situated” to men at work than elsewhere. By contrast, the ordinance provided what Crenshaw might term “bottom-up”¹²³ relief, a remedy more inclusive of disadvantaged people who are “least similarly situated” to men,¹²⁴ including prostituted women.

The fourth cause of action provided remedies against “[a]ssault or physical attack . . . or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography.”¹²⁵ It demanded the highest burden of proof. However, given sex purchasers’ ability to pinpoint specific pornography that inspired them to imitate abuse,¹²⁶ if assailants provably consumed specific material depicting behavior consistent with an attack, a preponderance of evidence standard should be sufficiently persuasive.

The Indianapolis ordinance was promptly challenged by publishers, book distributors, trade associations, and nonprofit organizations on expressive grounds in *American Booksellers Ass’n v. Hudnut* (1984).¹²⁷ Although no action had yet been brought under its auspices, the Seventh Circuit Court of Appeals deemed the ordinance ripe for review.¹²⁸ Hence, the court based its analysis on hypothetical rather than real-world conditions. Ultimately, all provisions were

120. INDIANAPOLIS, IND., CODE, *supra* note 114, at § 16-3(g)(5)(a).

121. *Id.* § 16-3(g)(6).

122. *Robinson v. Jacksonville Shipyards Inc.*, 760 F. Supp. 1486, 1494, 1534 (M.D. Fla. 1991) (requiring a shipyard 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,” in response to a female employee’s suit 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.”). For application of *Robinson* by other courts to determine how pervasive pornography in the workplace must be to become actionable sexual harassment and whether additional conduct is needed, *see, e.g.*, *Williams v. CSX Transp. Co.*, 533 Fed. App’x 637, 642–43 (6th Cir. 2013); *Greene v. A. Duie Pyle, Inc.*, 371 F. Supp. 2d 759, 763 (D. Md. 2005); *Lyle v. Warner Bros. Television Prods.*, 132 P.3d 211, 229–30 (Cal. 2006).

123. Crenshaw, *Demarginalizing the Intersection*, *supra* note 58, at 145.

124. MACKINNON, TFTS, *supra* note 61, at 233–34.

125. *Id.* § 16-3(g)(7).

126. *See supra* notes 34–36, 44–51 and accompanying text.

127. *Am. Booksellers Ass’n v. Hudnut*, 598 F. Supp. 1316, 1318–20 (S.D. Ind. 1984).

128. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985).

invalidated, and the Supreme Court declined to hear the case.¹²⁹ Had the courts so chosen, several theories were available to save the ordinance.

Under the *strict scrutiny* standard, the Supreme Court permits First Amendment “infringements” when superseded by more “compelling” governmental interests to eliminate both sex discrimination in the workplace and other “barriers to economic advancement and political and social integration that have historically plagued women.”¹³⁰ By contributing to violence against women,¹³¹ pornography arguably constitutes a barrier to achieving sex equality for women. Certainly, this standard requires “narrowly tailored” laws.¹³² The ordinance thus covered only presentations that provably caused harm and avoided overbreadth by excluding non-explicit sexually objectifying materials; although they, too, have been shown to contribute significantly to attitudes supporting violence against women.¹³³ Moreover, the cause of action against trafficking in pornography exempted “isolated” portions of a work and excluded the sixth sub-definition that covered women being presented “as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display.”¹³⁴ Additionally, with the exception of producers, those accused of “trafficking” or “assault” had to “know” that the targeted materials were pornographic,¹³⁵ further narrowing the ordinance’s ambit.

129. *Hudnut*, 771 F.2d at 332–34, *aff’d mem.* 475 U.S. 1001 (1986) (6-3 decision) (summary affirmance without opinion), *reh’g denied* 475 U.S. 1132 (1986); for discussion regarding precedential value of a summary affirmance, see MacKinnon, Sex Equality, *supra* note 58, at 1757 (stating summary affirmances on direct appeal have been made largely impermissible by federal legislation passed in 1988 and are technically binding only within the specific circuit of the appeal, and that the scope of precedential value is unclear because no reasons are given for the decision).

130. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1535 (M.D. Fla. 1991); see *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–28 (1984) (acknowledging that requiring a voluntary all-male organization to accept women “may impair the ability of the original members to express only those views that brought them together,” but emphasizing that excluding women from such organizations is “invidious discrimination” productive of “unique evils that government has a compelling interest to prevent—wholly apart from the point of view such conduct may transmit.” The Court further acknowledges the “importance, both to the individual and to society, of removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women.”); *accord*, *Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

131. See evidence discussed *supra* notes 4–53 and accompanying text.

132. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (5-4 decision) (“Laws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (Roberts, C.J., plurality opinion))); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606–07 (1982).

133. See Lanis & Covell, *supra* note 30, for experiments with non-explicit sexually objectifying print ads. See MacKay & Covell 1997, *supra* note 30, for the same. See Milburn, Mather, & Conrad, *supra* note 30, for an experiment with R-rated Hollywood movies. See Wright & Tokunaga, *supra* note 30, for a naturalistic study including “men’s magazines” and “reality TV.”

134. *Hudnut*, 771 F.2d at 324–26 (describing the ordinance and its exemptions).

135. *Id.* at 326.

Furthermore, law students who were tested have applied the ordinance consistent with its intentions, avoiding overbreadth.¹³⁶

Under *intermediate scrutiny*, a law may survive expressive challenges if it advances a less compelling, yet “substantial or important governmental interest.”¹³⁷ Here, the ordinance’s narrow reach is critical. It did *not* target viewpoints endorsing sexual subordination—which may be expressed non-pornographically.¹³⁸ The ordinance confined itself to the graphic sexually-explicit subordination and required additional specification that the legislature had determined contributed to violence against women and analogous harms. In this sense, one may argue that the “governmental interest” of the ordinance “is unrelated to the suppression of free expression,”¹³⁹ hence is viewpoint neutral. Although the ordinance may cause “incidental restriction on alleged First Amendment freedoms,” the restriction will be “no greater than is essential to the furtherance of that interest.”¹⁴⁰ In striking down the cause of action against “coercion” into pornography, the Seventh Circuit proposed making “injury” during production “unlawful independent of the viewpoint expressed in the film.”¹⁴¹ However, general laws already exist against causing injuries, yet they fail to recognize the multiple

136. James Lindgren, *Defining Pornography*, 141 U. PENN. L. REV. 1153, 1187–91, 1210 (1993) (comparing an antipornography ordinance similar to Indianapolis’ version to existing U.S. obscenity law and a pornography definition drafted by law professor Cass R. Sunstein. The antipornography ordinance was found most reliable of the three, and particularly easy to apply when qualified to cover materials “whose dissemination in context would tend to subordinate women.”); see *IN HARM’S WAY*, *supra* note 51, at 39–425 (showing the legislative history of the ordinance made clear that it was reliant on a contextual finding of subordination, consistent with Lindgren’s qualified changes.)

137. *United States v. O’Brien*, 391 U.S. 367, 377 (1968). See also *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (“We . . . apply[] the standards for intermediate scrutiny enunciated in *O’Brien*.” (citing *O’Brien*, 391 U.S. at 377)).

138. The Seventh Circuit acknowledged that pornography “is a systematic practice of exploitation and subordination based on sex which differentially harms women,” and that “pornography is not an idea; pornography is the injury.” *Hudnut*, 771 F.2d at 328–29 (quoting INDIANAPOLIS CODE (1984), *supra* note 107, ch. 16 § 16-1(a)(2)). Yet, the court later referred to the ordinance as if it regulated “depictions,” “viewpoints,” or “speech.” *Id.* at 324–25, 330, 331 n.3, 332, 334. If the ordinance gave a cause of action to sue people who disseminate the “viewpoint” that women should be subordinated sexually, the court would indeed have been correct. However, the ordinance did not regulate expression that is not graphic, explicit, and sexually subordinating as pornography. The fact that “other speech” also “does” things does not change the fact that *only* pornography could be subject to a cause of action under the ordinance—not “other speech.” See *id.* at 329 (“If pornography is what pornography does, so is other speech. Hitler’s orations affected how some Germans saw Jews.”).

139. *O’Brien*, 391 U.S. at 377.

140. *Id.* Particularly when compared to obscenity laws, the Indianapolis ordinance appears narrowly tailored to its objectives. See Lindgren, *supra* note 136. Moreover, the Supreme Court holds that the exclusion of certain speech from a particular venue or forum may be permissible if there are “substantial alternative channels” for that speech. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 53 (1983). In the age of global mass media, even the most reactionary views on women’s rights, including opinions that women should be sexually abused and degraded, can be expressed and reach a considerable audience without the coercion, force, assault or trafficking that attend pornography.

141. *Hudnut*, 771 F.2d at 330.

disadvantages that facilitate sexual exploitation and abuse. In lieu of overbroad laws against film production, what is needed are narrowly tailored laws, like the ordinance, to accurately identify coercive circumstances. Still, the appellate court likened its specifications to viewpoint discrimination that would suppress “Hitler’s orations” as well as “a book about slavery,”¹⁴² ignoring that exploitative abuse is integral to pornography production. Rather than targeting a book about slavery, the ordinance was aimed at the slavery of pornography.¹⁴³

Under *rational basis review*, pornography may be seen as analogous to unprotected expressions, such as group libel,¹⁴⁴ obscenity,¹⁴⁵ insulting, or “fighting words.”¹⁴⁶ The Seventh Circuit acknowledged that the Supreme Court “sometimes balances the value of speech against the costs of its restriction.”¹⁴⁷ However, citing only law review articles, the Seventh Circuit maintained that balancing is accomplished “by category of speech and not by the content of particular works,” while the ordinance “created an approved point of view” preventing this route.¹⁴⁸ Assuming this, *arguendo*, the Supreme Court by implication created an approved view when it sustained an Illinois group libel law, which disapproves of views that “‘portray[] depravity, criminality, unchastity, or lack of virtue of a class of citizens.’”¹⁴⁹ In truth, neither “history” nor “practice” had defined group

142. *Id.* at 329–30.

143. Some courts approve charging pornography producers for prostitution-related conduct that does not directly address any dissemination of the materials. *See, e.g.,* United States v. Roeder, 526 F.2d 736, 739 (10th Cir. 1975) (holding that transporting someone across state lines for the purpose of producing pornography violates the Mann Act and is unprotected by the First Amendment); *People v. Kovner*, 409 N.Y.S.2d 349, 352 (N.Y. Sup. Ct. 1978) (upholding conviction of a pornography producer for “promoting prostitution” and other offenses associated with the production, promotion, and sale of pornography, noting that, “[w]hile First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which it was obtained, this protection will not shield one against a prosecution for a crime committed during the origination of the act.”). However, with no controlling federal case, other courts have reached contrary determinations as to whether the First Amendment protects pornography production. *See* MACKINNON, SEX EQUALITY, *supra* note 60, at 1704–1711 (describing a number of factually similar cases with different legal outcomes).

144. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

145. *United States v. Orito*, 413 U.S. 139 (1973).

146. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

147. *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 331–32 (7th Cir. 1985).

148. *Id.* at 332.

149. *Beauharnais*, 343 U.S. at 251 (quoting § 224a of the ILLINOIS CRIMINAL CODE, Ill. Rev. Stat., 1949, c. 38, Div. 1, § 471). The defendant in *Beauharnais*, the president of the White Circle League of America, Inc., was convicted for disseminating a leaflet defaming the Black community in Chicago. *Id.* at 252. The Seventh Circuit believed that libel cases, beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), had “so washed away the foundations of *Beauharnais* that it cannot be considered authoritative.” *Hudnut*, 771 F.2d at 332 n.3. Still, *Beauharnais* has continued to be cited as authority by the Supreme Court. *See, e.g.,* *United States v. Stevens*, 559 U.S. 460, 468 (2010); *New York v. Ferber*, 458 U.S. 747, 763 (1982). The defamation of private individuals has been regulated under a more relaxed standard than *New York Times* sets forth for public officials since at least 1974. *Compare* *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), with *New York Times*, 376 U.S. at 254. There is no precedent as to which of these newer standards, if any, applies to group libel.

libel as unprotected until the Court did so.¹⁵⁰ Contrary to the Seventh Circuit's claim then, Illinois duly considered the "content of particular works" when delineating that category, just as Indianapolis did with respect to pornography.¹⁵¹ Anything less would have precluded action against racial segregation in *Brown v. Board of Education* as contravening the established regime of separate but equal.¹⁵² *Brown's* progressive logic was plainly not applied in *American Booksellers*.¹⁵³

Considering the various routes available to uphold the Indianapolis ordinance, the Seventh Circuit's invalidation appears to be based less on *law* than *ideology*; that is, rather than relying on "a system of enforceable rules governing social relations and legislated by a political system," *American Booksellers* relied on "a system of political ideas."¹⁵⁴ Compared to Canada's approach to constitutional rights, such rhetorical and ideological persuasion might be more effective under the U.S. negative rights approach. This seems particularly evident with regard to the viewpoint neutrality doctrine, which derives from a body of law that, unlike child pornography and sex discrimination laws, was largely carved out of cases arising during the Red Scare and McCarthyism eras, and the 1960s

150. *Beauharnais*, 343 U.S. at 258. The opinion noted that whether libelous statements could be proscribed when "directed at designated collectivities" as opposed to individuals was not answered by the doctrine. *Id.* at 257–58. Yet, it accepted Illinois' analogous reasoning on the notion that the discrimination suffered by members of social groups through group libel was similar to that suffered by individuals in the case of personal libel, insofar as the former's status "depend[s] as much on the reputation of the racial and religious group" to which they "willy-nilly" belong, as on their "own merits." *Id.* at 263. This logic can likewise be applied to social groups subordinated by pornography.

151. The notion that the ordinance is not viewpoint neutral because it does not conform to preexisting categories, thus purportedly unconstitutional, fails to acknowledge that some unprotected categories were conceived in situations analogous to those surrounding Indianapolis' adoption of the ordinance. For instance, obscenity is by law defined according to the contemporary community standards test. *Miller v. California*, 413 U.S. 15, 24 (1973). Yet this test is impliedly a measure of the community's majority's viewpoint, which is hardly viewpoint neutral, at least not relative to the minority's. *Cf. Cohen v. California*, 403 U.S. 15, 25 (1971) ("[O]ne man's vulgarity is another's lyric"); *Miller*, 413 U.S. at 40–41 (Douglas, J., dissenting) ("What shocks me may be sustenance for my neighbor.").

152. *See Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483, 494–95 (1954).

153. As the *Beauharnais* Court did regarding group libel two years earlier, the *Brown* Court realized that although preexisting doctrines "cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive." *Brown*, 347 U.S. at 489. In contrast to *Brown*, which decided to end de jure educational segregation, the Seventh Circuit observed that pornography causes "affront and lower pay at work, insult and injury at home, battery and rape on the streets," *Hudnut*, 771 F.2d at 329, yet invalidated the ordinance that could have ended those harms. The Seventh Circuit's decision is similar to the approach taken by a lower Kansas court cited in *Brown* in sustaining *Plessy*, despite acknowledging that racial segregation in education imposed a sense of "inferiority" on African American children and negatively affected their ongoing education compared to those attending racially integrated schools. *Brown*, 347 U.S. at 494 (quoting the Kansas court without citation).

154. Christine Sypnowich, *Law and Ideology*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., summer 2019) [https://perma.cc/7FB5-FW83].

and 1970s anti-Vietnam war efforts.¹⁵⁵ The First Amendment, among other things, protected social activists, intellectuals and other dissident minorities from being arbitrarily censored or otherwise persecuted by the U.S. government, partially as a means to ensure that, in Justice Brandeis' words, "the deliberative forces should prevail over the arbitrary."¹⁵⁶ However, the way that the Seventh Circuit applied this doctrine to insulate pornographers from being held civilly accountable turned the law on its head: it protected pornographers as if *they* were the marginalized, oppressed groups or intellectual dissidents being persecuted by the U.S. government.¹⁵⁷ The evidence instead suggests that pornographers walk almost literally over dead women's bodies to provide millions of men with graphic, sexually explicit subordination of women as entertainment.¹⁵⁸ The Seventh Circuit thus protected not marginalized groups—as originally envisioned under the First Amendment—but the mainstream population of consumers and their pornographers who exploit, abuse, and subordinate the marginalized.¹⁵⁹

Canada

Since 1959, the Canadian Criminal Code has defined *obscenity* in a distinctly different manner than its Anglo-American counterparts, deeming "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence" obscene.¹⁶⁰ Although not legislatively mandated, the Supreme Court of Canada held that "community standards" would determine the application of the obscenity law.¹⁶¹ Subsequently, undue exploitation of sex was interpreted according to the degree of explicitness, while crime, horror, cruelty and violence were "largely ignored."¹⁶² However, a more critical Canadian discourse on pornography emerged in the mid-1970s and 1980s.¹⁶³ Yet, the last major piece of national legislation, Bill C-54 (1987), proposed a criminal law

155. Cf. DANIEL A. FARBER, *THE FIRST AMENDMENT* 65, 71, 73 (4th ed., 2014); CATHARINE A. MACKINNON, *ONLY WORDS* 38 (1993).

156. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

157. See, e.g., *supra* notes 137–143, especially 138, and accompanying text.

158. See *supra* notes 2–28 and accompanying text for evidence of the conditions of pornography production and the character of the demand for the products that result.

159. This misuse of the viewpoint neutrality doctrine is akin to what Karl Marx and Friedrich Engels referred to as "ideology" when introducing the "*camera obscura*" analogy, which represents an inverse "upside-down" image of material reality—an ideology derived not from "empirically verifiable" facts, but from the statements, conceptions, and imaginings of that reality. KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* 68–69 (C.J. Arthur ed., 2nd ed. Electric Book Co., 2001).

160. Criminal Code, R.S.C. 1985, c C-46, § 163(8) (Can.).

161. *Brodie v. The Queen*, [1962] S.C.R. 681, 706 (Can.).

162. Kathleen E. Mahoney, *Obscenity, Morals and the Law: A Feminist Critique*, 17 OTTAWA L. REV. 33, 58 (1985) [hereinafter Mahoney, *Obscenity and the Law*].

163. See COLE, *supra* note 1, at 70–73, 76–77; cf. DANY LACOMBE, *BLUE POLITICS: PORNOGRAPHY AND THE LAW IN THE AGE OF FEMINISM* 26–29 (1994).

without a civil rights remedy.¹⁶⁴ It was never passed and received extensive criticism, both for employing a definition of pornography that failed to recognize provably harmful elements and for being functionally useless or overbroad.¹⁶⁵ A contemporaneous observer concluded that Canadian “feminist strategies for reform of obscenity law have shown a lack of strategy.”¹⁶⁶

However, a parallel judicial development was initiated after the passage of the *Canadian Charter of Rights and Freedoms* (the “Charter”) in 1982.¹⁶⁷ Until that time, Canada had been dependent on the British Parliament to amend its constitution while its judiciary was inclined to defer to legislators on federal and provincial levels.¹⁶⁸ When British authority ended with the passage of the *Canada Act of 1982*,¹⁶⁹ these conditions shifted dramatically. The Canadian Supreme Court’s caseload “almost quadrupled” in the first ten years of the Charter’s existence, and constitutional activism in the courts assumed a shape similar to that of the United States.¹⁷⁰

In 1982 in Ontario, a judge concluded that “films which consist substantially or partially of scenes which portray violence and cruelty in conjunction with sex, particularly where the performance of indignities degrade and dehumanize the people upon whom they are performed, exceed the level of community tolerance.”¹⁷¹ Then, in Manitoba, nonviolent pornography was found obscene when women were “humiliated and treated only as an object of male domination sexually.”¹⁷² The Supreme Court thereafter reviewed “the proper

164. An Act to amend the Criminal Code and other Acts in consequence thereof, H. Commons B. 54, 2d Sess., 33d Parl., 1987 (first reading on May 4, 1987).

165. See Kathleen E. Mahoney, *Defining Pornography: An Analysis of Bill C-54*, 33 MCGILL L.J. 575, 583–88, 596–99 (1988) [hereinafter Mahoney, *An Analysis of Bill C-54*]; cf. COLE, *supra* note 1, at 77–84; LACOMBE *supra* note 163, at 117–33.

166. KIRSTEN JOHNSON, *UNDRESSING THE CANADIAN STATE: THE POLITICS OF PORNOGRAPHY FROM HICKLIN TO BUTLER* 53 (1995); cf. Kirsten K. Johnson, *Undressing the Canadian State: A Feminist Approach to Obscenity Legislation in Canada* 88 (1994) (unpublished M.A. thesis, University of Manitoba, on file with the National Library of Canada) [<https://perma.cc/QNS5-RYHQ>]. Supporting her conclusion, another contemporaneous observer noted that “most” of the public submissions to a federal committee that was reviewing the pornography laws two years earlier had “provided an emotional purge for all women who are sickened by the extent of violent and degrading pornography, but few attempted to address the specifics of law reform.” *Id.* 88 n.37 (quoting Jane Rhodes, “Silencing Ourselves? Pornography, Censorship and Feminism in Canada,” 17 *Resources for Feminist Research / Documentation sur la Recherche Feministe* no. 3, 133, 134 (1988)).

167. See CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Part 1 of the CONSTITUTION ACT, 1982, *being* Schedule B to the CANADA ACT, 1982, c 11 (U.K.) [hereinafter CANADIAN CHARTER].

168. Steven L. Newman, *Introduction*, in *CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES* 1, 1–2 (Steven L. Newman ed., 2004).

169. *Id.* at 2.

170. *Id.* at 3.

171. *R. v. Doug Rankine Co.* (1983) 9 C.C.C. 3d 53, 70, 1983 CanLII 3601 (Can. Ont. Ct. Ct.).

172. *R. v. Ramsingh* (1984) 29 Man. R. 2d 110, 116, 14 C.C.C. 3d 230, 239, 1984 CarwellMan 230, para. 22, 1984 CanLII 3569 (Can. Man. Q.B.).

test” for obscenity,¹⁷³ observing that “it is unfortunate but true that the community may tolerate publications that cause harm,” and specifying that “a legal definition of ‘undue’ must also encompass publications harmful to members of society.”¹⁷⁴ The courts adopted the psychologist James Check’s harms-based definition, distinguishing: (1) violent pornography, (2) nonviolent dehumanizing or degrading pornography, and (3) “erotica” that presents mutually affective sex premised on equality.¹⁷⁵ Only “erotica” was deemed non-obscene.¹⁷⁶ Although these courts associated obscenity with provable harm, judicial opinions continued to exhibit shortcomings.

For instance, a court found *Deep Throat* non-obscene.¹⁷⁷ Yet the lead actor testified in public hearings that she had been threatened, battered and raped off-camera during filming.¹⁷⁸ Sexual assault survivors had also increasingly reported that assailants referred to *Deep Throat* before assaulting them.¹⁷⁹ The court failed to consider such harms when it found *Deep Throat* not “the least bit offensive.”¹⁸⁰ A civil cause of action might have better informed the judiciary by representing survivors’ perspectives, given that it would be initiated by individuals or groups with significant knowledge and strong incentives to present persuasive evidence to consider gender-based violence and sexual exploitation seriously. Certainly, ambitious prosecutors looking to add to their tally of wins may seem like an effective antidote to misinformed courts, presuming that such individuals are motivated to present the best available evidence for their cases. However, considering, among other things, the public resistance engendered by those in support of pornography, careerist prosecutors can be discouraged and prioritize other crimes. Making the process more accessible to the survivors would, therefore, strengthen incentives for bringing more cases and improve the likelihood of success independently of the prosecutors.

Survivor representation was considerably improved when the Canadian Women’s Legal Education and Action Fund (“LEAF”) intervened in *R. v. Butler* (1992),¹⁸¹ a constitutional challenge to obscenity laws. A federal program that had been running since 1982, which supported “disadvantaged groups” in litigation, facilitated LEAF’s intervention.¹⁸² LEAF’s brief (*factum*) maintained that

173. *Towne Cinema Theatres, Ltd. v. R.*, [1985] 1 S.C.R. 494, 497 (Can.) (Dickson, C.J.) (plurality opinion).

174. *Id.* at 505.

175. *R. v. Wagner*, 1985 CarswellAlta 35, paras. 56–64, 36 Alta. L.R. 2d 301 (Can. Alta. Q.B.), *aff’d* (1986) 69 A.R. 78, 43 Alta. L.R. 2d 204 (C.A.).

176. *Id.*, para. 64.

177. *Ramsingh*, 29 Man. R. 2d at 117, 1984 CarswellMan 230, para. 25.

178. *E.g.*, IN HARM’S WAY, *supra* note 51, at 60–65, 205–13.

179. *Id.* at 215.

180. *Ramsingh*, 29 Man. R. 2d at 116, 1984 CarswellMan 230, para. 20.

181. *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.).

182. Jeff Sallot, *Legal Victory Bittersweet GOOD; BAD NEWS: The Supreme Court’s Pornography Ruling Is Hailed As a Stunning Advance. But a Program That Helped Make It Possible Has Been Cut*, GLOBE AND MAIL, Feb. 29, 1992, at A6. Although the program was cut in 1992, it received new funding in 1994 and continued to operate until September 2006. See CANADIAN HERITAGE, *Summary Report on the Court Challenges Program Consultations*,

pornography was a practice of sex inequality disproportionately harmful to women¹⁸³—an argument never raised by the Crown.¹⁸⁴ Eventually, the Supreme Court admitted that obscenity law “infringes” upon expressive freedoms¹⁸⁵ but determined it was “a reasonable limit” of democratic freedoms under Section 1 of the Charter.¹⁸⁶ Opining that the law was “confined” to violent materials and nonviolent, “degrading or dehumanizing,” materials, the Court determined that such expressive infringements did “not outweigh” the law’s objective to “enhance respect for all” and “non-violence and equality in their relations.”¹⁸⁷

Note that Indianapolis’s definition of pornography as “subordination” is conceptually similar to Canada’s “dehumanization and degradation” standard, both supported by similar evidence. Thus, *Butler* resembles a U.S. balancing decision where the government’s interest in preventing sex discrimination outweighs First Amendment protections. Unlike the Seventh Circuit’s decision in *American Booksellers*, the Supreme Court of Canada did not contemplate viewpoint neutrality or preexisting unprotected categories; it simply balanced equality against speech without assuming speech to be the norm and equality the exception. Those harmed by pornography were represented both in *American Booksellers* and *Butler*; their interests prevailed only in *Butler*. There is pattern matching here insofar as hierarchy theory predicted that a positive-rights balancing approach, which also recognizes substantive equality, would promote more successful legal challenges to pornography than a negative rights approach.

After *Butler*, many activists in the national women’s antipornography movement might reasonably have expected that violent, dehumanizing and degrading pornography would be successfully prosecuted in the future. Neither were these expectations met, nor did *Butler* lead to a new era in which the spread of pornography was countered. The following analysis explains this development, focusing on published decisions in major obscenity trials that centered on adult pornography films.

last modified August 10, 2017, <https://www.canada.ca/en/canadian-heritage/corporate/publications/general-publications/summary-court-challenges-program-consultations.html> [https://perma.cc/88YH-557C]. The program was eventually reinstated on February 7, 2017. See GOVERNMENT OF CANADA, *Court Challenges Program*, last modified March 16, 2020, <https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html> [https://perma.cc/TJ9A-VNNM].

183. Factum of the Intervener Women’s Legal Education and Action Fund, paras. 7, 22, in *R. v. Butler*, [1992] 1 S.C.R. 452 (Can.), reprinted in WOMEN’S LEGAL EDUCATION AND ACTION FUND (LEAF), *EQUALITY AND THE CHARTER: TEN YEARS OF FEMINIST ADVOCACY BEFORE THE SUPREME COURT OF CANADA* 201, 204–217 (1996) [hereinafter Factum of LEAF in *Butler*].

184. MACKINNON, *SEX EQUALITY*, *supra* note 60, at 1795.

185. *Butler*, [1992] 1 S.C.R. at 489.

186. *Id.* at 509–10. Section 1 of the Canadian Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” CANADIAN CHARTER, *supra* note 167, § 1.

187. *Butler*, [1992] 1 S.C.R. at 509.

An obscenity trial in Ontario in 1993 ruled on nonviolent materials showing men who, inter alia, ejaculated onto women's faces and into their mouths,¹⁸⁸ without any groups representing those harmed. A similar case was brought in another Ontario court, which ruled on pornography that generally presented women as sexually insatiable, constantly seeking sex with strangers, often in groups.¹⁸⁹ The judge opined that these women took "the lead in inducing" sex with men, allegedly "asserting their equality"; he found not "even a hint of humiliation or degradation."¹⁹⁰ This reasoning, of course, contravenes studies showing that nonviolent pornography promotes conceptions of female promiscuity that depersonalize women as legitimate targets of male sexual aggression.¹⁹¹ However, because *Butler* stated that nonviolent dehumanizing/degrading pornography is only "undue if the risk of harm is substantial,"¹⁹² Ontario's highest court required proof of harm "in every case," even where materials are degrading and dehumanizing.¹⁹³ While the Crown lost its argument that the prosecuted pornography would "encourage unrealistic and damaging expectations,"¹⁹⁴ there is no indication that it cited relevant research to buttress its position. By contrast, LEAF, the only women's organization represented in *Butler*,¹⁹⁵ made extensive use of research on harm.¹⁹⁶

Similarly, those harmed were not represented when the Alberta Provincial Court in 1994 acquitted two stores of selling/renting nonviolent pornography that the defendants conceded were "degrading and dehumanizing."¹⁹⁷ There, defendants relied on aggregated longitudinal crime report data from West Germany to cast doubt on the association between pornography and rape.¹⁹⁸ To underscore, such data is highly unreliable, especially compared to social science experiments and surveys.¹⁹⁹

188. *R. v. Ronish*, 1993 CarswellOnt 75, paras. 5, 7, 11(4) (WL), 18 C.R. 4th 165 (Can. Ont. Ct. J., Prov. Div.), *aff'd* 15 O.R. 3d 549, 1993 CarswellOnt 133 (C.A.).

189. *R. v. Hawkins*, 1992 CarswellOnt 1940, paras. 7–13 (Can. Ont. Ct. J., Gen. Div.), *aff'd sub nom. R. v. Ronish* (1993), 15 O.R. 3d 549, 1993 CarswellOnt 133 (C.A.).

190. *Id.* paras. 14–15.

191. See *supra* notes 32–36 and accompanying text.

192. *R. v. Butler*, [1992] 1 S.C.R. 452, 485 (Can.).

193. *R. v. Ronish* (1993), 15 O.R. 3d 549, 567, 1993 CarswellOnt 133, para. 57 (C.A.) (hearing five appeals together).

194. *Ronish*, 15 O.R. 3d at 564, 1993 CarswellOnt 133, para. 49.

195. *Butler*, [1992] 1 S.C.R. at 460.

196. See, e.g., Factum of LEAF in *Butler*, *supra* note 183, paras. 30–34, 44–48.

197. *R. v. Erotica Video Exchange, Ltd.* (1994), 163 A.R. 181, 184, 1994 CarswellAlta 820, para. 7 (Can. Alta. Prov. Ct.) ("[T]he defense concedes that each of the three videos contains degrading and dehumanizing pornography[.]").

198. *Id.*, para. 14 (quoting Berl Kutchinsky, *Pornography and Rape: Theory and Practice? Evidence from Crime Data in Four Countries Where Pornography is Easily Available*, 14 INT'L J. L. & PSYCHIATRY 47, 62 (1991)).

199. Actually, Kutchinsky's data showed an increase in reported sexual coercion accompanied by a reduction in reported rapes from 1971–1984. Kutchinsky, *supra* note 198, at 57 fig.7. However, as recalled, Kutchinsky's work and similar longitudinal studies have been strongly criticized for being unreliable by scholars in the field since the 1970s. See *supra* notes 54–57 and accompanying text.

As the obscenity law became increasingly permissible, Canadian law professor Janine Benedet observed that it was accompanied by a dwindling number of prosecutions of adult pornography, particularly since 1996.²⁰⁰ One of the few reported cases since then, a British Columbia case, *R. v. Price* (2004), concerned eleven movies, picturing primarily bondage, discipline, and sadomasochism (BDSM).²⁰¹ In one, a man verbally abuses a woman, then forces her to bend backward over a toilet while urinating into her mouth.²⁰² When her mouth overflows, he “punishes” her by scrubbing the toilet bowl with her head.²⁰³ The judge termed this conduct “obviously” nonconsensual.²⁰⁴ Further, the judge pointed to “strong evidence [] from the content of the Eleven Videos themselves” indicative of “a risk of harm.”²⁰⁵ The defense cited studies based, among other things, on aggregated longitudinal crime statistics.²⁰⁶ Despite their methodological unreliability, the prosecution presented “no evidence” in rebuttal.²⁰⁷

Furthermore, *Price* relied on community standards. These were not abandoned in *Butler*. Instead, *Butler* ruled that “courts must determine as best they can what the community would tolerate others being exposed to on the basis of the degree of harm that may flow from such exposure.”²⁰⁸ Accordingly, *Price* searched for, and found, “at least seventy websites” with “identical” or “more extreme” violent pornography than the Eleven Videos.²⁰⁹ It was further asserted that mainstream movies show more, albeit it is less graphic, sexual violence.²¹⁰ *Price* acquitted the defendant, concluding that “Canadians, for better or for worse, tolerate other Canadians viewing” materials “more or less indistinguishable” from those prosecuted.²¹¹ It found “reasonable doubt that the contemporary Canadian community would not tolerate other Canadians viewing the Eleven Videos on the basis that harm would flow from watching” them.²¹²

In contrast to *Price*, a producer/distributor of violent pornography with explicit sex, but no actual sexual activity, was convicted in an Ontario case, *R. v. Smith* (2012), after ten years of litigation that included trials with two different juries and judges.²¹³ The pornography at issue showed women as “easily

200. Janine Benedet, *The Paper Tigress: Canadian Obscenity Law 20 Years After R v Butler*, 93 CAN. B. REV. 1, 13 (2015).

201. *R. v. Price*, 2004 BCPC 103, [2004] B.C.J. No. 814, para. 4 (Can. Low Prov. Ct. J.) (QL).

202. *Id.*, para. 59.

203. *Id.*

204. *Id.*

205. *Id.*, para. 88.

206. *Id.*, paras. 46–50.

207. *R. v. Price*, *supra*, note 201, para. 53.

208. *R. v. Butler*, [1992] 1 S.C.R. 452, 485 (Can.).

209. *Price*, 2004 BCPC 103, paras. 21–22.

210. *Id.*, paras. 25, 27, 95.

211. *Id.*, para. 99.

212. *Id.*, para. 100.

213. *R. v. Smith*, 2012 ONCA 892, [2012] O.J. No. 5968, paras. 1–4 (Can. Ont. C.A.) (QL).

manipulated,” sometimes “complicit in the violence.”²¹⁴ By portraying females “as ‘bad women’ by being sexually loose, or attempting to use their sexuality to control men,” violence against women was portrayed as “justified.”²¹⁵ Consistent with current research, experts called by the prosecution testified that these materials promote sexual aggression.²¹⁶ The defendant’s experts submitted evidence of their artistic merit and, tacitly invoking permissible standards, presented pornography that was “available in the community” where sex and extreme violence were combined.²¹⁷ Unlike *Price*, however, *Smith* branded such works as “a poison” that “has become acceptable.”²¹⁸ At the conclusion of the appellate process, the conviction was affirmed.²¹⁹

A civil rights remedy could empower subordinated groups to use the law, which, as indicated through LEAF’s intervention in *Butler* in 1992, might be more effective. Apart from *Butler*, those subordinated through pornography were not represented in the obscenity trials. Consistent with hierarchy theory, the relative weakness of the evidence in every case but *Smith* exposes criminal law as insufficient to represent their interests. Indeed, the pornographers’ defense lawyers have energetically appealed critical indictments made in Canada after *Butler*, hence contributing to narrowing the law’s reach and making further public litigation exceedingly difficult. In 2015, Professor Benedet counted all reported and unreported court decisions on obscenity as well as news reports of arrests and convictions since *Butler*.²²⁰ During the period 1998–2012, she found fewer than ten newspaper reports of arrests, of which some involved obscenity charges that were ancillary to other charges.²²¹ Likewise, Benedet discovered only three judicial decisions and one jury verdict involving pornography that was alleged to be violent or degrading to women, with only one conviction (the *Smith* case).²²² In contrast, with a simple search on legal databases, she found 283 separate cases of child pornography charges with a final verdict between 1993 and 2012.²²³ As per November 2019, no reported judicial obscenity decisions on adult pornography appear on Lexis, Westlaw, or CanLII since the 2012 *Smith* case was decided, except as ancillary to other charges.²²⁴

214. *R. v. Smith*, [2002] O.J. No. 5018, para. 7 (Can. Ont. Sup. Ct. J.) (QL).

215. *Id.*

216. *R. v. Smith* (2005), 76 O.R. 3d 435, 441, [2005] O.J. No. 2811, paras. 13–14 (Can. Ont. C.A.).

217. *Id.* at 441.

218. *Smith*, [2002] O.J. paras. 31–32.

219. *R. v. Smith*, *supra* note 213, para. 44.

220. Benedet, *supra* note 200, at 12–13.

221. *Id.* at 18.

222. *Id.* at 18–19.

223. *Id.* at 20; *cf. id.* at 13 n.48.

224. My search included cases involving charges for obscenity offenses under s. 163 of the Canadian Criminal Code. For instance, occasionally, s. 163 appears as a subsidiary charge to child pornography offenses because of a plea, see *R. v. J.C.*, 2013 BCPC 237, [2013] B.C.J. No. 20204 (Can. Prov. Ct. J.) (QL); *R. v. Rogers*, 2012 BCPC 518, [2012] B.C.J. No. 2916 (Can. Prov. Ct. J.) (QL), or as a subsidiary charge to other sexual offenses against children, see *R. v. Danylak*, 2012 ABCA 179, [2012] A.J. No. 614 (Can. Alta. C.A.) (QL), or as an

Because of the structure of criminal law, the Crown must bring cases for other organizations to be able to intervene and provide accurate evidence of the harms as LEAF did back in 1992. The lack of opportunity to influence the law has thus been a constant since the mid-1990s. However, if Canada passes an anti-pornography civil rights law, it would enable those directly hurt by pornography who have the most substantial incentives to initiate legal action on their own—with or without government assistance. In that scenario, the government would be ascribed a secondary role, if any, much like that of the interveners under the current regime. The civil rights ordinances share similar definitional terminology as the existing Canadian harms-based law, so should, therefore, likely be constitutional under *Butler*. There are currently no alternative fora for those hurt by pornography to address the problem and take legal action in a meaningful way. Thus, only if such a law exists, will we know the true extent of the harms caused by pornography.

Sweden

What are the results of Sweden's substantive equality prostitution law? In 1993, there were an estimated 2,500–3,000 prostituted women in Sweden, of whom 650 were on the streets.²²⁵ In 1998, one year before the new law was implemented, approximately 726 women were involved in street prostitution.²²⁶ By 2007, that number had declined to about 300, while 300 women and 50 men were advertised online.²²⁷ Similar studies of street prostitution and advertisements in Denmark, where sex purchasing is legal, estimated an increase from 3,886 prostituted women in 2002 to 5,567 in 2007, of whom 1,415 were on the streets.²²⁸

ancillary charge to other offenses, e.g., *R. v. Magnotta*, 2014 QCCS 4247, [2014] Q.J. No. 15758 (Can. Que. Sup. Ct.) (QL).

225. Statens Offentliga Utredningar [SOU] 1995:15 *Könshandeln: Betänkande av 1993 års Prostitutionsutredning* [government report series] at 98–99 (Swed.) [hereinafter SOU 1995:15].

226. SOCIALSTYRELSEN [NAT'L BD. HEALTH & WELFARE], PROSTITUTION IN SWEDEN 2003: KNOWLEDGE, BELIEFS & ATTITUDES OF KEY INFORMANTS 23 (2004), [<https://perma.cc/0vWJVmQN1Ea>] [hereinafter PROSTITUTION IN SWEDEN 2003].

227. Charlotta Holmström, *Prostitution och människohandel för sexuella ändamål i Sverige: Omfattning, förekomst och kunskapsproduktion*, in PROSTITUTION I NORDEN: FORSKNINGSRAPPORT 303, 314 (Charlotta Holmström & May-Len Skilbrei eds, 2008) [<https://perma.cc/U4WP-PTJA>]. For an abbreviated English version, see CHARLOTTA HOLMSTRÖM & MAY-LEN SKILBREI, PROSTITUTION IN THE NORDIC COUNTRIES: CONFERENCE REPORT, STOCKHOLM, OCTOBER 16–17, 2008 at 15 (2008) [<https://perma.cc/H499-T54S>]; cf. SOCIALSTYRELSEN, PROSTITUTION IN SWEDEN 2007 at 52 (2008) [<https://perma.cc/DS2K-36HS>] [hereinafter PROSTITUTION IN SWEDEN 2007] (estimating online prostitution).

228. Jeanett Bjønness, *Holdninger til prostitution i Danmark*, in PROSTITUTION I NORDEN, *supra* note 227, at 101, 108; Charlotta Holmström & May-Len Skilbrei, *Nordiska prostitutionsmarknader i förändring: En inledning*, in PROSTITUTION I NORDEN, *supra* note 227, at 9, 14; cf. HOLMSTRÖM & SKILBREI, *supra* note 227, at 15–16. The Danish numbers did not include prostituted males. See Bjønness, *supra*, at 108.

Given their respective populations, the extent of female prostitution in Denmark was almost sixteen times greater per capita than that of Sweden.²²⁹

When buying sex was legal in Norway, comparable estimates found that prostitution increased after 2000 (especially among foreign street-prostituted women) such that there were 2,654 prostituted women in 2007, of whom 1,157 were on the streets.²³⁰ Norway's proportion of prostituted women was thus almost nine times higher per capita than that of Sweden.²³¹ Furthermore, street prostitution in Sweden had decreased to 200–250 women by 2014, with no evidence of a corresponding increase in indoor prostitution.²³²

Although numbers that estimate prostitution populations are necessarily imprecise, the staggering Scandinavian differences are indicative of the substantial impact of Sweden's law.²³³ Considering the need to be visible to attract potential sex purchasers, it is hardly likely that any measurable degree of prostitution would go undetected.²³⁴ A 2008 report by the Swedish National Board of Health and Welfare thus found that sex purchasers in Sweden regularly demanded "novelty," citing informants stressing that women who were new to the market were "more desirable," and that "[n]ew pictures and advertisements garner the keenest

229. See *StatBank Denmark*, STATISTICS DENMARK, <https://www.statbank.dk/> (follow "Population and elections," under "Population and population projections," follow "Population in Denmark," then "Population figures from the censuses," select "All Denmark," and year 2007); *Population and Population Changes 1749–2013*, STATISTICS SWEDEN (SCB), <https://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 Oct. 13, 2019) [<https://perma.cc/G8L5-DTQF>].

230. Marianne Tveit & May-Len Skilbrei, *Kunnskap om prostitusjon og menneskehandel i Norge*, in PROSTITUTION I NORDEN, *supra* note 227, at 220–21.

231. See *Population per 1 April 2007 and population changes during 1st quarter of 2007*, STATISTICS NORWAY, https://www.ssb.no/a/english/kortnavn/folkendrkv_en/2007k1/kvart00-en.html (last visited Oct. 13, 2019) [<https://perma.cc/U98M-P23Y>].

232. ENDRIT MUJAJ & AMANDA NETSCHER, LÄNSSTYRELSEN STOCKHOLM [STOCKHOLM CNT'Y ADM. BD.], PROSTITUTIONEN I SVERIGE 2014: EN OMFATTNINGSKARTLÄGGNING 9–10 (2015) [<https://perma.cc/2ML4-6LMR>].

233. A so-called sex workers organization in Denmark (SIO) claimed that Reden, an NGO that worked with prostituted women through outreach programs, had overstated the magnitude of the problem when it reported that 1200 individuals were engaged in street prostitution in Copenhagen, SIO saying that the police had estimated that they were only 200. See *Svensk rapport bygger på forkerte tal for Danmark: Nu må Reden sige sandheden*, SEXARBEJDERNES INTERESSEORGANISATION (July 4, 2010) [<https://perma.cc/Q6W2-FYW4>]. Yet estimates of indoor prostitution, including, for example, "clinic prostitution" (i.e., massage parlors), which alone accounted for 3,278 people, Holmström & Skilbrei, *supra* note 228, at 14, were not based on information from Reden. See Bjønness, *supra* note 228, at 107 (noting that indoor and escort prostitution was estimated based on advertisements and number of parlors). Thus, even if street prostitution was over-reported accordingly, Denmark's female prostitution population was still about thirteen times larger per capita than Sweden's at the time.

234. Statens Offentliga Utredningar [SOU] 2010:49 Förbud mot köp av sexuell tjänst: En utvärdering 1999–2008 [government report series] at 120 (Swed.) [hereinafter SOU 2010:49].

interest on the Web.”²³⁵ These dynamics make it all the more imperative for those in prostitution to be highly visible in order to attract new sex purchasers. Thus, any “unknown prostitution”—a seemingly oxymoronic concept²³⁶—would not meaningfully affect relative national differences. Moreover, an Internet-based survey about sex purchasing conducted in August 2010 with 12,252 men and women in Scandinavia indicates a pattern that is consistent with the estimates of Scandinavian prostitution populations.²³⁷ There, the proportion of men who reported buying sex during the *last six months* was about 4.7 times greater in Denmark and 3.1 times greater in Norway than in Sweden (notably, Norway had just criminalized sex purchasing in 2009).²³⁸

The downward trend in Swedish prostitution is also corroborated by a number of law enforcement and social work sources. For instance, due to purchasers’ and third parties’ fears of apprehension, indoor prostitution must be conducted furtively, a complicated and expensive proposition for traffickers. Instead of purchasers simply lining up at a brothel or on the streets, for example, prostituted women in Sweden may have to be escorted to individual buyers, reducing the number of transactions and with it third-party profits.²³⁹ Those orchestrating prostitution must avoid staying too long in any one location, thus creating an expensive and complicated need for “several premises.”²⁴⁰ Consequently, they view the Swedish market as less profitable.²⁴¹ While European police raids have commonly found 20–60 prostituted women caught up in criminal pimping activities, raids in Sweden typically involve relatively small clandestine brothels where authorities rarely find more than 2–4 prostituted women on the premises.²⁴²

235. PROSTITUTION IN SWEDEN 2007, *supra* note 227, at 34; *cf. id.* at 61 (noting that being “new to the game” is a “positive attribute” in prostitution advertisements).

236. *See, e.g.*, NAT’L CRIMINAL INVESTIGATION DEP’T, TRAFFICKING IN WOMEN: SITUATION REPORT NO. 5 at 35 (2003) [<https://perma.cc/QXD7-DVMN>] [hereinafter SITUATION REPORT NO. 5] (“The fact that the prostitution and the trafficking are not visible does not mean that the police do not receive information of what is going on. Daily the police receive such information through Internet surveillance, physical surveillance, tip-offs from the public at large and other sources. The biggest problem of the police is not to get information but the lack of resources [to enforce the laws].”).

237. Andreas Kotsadam & Niklas Jakobsson, *Shame on You, John! Laws, Stigmatization, and the Demand for Sex*, 37 EUR. J. L. & ECON. 393, 396–97, 402–03 (2014).

238. The percentage of men who stated that they bought sex during the previous six months was 2.63% in Denmark, 1.71% in Norway, and 0.56% in Sweden. *See Id.* at 396 & tbl.1. These differences were statistically significant, and robustly so ($p=.002$). *Id.* at 396 (using Fisher’s exact test).

239. SITUATION REPORT NO. 5, *supra* note 236, at 34.

240. *Id.*

241. SOU 2010:49, *supra* note 234, at 122–23; RIKSPOLISSTYRELSEN, LÄGESRAPPORT 10: MÄNNISKOHANDEL FÖR SEXUELLA OCH ANDRA ÄNDAMÅL 2007–2008 at 10 (2009) [<https://perma.cc/9ZAV-N8CQ>] [hereinafter SITUATION REPORT NO. 10]; SITUATION REPORT NO. 5, *supra* note 236, at 34.

242. SOU 2010:49, *supra* note 234, at 122; *cf.* SITUATION REPORT NO. 10, *supra* note 241, at 10; *see also* POLISMYNDIGHETEN, MÄNNISKOHANDEL FÖR SEXUELLA OCH ANDRA ÄNDAMÅL: LÄGESRAPPORT 19 at 119–23 (2018) [<https://perma.cc/3CUX-YR7G>] (reporting convictions during 2017 for procuring and trafficking for sex where 4 cases involved 1

Some scholars question whether the existing knowledge is sufficient to infer that Sweden's law contributed to a smaller prostitution market relative to that of other Scandinavian countries. May-Len Skilbrei and Charlotta Holmström suggest that some prostitution in Sweden started to occur beyond the radar of police and social workers, thus implying that what is presently known about the law's effect is inadequate.²⁴³ For instance, in 1999, prostitution was reportedly occurring in taxi cabs, while some prostituted women were using their own cars to transport sex purchasers to apartments where sex was purchased.²⁴⁴ However, prostitution in taxis was regularly reported in Stockholm already in 1993, years before the new law.²⁴⁵ A public inquiry also cited an in-depth interview with a prostituted woman who described using her own car to "pick up clients," which enabled her to "select" her sex purchasers.²⁴⁶ Skilbrei and Holmström thus omit information contradicting their implication that such prostitution first occurred in 1999. Furthermore, they say nothing about the prevalence of these forms of prostitution in other countries, or whether the women involved advertised or made contact with taxis or sex purchasers where street prostitution was known to occur, making it likely they would have been included in prevalence estimates for those venues. Likewise, if Swedish prostitution was advertised on Danish websites,²⁴⁷ it does not follow that studies assessing Swedish prostitution underestimated its extent; advertising "directed at residents of Sweden" has been included,²⁴⁸ apparently regardless of the websites' origins. In addition, Skilbrei and Holmström discuss several substantial Swedish legal cases decided between 1999 and 2008 involving third parties charged with trafficking or procuring foreign women, implying that the prevalence of foreign prostitution was higher than the government suggested.²⁴⁹ However, in isolation, these cases provide little insight into the law's efficiency and effectiveness; some basis for comparison to neighboring countries is needed. Beyond legal prostitution, other observers have

prostituted woman as a plaintiff/injured party, 2 cases involved 2 women each, 1 case involved 4 women, and 1 involved 5 women).

243. MAY-LEN SKILBREI & CHARLOTTA HOLMSTRÖM, PROSTITUTION POLICY IN THE NORDIC REGION: AMBIGUOUS SYMPATHIES 68 (2016) [hereinafter AMBIGUOUS SYMPATHIES].

244. *Id.* at 68.

245. SOU 1995:15, *supra* note 225, at 94.

246. *Id.* at 77.

247. AMBIGUOUS SYMPATHIES *supra* note 243, at 68.

248. PROSTITUTION IN SWEDEN 2007, *supra* note 227, at 15.

249. AMBIGUOUS SYMPATHIES *supra* note 243, at 68–69 (citing SOU 2010:49, *supra* note 234, at 285–287). With nothing more than a pinpoint citation to the government's evaluation, Skilbrei and Holmström recount the case of 13 Estonian women "where contact was established in a pizzeria," *id.* at 68, implying that there was no Internet or other advertising involved, notwithstanding the fact that the page cited explicitly mentions that their prostitution was advertised on the website *Sekreterarakademin*. *Id.* (citing SOU 2010:49, *supra* note 234, at 287). Furthermore, that same page says only that one defendant unsuccessfully claimed to have socialized with, but not bought sex from, one prostituted woman whom he met at a pizzeria a week earlier. SOU 2010:49, *supra* note 234, at 287. Hence, contrary to the impression conveyed by Skilbrei and Holmström, nothing in the evidence they set forth suggests that the thirteen women were trafficked through a pizzeria.

deduced that large criminal trafficking operations were much more common in other European countries at that time.²⁵⁰

In tandem with changing legal conditions affecting the potential criminal liability of sex purchasers, the safety of prostitution in Sweden has also changed. It is well established that purchasers often demand harmful sex that creates dangerous conditions. Although women were victims of attempted and completed murder in prostitution prior to the new law,²⁵¹ since 1999, no woman has been murdered in Sweden while being prostituted or in direct proximity to her prostitution. By contrast, in Germany, at least 60 attempted and 92 completed murders of prostituted persons committed by purchasers or other people in the prostitution milieu have been reported from the time prostitution was legalized in 2002 up to July 2020.²⁵² Several such murders have also been reported in New Zealand since prostitution was decriminalized in 2003.²⁵³ Swedish research indicates underlying mechanisms that may account for these differential murder rates. Interviews with cis women, as well as cis men and transgender people, in prostitution describe purchasers being more careful now that they can be liable simply for attempting to purchase sex while the prostituted person commits no offense—a situation respondents say gives them a bargaining advantage that strengthens their control, safety, security, and personal integrity.²⁵⁴ Implying a similar dynamic, a Swedish government agency reported that an informant knew “several” prostituted women that “dared to file rape complaints” against purchasers due to

250. See *supra* notes 239–242 and accompanying text. Skilbrei and Holmström further maintain, “Waltman bases his conclusions on governmental reports on the consequences of the Law on very weak grounds.” *AMBIGUOUS SYMPATHIES* *supra* note 243, at 67. Here, they cite only two of many sources marshaled while unfortunately assuming, incorrectly, that the National Criminal Investigation Department’s report from 2003 “only” presents “an incident where police in surveillance material in a trafficking case overheard traffickers complain about lack of clients in Sweden” as evidence that the law has made Sweden “a less attractive country for traffickers.” *AMBIGUOUS SYMPATHIES* *supra* note 243, at 67–68 n.16. However, the claim that traffickers regarded Sweden as a poor market was supported by several sources of evidence, including interrogations of prostituted women, information received “on several occasions” by law enforcement agents in the Baltic States, information from almost all preliminary investigations, and intercepted telephone conversations. *SITUATION REPORT NO. 5*, *supra* note 236, at 34. These sources cannot reasonably be described as “an incident.”

251. See, e.g., *SOU* 1995:15, *supra* note 225, at 140–143 (mentioning that murder and attempted murder had occurred in Swedish prostitution).

252. See *Prostituiertenmorde in Deutschland*, *SEX INDUSTRY KILLS*, <https://sexindustry-kills.de/doku.php?id=prostitutionmurders:de> (last visited July 6, 2020) [<https://perma.cc/6KPT-J3KC>].

253. Penny White, Commentary, *Remembering the Murdered Women Erased by the Pro-Sex Work Agenda*, *FEMINIST CURRENT* (Nov. 13, 2015), <https://www.feministcurrent.com/2015/11/03/remembering-the-murdered-women-erased-by-the-pro-sex-work-agenda> [<https://perma.cc/CS8A-JMPU>].

254. SUZANN LARSDOTTER, RFSL, ET AL., *OSYNLIGA SYNLIGA AKTÖRER: HBT-PERSONER MED ERFARENHET AV ATT SÄLJA OCH/ELLER KÖPA SEXUELLA TJÄNSTER* 98–99, 245, 260 (2011) [<https://perma.cc/X5PY-TSB3>]; NIKLAS ERIKSSON & HANS KNUTAGÅRD, RFSL *RÄDGIVNINGEN SKÅNE, SEXMÄNSÄLJER.SE/X: NÖJE BLIR FUNKTION* 54, 76 (2005) [<https://perma.cc/YEV7-M4KF>].

the new law, which was seen as “a source of strength and support.”²⁵⁵ Other survivors have acknowledged the law’s empowering effect of shifting the stigma of prostitution to purchasers, making survivors stop blaming themselves and shifting the responsibility on to the sex purchasers for the mental scars and difficult memories that they live with.²⁵⁶

A pattern emerges whereby Sweden’s law reduces the hierarchy between prostituted people and purchasers and increases substantive equality, in contrast to countries that permit buying sex, where purchasers behave as if nothing can stop them. Apart from increasing the demand for prostitution, this makes conditions demonstrably more harmful. In Victoria, Australia, prostituted people reported that legalization precipitated increased competition and demands for unsafe sex, frequently with brothels tacitly endorsing unsafe sex and imposing penalties for refusing abusive purchasers.²⁵⁷ Similar manifestations of exploitation, non-transparency, and harmful demands have been reported from legal indoor prostitution in places like Nevada, London, Germany, and the Netherlands.²⁵⁸ In New Zealand, a government survey found that a “majority” of prostituted individuals and brothel operators believed legalization “could do little about violence against women in prostitution.”²⁵⁹ These conclusions reflect the stark reality that purchasers have the money, while those in prostitution are usually without viable alternatives.

Sweden’s three largest cities provide specialized social services that support an exit from prostitution. The national government adopted an action plan against prostitution and human trafficking for sexual purposes in 2007, which included evaluating the work of these services with the purpose of further developing it.²⁶⁰ In 2012, a clinical study of their programs was reported, which had been conducted with 34 clients, 26 of whom participated in follow-ups one year later.²⁶¹ Researchers determined that 80% had exited prostitution entirely, with those remaining reporting less frequent prostitution and a desire to exit.²⁶² The majority

255. PROSTITUTION IN SWEDEN 2003, *supra* note 226, at 34.

256. SOU 2010:49, *supra* note 234, at 130.

257. See MARY SULLIVAN, WHAT HAPPENS WHEN PROSTITUTION BECOMES WORK? AN UPDATE ON LEGALISATION OF PROSTITUTION IN AUSTRALIA 7, 20–21 (2005) [<https://perma.cc/0vmQYRcckgR>]; cf. Priscilla Pyett & Deborah Warr, *Women at Risk in Sex Work: Strategies for Survival*, 35 J. SOC. 183, 186, 190 (1999) (noting that prostituted women in some licensed brothels report that unsafe sex is either encouraged or tacitly condoned, and that there is strong competitive pressure to accept it).

258. Max Waltman, *Assessing Evidence, Arguments, and Inequality in Bedford v. Canada*, 37 HARV. J.L. & GENDER 459, 474–95 (2014).

259. N.Z. MINISTRY OF JUSTICE, REPORT OF THE PROSTITUTION LAW REVIEW COMM. ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 at 57 (2008) [<https://perma.cc/0dW66NBn2Ti>].

260. CARL GÖRAN SVEDIN ET AL., PROSTITUTION I SVERIGE: HUVUDRAPPORT; KARTLÄGGNING OCH UTVÄRDERING AV PROSTITUTIONSGRUPPERNAS INSATSER SAMT ERFARENHETER OCH ATTITYDER I BEFOLKNINGEN 2 (2012) [<https://perma.cc/P8DV-EGSF>] [hereinafter PRIMARY REPORT] (citing the national action plan).

261. *Id.* at 8–9.

262. *Id.* at 9.

also reported better self-esteem and improved quality of life.²⁶³ A control group included 11 girls and women aged 15-25 who were prostituted online but were not recruited via the treatment programs.²⁶⁴ All these subjects described feeling steamrolled, misunderstood, and that they were given no opportunities where they felt safe to reveal their prostitution to relevant social welfare, psychiatric, and other professionals.²⁶⁵ Their accounts align with those of other prostituted people calling for better access to specialized units where staff members are more knowledgeable than general social service personnel.²⁶⁶ Indeed, hierarchy theory predicts that survivor-centered initiatives are best able to promote survivors' interests.

British ethnographer Jay Levy and Swedish activist Pye Jakobsson²⁶⁷ criticize the specialized support and exit programs in Stockholm and Gothenburg, which oppose the distribution of free condoms and other safe-sex materials on the streets (so-called harm reduction) on the theory doing so would indirectly promote prostitution.²⁶⁸ Yet Levy and Jakobsson elide the fact that sex purchasers often prefer unprotected sex and pressure prostituted people to provide it regardless—conditions that are systematically documented in legal prostitution²⁶⁹ and further suggested by information and informants from Sweden that they themselves refer to. That is, if “the vast majority” of the prostituted people who participated in a Swedish survey cited by them already acknowledged that oral

263. *Id.*

264. See LINDA JONSSON & CARL GÖRAN SVEDIN, “ONLINE ÄR JAG NÅGON ANNAN...” UNGA KVINNOR MED ERFARENHET AV ATT SÄLJA SEXUELLA TJÄNSTER ONLINE: DELRAPPORT 8 UR PROSTITUTION I SVERIGE 12–13 (2012) [<https://perma.cc/KAQ2-3ZKH>] (describing the recruitment procedure of the 11 informants).

265. PRIMARY REPORT, *supra* note 260, at 13–14, 17.

266. See, e.g., SOU 2010:49, *supra* note 234, at 232 (interviewing survivors and currently prostituted persons); cf. Kajsa Ekis Ekman et al., Op-Ed, *Stockholm har raserat en världsledande behandling*, SVENSKA DAGBLADET (Jan. 13, 2018), <https://www.svd.se/stockholm-har-raserat-en-varldsledande-behandling> [<https://perma.cc/6S23-3RTD>] (voicing critique by prostitution survivors and experts against a municipal reorganization of the unit in Stockholm, arguing it will dilute its specialized expertise).

267. Pye Jakobsson is a “former sex worker,” co-founder of the Swedish (pro-) sex work organization Rose Alliance, president of the Global Network of Sex Work Projects (NSWP), and “a persistent and vocal critic of the Swedish Model that criminalizes the clients of sex workers.” See *NSWP Elects New President, Pye Jakobsson*, NSWP: GLOBAL NETWORK OF SEX WORK PROJECTS (Jan. 31, 2014) [<https://perma.cc/F8DH-2B6L>]. For a time she was also a board member of a smaller Stockholm strip club where she both stripped and scheduled other strippers, but claims not to have received compensation for sitting on the board. See Kajsa Skarsgård, *Frontfigur också i styrelse för strippklubb*, DAGENS ARENA (Jan. 14, 2013), <https://perma.cc/63XY-4HZF>; Gerda Christenson, *Swedish Rose Alliance—a Fraudulent Organization*, THE WOMEN’S FRONT IN SWEDEN, Internal Newsletter no. 4 (Annina Claesson trans., 2013) [<https://perma.cc/7GZB-7TMB>].

268. Jay Levy & Pye Jakobsson, *Sweden’s Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden’s Sex Workers*, 14 CRIMINOLOGY & CRIM. JUST. 593, 600–01 (2014); cf. JAY LEVY, CRIMINALISING THE PURCHASE OF SEX: LESSONS FROM SWEDEN 139, 142–153, 190–192 (2015).

269. See *supra* notes 257–259 and accompanying text (describing demands for more dangerous and unsafe sex in legalized settings).

sex was less safe without a condom, yet about half admitted providing unprotected oral sex, it is because the sex purchasers demand it—not, as disingenuously implied, because of “a dearth in harm reduction initiatives designed to translate knowledge to practice.”²⁷⁰ Distributing free condoms to prostituted women certainly seems innocuous, but Levy and Jakobsson provide no evidence that it would reduce unprotected sex, seemingly intent on portraying prostitution as safer than it actually is.

Considering that purchasers take advantage of the coercive social circumstances that pressure people into prostitution, where they are further harmed, purchasers should arguably be liable for compensatory damages to support their victims’ exit from prostitution. The Swedish Supreme Court obstructed a civil rights remedy along these lines in 2001 when it summarily affirmed lower courts’ rulings that a prostituted person’s “consent” rendered sex purchase a crime primarily against the public order, not against the individual prostituted person.²⁷¹ Yet neither the conditions of prostitution recognized in the legislative history,²⁷² nor contemporary research findings, document the freedom required for this “consent” to be meaningful. Indeed, when responding anonymously, most purchasers admit understanding that prostituted people do not enjoy the sex, but are economically vulnerable and subjected to violence and such additional harms as pimping and trafficking.²⁷³

Like their Canadian counterparts, survivors’ interests and perspectives were not directly represented in Swedish courts. However, in Sweden—where the legislative “referral process” is by design open to survivor representation, for instance via briefs from considerate parties that may be affected by new government proposals²⁷⁴—the legislature recognized, in conjunction with raising the maximum penalty for sex purchasing, the right of prostituted individuals to claim

270. Levy & Jakobsson, *supra* note 268, at 600; *cf.* Levy, *supra* note 268, at 191 (“[O]n the street it’s very common, clients, they [are] asking to do it without a condom[.] And they are very much allergic to condoms *laughs*.” (quoting female sex worker)); *ibid.* (“[C]ustomers who do not wish to use a condom seem to be frequent” (citing Larsdotter et al., *supra* note 254, at 130) (Levy’s translation)).

271. Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2001 pp. 527, 532–33 B 3947-00 (Swed.).

272. For legislative history prior to the 2001 Supreme Court decision, see Prop. 1997/1998:55 Kvinnofrid [government bill] (Swed.); SOU 1995:15, *supra* note 225. *See also* notes 99–101 and accompanying text (referring to the government’s recognition in 1998 of the relationship between prostitution and violence against women, exploitation, and substantive inequality).

273. *See, e.g.,* Melissa Farley et al., *Comparing Sex Buyers with Men Who Do Not Buy Sex: New Data on Prostitution and Trafficking*, 32 J. INTERPERSONAL VIOLENCE 3601, 3614–15 (2017) (surveying 101 sex purchasers in Boston); Farley et al., *Scotland*, *supra* note 43, at 372–73, 376; MELISSA FARLEY, EAVES, ET AL., MEN WHO BUY SEX: WHO THEY BUY AND WHAT THEY KNOW 14–16 (2009) [<https://perma.cc/QSU2-7AQV>] (surveying 103 sex purchasers in London); DURCHSLAG & GOSWAMI, *supra* note 45, at 20–23 (surveying 113 sex purchasers in Chicago); *cf.* Andrea Di Nicola & Paolo Ruspini, *Learning from Clients*, in PROSTITUTION AND HUMAN TRAFFICKING: FOCUS ON CLIENTS 227, 231–32 (Andrea Di Nicola et al. eds., 2009).

274. *See* GOVERNMENT OFFICES OF SWEDEN, SWEDISH LEGISLATION—HOW LAWS ARE MADE, (Mar. 02, 2015) [<https://perma.cc/3ZV8-8NCD>].

compensatory damages from purchasers.²⁷⁵ But it also required that a determination be made in *every* case of whether the crime was also directed against the prostituted person.²⁷⁶ No reported case since has afforded damages. There is, needless to say, room for improvement.

Considering that Sweden reduced prostitution and provided prostituted people more leverage that made prostitution safer and substantively more equal, pattern matching further corroborates hierarchy theory. Where Swedish outcomes were inadequate, as in judicial interpretation, the mechanisms appear similar to Canadian criminal trials where the government had the initiative. By contrast, civil rights laws could empower survivor-led initiatives.

CONCLUSION

When two similar antipornography laws targeting gender subordination were constitutionally challenged in Canada and the United States, only the Canadian statute survived. Canada's positive rights constitutional balancing framework facilitated substantive equality, while the negative rights approach prevailing in the U.S. made expressive imperatives the norm, equality the exception. However, U.S. courts ignored multiple First Amendment routes that might have saved the law, suggesting reliance on the rhetoric of negative rights and ideology rather than a coherent system of laws. Case analysis in Canada and Sweden suggested that enhanced representation of those harmed would encourage better informed judicial decision-making, indicating that civil rights, not criminal, law offers a more propitious foundation for mounting successful challenges.

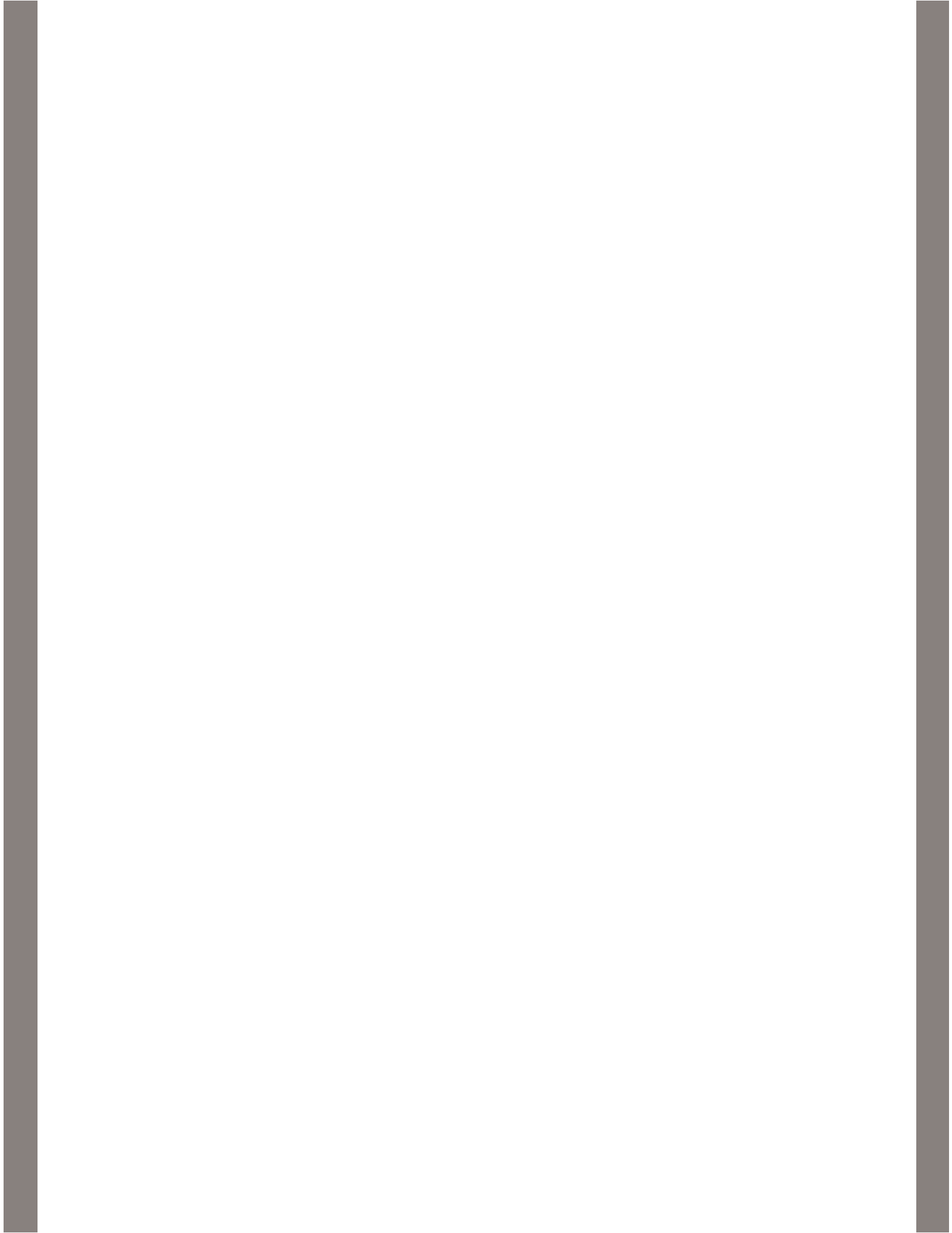
The patterns emerging from the Swedish experience with prostitution, of which pornography is an arm, matched the empirical outcomes predicted. Sweden's new law reduced prostitution considerably relative to neighboring countries, supported prostituted people in seeking to exit, and advanced their empowerment by creating leverage vis-à-vis purchasers that increased substantive equality and made prostitution safer. If a similar law applied to pornography producers, it would likely also reduce their numbers. At the same time, those remaining would become less abusive since performers could report them without risking sanctions themselves. Even where Sweden's law fell short (e.g., denying damage awards), within-case analysis corroborated hierarchy theory insofar as the *lack*, rather than *presence*, of survivors' perspectives contributed to the problems.

The impact of pornography production and prostitution on disadvantaged and exploited groups—and the gender-based violence pornography exacerbates in society—cause compelling harms. Democracies should rethink their legal approaches to challenging these powerful and persistent manifestations of social dominance and inequality. A shift in legal authority away from criminal law, where the state has the power to shape the case, is called for, making the law

275. Justitiekommitténs betänkande 2010/2011:JuU22 Skärpt straff för köp av sexuell tjänst [parliamentary committee report] 11–12 (Swed.); *accord* Prop. 2010/2011:77 Skärpt straff för köp av sexuell tjänst [government bill] 14–15 (Swed.).

276. *See supra* note 275.

more accessible both to groups harmed by such practices and representatives more strongly committed to pursuing redress as a matter of civil rights.



HOW THE UNITED STATES USES FOREIGN POLICY TO CONTROL AND ADVERSELY IMPACT FOREIGN WOMEN

Liam Pisan[†]

“It is difficult to understand what religious or moral principle, what divine or human purpose, is served by compelling underprivileged women to undergo pregnancy for the full term and to bear unsought and frequently unwanted children or to risk sickness or death at the hands of incompetent and frequently lecherous and importunate abortionists. No doubt the fact that the price of maintaining this principle is paid almost exclusively by the poor has delayed its critical examination.”¹

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1. NORVAL MORRIS & GORDON HAWKINS, THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL (1970).

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INTRODUCTION

The United States has a long history of restricting women's rights to bodily autonomy by deliberately increasing the difficulty of obtaining an abortion, failing to guarantee birth control, frequently pushing discredited narratives about contraceptive services as fact, etc. What is less discussed in American society is how the government extends those restrictions abroad, often extending influence past what could be constitutionally supported in the domestic system. And as the world generally expands its recognition of women's rights, the United States seems to be moving backward – starting with women outside its borders.

Over the past several decades, the United States has frequently taken steps to restrict the level of aid provided to non-American women in need, whether through immigration policy or through foreign policy. But while the United States has historically used both foreign policy and immigration law to control foreign women, the Trump administration has expanded that control to an unprecedented degree. Under the Trump administration, this legislative and jurisprudential malice has accelerated at an unprecedented rate. By reducing the ability of refugee women to pursue relief from persecution here in the United States by expanding foreign policy designed to control the bodily autonomy of women abroad, the Trump administration has been aggressively active in codifying its vehement opposition to foreign women.

In Part I, I provide a brief overview of the protections commonly afforded to women under normative international law, the combined ineffectualness and harm propagated by anti-abortion policies generally, and the foreign policy justifications for the United States to use foreign assistance to support women's right to bodily autonomy. In Part II, I detail the history of the Mexico City Policy and its concrete negative impact on women worldwide. In Part III, I discuss the Trump administration's expansion of the Mexico City Policy and its likely worsened effects on foreign women. In Part IV, I reflect on how the effectual antipathy of the United States toward foreign women extends as women attempt to flee situational violence, and I also provide a brief contrast with the Canadian system of refugee assessment. Lastly, I conclude with some basic solutions by which this institutional oppression of the rights of foreign women can be ameliorated or corrected.

I. BACKGROUND

A. *International law protects the rights of women to procure safe abortions.*

International norms establish that women possess the right to “the highest attainable standard of physical and mental health.”² The United Nations has consistently commented that sexual and reproductive health services are an integral part of the universal right to attain the best possible physical and mental health.³ It has repeatedly affirmed that women have and should have “the right to control one’s health and body, including sexual and reproductive freedom, and the right to be free from interference.”⁴ These normative rights set out that sexual and reproductive health services should be available, accessible, and affordable.⁵ This means ensuring the availability of functioning health care facilities, services, goods, programs, and trained medical providers and professional personnel within safe geographical and physical reach at limited to no cost.⁶

The member states of the United Nations have also collectively emphasized the importance of securing women’s health rights. Member states, including the United States, universally committed in 2000 to eight development goals, one of which was to improve maternal health through universal access to reproductive health resources and radical decline in maternal mortality rates.⁷ In addition, 189 states have ratified the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).⁸ Of those 189 ratifying nations, 80 have signed its Optional Protocol, which provides a standard enforcement mechanism for CEDAW.⁹ The United States notably is one of only two CEDAW signatory states which has failed to ratify the treaty since its adoption in 1981.

2. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1996) (explaining that of the 174 signatories, the United States is one of four not to ratify the covenant within its legislature).

3. See Comm. on Economic, Social, and Cultural Rights, *General Comment No. 22 on the Right to Sexual and Reproductive Health*, ¶ 11, E/C.12/GC/22 (May 2, 2016).

4. Comm. on Economic, Social, and Cultural Rights, *CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, ¶ 80, E/C.12/2000/4 (Aug. 11, 2000).

5. Comm. on Economic, Social, and Cultural Rights, *supra* note 3, at ¶¶ 12-21.

6. *Id.*

7. MDG 5: *Improve Maternal Health*, MDG MONITOR (2016), <https://www.mdgmonitor.org/mdg-5-improve-maternal-health> [<https://perma.cc/AR6S-8ML9>].

8. G.A. Res. 34/180, *Convention on the Elimination of All Forms of Discrimination against Women* (Dec. 18, 1979); *Convention on the Elimination of All Forms of Discrimination against Women*, UNTC, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en [<https://perma.cc/ZA2S-ANG4>].

9. *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, UNTC, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&lang=en [<https://perma.cc/Q5PN-SS7Y>].

Women's health rights are not merely affirmative. According to the United Nations Human Rights Committee, denying access to legal abortion services constitutes an arbitrary interference in the private lives of women.¹⁰ Furthermore, criminalizing abortion, or otherwise failing to take steps to work against restrictive laws which force women to either to carry unwanted pregnancies to term or to undergo dangerous illegal abortions, constitutes cruel and inhumane treatment.¹¹ The United Nations has generally framed maternal deaths resulting from unsafe abortion as a violation of women's right to life.¹² Under that legal framework, the United States has previously been brought before the United Nations Human Rights Council for denying "safe abortion services to girls and women raped in armed conflict in violation of the Geneva Conventions, customary international law, and international human rights law."¹³ This continued rejection of such universally recognized international standards to protect and support women evidences the harmful outlier mentality of the United States toward women outside its borders.

B. Stringent abortion restrictions do not reduce abortion rates and are ultimately harmful to women.

Broad anti-abortion policies like those propagated and promoted by the United States have historically never been effective in preventing women from seeking out abortions. Abortions are generally both more common and more dangerous in areas where abortion is restricted than in areas where abortion is broadly legal.¹⁴ The abortion rate of women in regions with developing industrial economies, such as much of South America, Africa, and Asia, is 3.7 percent, as opposed to the 2.7 percent abortion rate for women in industrially developed regions, such as most of Europe and North America.¹⁵ Regions where abortion

10. International Covenant on Civil and Political Rights, Human Rights Committee, *K.L. v. Peru*, CCPR/C/85/D/1153/2003 (Nov. 22, 2005).

11. Human Rights Committee, *Concluding Observations of the Human Rights Committee, Peru*, CCPR/C/79/Add.72 (1996).

12. *Safe and Legal Abortion is a Woman's Right*, CTR. FOR REPROD. RIGHTS (Oct. 2011), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_fac_safeab_10.11.pdf [<https://perma.cc/C2C7-ZLVS>].

13. Akila Radhakrishnan, *Submission to the UN Universal Periodic Review – Twenty-Second Session of the UPR Working Group of the Human Rights Council*, GLOB. JUSTICE CTR. (2015) <http://www.globaljusticecenter.net/documents/GJC.US.UPR2015.CompleteSubmission.pdf> [<https://perma.cc/ZZ27-N2QC>].

14. Sneha Barot, *When Antiabortion Ideology Turns into Foreign Policy: How the Global Gag Rule Erodes Health, Ethics, and Democracy*, 20 GUTTMACHER POL'Y REV. 73, 75 (2017) <https://www.guttmacher.org/gpr/2017/06/when-antiabortion-ideology-turns-foreign-policy-how-global-gag-rule-erodes-health-ethics> [<https://perma.cc/2HW3-AJ2W>].

15. *Abortion rates drop in more developed regions but fail to improve in developing regions*, WHO (May 12, 2016), <https://www.who.int/reproductivehealth/news/abortion-rates/en/> [<https://perma.cc/W4YC-ZC8W>].

is broadly legal and accessible, specifically North America and Northern and Western Europe, are the regions with the lowest abortion rates in the world.¹⁶ Restrictive policies on abortions themselves will never eliminate abortion until the need for abortion is itself eliminated.¹⁷ History has repeatedly evidenced this trend, yet anti-choice politicians in the United States continue to ignore it.¹⁸

Furthermore, applying broad anti-abortion principles to funding for family planning services will almost always negatively impact the contraceptive services accessible to women, which in turn increases abortion rates.¹⁹ Increases in abortion rates occur because abortions broadly correspond to unwanted pregnancies.²⁰ When women lack adequate access to family planning services, they lack the tools necessary to prevent unwanted pregnancies.²¹ Therefore, when women lack the tools necessary to prevent unwanted pregnancies, they are more likely to pursue abortions, regardless of legality.²² This dynamic led the Guttmacher Institute, a leading organization for policies and research of sexual and reproductive health, to conclude that “by undermining access to family planning services and denying women the tools they need to prevent unwanted pregnancies,” these broad anti-abortion policies ironically only serve to exacerbate abortion rates.²³

Anti-abortion policies are not merely harmful to women’s right to bodily autonomy: they are also harmful to women’s health. An estimated 45% of all global abortions are unsafe.²⁴ Unsafe abortions cause the death of over 22,000 women every year,²⁵ with some estimates extending as high as 68,000 deaths annually.²⁶ And restrictions on women’s access to safe abortion increases the rate of unsafe abortions.²⁷

Previous analyses have estimated that countries with more restrictive abortion laws have up to four times higher rates of unsafe abortion and three times higher maternal mortality rates than in countries with less restrictive

16. Barot, *supra* note 14.

17. Sneha Barot & Susan A. Cohen, *The Global Gag Rule and Fights over Funding UNFPA: The Issues That Won’t Go Away*, 18 GUTTMACHER POL’Y REV. 27, 29 (Spring 2015) https://www.guttmacher.org/sites/default/files/article_files/gpr1802715.pdf [<https://perma.cc/RK45-VV7V>].

18. *Id.* at 32.

19. *Induced Abortion Worldwide*, GUTTMACHER INST. (Mar. 2018), https://www.guttmacher.org/sites/default/files/factsheet/fb_iaw.pdf [<https://perma.cc/75KB-R9BF>].

20. Barot & Cohen, *supra* note 17, at 30-31.

21. Brooke Ronald Johnson, Jr. et al., *A Global Database of Abortion Laws, Policies, Health Standards and Guidelines*, 95 BULL. WORLD HEALTH ORG. 542 (2017).

22. *Id.*; See generally Grant Miller and Christine Valente, *Population Policy: Abortion and Modern Contraception Are Substitutes*, 53 DEMOGRAPHY 979 (2016).

23. *Induced Abortion Worldwide*, *supra* note 19, at 2.

24. *Id.*

25. *Id.*

26. Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REVIEWS IN OBSTETRICS & GYNECOLOGY 122 (2009).

27. *Id.*

abortion laws.²⁸ Accordingly, most of the women bearing the brunt of the consequences from unsafe abortions are from countries with developing industrial economies.²⁹ The World Health Organization (WHO) has estimated that 30 women die for every 100,000 unsafe abortions in industrially developed regions, whereas in regions with developing industrial economies the death rate is multiplied sevenfold to 220 deaths per 100,000 unsafe abortions.³⁰ Complications from unsafe abortions are estimated to cause between 4.7 to 13.2 percent of all maternal deaths,³¹ and 97 percent of unsafe abortions occur in countries with developing industrial economies.³² When anti-abortion policies are tied to contraceptive and family planning services, the reduced access to quality contraceptive services increases both the probability of unintended pregnancy and the rate of unsafe abortions.³³ Therefore, these anti-abortion policies ultimately serve to increase maternal death rates.

C. Funding contraceptive services adheres with fundamental principles of American foreign assistance.

Foreign assistance is an essential part of American foreign policy.³⁴ The United States government defines foreign assistance as aid distributed to nations for crisis relief and for “global peace, security, and development efforts”.³⁵ Foreign assistance is further described as a “strategic, economic, and moral imperative” which variably can be used to address extremism, the root causes of poverty, and international perceptions of the United States.³⁶ Using foreign assistance to respond specifically to global health problems has been an area of increased focus in United States in recent decades,³⁷ commonly with more evident and more demonstrably substantive results than with other more principally nebulous targets of foreign assistance (e.g. economic development).³⁸ Finally, foreign assistance can even be used to justify a country’s isolationism,

28. Johnson, Jr. et al., *supra* note 21.

29. Barot, *supra* note 14, at 75.

30. *Preventing Unsafe Abortion*, WHO (June 26, 2019), <https://www.who.int/en/news-room/fact-sheets/detail/preventing-unsafe-abortion> [<https://perma.cc/D627-BQJM>].

31. Lale Say et. al., *Global Causes of Maternal Death: A WHO Systematic Analysis*, 2 LANCET GLOBAL HEALTH 323, 327 (June 2014).

32. Dr. Bela Ganatra, M.D., et al., *Global, Regional, and Subregional Classification of Abortions by Safety, 2010–14: Estimates from a Bayesian Hierarchical Model*, 390 THE LANCET 2372 (Nov. 2017).

33. *Induced Abortion Worldwide*, *supra* note 19.

34. Curt Tarnoff & Larry Nowels, *Cong. Research Serv., Foreign Aid: An Introductory Overview of U.S. Programs and Policy* 1 (2005).

35. *What is U.S. Government Foreign Assistance?*, FOREIGNASSISTANCE.GOV, <https://www.foreignassistance.gov/> [<https://perma.cc/C4DB-N769>] (last visited Apr. 4, 2020).

36. *Id.*

37. Tarnoff & Nowels, *supra* note 34, at 2.

38. Gabriel Staicu & Razvan Barbulescu, *A Study of the Relationship Between Foreign Aid and Human Development in Africa*, INT’L DEVELOPMENT 142 (Seth Appiah-Opoku ed., 2017).

when used as a means to ethically reduce the perceived need to immigrate from the recipient nation.³⁹

The foreign policy purposes of American foreign assistance were first clearly articulated with the Foreign Assistance Act (FAA). The FAA created the United States Agency for International Development (USAID) and uniformly established a definitive frame for the use of foreign assistance where none had existed prior.⁴⁰ Under the FAA, the foreign policy goals of foreign assistance are stated to be in large part to help the poor majority of people in industrially developing countries through the provision of basic human needs and the protection of various human, economic, and environmental rights.⁴¹ Foreign assistance can therefore be assessed as a means by which the United States can support political and economic stability in the recipient country, often for expressly humanitarian purposes.⁴² In actual effect, however, foreign assistance related to security or more abstractly to trade expansion has been the main use of this political tool.⁴³ Furthermore, despite the sizable total dollar amount of financial aid annually provided by the United States, the country's percentage of GDP going to foreign assistance is smaller than most of the other industrially developed nations with established aid programmed of their own.⁴⁴

Updates and amendments to the FAA have further emphasized the importance of using foreign assistance to specifically advance the interests of foreign women. One such provision promises "to give particular attention to those programs, projects, and activities which tend to integrate women into the national economies of developing countries, thus improving their status and assisting the total development effort."⁴⁵ However, this recognition of the unique disadvantages women tend to face in countries with developing industrial economies has too often been disregarded when it comes to women's right to family-planning.

The death toll resulting from unsafe abortions should be at odds with any foreign policy devoted to health and fundamentally represents a moral blight in dire need of address. The economic costs of unsafe abortions are less immediately apparent than the cost of life, but the resultant drain on the economy from deaths, medical complications, and unwanted children can be similarly

39. Sarah Blodgett Bermeo & David Leblang, *Migration and Foreign Aid*, 69 INT'L ORG. 627 (2015).

40. James Roberts & Brett Schaefer, *An Overhaul of America's Foreign Assistance Programs Is Long Overdue*, REP. GLOB. POL. (Sept. 19, 2017), <https://www.heritage.org/node/804032/print-display> [<https://perma.cc/JJS5-S3PT>].

41. 22 U.S.C. § 2151-1(a) (1976).

42. Lynne Dratler Finney, *Development Assistance – A Tool of Foreign Policy*, 15 CASE W. RES. J. INT'L L. 213, 213-14 (1983).

43. Jeremy Caddel, *Foreign Aid Accounts and the Politics of the U.S. Foreign Assistance Budget* 9 (2013) <https://pages.wustl.edu/caddel/foreign-aid-accounts-and-politics-us-foreign-assistance-budget> [<https://perma.cc/A7RE-WEJJ>].

44. Tarnoff & Nowels, *supra* note 34, at 1.

45. 22 U.S.C. § 2151(k) (1973), *amended by* 22 U.S.C. § 2151(k) (Supp. V 1981).

intuitive.⁴⁶ Consequently, within the official framework of American foreign assistance there is no strong argument in favor of using foreign assistance to restrict aid, whereas there are numerous reasons to argue that the United States should not limit such funding. Considered in tandem with international norms as to women's rights generally and women's right to family planning services specifically, and with the established truth that contraceptive services improve women's quality of life, any case in favor of anti-abortion foreign policy would be profoundly hypocritical and irresponsibly dangerous.

II. THE INTERNATIONAL ABORTION RESTRICTIONS HISTORICALLY PUSHED BY THE UNITED STATES ARE HYPOCRITICAL, ARE INEFFECTIVE AT ACHIEVING THEIR STATED GOALS, AND HARM THE QUALITY OF LIFE FOR MILLIONS OF WOMEN LIVING OUTSIDE OF THE UNITED STATES.

Women in the United States have been afforded the constitutional right to abortion since 1973's Supreme Court decision in *Roe v. Wade*.⁴⁷ Conservative state governments have frequently combated this constitutional right to varying degrees of success, but despite those ongoing efforts, women in the United States still have the constitutional right to pursue abortions. However, although laws within the United States cannot act explicitly contrarily to the Court's decisions on abortion rights, the government carries no such obligation to follow similar principles of women's rights when applying foreign policy to other countries. Thus, with the Supreme Court formally protecting abortion within the United States, Congress pushed anti-abortion policies outside of the United States by passing the Helms Amendment.⁴⁸ The Helms Amendment effectively prohibited the use of foreign assistance funds for most abortions,⁴⁹ which created "a contract for aid where the onus is placed on the individual female body" and thus "perpetuate[d] a moral imperialism where women are stripped of the ability to choose, despite the alleged right to do so."⁵⁰

The effect of the Helms Amendment extended beyond the suggestion of its written language. The Helms Amendment prohibits funds for abortion used for family planning; however, at the direction of USAID, the application of the Amendment has been to restrict funds for abortion even in instances of rape,

46. Mansureh Yazdkhasti et al., *Unintended Pregnancy and Its Adverse Social and Economic Consequences on Health System: A Narrative Review Article*, 44 IRAN. J. OF PUBLIC HEALTH 12, 18 (2015).

47. *Roe v. Wade*, 410 U.S. 113 (1973).

48. Foreign Assistance Act of 1973, P.L. 93-189, sec. 114 (1973).

49. CONG. RESEARCH SERV., R41360, ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 3 (2019).

50. Aviva Rabin-Court, *At the Helm: United States Foreign Policy and Reproductive Rights*, YALE GLOB. HEALTH REV., Fall 2016, at 33, 33-34, https://issuu.com/yaleglobalhealthreview/docs/yghr_vol_4_no_1 [<https://perma.cc/S5YT-FNBX>].

incest, or maternal endangerment.⁵¹ The implications of this policy are chilling, and they are at their most egregious and devastating when conceptually applied to conflict zones – such as, for example, during the Rwandan Genocide, when an estimated 250,000 to 500,000 women were raped.⁵²

The use of American foreign policy to restrict abortion practice expanded beyond the Helms Amendment when the Reagan administration signed the Mexico City Policy into law.⁵³ The Mexico City Policy (alternatively known as the Global Gag Rule by critics) works against international abortion norms by prohibiting the distribution of family planning aid to global non-governmental organizations (NGOs) which provide abortion services or information about abortion – even when funds apportioned by the United States were not used for those services.⁵⁴ The policy prohibits NGOs which receive American funding from advocating for abortion rights or, in countries which already permitted abortion, from offering abortions or otherwise referring women to an abortion provider.⁵⁵ The policy also professed a goal of reducing the rate of population growth and claimed to promote “good health conditions” as “a principal element in improved quality of life.”⁵⁶ However, the effects of the policy have ultimately only exacerbated those stated interests.

A. The Mexico City Policy fails in its stated goals and imposes a significant deleterious effect on foreign women.

The Mexico City Policy is ineffectual in its stated goals, starting with its abject failure to reduce abortion rates. At the time of the Clinton administration’s rescission of the policy, research had not indicated a significantly correlative decline in abortion rates.⁵⁷ The Stanford University Department of Medicine

51. Lauren Bassett & Ryan Grim, *Hillary Clinton And Bernie Sanders Make Major Pledge On Abortion Policy*, HUFFPOST (Feb. 11, 2016), https://www.huffpost.com/entry/hillary-clinton-bernie-sanders-helms-amendment-abortion_n_56bcabdf4b08ffac124143b [https://perma.cc/UJ8D-XCN3].

52. Danielle Paquette, *How a 42-year-old Law Keeps the U.S. from Helping ISIS’s Rape Victims get Abortions: Antiabortion Groups Hailed the 1973 Helms Amendment as a Victory in the Aftermath of Roe v. Wade*, WASH. POST (Nov. 30, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/30/how-a-42-year-old-law-prevents-the-us-from-aiding-women-raped-by-isis/> [https://perma.cc/X6C9-MY6T]; PLoS Medicine Editors, *Rape in War is Common, Devastating, and too Often Ignored*, PLoS MEDICINE, Jan. 2009, at 0001.

53. 48 C.F.R. § 752.7016(b) (1986).

54. *Id.*; see also Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, GUTTMACHER 10 (Summer 2013), https://www.guttmacher.org/sites/default/files/article_files/gpr160309.pdf [https://perma.cc/2SEF-V9FS].

55. 48 C.F.R. § 752.7016(b).

56. *Id.*

57. *The Global Gag Rule & Maternal Deaths Due to Unsafe Abortion*, GLOBAL GAG RULE IMPACT PROJECT, <http://pai.org/wp-content/uploads/2016/12/The-Global-Gag-Rule-and-Maternal-Deaths-Due-to-Unsafe-Abortions.pdf> [https://perma.cc/76YT-3N37] (last visited Apr. 4, 2020).

attempted to measure the effect of the Mexico City Policy and found that the policy correlates with an *increase* in abortions and abortion rates.⁵⁸ The Stanford researchers theorized that women could have been substituting abortion for contraception as a consequence of the area's reduced financial support for family planning under the Mexico City Policy.⁵⁹

In sub-Saharan Africa, when the Mexico City Policy was reintroduced, countries reliant on humanitarian aid from NGOs saw a relative increase in induced abortion rates and a relative decline in modern contraceptive techniques compared to countries with less reliance on NGO health funding.⁶⁰ Numerous developing countries, especially in Africa, lost significant access to condoms and contraceptives.⁶¹ In Ghana, the 2001 reinstatement ultimately affected 1,327 communities when the Planned Parenthood Association of Ghana (PPAG) downsized because of severe budget cuts.⁶² Alison Marshall, who served as a director of advocacy for the International Planned Parenthood Federation (IPPF), the world's largest non-government provider of contraceptive services, commented on the extreme adverse effects that follow reinstatement of the Mexico City Policy:

It was enormously disruptive because we faced enormous budget cuts very suddenly. And not just for [our group] but for other nonprofit providers, clinics had to be closed, staff had to be laid off. We just weren't able to offer the family planning services to the women and girls who needed them.⁶³

The policy's deleterious effect on contraceptives and the subsequent spike in pregnancies contradicts its claimed purpose. By tying support for family planning services to its anti-abortion goals, the Mexico City Policy ultimately only increases the likelihood that women will suffer unplanned pregnancies and subsequently pursue abortion.

Data on the harm caused by the Mexico City Policy's anti-abortion principles also stands in stark contrast to the policy's comment on "good health conditions" as "a principal element in improved quality of life."⁶⁴ The decline in financial support for legal abortion simply led to more women turning to dangerous, low-quality, or otherwise illegal abortion methods.⁶⁵ Hundreds of

58. Eran Bendavid, Patrick Avila & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, 89 BULL. WORLD HEALTH ORG. 873 (2011).

59. *Id.*

60. *Id.*

61. *Worldwide Access Denied – 2001-2009*, POPULATION ACTION INT'L, <http://trumpglobalgagrule.pai.org/history/worldwide-access-denied/> [<https://perma.cc/3UWY-ZPZC>] (last visited Apr. 4, 2020).

62. *Id.*

63. Nurith Aizenman, *Will Trump Reinstall Reagan's Abortion Rule for International Charities?*, NPR (Dec. 6, 2016, 8:41 AM), <https://www.npr.org/sections/goatsandsoda/2016/12/06/503187530/will-trump-bring-back-the-reagan-rule-about-abortions> [<https://perma.cc/E98X-PLV5>].

64. *See generally*, LEGISLATION ON FOREIGN RELATIONS THROUGH 1998 28 (1999).

65. POPULATION ACTION INT'L, *supra* note 61.

thousands of women endanger their lives every year through unsafe abortions.⁶⁶ A study of Nigerian women who had experienced medical complications resulting from illegal abortions concluded, “[p]olicy and program interventions are needed to improve access to contraceptive services and post-abortion care in order to reduce abortion-related morbidity and mortality.”⁶⁷ The lives of women, as well as their children, are further endangered by the inadequate access to medical care which frequently accompanies the cuts in funding caused by the Mexico City Policy.⁶⁸

If the horrific effects of the Mexico City Policy could have ever possibly been excused by mere ignorance, that is no longer possible with the information collected since its implementation. Under the Obama administration, during which the Mexico City Policy was not in effect, foreign assistance for family planning annually averted six million unintended pregnancies and prevented over two million abortions in estimate.⁶⁹ Approximately eighty percent of those prevented abortions would have been unsafe in the absence of that foreign assistance.⁷⁰ Each ten million dollars in assistance for family planning roughly correlated to 460,000 women and couples receiving contraceptive services and supplies, which by rate equates to approximately 97,000 fewer unintended pregnancies and 39,000 fewer abortions, of which 30,000 would have been unsafe.⁷¹ This contrasted with the George W. Bush administration, which saw no significantly correlative decline in abortion rates with the Mexico City Policy in place.⁷²

An analysis by the Guttmacher Institute further confirmed how increased funding in contraceptive services and pregnancy care positively corresponds to global health: “[m]eeting all unmet need for modern contraceptive services *and* essential pregnancy care would reduce maternal deaths by more than two-thirds, from 290,000 in 2014 to 96,000 annually. It would reduce newborn deaths by more than three-fourths, from 2.9 million to fewer than 700,000 annually.”⁷³ While data marking the Mexico City Policy as outdated and dangerous continues to discredit the policy’s intent, reimplementing or expansion of the policy would signal a total rejection of women’s health in favor of harmful and oppressive political machinations.

66. GLOBAL GAG RULE IMPACT PROJECT, *supra* note 57.

67. Stanley K. Henshaw et al., *Severity and Cost of Unsafe Abortion Complications Treated in Nigerian Hospitals*, 34 INT’L PERSP. ON SEXUAL & REPROD. HEALTH 40 (2008).

68. GLOBAL GAG RULE IMPACT PROJECT, *supra* note 57.

69. *Just the Numbers: The Impact of U.S. International Family Planning Assistance, 2015*, GUTTMACHER INST. (Apr. 10, 2015), <https://www.guttmacher.org/article/2015/04/just-numbers-impact-us-international-family-planning-assistance> [<https://perma.cc/JTX4-U7TA>].

70. *Id.*

71. *Id.*

72. *See* POPULATION ACTION INT’L, *supra* note 61.

73. SUSHEELA SINGH ET AL., GUTTMACHER INST., *ADDING IT UP: THE COSTS AND BENEFITS OF INVESTING IN SEXUAL AND REPRODUCTIVE HEALTH 2014* (Haley Ball ed., 2014), https://www.guttmacher.org/sites/default/files/report_pdf/addingitup2014.pdf [<https://perma.cc/L722-HHFG>].

B. The Mexico City Policy violates international norms and works against professed American values.

In addition to being fundamentally ineffective in its stated goals, the international abortion restrictions imposed by the Mexico City Policy violate domestically and internationally established principles of medical ethics.⁷⁴ Medical practitioners have a strict duty to act in the best interests of their patients.⁷⁵ By tying needed funds to standards which forbid medical practitioners from engaging at all with abortion services, international abortion restrictions such as the Mexico City Policy pressure medical practitioners to stay silent on key medical options for their patients regardless of whether the law in those countries allows abortion.⁷⁶ The United Nations itself generally prefers to avoid exerting too explicit an influence on a nation's acceptance of abortion; however, it does involve itself in ensuring maternal health by supporting family planning and the availability of safe abortions where abortion is legalized.⁷⁷ The United States should follow the standard practice of the United Nations and discontinue its incentivization of anti-abortion narratives and its improper correlation of family planning services with abortions.

International abortion restrictions such as the Mexico City Policy stand at odds with stated American foreign policy goals of promoting democracy.⁷⁸ By prohibiting organizations from lobbying for expanded abortion services or from disseminating information on abortion services, the United States is essentially using financial leverage to disincentivize free speech in foreign states.⁷⁹ The director of policy at Population Action International (PAI), which advocated for global reproductive health services, has stated that to his knowledge no other countries internationally extend their reproductive health policies like the United States⁸⁰ – the irony again being that the United States is not even extending its own domestic policies.

The Mexico City Policy's failure to promote democracy reflects its imperialist roots. The policy disproportionately affects countries reliant on outside funding.⁸¹ The countries most reliant on outside funding are typically countries with developing industrial economies.⁸² Countries with developing industrial economies are predominately non-white and have often been the

74. Barot, *supra* note 14.

75. *Id.*

76. *Id.*

77. United Nations Population Fund, *Statement on the United States Decision to Again Withhold Funding from UNFPA* (July 15, 2019), <https://www.unfpa.org/press/statement-united-states-decision-again-withhold-funding-unfpa-0> [<https://perma.cc/4CUK-RKSD>].

78. Barot, *supra* note 14.

79. *Id.*

80. Annalisa Merelli, *The American Anti-Abortion Movement is Reverberating Abroad*, QUARTZ (Nov. 14, 2019), <https://qz.com/1743640/us-abortion-politics-are-affecting-global-reproductive-health/> [<https://perma.cc/6JYY-KSLS>].

81. Barot, *supra* note 14.

82. *Id.*

victims of colonialism.⁸³ The ultimate effect of these international abortion restrictions is thus to restrict the freedom of speech and right to self-actualization of predominately non-white nationals in states with a long history of western exploitation.

III. THE TRUMP ADMINISTRATION'S EXPANSION OF INTERNATIONAL ABORTION RESTRICTIONS IS A NEW NADIR IN DECADES OF ANTI-ABORTION AMERICAN FOREIGN POLICY.

The original Mexico City Policy worked against international abortion norms by prohibiting the distribution of family planning aid to global NGOs providing abortion services or information about abortion.⁸⁴ As a policy, it failed to adequately support its own stated goals, led to increased harm to women, violated medical principles, and restricted democratic agency in predominantly non-white nations. Expanding such a dangerous and unjust policy only reaffirms the United States' callous disregard for foreign women, in a time when the rest of the world broadly advocates for increased protections.

The Trump administration has significantly expanded the breadth of the Mexico City policy and further exacerbated its deleterious effects on foreign women. Since Reagan, the Mexico City Policy has been regularly rescinded and reinstated according to presidential party lines.⁸⁵ However, whereas George W. Bush effectively reimplemented Ronald Reagan's policy in its original form, Donald Trump grossly expanded the financial area covered by the Mexico City Policy, which marks an even more regressive shift in the support for women's rights abroad and has led to harsh consequences for nations and women reliant on American reproductive aid.⁸⁶

Under the Trump administration's version of the Mexico City Policy, now ironically rebranded as "Protecting Life in Global Health Assistance," most American foreign assistance is subject to these restrictions, rather than just funds for family planning assistance.⁸⁷ If the Trump administration had followed its Republican predecessors and simply reinstituted the pre-existing Mexico City Policy, approximately 600 million dollars of funding would have been affected;⁸⁸ instead, the Trump administration's policy at the time of its implementation

83. *See id.*

84. *The Mexico City Policy: An Explainer*, KAISER FAM. FOUND. (Aug. 15, 2019), <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/> [<https://perma.cc/7GQ7-B8T9>].

85. *Id.* Democrat Bill Clinton rescinded the policy shortly after inauguration in January 1993; Republican George W. Bush reinstated the policy in January 2001; Democrat Barack Obama again rescinded the policy in January 2009; and Republican Donald Trump again reinstated the policy in January 2017.

86. *Id.*

87. *Id.*

88. *Id.*

affected potentially over 9 billion dollars of funding.⁸⁹ The Trump administration's new policy now threatens numerous types of foreign funding, including assistance for tuberculosis, nutrition, and maternal and child health.⁹⁰

The new policy stands in even starker opposition to international abortion precedent, domestically and internationally established principles of medical ethics, and repeatedly substantiated data detailing the ineffectiveness of the policy in reducing abortion rates.⁹¹ As foreign policy, the Trump administration's order signifies a callous disregard, if not outright antipathy, for foreign women's right to bodily autonomy and sexual wellbeing.

A. *The expected consequences of the Trump administration's "Protecting Life in Global Health Assistance" policy will only worsen the effects of the Mexico City Policy.*

The Trump administration's new order will almost certainly exacerbate the now well-established negative effects of the Mexico City Policy, especially for women living without access to proper contraceptive resources beyond those provided by NGOs. The Trump administration's policy will force hundreds of NGOs either to accept "drastic funding cuts (if they decline to sign the gag rule)" or, if they agree to the stipulations, to deny patients the information and services to which they are entitled.⁹² Health services provided by NGOs in low-income settings are often highly integrated; local NGOs may be the primary source of "contraceptive care, HIV prevention or treatment, maternal health screenings, immunizations, and information on safe abortion care..." for many patients in these low-income settings.⁹³

The IPPF was quick to publicly reject the restrictions imposed by the Mexico City Policy.⁹⁴ Immediately following the Trump administration's order, the IPPF released a statement saying they "will not sign a policy that denies human rights and puts the lives of women at risk."⁹⁵ The IPPF went on to decry the policy for "block[ing] critical funding for health services like contraception, maternal health, and HIV/AIDS prevention and treatment for any organization that refuses to sign it," before concluding with a declaration that the organization "cannot—and will not—deny life-saving services to the world's poorest

89. *Do You Really Know the Global Gag Rule?*, POPULATION ACTION INT'L, <http://trumpglobalgagrule.pai.org/wp-content/uploads/2017/04/Do-You-Really-Know-the-Global-Gag-Rule-FINAL.pdf> [<https://perma.cc/PV6J-WY82>] (last visited April 13, 2020).

90. KAISER FAM. FOUND., *supra* note 84.

91. Barot, *supra* note 14.

92. Ann M. Starrs, *The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid*, 389 THE LANCET 485, 486 (2017).

93. *Id.*

94. *Why we will not sign the Global Gag Rule*, INT'L PLANNED PARENTHOOD FED'N (Jan. 23, 2017), <https://www.ippf.org/news/why-we-will-not-sign-global-gag-rule> [<https://perma.cc/C4M4-HE4P>].

95. *Id.*

women.”⁹⁶ Nevertheless, those services have been disrupted. In Columbia, one such group, Profamilia, could no longer maintain its sexual and reproductive health care brigades and education facilities in certain rural areas isolated from full service clinics.⁹⁷ The loss of these services in a country where “rural women are 26.7 times more likely to become adolescent mothers,” is yet another imposed penalty on foreign women.⁹⁸

The new policy also affects the President’s Emergency Plan for AIDS Relief (PEPFAR). According to Scott Evertz, director of the White House Office of National AIDS Policy during part of the George W. Bush administration, “[i]t would have been impossible to treat HIV/AIDS in the developing world as the emergency that PEPFAR said it was if the global gag rule were to be applied to the thousands of organizations with which those of us involved in PEPFAR would be working.”⁹⁹ Senator Shaheen, a major opponent of the Trump administration’s policy who has attempted to implement legislation which would undo the order, credited the PEPFAR program with “prevent[ing] almost 2 million babies from being born with HIV.”¹⁰⁰ The blatant exacerbation of health issues for both women and children signifies the administration’s apparent utter contempt for modern international health standards. Even the Reagan administration made some attempt to gesture toward international law by citing to the United Nations Declaration to the Rights of the Child as a tepid and arguably outright disingenuous justification for the Mexico City Policy.¹⁰¹ Now, as international law grows increasingly more affirmative of human rights, the Trump administration openly signals its outright hostility to these international norms without any pretense of support.

The highly regressive nature of the Trump administration’s new policy is to some extent in line with the regressive family planning policies it has pushed domestically. The Trump administration has worked to roll back access to contraception with statistically discredited claims that they are ineffective in reducing pregnancy.¹⁰² Also offered as support were similarly false claims that

96. *Id.*

97. Kelli Rogers, *In Colombia, ‘global gag rule’ Punishes Conflict-Affected Populations*, DEVEX (June 6, 2017), <https://www.devex.com/news/in-colombia-global-gag-rule-punishes-conflict-affected-populations-90393> [<https://perma.cc/MK8Q-AE33>].

98. *Id.*

99. Michelle Goldberg, *Trump Didn’t Just Reinstate the Global Gag Rule. He Massively Expanded It.*, SLATE MAG. (Jan. 24, 2017, 5:20 PM), <https://slate.com/news-and-politics/2017/01/trumps-global-gag-rule-is-even-worse-than-it-seemed.html> [<https://perma.cc/U6C6-BEZX>].

100. Sophie Edwards, *Q&A: Senator Shaheen on Her Fight to Repeal the ‘global gag rule’ Permanently*, DEVEX (Mar. 13, 2017), <https://www.devex.com/news/q-a-senator-shaheen-on-her-fight-to-repeal-the-global-gag-rule-permanently-89789> [<https://perma.cc/46E3-DHDX>].

101. See White House Office of Policy Development, *U.S. Policy Statement for the International Conference on Population*, 10 POPULATION & DEV. REV. 574, 578 (1984).

102. Julia Belluz, *The Trump Administration’s Case Against Birth Control is a Stunning Distortion of Science*, VOX (Oct. 10, 2017, 9:10 AM), <https://www.vox.com/science-and-health/2017/10/10/16447202/trump-case-against-birth-control-distortion-of-science> [<https://perma.cc/ZG5S-5J58>].

access to birth control increased sexual activity¹⁰³ – which further highlights the base intent to exert control over women’s bodily autonomy. When policies take effect in blatant disregard of widely available and replicated data, to known negative and frequently fatal consequences for the targeted population, the issue goes beyond ostensible justification; rather, it reveals an inherent cruelty and oppressive intent against however many women are unfortunate enough to fall under the sphere of influence of the American government.

IV. THE MISTREATMENT OF FOREIGN WOMEN THROUGH AMERICAN FOREIGN POLICY PERSISTS WITHIN THE AMERICAN IMMIGRATION SYSTEM.

Foreign women victimized by American foreign policy who attempt to flee their circumstances by seeking immigration relief in the United States are likely to encounter similarly cold treatment at the border. American immigration law precedent has established numerous obstacles for women seeking gender-based relief, and in a time when international displacement has never been higher,¹⁰⁴ the United States is accepting its fewest number of refugees in decades.¹⁰⁵

Women’s refugee claims are often different from men’s refugee claims because women’s refugee claims disproportionately involve some gender-based persecution.¹⁰⁶ For example, refugee women endure sexual violence at substantially higher rates than refugee men.¹⁰⁷ Gender-based persecution occurs in a variety of ways, such as: forced marriage, honor killings, trafficking, rape and sexual assault, and female genital mutilation (FGM).¹⁰⁸ These instances of gender persecution typically rely on a difference in societal status in the traditionally patriarchal societies in which they occur.¹⁰⁹ Notably, these instances of violence often occur at the hands of family members rather than at the hands of the state or organized groups,¹¹⁰ which under American immigration law is yet another barrier for women fleeing gender-based violence. With consideration to

103. *Id.*

104. *Figures at a Glance*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (June 19, 2019), <https://www.unhcr.org/figures-at-a-glance.html> [<https://perma.cc/GQ4U-EDJ5>].

105. Brett Samuels, *US Set to Admit Fewest Refugees in Decades: Report*, HILL (Apr. 21, 2018, 2:31 PM), <https://thehill.com/blogs/blog-briefing-room/384276-us-set-to-admit-fewest-refugees-in-decades-report> [<https://perma.cc/49W8-9K4N>].

106. U.N. Refugee Agency, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

107. U.N. Office for the Coordination of Humanitarian Affairs, *Global Humanitarian Overview*, 17 (2019), <https://www.unocha.org/sites/unocha/files/GHO2019.pdf> [<https://perma.cc/HH3F-CDNP>].

108. U.N. Refugee Agency, *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶ 3, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

109. See Etinne G. Krug et al., *WORLD REPORT ON VIOLENCE AND HEALTH*, WORLD HEALTH ORG. 149 (2002), https://apps.who.int/iris/bitstream/handle/10665/42495/9241545615_eng.pdf;jsessionid=FB20873F128E4E98B32A8C38011E0D8?sequence=1 [<https://perma.cc/8W46-REHB>].

110. *See id.* at 149-60.

the anti-abortion policies promoted by the United States government, this can lead to dynamics where women lose their economic independence by needing to provide childcare in the event of an unplanned pregnancy – and in certain instances, to a child born of rape.

For refugees fleeing privately targeted gender-based violence, American refugee jurisprudence has historically offered little support. Refugees must prove that they have or will face persecution on account of their race, religion, nationality, political opinion, or membership in a particular social group.¹¹¹ Because gender is not one of the protected grounds in American refugee law, gender-based persecution cases are almost always forced to mold themselves to fit the lenses of political, religious, or social persecution.¹¹² The failure of American refugee jurisprudence to adequately address the various forms of harm suffered by women stems directly from its failure to recognize claims of gender-based persecution. To better support and protect foreign women, the United States must correct the gender-bias that exists throughout refugee law.

A. Immigration jurisprudence in the United States often conflicts with established international norms.

American immigration law's blind focus on the text of the Refugee Convention ignores the numerous steps taken by the United Nations to correct the inadequate gender protections, including direct commentary that "[women] bear the disproportionate burden of social and economic rights violations."¹¹³ The United Nations has since released guidelines specifically addressing issues facing refugee women and drafted various supplemental conventions, such as CEDAW and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). These international instruments were designed to assist in protecting and furthering the rights of immigrant women, and their relative dismissal in American jurisprudence marks an immense point of disparity.

American jurisprudence too often ignores the unique difficulties experienced by refugee women because of their sex or gender. Violence against women tends to become normalized during periods of conflict and can carry over into the period of post-conflict.¹¹⁴ During periods of conflict, established gender norms often take on even greater socio-political significance than during peacetime because "[t]he role of women in the biological and social reproduction of group identity places them in a position of particular vulnerability."¹¹⁵ Unfortunately, the significance of the meaning and repercussions behind gender-

111. 8 C.F.R. § 208.13 (2019).

112. *See id.*

113. U.N. Women, 2011-2012 Progress of the World's Women: In Pursuit of Justice 84 (2011), <https://www.un.org/ruleoflaw/files/EN-Report-Progress.pdf> [<https://perma.cc/AJ8J-GMH3>].

114. *See* Press Release, Security Council, Women Suffer Disproportionately During and After War, Security Council Told During Day-Long Debate on Women, Peace and Security, U.N. Press Release SC/7908 (Oct. 29, 2003).

115. HEAVEN CRAWLEY, REFUGEES AND GENDER: LAW AND PROCESS 88 (2001).

related acts of violence “are currently rarely recognized in the asylum determination process,” as evidenced by the common obstacles faced by women in proving that they were persecuted for their gender in the past and/or that they risk gender-related persecution in the future.¹¹⁶

But even after these periods of conflict subside, some women continue to live in social circumstances produced because of the conflict: For example:

[M]any girls (now women), who were forced to become so-called ‘bush wives’ during the conflict in Sierra Leone, stayed with their appointed husbands after the conflict, because social stigmatization, loss of family, poverty, and loss of educational opportunities placed them in a situation in which they felt they had no other alternatives for subsistence.¹¹⁷

Refugee women who face persecution by family members have the burden of proving that their country’s government cannot or will not protect them from their families.¹¹⁸ For women fleeing abuse, this may be an eminently difficult burden to meet. Immigration officials in the United States consistently mark the familial abuse of women as private acts with which the state need not interfere.¹¹⁹ Because these familial abuses are inflicted by non-state actors, American jurisprudence acts as though these abuses do not merit foreign protection.¹²⁰ This standard ignores the reality of the hardships these refugee women endure. Evidence of abuse may only be anecdotal, and particularly where a country has outlawed a common practice, the woman must prove the law is not adequately enforced.¹²¹ Where a woman’s persecutor is her family, she has the burden of proving that she faces danger throughout her entire country.¹²² She must show that it would not be reasonable to expect her to relocate somewhere else within the country, away from her family or community.¹²³ This places a grossly onerous burden on refugee women fleeing familial persecution.¹²⁴

The myriad of problems refugee women face in American immigration cases is a subsidiary element of the larger failure to make persecution based on gender an explicit statutory ground upon which women can claim refugee status. The United States continued to refuse to identify women as a “particular social group” suffering gender persecution continues. A study of 206 asylum claims made by women who experienced domestic violence and sought refuge in the

116. *Id.*

117. Dyan Mazurana & Khristopher Carlson, *The Girl Child and Armed Conflict: Recognizing and Addressing Grave Violations of Girls’ Human Rights*, 11-12, U.N. Doc. EGM/DVGC/2006/EP.12 (Sept. 2006).

118. 8 C.F.R. § 208.13(a)-(b)(1) (2020).

119. *See, e.g.*, A-B-, 27 I. & N. Dec. 316, 318 (Att’y Gen. 2018).

120. 8 C.F.R. § 208.13 (2020).

121. *Id.*

122. *Id.*

123. 8 C.F.R. § 208.13(b)(1)(i)(B) (2020).

124. Louise Lund Liebmann, *Liberating Battered Ethnic Minority Women on Women’s Liberation Day?*, 4 J. OF L. & SOC. RES. 73 (2013).

United States found that approximately one third of the cases (63 of 206) were denied, most commonly relating to the lack of cognizable social group.¹²⁵ This occurred despite the fact that “many of the judges who denied relief had no trouble finding that the harm the applicants suffered – often involving severe physical, sexual, and psychological violence – constituted persecution, or even that the fear of future harm was well-founded.”¹²⁶ Even when legislators seem more willing to recognize persecution based on religion, or race, or political opinion, too often they fail to grasp the nature of persecution based on gender.¹²⁷

- i. The United States can adapt its treatment of women refugees to better comply with international norms and realities by modeling its immigration policy after other nations.

Legislators could improve these ineffective and unjust American immigration standards by bringing American immigration law in line with broader international immigration standards. The first and closest country the United States should look to for guidance is Canada. Canada was one of the first nations to officially issue guidelines specifically including the gender-based claims of women.¹²⁸ These guidelines were revolutionary in their reassessment of common Convention issues, which the United States has often cited to justify denying asylum grants based on gender.¹²⁹ The Canadian Guidelines state that although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of a refugee under the Convention may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.¹³⁰ This standard would provide far more security to women fleeing violence from private parties than the current restrictive American standard.

In addition to applying a broader reading of the Convention, the Canadian Guidelines also apply a version of the nexus analysis utilized in American immigration cases, whereby the persecution must be on account of a protected ground. The Canadian Guidelines refer to this analysis as the “linkage between gender, the feared persecution, and one or more of the [five Convention] grounds.”¹³¹ The Canadian Guidelines, contrary to American asylum law, allowed the requisite linkage to be met in one of the four following ways: (1)

125. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 120-121 (2013).

126. *Id.* at 121-122.

127. Michelle Foster, GENDER IN REFUGEE LAW 18 (Efrat Arbel et al. eds., 2014).

128. Stephanie Kaye Bell, *Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims*, 20 N. C. J. INT’L L. & COMP. REG. 655, 664 (1995).

129. *Id.* at 664-665.

130. *Women Refugee Claimants Fearing Gender-Related Persecution*, IMMIGRATION AND REFUGEE BOARD OF CANADA (Nov. 13, 1996) (Can.).

131. *Id.*

traditional Convention reasons; (2) fear of persecution due to reasons of kinship; (3) fear resulting from discrimination on the grounds of gender, or acts of violence either by state, or non-state actors, and (4) fear for failure to conform to gender-biased religious or customary laws in their country of origin.¹³² By explicitly acknowledging the need to protect against persecution by kin and non-state actors, Canada creates a significantly more welcoming, accommodating, and supportive border for persecuted women than its apathetically restrictive southern neighbor.

American immigration law's lack of accord with established international norms reflects its often-discriminatory practices. However, by better modeling itself on established United Nations standards, or even by modeling itself on some of its less discriminatory neighbors, the United States can quickly bring itself in line with international norms. The question is whether there is enough of a political drive to act against the United States' continued failure to ameliorate and often exacerbate the oppression of foreign women.

V. CONCLUSION

"How do I hold States accountable if there is no specific legally binding instrument on violence against women?" is a question which was asked by Rashida Manjoo when she was the U.N. Special Rapporteur on Violence Against Women.¹³³ Her concern can be similarly applied to the United States in that if the United States chooses to continue its oppressive tendencies against foreign women, other nations have limited reasonable ability to push them to stop. Change almost certainly will need to come from within, and that can be an intimidating prospect because of how often the United States' government has ignored its professed goals of promoting human rights, economic development, and health, in favor of an extremist patriarchal attitude toward limiting women's bodily autonomy.

Fortunately, awareness of the problems facing women has grown in the past several years. For example, the Hyde Amendment had long gone untouched and relatively unchallenged; no president, Republican nor Democrat, has acted to either limit its effect or push for its repeal entirely, and Congress reauthorizes the Amendment annually.¹³⁴ However, in 2016 the top Democrat presidential candidates each took positions against the Amendment's current effect: Hillary Clinton promised to correct the long-held restrictions in the instance of rape, incest, or maternal endangerment, and Bernie Sanders promised he would seek to repeal the Amendment entirely.¹³⁵ Since then, more voices have spoken out

132. *Id.*

133. Every Woman Treaty, *Violence Against Women and International Law: An Overview* (2018), <https://everywoman.org/violence-against-women-and-the-law/> [https://perma.cc/3UU8-ZFYE].

134. Alina Salganicoff, Laurie Sobel, & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, THE HENRY J. KAISER FAMILY FOUNDATION (Jan. 24, 2020), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [https://perma.cc/CHT7-XXZ5].

135. Bassett & Grim, *supra* note 51.

against the Helms Amendment, to the point where nearly every Democratic presidential candidate in 2020 favored repeal.¹³⁶ Even Joe Biden, a long-time supporter of the Amendment, has reversed his position.¹³⁷

Nevertheless, while the President of the United States has enough authority and constitutional mandate to attempt to reduce the negative impacts conveyed upon foreign women by American laws and foreign policy, they are ultimately limited in their ability to fully overwrite established legislation. Thus, to truly end the United States' oppressive impact upon foreign women and its lack of adherence to international norms, Congressional action will be necessary. For the Helms Amendment, this means at minimum no more reauthorization; however, the Trump administration has expressed a desire to make the Helms Amendment permanent, which is why the better option would be to pass legislation affirmatively opposing the Helms Amendment and making its policies illegal.¹³⁸ Similarly, rather than tie the Mexico City Policy, or the Trump administration's expansion, to oscillations between whichever party holds the presidency, Congress should ideally also act to affirmatively stand against and dismantle the Mexico City Policy and prevent any similar future order. These could likely be accomplished in tandem by stating, as a basic summarization, something akin to that family planning and contraceptive services may never be tied to an institution's abortion policies. This would reflect the actual impact of those services on abortion, rather than shrouding ill intent in a false veneer of imperialist morality.

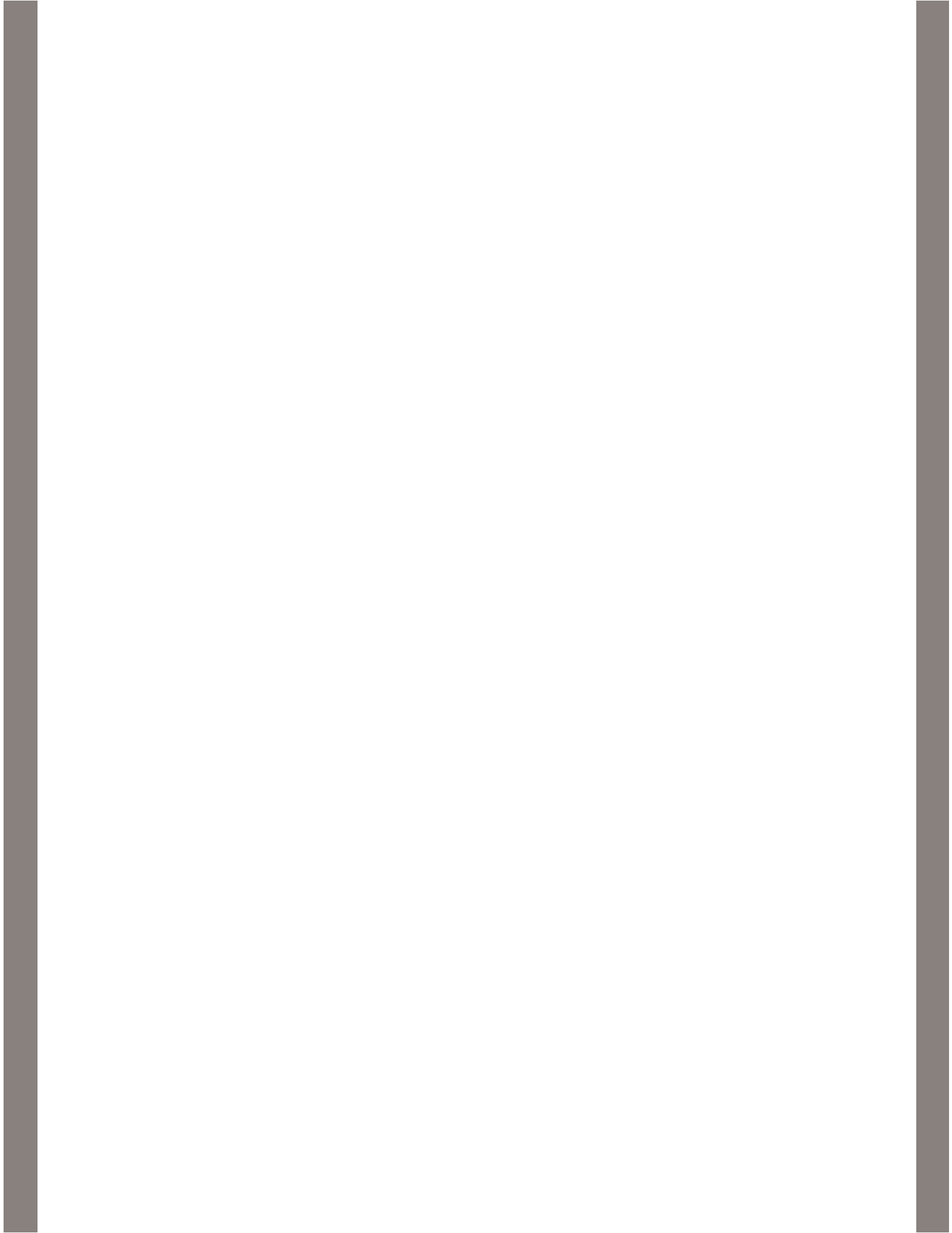
Finally, Congress should act to ratify CEDAW and sign its Optional Protocol so that the United States is both more properly in line with international norms and subject to enforcement for any future violations. This can also be done in tandem with acts ensuring the United States will be compliant, such as by correcting the gender-based flaws in its immigration system discussed earlier and by reestablishing protection for women domestically. This should be the goal to which the United States strives, even as it will likely encounter further opposition from within Congress and within the presidency.

American history has too long imperialistically limited foreign women's ability to pursue their own autonomy. The policies established by the Trump administration represent a nadir, but it is one resulting from all that came before it. Without a comparatively revolutionary movement from both the presidency and Congress, this pattern of attacking foreign women seems likely to continue. The expansion of policies directed against foreign women will have extreme enduring effects and should be permanently ceased to minimize further damage.

136. Salganicoff, Sobel, & Ramaswamy, *supra* note 134.

137. Tal Axelrod, *Ocasio-Cortez starts petition to repeal Hyde Amendment*, THE HILL, June 15, 2019, <https://thehill.com/homenews/house/448728-ocasio-cortez-starts-petition-to-repeal-hyde-amendment> [<https://perma.cc/Q35J-XMBZ>].

138. Salganicoff, Sobel, & Ramaswamy, *supra* note 134.



“FREE THE NIPPLE” ONE BROADCAST AT A TIME: FCC INDECENCY REGULATIONS OF NUDITY

Michaela Mullis & Jasmin McNealy[†]

ABSTRACT

With feminist movements gaining momentum, it is important to examine societal constructions rooted in androcentric ideologies, including laws and policies. This article examines FCC indecency regulations in conjunction with the “Free the Nipple” campaign, a social movement emphasizing the liberation of female toplessness. Through exploration of societal and legal contexts, this article disputes two popular arguments for the censorship of the female nipple on broadcast television: the sexual organ argument and the child protection defense.

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*“Why is my nipple more obscene than a murder?”*¹ The “Free the Nipple” campaign poses this question that begs the examination of societal standards and

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1. Free the Nipple (Film Trailer, Sundance Selects 2014), <http://www.mongrelmedia.com/index.php/filmlink?id=370c7de6-d244-4a71-9842-789fcd015256> [<https://perma.cc/6V9L-HQ9K>]. “Free the Nipple” (2012) is a film inspired by true events that showcases the efforts of a group of women in New York City to protest

media depictions glorifying blood and death but censoring the natural form of a woman's body. In 2012, a gender equality campaign entitled "Free the Nipple" arose in correspondence with a film released with the same name.² This movement highlights the incongruities in perceptions, standards, and laws regarding women's breasts, but also more broadly focuses on "equality, empowerment, and freedom" for all genders.³ Demonstrators stress their constitutional rights to freely express themselves and question why the First Amendment is applied more liberally to men's nudity than women's nudity.⁴

"Free the Nipple" was used more times across social media sites in 2015 than other equality movement phrase, such as "gender equality" and "equal pay," demonstrating the recent spike in interest and popularity of the movement.⁵ Now, with the gaining momentum of third-wave feminism through the Women's Marches in 2017 and 2018 and the #MeToo and #TimesUp movements, it is more important than ever to recognize and understand the embedded incongruities in society based on gender. This review highlights the engrained constructions surrounding the sexualization of the female body and the androcentric culture of the United States regarding broadcast indecency laws.

While history, media, and culture may be an obvious influence on current societal views, laws regarding indecency standards are a more subtle authority on gender perceptions. This is not to say that laws necessarily create gender binaries, but rather that they play a role in perpetuating hegemonic values of the society in which they are created. For example, the Federal Communication Commission (FCC) regulates broadcasts through the agency's own definition of indecent material. The broadcast spectrum has been defined as a scarce resource in terms of airwaves⁶ but also as a freely accessible and widely distributed

censorship laws in the United States. *Id.* The film synopsis states: "The film explores the contradictions in our media-dominated society, where acts of violence and killing are glorified, while images of a woman's body are censored by the FCC and MPAA." *Id.* This film helped launch the "Free the Nipple" campaign in the United States.

2. *Free the Nipple: Inside the Controversy*, NEW IDEA (Nov. 19, 2019), <https://www.newidea.com.au/free-the-nipple-what-is-it-who-is-involved> [<https://perma.cc/DXM3-NDU4>]. With the slogan "How far will you go for equality?" the "Free the Nipple" movement focuses on gender equality in terms of nudity but also broadly encompasses social issues and injustices. *Id.* This international campaign seeks to raise awareness and affect change through various media platforms and demonstrations. *Id.* The ultimate goal of the campaign centers on equal rights for men and women. *Id.*

3. *Id.*

4. *Id.*

5. Deborah Acosta, *The Fight to Free the Nipple*, N.Y. TIMES (Jan. 26, 2016), <https://www.nytimes.com/2016/01/25/fashion/free-the-nipple-video.html> [<https://perma.cc/68XK-WSEN>].

6. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387-90 (1969). In necessitating the abridgement of First Amendment rights for broadcasters, the Court stated: "Although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them... But the reach of radio signals is incomparably greater than the range of the human voice, and the problem of interference is a massive reality." *Id.* at 387-88. The Court continued: "Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique

intruder in homes.⁷ Due to this widespread accessibility of broadcasted content, both the FCC and the U. S. Supreme Court have necessitated the regulation of material not be suitable for children or sensitive audiences.⁸ Definition of what is suitable and what is not begins the implementation of sexist views of decency. Indecency standards are based in a culture embedded with an androcentric view of sexuality, minimizing the equal application of law between males and females.

This paper examines how the FCC's indecency regulations of broadcast material influence societal perceptions of the male body compared to the female body. The FCC indecency standards of broadcast material have impacted perceptions of the female nipple, negatively perpetuating a sexist view of nudity in America. This article first presents an overview of the current societal context, including the defining characteristics of our androcentric culture and third wave feminism. Second, this article examines the legal context of indecency regulations and FCC codes. Finally, this article argues that the FCC perpetuates sexist and disparate standards of indecency through two broadcasting regulation arguments: the sexual organ argument and the child protection defense.

SOCIETAL CONTEXT: THE AMERICAN CULTURE OF NUDITY

It is not difficult to identify certain divergent standards between the outward appearances of men and women. Whether it is hair length, makeup, or certain clothing choices, such as dresses and ties, societal standards of right and wrong gender appearances are clearly apparent.⁹ Many individuals do not realize this constant influence because gender is such an engrained aspect of daily American life.¹⁰ However, these standards are not innate mental structures; they are learned values based on social constructions.¹¹ Gender is a social construction that is "created and recreated out of human interaction" and social life.¹² Gender, as opposed to the biological differences between men and women called "sex,"¹³ is

medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 90.

7. *FCC v. Pacifica Found.*, 438 U. S. 726, 748 (1978). In defining broadcast as a pervasive medium, the Court compared broadcasting to privacy intrusion: "The broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Id.* at 748.

8. *Id.* at 749 (stating broadcast's easy accessibility to children in addition to its pervasiveness as the two main reasons necessitating regulation of indecent material).

9. See S. K. Murnen & B. P. Don, *Body Image and Gender Roles*, in 1 *ENCYCLOPEDIA OF BODY IMAGE AND HUMAN APPEARANCE* 128-134 (Thomas Cash ed., Academic Press 2012).

10. JUDITH LORBER, "Night to his Day": *The Social Construction of Gender*, in *PARADOXES OF GENDER* 1, 13-15 (1994).

11. *Id.* at 13; see also JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2011).

12. LORBER, *supra* note 10, at 13.

13. *Id.*

a fluid function of society that imposes freedoms and restrictions. Gender norms are present from the day parents find out the sex of their baby to the day family members pick out flower arrangements at a funeral. The influence of gendered societal standards is abundant and relentless in American culture.

Androcentrism and Third Wave Feminism

Not only are gender norms a pervasive element of American culture, they are defined through dominant ideologies that encompass patriarchal ideals and androcentric values.¹⁴ Androcentrism is the concept of male-centeredness that underpins cultural norms and values.¹⁵ This concept not only highlights who is in power, but also explains how their power is culturally produced, engrained, and transmitted.¹⁶ Specifically, androcentrism is the normalizing of males and the male experience as a “neutral standard,” while marginalizing the female experience as an abnormal deviation from that standard.¹⁷ This dominant ideology in American culture encompasses theological, philosophical, historical, and psychological foundations.¹⁸ The concept of power is central to this ideology as an ultimate goal.¹⁹ Through androcentrically derived public power, males create “cultural discourses and social institutions that automatically privilege male experience and otherize female experience.”²⁰

In differentiating sexes, there are obvious biological variances.²¹ However, “the impact of any biological feature depends in every instance on how that biological feature interacts with the environment for which it is situated.”²² Thus, cultural invention embedded in people’s ability to create language, rules, and norms wholly impacts the environment in which the differing biological features are situated.²³ While there is no innate power hierarchy that coincides with the naked female and male body, defining the normal naked body through an androcentric value system stigmatizes the female body as irregular and altered.²⁴ Perceptions of nudity are formed through the male perspective, and values of good or bad and sexy or not sexy are transmitted through society via institutionalized masculine power.²⁵ Through androcentrism, the female body is an object of male pleasure, sexualizing the diverging characteristics between

14. SANDRA L. BEM, *THE LENSES OF GENDER: TRANSFORMING THE DEBATE ON SEXUAL INEQUALITY*, 40-41 (Yale Univ. Press 1993); *see also* JULIA T. WOOD, *GENDERED LIVES: COMMUNICATION, GENDER, AND CULTURE* (9th ed. 2011).

15. BEM, *supra* note 14, at 40-41.

16. *Id.*

17. BEM, *supra* note 14, at 41.

18. BEM, *supra* note 14, at 40-41.

19. BEM, *supra* note 14, at 78-79.

20. BEM, *supra* note 14, at 79.

21. BEM, *supra* note 14, at 22; *see also* FRANK H. NETTER, *ATLAS OF HUMAN ANATOMY* (7th ed., Elsevier 2019).

22. BEM, *supra* note 14, at 22.

23. *Id.*

24. *Id.*

25. *Id.*

male nudity and female nudity.²⁶ The female nipple falls victim as an object of sexuality rather than a biological mechanism with the means of sustaining life.²⁷ While the biological differences and appearance between a male and female nipple are slim, filtering the societal meanings of nudity through androcentric values creates and reproduces male-driven, sexualized conceptions of the female nipple.²⁸ These conceptions then inform all the functions of society including interactions, laws, and media.

Third wave feminism is the most current reaction to these sexist ideals. Feminism, although a controversial word itself, generally means the right to and fight for equality amongst all people.²⁹ Stemming from previous iterations, third wave, or new wave, feminism highlights individualized empowerment, the multitude of genders in society beyond the typical binary, and the need to identify and reconstruct androcentric ideologies in American culture.³⁰ Because women have made important strides in equality, the third wave refocuses equality energy on using platforms to conduct constructive conversations, raise awareness of embedded inequalities, and ultimately affect change structurally, lawfully, and culturally.³¹

This ideology has birthed many feminist movements including the “Free the Nipple” campaign in 2012, the Women’s March on Washington in 2017, and the #MeToo movement in 2017, all of which have sparked political and cultural conversations about many inequities in society including women’s sexual liberation and empowerment. The ““Free the Nipple”” campaign has emphasized the disparate treatment of women’s bodies and sexuality in terms of media messages and the law. In 2012, Lina Esco directed *Free the Nipple*, a movie based on the little-known movement, which sparked a stark rise in the popularity of the social campaign.³² The movie and movement emphasize the “archaic censorship laws in the United States” and aim to inform the public about the apparent lack of equality and advocate for changing the laws regarding female censorship.³³ The movement predominately focuses on media depictions and asks the question “why is a woman’s nipple more obscene than a murder?”³⁴ The movie asks: if violence and killing are glorified in media, how can the FCC and MPAA lawfully regulate depictions of female nudity?³⁵ This contradiction

26. PAM CARTER & JO CAMPING, FEMINISM, BREASTS AND BREASTFEEDING 106-160 (1995); see also Luke Boso, *A (Trans) Gender-Inclusive Equal Protection Analysis of Public Female Toplessness*, 18 L. & SEXUALITY 143 (2009).

27. *Id.* at 133.

28. *Id.*

29. CHRIS BARKER, CULTURAL STUDIES: THEORY AND PRACTICE 290-293 (2ND ED. 2012); see also Susan Archer Mann & Douglas J. Huffinan, *The Decentering of Second Wave Feminism and the Rise of the Third Wave*, 96 SCI. & SOC’Y 56 (2005).

30. BARKER, *supra* note 29, at 292.

31. BARKER, *supra* note 29, at 292.

32. FREE THE NIPPLE, *supra* note 1.

33. FREE THE NIPPLE, *supra* note 1.

34. FREE THE NIPPLE, *supra* note 1.

35. FREE THE NIPPLE, *supra* note 1.

confounds many third wave activists and is the driving force of the “Free the Nipple” campaign.

Many women and men recently have used the platform to form their own groups and protest indecency laws in metropolitan areas. For example, members of a literary group in New York called the Outdoor Co-ed Topless Pulp Fiction Appreciation Society gather in parks across the state to read topless.³⁶ The nudity draws attention, especially among men and children, but the group uses the attention to promote equality in alliance with “Free the Nipple.”³⁷ In addition, August 26, 2017 was announced as “Go Topless Day” where many topless marches promoting gender equality were organized in cities across the country.³⁸ Marchers used slogans like “equalize, don’t sexualize” as they marched topless through the streets of their cities.³⁹ Surprisingly, it is legal for women to be topless in the majority of states due to public decency laws.⁴⁰ Indiana, Tennessee, and Utah are the only states that do not allow women to be topless in public.⁴¹ Several states, including Florida, have ambiguous public indecency laws that do not clearly specify whether the female nipple is indecent.⁴² Regardless, citizens use the “Free the Nipple” platform to demonstrate their First Amendment rights in this country to openly express themselves in public.

Media and Culture

While understanding gender equality and female liberation in a general context is important, it is necessary to grasp the pervasiveness of media in American culture to understand the interaction of the two. Some scholars assert that media consumption has reached a level of saturation, implying that media is a constant and important aspect of society.⁴³ Media saturation involves continuous presence, elevated levels of consumption, and excessive dependency on mediated messages.⁴⁴ It is not hard to examine this phenomenon in practice as the average American spends 238 minutes a day watching TV, 197 minutes on their phone, and 123 minutes online on other devices.⁴⁵ On average, more than half (58%) of time spent awake per day is used consuming media.⁴⁶

36. Acosta, *supra* note 5.

37. Acosta, *supra* note 5.

38. *GoTopless Day*, GoTOPLESS.ORG, <http://gotopless.org/gotopless-day> (last visited Feb. 26, 2020) [<https://perma.cc/ZYF9-YP97>].

39. *Id.*

40. *Topless Laws*, GoTOPLESS.ORG, <http://gotopless.org/topless-laws> (last visited Feb. 26, 2020) [<https://perma.cc/C86C-SHQL>].

41. *Id.*

42. *Id.*

43. Jay Newell, Joseph J. Pilotta, and John C. Thomas, *Mass Media Displacement and Saturation*, 10 INT’L J. ON MEDIA MGMT. 131, 133 (2008).

44. *Id.*

45. *Average time spent with major media per day in the United States as of October 2018 (in minutes)*, STATISTA, (last visited Feb. 26, 2020) [<https://perma.cc/GCN8-7U5Z>].

46. *Id.*

Since consumption and dependency rates are so high, it logically follows that media have a large impact on society. In fact, immense research efforts through academics and corporations focus solely on the effects media have on the individual consumer and the general public. Mass media scholars have asserted that media tell us what to think about,⁴⁷ how to think about it,⁴⁸ teach us important values and behaviors through cognitive processes,⁴⁹ and cultivate beliefs about our world.⁵⁰ Through empirical testing, researchers have found direct links between media and a multitude of variables including violence, body image, and sex-role stereotyping.⁵¹ These potential effects suggest the importance of understanding how media messages may impact viewers' perceptions, values, attitudes, and beliefs. More specifically, it is important to understand how broadcast regulations of indecent material shape conceptions of right and wrong, good and bad, and decent and indecent for society as they pertain to nudity.

LEGAL CONTEXT: THE FCC AND NUDITY REGULATIONS

The Federal Communications Commission is an independent agency created to oversee and regulate communications within the United States.⁵² Among the agency's many responsibilities is regulating broadcast content including indecency: material usually involving sexual or excretory explicitness that is offensive to the average person.⁵³ What is legally considered explicit or indecent is difficult to define because these terms are subjective. Nevertheless, through various court decisions and regulatory standards, the FCC uses its power to define what can be depicted and said on broadcast television during certain times.

The FCC's regulatory power over broadcast media was confirmed in *Red Lion Broadcasting Co. v. FCC*,⁵⁴ in which a broadcaster questioned the constitutionality of the fairness doctrine, a set of regulations requiring the fair

47. Maxwell E. McCombs and Donald L. Shaw, *The Agenda Setting Function of Mass Media*, 36 PUB. OPINION Q. 176 (1972).

48. Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMM. 51 (1993).

49. E.g., Albert Bandura, *Social Cognitive Theory of Mass Communication*, 3 MEDIA PSYCHOL., 265 (2001).

50. George Gerbner, *Cultivation Analysis: An Overview*, 1 MASS COMM. AND SOC'Y, 175, 179 (1998).

51. See COMM. THEORY, J. OF COMM., and J. OF MEDIA PSYCHOL., for published studies on media effects across a multitude of variables.

52. Overview, FED. COMM. COMMISSION, <https://www.fcc.gov/about/overview> (last visited Jan. 20, 2020) [<https://perma.cc/4W93-MMKR>].

53. *Id.*; see, e.g., Allen S. Hammond, *Indecent Proposals: Reason, Restraint and Responsibility in the Regulation of Indecency*, 3 VILL. SPORTS & ENT. L.J. 259, 272, 278 (1996) (noting the FCC's promulgation of indecency rules for broadcast); Brian J. Roeder, *Broadcast Indecency Regulation in the Era of the Wardrobe Malfunction: Has the FCC Grown Too Big for Its Britches*, 74 FORDHAM L. REV. 871, 871-72 (2005) (arguing that the regulation of indecency would be better left to market forces).

54. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

coverage of opposing viewpoints in public controversies on broadcast airwaves.⁵⁵ Red Lion Broadcasting argued that the FCC's enforcement of the doctrine violated its First Amendment rights by requiring it and other broadcast licensees to allow outsiders to have access to time on its station and to cover opposing viewpoints for certain topics. In this specific case, Red Lion declined to allow a man time to reply to a personal attack that aired on the station. The FCC declared the station's actions were in violation of the fairness doctrine.⁵⁶

In ruling that the fairness doctrine was constitutional, the Court edified the FCC's regulatory authority over broadcast.⁵⁷ The Court found that as a "scarce resource," broadcast was in need of governmental regulation.⁵⁸ Without regulation the medium would be useless due to the "cacophony of competing voices, none of which could be clearly and predictably heard."⁵⁹ Thus, the Court reiterated that the Communications Act of 1934 gives the FCC the responsibility and authority of ensuring that broadcasters operate for and within the interests of the public.⁶⁰ This regulatory power is purposefully broad to allow the FCC to safeguard the public airwaves.⁶¹ This power not only includes the enforcement of equal airtime for political and social content, but also the regulation of sexually-related material.

Broadcast Obscenity and Indecency

On the hierarchy of protected expression, obscene expression is on the lowest tier receiving no First Amendment protection.⁶² Obscenity is defined using a three-pronged test created by the U.S. Supreme Court in *Miller v. California*.⁶³ In general, obscene material is any expression that the average

55. *Id.* at 371-75.

56. *Id.* at 372.

57. On ruling the fairness doctrine constitutional, the Court stated:

In light of the fact that the "public interest" in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public; the fact that the FCC has rested upon that language from its very inception a doctrine that these issues must be discussed, and fairly; and the fact that Congress has acknowledged that the analogous provisions of § 315 are not preclusive in this area, and knowingly preserved the FCC's complementary efforts, we think the fairness doctrine and its component personal attack and political editorializing regulations are a legitimate exercise of congressionally delegated authority.

Id. at 385.

58. *Id.* at 399.

59. *Id.* at 376.

60. *Id.* at 380 (citing *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 219 (1943)).

61. *Id.*

62. *Roth v. United States*, 354 U.S. 476, 483, 485-86 (1957) (finding that the First Amendment was not intended to protect all categories of speech); *see also* *R.A.V. v. St. Paul*, 505 U.S. 377, 422-23 (1992) (Stephens, J., dissenting) (noting a hierarchy of constitutional protection of speech under the First Amendment with obscenity receiving the least protection); Paul B. Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 206 (1982) (arguing that a content neutrality rule ignores the hierarchy of First Amendment values).

63. The Court's obscenity test, known as the *Miller* test, includes these three elements:

person would find as wholly sexually offensive in accordance with community standards and that lacks any social or scientific value.⁶⁴ What could be defined as obscene is rarely depicted on television, as obscene material can be criminally punished in the U.S. The FCC has regulatory power over prohibiting and punishing the publication of obscene and other sexually-related materials in broadcast and cable television.⁶⁵ Viewer complaints to the FCC about sexually-related content, which usually encompass objections to indecency, can result in warnings, monetary fines, or license revocation for broadcast and cable stations.⁶⁶

The U.S. Supreme Court's opinion in *FCC v. Pacifica Foundation*, in which *Red Lion* is used as precedent for the FCC's authority to regulate broadcast, found that the First Amendment rights of broadcasters were not violated and the FCC was not engaged in censorship when it issued a declaratory order upholding a complaint about the broadcast of a monologue containing repeated expletives.⁶⁷ The FCC had relied on a federal law prohibiting the use of indecent language on the radio⁶⁸ when it reprimanded the Pacifica Foundation's radio station that aired the broadcast.⁶⁹ The Court had a twofold rationale for regulating broadcast content.⁷⁰ First, the pervasiveness and intrusiveness of broadcast warranted strict regulation.⁷¹ Second, the FCC's responsibility to ensure broadcasters operate in the public's interest merited censorship, especially regarding the protection of young viewers.⁷² The Court stated that the government's compelling interest in protecting children justified the regulation of indecent material when children could be exposed.⁷³ The FCC, then, had the authority to regulate indecent content including limiting the times during which it could be broadcast.⁷⁴

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- (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest,
 - (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and
 - (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Miller v. California*, 413 U.S. 15, 24 (1973).

64. *Id.*

65. *Obscene, Indecent, and Profane Broadcasts*, FED. COMM. COMMISSION, <https://www.fcc.gov/consumers/guides/obscene-indecnt-and-profane-broadcasts> (last updated Dec. 30, 2019) [<https://perma.cc/J5RH-6KMP>].

66. *Id.*; see also Steven P. Frankino, *The FCC's Role in Television Programming Regulation—A Symposium - Introduction*, 14 VILL. L. REV. 581 (1969) (exploring the FCC's regulatory changes directly prior to *Red Lion*).

67. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

68. The statute stated, "[w]hoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than \$10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1976).

69. *Pacifica*, 438 U.S. at 731.

70. *Id.* at 748.

71. *Id.* at 748-49.

72. *Id.* at 749-50.

73. *Id.* at 749.

74. *Id.* at 750.

Since the *Pacifica* ruling, the FCC has confronted constitutional questions about its indecent material regulations in the courts many times. In *Sable Communications v. FCC*, the Court ruled that a provision of the Communications Act that banned indecent phone messages violated the constitution.⁷⁵ The FCC and Department of Justice had argued that *Pacifica* granted the regulatory authority to enforce a ban on dial-a-porn messages, including the filing of criminal charges, to protect children from possible exposure to the indecent content.⁷⁶ In ruling that the statute in question was unconstitutional because it was not narrowly tailored and would otherwise prohibit adults from accessing indecent materials,⁷⁷ the Court distinguished *Pacifica* as “emphatically narrow, rel[ying] on the unique attributes of broadcast media,” and was, therefore, not broadly applicable to all communications media.⁷⁸

In the mid-1990s, the FCC again found itself in court over its enforcement of indecency regulations. In *Action for Children Television v. FCC*, the D.C. Court of Appeals ruled that although the government had a compelling interest for channeling broadcast indecency into certain times to protect children, the agency’s enforcement of a strict safe harbor of midnight to 6AM for indecent radio broadcasts violated the First Amendment.⁷⁹ A year later, the U.S. Supreme Court ruled that although §10(a) of the Cable Television Consumer Protection and Competition Act of 1992, which gave operators of leased access cable channels the ability to control indecent and obscene programming, did not infringe on the right to free speech, §10(b) – requiring public access channel operators to restrict “patently offensive” content to one channel that was blocked unless access unblocking was requested – and §10(c), permitting operators to ban offensive or indecent programming, were unconstitutional.⁸⁰ Although the cases above represent conflicts about the authority and constitutionality of indecency regulation enforcement, they do not provide much in the way of understanding what the FCC considers indecent.

Current FCC Code

The FCC’s current obscenity and indecency code enforces federal statute 18 U.S.C. § 1464 and employs the time restrictions found to be constitutional in *Pacifica*. The code states that “[n]o licensee of a radio or television broadcast station shall broadcast on any day between 6 a.m. and 10 p.m. any material which

75. *Sable Comm. v. FCC*, 492 U.S. 115, 131 (1989).

76. *Id.* at 126-28.

77. *Id.* at 128, 131; *c.f.* *U.S. v. Playboy Ent. Group Inc.*, 529 U.S. 803 (2000) (ruling that a provision of the Communications Decency Act of 1996 was unconstitutional because it was not the least restrictive means of protecting children from possibly encountering indecent materials on cable).

78. *Sable*, 492 U.S. at 127.

79. *Action for Children Television v. FCC*, 58 F.3d 654, 656 (D.C. Cir. 1995). The court based its holding on the failure of Congress to adequately differentiate between categories of broadcasters in the statute. *Id.* at 669.

80. *Denver Area Educ. Telecomm. Consortium Inc. v. FCC*, 518 U.S. 727 (1996).

is indecent.”⁸¹ Whereas obscene material is completely prohibited from broadcast at all times of the day,⁸² indecent material cannot be punished or prohibited if it airs during the “safe harbor” time period, when children are less likely to be watching.⁸³ In deciding whether material is indecent, the Enforcement Bureau of the FCC uses two criteria. First, “the material must describe or depict sexual organs or activities.”⁸⁴ Second, the Bureau employs part of the *Miller* test in determining whether the broadcast material is “patently offensive as measured by contemporary community standards for the broadcast medium.”⁸⁵ The community standard for the FCC’s purpose does not regard a specific geographical location, but rather the “standard is that of an average broadcast viewer or listener.”⁸⁶ The Bureau must also examine the material as a whole in determining patent offensiveness. The full context of the potentially indecent material weighs heavily on the Bureau’s decision.⁸⁷ The FCC has regarded news, for example, as deserving more protection because of the newsworthiness factor and press freedoms.⁸⁸ The Commission has outlined three factors in determining patent offensiveness of broadcast material: the explicitness or graphicness, the length of exposure or repetitiveness, and the use of material to shock, pander, or titillate.⁸⁹ After a complaint is filed, all of these aforementioned elements are considered in order for material to be deemed indecent.⁹⁰

Yet, rather than consistently applying a specific, concrete standard, the Commission typically relies on public outcry or court cases to make regulatory decisions.⁹¹ In 2004, the FCC reversed its own ruling that the use of the word

81. Enforcement of 18 U.S.C. 1464 (restrictions on the transmission of obscene or indecent material), 47 C.F.R. § 73.3999(b) (2019).

82. 47 C.F.R. § 73.3999(a).

83. FCC v. *Pacifica Found.*, 438 U.S. 726, 731 (1978); see generally Edythe Wise, *A Historical Perspective on the Protection of Children from Broadcasting Indecency*, 3 VILL. SPORTS & ENT. L.J. 15 (1996) (providing a history of the FCC and its broadcast indecency regulations); Harvey Jassem & Theodore L. Glasser, *Children, Indecency and the Perils of Broadcasting: The ‘Scared Straight’ Case*, 60 JOURNALISM Q. 509 (1983) (arguing that the rationale provided in *Pacifica* for regulating indecency conflicts with the First Amendment).

84. Indust. Guidance on the Comm’n’s Case Law Interpreting 18 U.S.C. § 1464 and Enf’t Policies Regarding Broad. Indecency, 16 FCC Rcd. 7999, 8002 (2001) [hereinafter *Industry Guidance*].

85. *Id.* (emphasis omitted).

86. *Id.*

87. *Id.* at 8003.

88. Complaints Regarding Various Television Broadcs. Between February 2, 2002 and March 8, 2005, F.C.C. 06-17 (2006).

89. *Industry Guidance*, *supra* note 84, at 8003.

90. *Id.*

91. See generally Jordan Butler, Note, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U. L. REV. 621 (2011); Genelle I. Belmas, Gail D. Love, & Brian C. Foy, *In the Dark: A Consumer Perspective on FCC Broadcast Indecency Denials*, 60 FED. COMM. L.J. 67 (2007); John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329 (1989).

“fucking” as an adjective in a fleeting manner is not indecent.⁹² On a broadcast airing of the Golden Globe Awards singer Bono stated, “This is really, really fucking brilliant!” in an acceptance speech.⁹³ After receiving complaints, the FCC initially denied claims that this use was indecent asserting that the use was not an explicitly sexual reference.⁹⁴ Following this, the FCC received numerous complaints from discontented viewers and members of Congress, which lead to a full reversal of its decision.⁹⁵ Instead of following its past standard that focused on the repetitive use of an expletive, the FCC stated that Bono’s single use of an expletive was indecent because it referred to sexual acts in a patently offensive manner.⁹⁶ This change in standards indicates the FCC’s reliance on public opinion rather than preexisting criteria for reviewing indecency complaints.⁹⁷

More importantly, the constitutionality of how the FCC applies its indecency standard has been through multiple challenges in the courts. The U.S. Supreme Court has denied ruling on the constitutionality of the standard twice and sent the cases back to lower courts for review.⁹⁸ The U.S. Supreme Court ruled in 2012 that the FCC could not fine previous cases using its current standards.⁹⁹ *FCC v. Fox Television Stations (Fox I)*¹⁰⁰ arose after the FCC applied its “single use” standard to two instances involving Fox television broadcasts of the Billboard Music Awards in 2002 and 2003.¹⁰¹ The Second Circuit found the FCC’s application of the new standard violated the reasoning requirement for agency rulings under the Administrative Procedures Act.¹⁰² The U.S. Supreme Court reversed this judgment, but remanded the case to the appellate court to

92. Complaints Against Various Broadcast Licensees Regarding their Airing of the Golden Globe Awards Program, 19 FCC Rcd. 4975, 4975 (2004).

93. Complaints Against Various Broadcast Licensees Regarding their Airing of the Golden Globe Awards Program, 18 FCC Rcd. 19859, 19859 (2003) [hereinafter Airing of the Golden Globe Awards Program].

94. *Id.* at 19861.

95. Overview, FED. COMM. COMMISSION, <https://www.rcfp.org/fcc-commissioners-find-bono-remark-indecent> (last visited June 20, 2020) [<https://perma.cc/Y5VD-Q2ZK>].

96. Airing of the Golden Globe Awards Program, *supra* note 93, at 4978-79.

97. See generally Reed Hundt, *Regulating Indecency: The Federal Communication Commission’s Threat to the First Amendment*, 4 DUKE L. & TECH. REV. 1 (2005) (arguing that the FCC was attempting to use the media to curry favor with the public); Kurt Hunt, Note, *The FCC Complaint Process and “Increasing Public Unease”: Toward an Apolitical Broadcast Indecency Regime*, 14 MICH. TELECOMM. & TECH. L. REV. 223 (2007) (arguing that the public interest groups and procedural changes to the complaint process had manipulated the ideas about public opinion on indecency).

98. *FCC v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502 (2009); *FCC v. Fox Television Stations (Fox II)*, 567 U.S. 239 (2012).

99. *Fox II*, 567 U.S. at 257-58 (2012).

100. *Fox I*, 556 U.S. at 502 (2009).

101. See *id.* at 509-12. In separate instances during the awards show, Nichole Richie stated, “Why do they even call it ‘The Simple Life?’ Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”; Cher stated, “‘I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So fuck ‘em.’” *Id.* at 510.

102. *Id.* at 513-14; see generally 5 U.S.C. §§ 701-706 (2018) (requiring agency rulings to not be “arbitrary, capricious or an abuse of discretion”).

consider the constitutionality of the new rules.¹⁰³ Back at the Second Circuit, the court considered the constitutionality of the FCC's application of the fleeting expletives standards to both the award show broadcasts and nudity aired on ABC.¹⁰⁴ The ABC case involved nudity on a hit drama *NYPD Blue* in which the buttocks of an adult woman was displayed for seven seconds, and the side of her breast was shown momentarily.¹⁰⁵ The Second Circuit found the FCC's rules unconstitutionally vague.¹⁰⁶

Justice Kennedy, writing for the majority when *Fox II* reached the Court, vacated the ruling and remanded the case based on the finding that the FCC's use of the new indecency standard did not provide the proper amount of notice required under the Fifth Amendment's Due Process clause.¹⁰⁷ While the Court ruled in favor of the broadcasters by saying they could not be reprimanded in these cases, the Court did not rule on the constitutionality of regulating fleeting indecency,¹⁰⁸ leaving FCC indecency regulations as is and broadcasters puzzled.¹⁰⁹ Since the Court's ruling in *Fox II*, the FCC "temporarily deferred enforcement action on most indecency cases while awaiting further direction from the courts."¹¹⁰ These cases illustrate the FCC's inconsistency and external dependence in relation to indecency applications.

The Janet Jackson Nip Slip

Significant in the *Fox II* decision is the addition of an indecency case concerned with nudity. Prior FCC actions like *Pacifica* and *Fox I* had considered spoken indecency and the rationale provided for regulating indecent broadcast as based on its aural and not ocular pervasiveness.¹¹¹ But in a case against CBS, the FCC justified its punishment of a fine of more than half a million dollars on the argument that its earlier fleeting indecency exception had only applied to words and not images.¹¹²

103. *Fox I*, 556 U.S. at 529-30.

104. *Fox II*, 567 U.S. at 247-48 (2012).

105. *Id.*

106. *Id.* at 243-52.

107. *Id.* at 258-59.

108. *Id.* at 258.

109. See, e.g., Amy Davidson Sorkin, *The Court Flees from Expletives*, NEW YORKER (June 21, 2012), <https://www.newyorker.com/news/amy-davidson/the-court-flees-from-expletives> [<https://perma.cc/W7R3-WYYR>]; Mike Sacks, *Supreme Court Overturns Fleeting Expletives Ruling, Ducks Larger Issues*, HUFFPOST (June 21, 2012, 10:37 AM), https://www.huffingtonpost.com/2012/06/21/supreme-court-fleeting-expletives-fox-v-fcc_n_1614368.html [<https://perma.cc/CS3X-SDY3>].

110. Peter S. Sloane, Rachel M. Weiss, & Practical Law Commercial, *Advertising: Overview*, THOMSON REUTERS, 7 (2013) https://www.leasonellis.com/wp-content/uploads/2013/11/Advertising-Overview_Marketing.pdf [<https://perma.cc/4F3Y-F5XT>]. Editor's Note: At the time of drafting, the FCC's website still stated that enforcement of indecency complaints were being deferred. At the time of publication, the FCC had removed any mention of deferring enforcement without further guidance from the courts.

111. See *Fox I*, 556 U.S. 502 (2009).

112. See *CBS Corp. v. FCC*, 535 F.3d 167, 172-75 (3d Cir. 2008).

The case regarding nudity on broadcast television involved the halftime show during Super Bowl XXXVIII in 2004.¹¹³ Janet Jackson performed with guest Justin Timberlake, and at the end of a song, Timberlake ripped off a portion of Jackson's costume revealing her bare breast.¹¹⁴ With over 144 million viewers,¹¹⁵ this stunt sparked a deluge of complaints to the FCC with many focusing on the supposed "family" aspect of the Super Bowl.¹¹⁶ Indeed, Nielsen ratings reported that nearly 7 million children aged 2 to 11 watched this Super Bowl.¹¹⁷ In condemning the licensees for airing this live content, the FCC stated that the exposure of Jackson's breast was patently offensive in the context of the sexualized choreography and song lyrics.¹¹⁸ In its decision, the FCC claimed that "the nudity here was designed to pander to, titillate and shock the viewing audience."¹¹⁹ Thus, in conjunction with other cases at the time, the FCC tightened their regulations stating that even fleeting indecency, a one-time exposure, is subject to admonishment.¹²⁰

CBS challenged the fine the FCC imposed on constitutional, as well as statutory and public policy, grounds.¹²¹ The Third Circuit Court of Appeals ruled that CBS's broadcast of the Super Bowl Halftime Show was legal under the FCC's indecency policy—the pre-*Fox I* standards—at the time it aired.¹²² The court reaffirmed its 2008 ruling when it considered the case again on appeal in 2011 and declined to apply the *Fox I* ruling.¹²³ Instead, it distinguished *Fox I* because in that case the FCC had declined to fine the broadcaster.¹²⁴ More importantly, the appellate court reaffirmed its finding that the FCC's argument for the existence of a distinction between words and images was a departure from its previous policy.¹²⁵

Indecency, Nudity and the Breast

Even with the cases noted above that include opinions from both the U.S. Supreme Court and the federal appellate courts, there is little guidance on what kind of nudity, particularly nude breasts, the FCC considers indecent and why. It

113. *Id.* at 171.

114. *Id.* at 172.

115. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 187 (2006).

116. *In re* Complaints Against Various Television Licensees Concerning Their February 4, 2004 Broadcast of the Super Bowl XXXVIII Halftime Show, 19 FCC Rcd. 19230 (2004) (notice of apparent liability for forfeiture) [hereinafter Halftime Show Complaints].

117. Bungard, *supra* note 115, at 187.

118. Halftime Show Complaints, *supra* note 116, at 19235.

119. *Id.* at 19231.

120. Adam Liptak, *Supreme Court Rejects F.C.C. Fines for Indecency*, N.Y. TIMES (June 21, 2012) [<https://perma.cc/WV8M-JUR8>].

121. CBS Corp. v. FCC, 535 F.3d 167, 171 (3d Cir. 2008).

122. *Id.* at 209.

123. CBS Corp. v. FCC, 663 F.3d 122, 134 (3d Cir. 2011).

124. *Id.* at 129-130.

125. *Id.* at 131.

is instructive, then, to examine the nudity-based indecency cases the FCC has decided with an emphasis on those related to naked breasts. A search of the FCC Record since 1986 returned one case in which the FCC discussed its policy on nudity and few cases in which breasts were at the center of an indecency controversy.

In March 2015, the FCC issued its largest fine for a single instance of indecency.¹²⁶ The agency levied the \$325,000 fine against WDBJ for indecency when the station aired a screenshot of a porn site that included a small photo of a hand touching an erect penis.¹²⁷ The screenshot was part of a 6 p.m. news story focused on a former porn star who had become a paramedic in the area.¹²⁸ The station admitted that the broadcast included the photo, but that it was a fleeting instance of indecency as the picture was only onscreen for 3 seconds, and that the photo had not been visible in its editing bay.¹²⁹ The station further argued that it lacked sufficient notice that the FCC would fine material like the screenshot, which aired within the context of a news broadcast.¹³⁰

In assessing the station's arguments, the FCC reiterated its most current definition of indecency: "material that, in context, depicts or describes sexual or excretory organs or activities in terms *patently offensive* as measured by contemporary community standards of the broadcast medium."¹³¹ In its analysis of whether the broadcast was patently offensive, the FCC weighed three key factors: the explicitness of the description, whether the material was repetitive or the main focus of the broadcast, and the intent of the station to pander to the audience.¹³² Significantly, the agency noted that it had not excluded news programming from indecency enforcement.¹³³

As such, the FCC ruled the WDBJ broadcast indecent. The agency found the photo of the manipulation of an erection "extremely graphic."¹³⁴ Further, though only airing for three seconds, the FCC found that this period was not brief enough to not be considered indecent, finding, "Even relatively brief material can be indecent where other factors contribute to a finding of patent offensiveness."¹³⁵ Last, the agency found the broadcast to have pandered to and

126. See Ralph Berrier, Jr., *FCC hits WDBJ with proposed \$325,000 indecency fine*, ROANOKE TIMES (Mar. 23, 2015) [<https://perma.cc/K7Q2-JA5M>]; Ted Johnson, *FCC Slaps Virginia TV Station with \$325,000 Indecency Fine*, VARIETY (Mar. 23, 2015), [<https://perma.cc/TG7G-Y95A>].

127. *In re WDBJ TV, Inc.*, 30 FCC Rcd. 3024 (4) (2015) (notice of apparent liability for forfeiture) [hereinafter *WDBJ TV, Inc.*]. See also Clay Calvert, Minch Minchin, Keran Billaud, Kevin Bruckenstein, & Tershone Phillips, *Indecency Four Years after Fox Television Stations: From Big Papi to a Porn Star, an Egregious Mess at the FCC Continues*, 51 U. RICH. L. REV. 329 (2016).

128. *WDBJ TV, Inc.*, *supra* note 127, at 3024.

129. *Id.* at 3025-26.

130. *Id.* at 3026.

131. *Id.* at 3027 (emphasis original).

132. *Id.*

133. *Id.* at 3028.

134. *Id.* at 3029.

135. *Id.* (citing *Indecency Policy Statement*, 16 FCC Rcd. at 8009, para. 19).

shocked the audience, in spite of the “subjective state of mind of the broadcaster.”¹³⁶ That the photo aired during a bona fide news cast did not shield the station from responsibility for broadcasting sexually explicit materials outside of the designated safe harbor time period.¹³⁷ For its part, WDBJ has challenged the ruling.¹³⁸ There has not yet been a recorded disposition of the challenge.

The WDBJ case involved the accidental broadcast of a screenshot containing the photo of a hand stroking a penis. While providing guidance on the FCC’s most recent adjudication of indecency complaints, the case did not paint a clear picture of the agency’s issue with nude breasts. A search of the FCC Record since 1986 returned few cases in which either the depiction or description of breasts were a part of central indecent materials claim. In a 1987 case in which the FCC fined Infinity Broadcasting for airing the contents of the “Howard Stern” show, the agency included the discussion of “breast size” in its definition of material that could be ruled indecent.¹³⁹ In a 1994 separate Notice of Apparent Liability, the agency found a radio station had aired indecent material based on two instances, one of which included the discussion of whether a caller had “squirted...[her ex-husband] with...breast milk.”¹⁴⁰

Perhaps most interesting is a 1994 memorandum opinion and order from the FCC in which it denies twenty-one complaints from the Parents Television Council.¹⁴¹ Included in the PTC’s complaint was a letter about the broadcast of “The Diary of Ellen Rimbauer” in which viewer’s saw the side of a woman’s breast without view of the nipple.¹⁴² In another instance of complaint, a character on the show “Will & Grace,” speaking about his mother, described his greatest tragedy as “the day they yanked me from the breast of that saint.”¹⁴³ In both of these instances, the FCC called the depiction or description of breasts fleeting and not subject to an indecency finding.¹⁴⁴

Though somewhat interesting, these FCC notices of liability and memoranda do not provide specific guidance on what it is about breasts in particular that the agency finds indecent. The 1994 PTC memo may offer a hint in that the FCC specified that the clip of the side of the woman’s breast that aired

136. *Id.* at 3029 (citing Omnibus Indecency Remand Order, 21 FCC Rcd. at 13305, para. 17 & n. 43).

137. *Id.* at 3031.

138. See John Eggerton, *WDBJ Fights FCC Indecency Fine*, BROADCASTING & CABLE (July 01, 2015) [<https://perma.cc/4YM5-TSTQ>]; Ted Johnson, *Broadcasters Protest FCC Indecency Fine to Roanoke TV Station*, VARIETY (July 28, 2015) [<https://perma.cc/5J3P-Y67M>].

139. *In re* Infinity Broad’g Corp., 2 FCC Rcd. 2705 (9), 2706 (1987). See also, *In re* Infinity Broad’g Corp., 3 FCC Rcd. 930 (4), 932 (1987) (citing WYSP(FM), 2 FCC Rcd. at 2706 6 10).

140. KLZZ(FM), 9 FCC Rcd. 4454 (18), 4454 (1994).

141. Parents Television Council, 20 FCC Rcd. 1920 (3) (2005).

142. *Id.* at 1924.

143. Parents Television Council, 20 FCC Rcd. 1931 (3) (2005).

144. *Id.* at 1938; Parents Television Council, 20 FCC Rcd. 1920 (3), 1927 (2005).

did not contain a shot of the nipple.¹⁴⁵ Yet, a search of the FCC Record since 1986 for notices and other documents on the disposition of nipples returned, as with the earlier noted searches, scant information.

DISCUSSION: FREEING THE NIPPLE FROM ANDROCENTRIC ARGUMENTS

When watching broadcast television, especially primetime dramas, it is apparent that some nudity passes the indecency standards. Bare backs, women in lingerie, and male bare chests are common occurrences on current shows such as *How to Get Away with Murder* (ABC), *The Blacklist* (NBC), *Empire* (Fox), and *The Good Wife* (CBS). Broadcast news shows may even display bare-chested men if the story warrants. In contrast, bare-chested women are almost never depicted. A one-second nipple flash on CBS and side boob on ABC warranted a moral frenzy for the FCC and the public.¹⁴⁶ The difference in reaction between airing a male nipple and female nipple resides in androcentric values and “moral” obligations.

While these arguments only pertain to broadcast indecency, disparate FCC regulations remain a relevant topic to scrutinize. Cable and paid programming channels such as HBO and Showtime are not held to FCC indecency standards¹⁴⁷ and often depict bare-chested women. Watching any one episode of *Game of Thrones* (HBO) or *Masters of Sex* (Showtime) illustrates this. However, broadcast television remains the most pervasive group of channels accessible to every home without any subscription.¹⁴⁸ Thus, the allowances and portrayals on this specific form of media play an important role in the perpetuation of cultural ideologies.¹⁴⁹

Broadcast viewership is steadily declining. The 2018 Grammy Awards lost 6 million live viewers from 2017.¹⁵⁰ However, both time-shifted viewership as reported by Nielsen¹⁵¹ and social media streaming are on the rise.¹⁵² More than five million viewers streamed moments from the Grammys through Facebook live.¹⁵³ In addition, broadcast-only homes rose from 13.1 million in 2016 to 14.7 million in 2017, most likely due to a “cable-cutting” trend.¹⁵⁴ Local news stations have their own apps where viewers can watch segments of their newscast on their

145. Parents Television Council, 20 FCC Rcd. 1920 (3), 1924 (2005).

146. See *CBS v. FCC*, 535 F.3d 167 (3d Cir. 2008); *Fox I*, 613 F.3d 317 (2d Cir. 2010).

147. *Obscene, Indecent and Profane Broadcasts*, *supra* note 65.

148. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

149. See generally CHRIS BARKER & EMMA A. JANE, *CULTURAL STUDIES: THEORY AND PRACTICE* (5th ed. 2016).

150. Adrienne Gibbs, *Grammys 2018 Loses 6 Million in the Ratings Game; Here's Why*, *FORBES* (Jan. 29, 2018, 04:01 PM) [<https://perma.cc/PAP5-T5YZ>].

151. Jon Lafayette, *Nielsen: Live TV Viewing Continues to Decline*, *B&C* (Apr. 3, 2017) [<https://perma.cc/W3YM-ANGZ>].

152. Gibbs, *supra* note 150.

153. *Id.*

154. Lafayette, *supra* note 151.

phone,¹⁵⁵ and paid streaming services such as Netflix, Amazon, and Hulu provide another popular medium for broadcast television shows to be viewed.¹⁵⁶ So while broadcast television may seem to be losing relevancy, new technologies are rendering this argument incorrect. The medium for viewership may be in decline but the content censored by FCC regulations is still prevalent. Examining how the censored culture of broadcast television absorbs and transmits sexist ideologies is ever important due to the wide range of viewers provided through new media. The following section aims to dispel two popular arguments in defense of censoring female nipples on broadcast television: the sexual organ argument and the child protection defense.

The Sexual Organ Argument

The FCC defines indecent material as the patently offensive depiction or description of sexual or excretory organs or activities.¹⁵⁷ Although the FCC emphasizes regulating on a case by case basis, previous cases reveal the Commission's stance on the female nipple as a sexual organ.¹⁵⁸ In the Janet Jackson case, the only FCC case explicitly dealing with the depiction of a female nipple, the agency found the act of exposing the female nipple patently offensive.¹⁵⁹ While the context of the performance—such as the song “Rock my Body” and the sexualized choreography—played a role in its ruling, it was the nudity that was indecent according to the FCC.¹⁶⁰ In succeeding halftime shows featuring performers such as Madonna, Beyoncé, Lady Gaga, and Katy Perry¹⁶¹ with similar sexualized content but no FCC action, it is apparent that the depiction of the nipple was the driving force behind the FCC's ruling. Thus, the FCC defined the female nipple as patently offensive because it was a depiction of a sexual organ¹⁶² and not merely because of the context of the show.

Female nipples are considered sexual organs while male nipples are not. Bare-chested men are a common occurrence, even in sexualized choreography, on broadcast television,¹⁶³ but a female nipple in the same context is considered indecent. Proponents of the sexual organ argument typically cite biology as their main defense. Female and male nipples are biologically different in terms of

155. Jared Newman, *6 Ways to Watch Televised News Without Paying for Cable or Satellite*, TECHHIVE (July 30, 2015, 3:00 AM) [<https://perma.cc/8E9Q-4XHS>].

156. Troy Wolverton, *Netflix, Hulu, and Amazon Prime Offer Similar Fare –But Their Viewers Have Different Habits*, BUSINESS INSIDER (Jan. 24, 2018) [<https://perma.cc/7PNU-RZGF>].

157. *Obscenity, Indecency and Profanity*, FED. COMM. COMMISSION (Feb. 14, 2020) [<https://perma.cc/Q4PK-KXUQ>].

158. Halftime Show Complaints, *supra* note 116, at 19230.

159. *Id.* at 19235.

160. *Id.* at 19236.

161. Nate Peterson, *List of Every Super Bowl Halftime Performer: Timberlake, Lady Gaga, Prince, and More*, CBS SPORTS (Feb. 3, 2018) [<https://perma.cc/4FAC-URKG>].

162. Halftime Show Complaints, *supra* note 116, at 19235.

163. See, e.g., Halftime SuperBowl, *Bruno Mars - Superbowl Halftime Show HD 2014 XLVIII NFL*, at 8:25 (Feb. 3, 2014) [<https://perma.cc/77FL-5R8U>].

development, function, and hormones.¹⁶⁴ However, to say that one is a sexual organ and not the other is incorrect. Female nipples are often described as erogenous zones that enhance sexual arousal for women due to their abundance of nerve tissue.¹⁶⁵ Biologically, both the female and male nipple contain an abundance of nerve tissue making both sensitive to touch and capable of inducing sexual arousal.¹⁶⁶ Dr. Jerry Bergman, a biology and psychology researcher,¹⁶⁷ explained that “[t]he male nipple is equally as sensitive as the female nipple,”¹⁶⁸ and because the male nipple nerves are more compact when compared to the female’s “their sexual stimuli function must be much more focused and discrete.”¹⁶⁹ The capability of sexual arousal by the nipple is hypothesized to be more psychological than biological.¹⁷⁰ Thus, it is not necessarily the biology of the nipple that causes sexual arousal but more so the mind of the individual being aroused.¹⁷¹ If regulations are to define sexual organs by their sexual capacity, then either both the female and male nipple should be labeled as such or neither should be deemed a sexual organ.

It is within culture that the disparities between defining and framing nipples sexually occur. The female breast constitutes a sexual connotation in modern Western society so much so that breastfeeding in public is considered offensive.¹⁷² This perception stems from the patriarchal structure of American society in which hegemonic masculinity presides. Culturally, the female nipple is framed through the male gaze.¹⁷³ Therefore, society as a whole sees the female breast the way males themselves define breasts.¹⁷⁴ Historically, female breasts have been defined as objects of male pleasure that women must conceal to preserve sexual intimacy and male ownership.¹⁷⁵ The female nipple’s “primary aim is to serve the sexual desires of the male partner, and its range of exposure is limited and controlled by him, as his natural, essential right.”¹⁷⁶ In this way, the female nipple is androcentrically defined as a sexual organ.

164. Jerry Bergman, *Is the Human Male Nipple Vestigial?*, 15(2) J. CREATION 38–39 (August 2001).

165. *Id.* at 38.

166. *Id.*

167. *Id.* at 41. Jerry Bergman is a prominent researcher in vestigial organs and evolutionary biology. He has seven degrees including three Ph.D.s from Bowling Green State University and Northwest College, Archbold.

168. *Id.* at 38.

169. *Id.*

170. *Cf.* Stephanie Pappas, *Nipples ‘Light up’ Brain the Same Way Genitals do*, Live Sci. (Aug. 3, 2011) [<https://perma.cc/4TLX-G6UF>].

171. *Id.*

172. Prantik Saha, *Breastfeeding and Sexuality: Professional Advice Literature From the 1970s to Present*, 29 HEALTH EDUC. & BEHAV. 61, 66 (2002).

173. *See* Laura Mulvey, *Visual Pleasure and Narrative Cinema*, in *Visual and Other Pleasures* 14, 19 (Palgrave Macmillan 1989).

174. *See generally* CARTER & CAMPING, *supra* note 26, at 133–54.

175. *Id.*

176. *Id.*

While the sexualization of the female breast is widely a cultural phenomenon, tailoring laws and regulations around this sexualization defines the female body. This perpetuates a sexist message about the female body that is defined through androcentric values: male as the norm and female as the deviation from that norm. Because men see breasts as potentially arousing body parts, they are automatically considered sexual organs. This view stems entirely from a male perspective and completely disregards the use and function of the female nipple as a non-sexual body part. Relying on androcentric measures to define what is appropriate on television reinforces and reproduces this sexist message on a larger mediated scale.

Perpetuation of such sexist ideology resides in large part in media depictions.¹⁷⁷ Studies have shown a correlation between media depictions, media use, and traditional gender ideologies.¹⁷⁸ In examining the hegemonic masculinity dimension of sexualizing women's bodies, researchers found a strong association between male media use and media involvement and support of these traditional sexist views.¹⁷⁹ The more men viewed and engaged with television content, the more likely they were to accept the construction of women as sexual objects and men as sexually driven.¹⁸⁰ Media depictions influence conceptions of gender ideologies as they pertain to women's bodies. The media has such a strong impact on perceptions that "media content may make it difficult for men to see women any other way" than what is communicated through the content.¹⁸¹ It is, therefore, imperative for FCC regulations of broadcast media to not perpetuate or uphold engrained sexist ideologies, but rather use their democratized power to dispel current notions of inequality among genders. Sustaining regulations that treat body depictions of men and women equally can help eliminate the biases in media depictions that partly enculturate sexist mentalities.

In addition, the vagueness and inconsistency of the FCC's indecency regulations causes broadcasters to be especially sensitive to nudity in their airings. The networks have aired films such as *Schindler's List* (1993) that display full frontal female nudity without punishment.¹⁸² However, the safeguarding of this material is defined through its academic use and does not negate the androcentric stigmas surrounding the female breast. The previous cases involving fleeting nudity create a chilling effect for broadcasters that enhances sexist perceptions. The FCC regarded Janet Jackson's exposure indecent because of the full context of the performance, but whether the exposure would be indecent in a less sexualized context is still unclear.¹⁸³ Nudity by itself is not sexual. However, because a clear definition of indecent nudity is lacking,

177. Monique Ward, Ann Merriwether, & Allison Caruthers, *Breasts are for Men: Media, Masculinity Ideologies, and Men's Beliefs about Women's Bodies*, 55 SEX ROLES 703, 705 (2006).

178. *Id.*

179. *Id.*

180. *Id.* at 712.

181. *Id.*

182. WPBN/WTOM License Subsidiary, Inc., 15 FCC Rcd. 1838 (3) (2000).

183. Bungard, *supra* note 115, at 189.

broadcasters may be overly censoring themselves in fear of FCC violations. In addition, the U. S. Supreme Court has not ruled on the constitutionality of regulating fleeting nudity nor reexamined the rulings in *Pacifica* from 1978, a time before extensive cable channels, streaming services, and the internet.

Culture informs media and media informs culture in a circular pattern. Regulations can either conform to this pattern enhancing dominant ideologies or allow for freer expression and debate. The FCC typically relies on public complaints and opinions, but the amount of viewers who complain to the FCC is negligible when compared to the total amount of viewers. For example, the FCC received roughly 542,000 complaints about the Super Bowl incident.¹⁸⁴ This number may seem high but it is actually only 0.4% of the game's 144 million viewers.¹⁸⁵ If the community standard is important in regulating indecency, why does the FCC reprimand broadcasters and create regulations based on opinions of 0.4% of the viewing audience? Herein lies the circularity of perpetuating androcentric ideals and listening only to those who function solely within an androcentric ideology.

The female nipple should not be regulated as a sexual organ. Speaking outside of cultural implications, the male and female nipples hardly differ in sexual arousal capacity. The androcentric, heteronormative standard that a female nipple is sexually explicit must be rejected in order for society to move to a more gender equal state. It is important to allow equality of nudity in broadcasts because of the impact media have on culture and ideologies. Desensitization could benefit society in this case by breaking down androcentric views of female as the other and creating an equal standard of nudity on television. Most importantly, the officiating bodies who govern society must see beyond their androcentric ideology to understand that a topless female is not inherently sexual, just like a male.

The Child Protection Defense

One of the main defenses in regulating broadcasts is the government's compelling interest in protecting children from indecent exposure. Beginning with *Pacifica*, the FCC has continually emphasized the need to protect children from material their parents might not want them to see.¹⁸⁶ Ultimately, this argument undermines the parents' abilities to protect their own children from their definitions of indecency and places the power of censorship in governmental hands. In regards to indecent nudity, there are two faults in this defense: the neglect of indecent violence and the veil to protect society as is.

First, the child exposure defense is obsolete because the FCC fails to protect children from ALL potentially harmful airings. Specifically, the FCC's indecency regulation only covers sexual depictions and descriptions but

184. Joanne Ostrow, *Tame beasts takes burden off advertisers*, Denver Post Corp., Feb. 7, 2005, at D-11.

185. See Bungard, *supra* note 115, at 187.

186. Halftime Show Complaints, *supra* note 116, at 19230.

completely neglects violent depictions.¹⁸⁷ The “Free the Nipple” campaign compares the “indecentcy” of the female nipple with that of violent depictions.¹⁸⁸ The slogan “Why is my nipple more obscene than a murder?” is a clear representation of this comparison.¹⁸⁹ Activists in this regard question how the FCC can regulate the depiction of a natural body part but not the bloody, violent depictions of murder, rape, and assault.

If the FCC is sincerely concerned with protecting children, then violent material on broadcast television is a clear area of concern. Media scholars have shown the effects of violent depictions on children viewers beginning in 1963 with Albert Bandura’s bobo doll social experiments.¹⁹⁰ Bandura asserted that children model their behavior, including aggressive behavior, after a variety of sources including television.¹⁹¹ When violence is depicted on television and young children are frequently exposed, the child may adopt specific behaviors modeled in the violence, mirroring their thoughts, feelings, and actions after the model.¹⁹²

Since Bandura theorized this social learning proposition, many researchers have examined the influence of mediated violence on children. While the debate on short-term versus long-term effects is continual, longitudinal studies and meta-analyses of various social experiments show that a child’s exposure to mediated violence increases their chance to display adulthood interpersonal violence.¹⁹³ In a 2017 review conducted by the Workgroup on Media Violence and Violent Video Games, researchers found “compelling evidence” for both short-term and long-term harmful effects.¹⁹⁴ Through their review of meta-analyses and current research, the researchers confidently stated that “violent media exposure causes increased aggressive thoughts, angry feelings, physiologic arousal, hostile appraisals, aggressive behavior, and desensitization to violence and decreases prosocial behavior (e.g., helping others) and empathy.”¹⁹⁵ More rigorous studies on long-term effects of exposure are needed to fully understand lifetime implications of mediated violence.¹⁹⁶ Exposure to mediated violence is not the only risk factor for aggressive or violent behavior; however, research consistently indicates it is one of the few major risk factors for children.¹⁹⁷

187. 47 CFR 73.3999 (b) (1995).

188. FREE THE NIPPLE, *supra* note 1.

189. *Id.*

190. ALBERT BANDURA & RICHARD WALTERS, SOCIAL LEARNING AND PERSONALITY DEVELOPMENT 163 (1963).

191. L. Rowell Huesmann, AGGRESSIVE BEHAVIOR CURRENT PERSPECTIVES 159 (1994).

192. *Id.*

193. Rowell Huesmann, & Laurie S. Miller, *Long-term effects of repeated exposure to media violence in childhood*, in AGGRESSIVE BEHAVIOR, 155 (1994).

194. Craig Anderson et al., *Screen Violence and Youth Behavior*, 140 PEDIATRICS 142 (2017).

195. *Id.*

196. *Id.*

197. *Id.* at S143.

The Commission opened an inquiry into violence on television and its effect on children in 2004 but has not published any findings nor changed any regulations since then.¹⁹⁸ Thus, with a plethora of current research indicating the harmful effects of violent depictions on children, the question remains why the FCC regulations censor female nipples and not violent depictions. If the argument is truly to protect the children, the FCC is falling short in this regard. Nakedness is a natural and daily experience. Murder and violence on the other hand are not. Exposure to violence is largely a mediated experience for children.¹⁹⁹ Therefore, regulating the female nipple through the need to protect children is a contradictory standard since the FCC completely neglects violent material.

This contradiction begs for an exploration of the meaning behind “protecting the children,” which leads to the second fault in the child defense argument. Do the FCC and the courts truly want to protect our children? Or is it a way to safeguard the morals of society as they stand? In reality, these justifications are a “convenient cover” to regulate the moralities of society.²⁰⁰ What is good and what is bad are purely cultural constructions that policy makers embrace and reinforce through their own constructions. Defending the censorship of material “harmful” to children amounts to the objection of “cultural coarseness in public images and communications.”²⁰¹ But once again, “coarseness” is defined by dominant ideologies reinforced by those in power.

Policy makers continually use large-scale society defenses to perpetuate unbalanced social constructions. The logic follows: What are we saying as a nation if we allow nudity and sexuality on television?²⁰² We must, as policy makers, set a moral tone in order to be a moral society. This is the bedrock of indecency regulation: protecting children is an illusory defense in order to protect the morality of society. The regulation of indecent material on broadcast television is used to set the “moral tone” of society.²⁰³ This argument is typically used in favor of regulating nudity. For example, American viewers do not want to see a female nipple on television because it sets an immoral tone and showcases American culture as sexual. The dominant ideology of morality, therefore, is reinforced and transmitted by FCC indecency regulations.

Indecency standards are arbitrary constructions used to manage broadcasters through a subjective definition of what the public wants. While expletives and nudity may arouse certain negative responses in individuals, these responses are learned through societal standards of right, wrong, and taboo. When governing bodies tell us what is decent and what is not, our constructions

198. Violent Television Programming And Its Impact on Children, 19 FCC Rcd. 14394 (17) (2004).

199. See Anderson, *supra* note 194, at 142-143.

200. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 962 (1998).

201. *Id.*

202. Chad Bungard, *Indecent Exposure: An Economic Approach to Removing the Boob from the Tube*, 13 UCLA ENT. L. REV. 187, 195 (2005).

203. *Id.*

no longer remain our own, but rather they become constructed by a small elite. What ensues is unconstitutional governmental interference and institutionalized taboos which “allows our subconscious feelings to become law and triumph over science and reason.”²⁰⁴ Taboos are wholly culturally bound with no innate wrongness but that which is prescribed.²⁰⁵ Allowing the FCC and the courts to prescribe these taboos themselves permits the exclusivity of cultural standards to be decided by these privileged few. It is imperative that the definition of society remains in the hands of society as a whole, especially in regards to imposing what is decent or indecent.

The child defense argument is a way for governing bodies to institutionalize certain depictions as taboo and reinforce agendas rooted in inequality. Policy makers must argue for the necessity of allowing free expression and equality on television in order to showcase a moral, inclusive culture. Hiding behind children to set an androcentric, sexist precedent for broadcasts sets an immoral, elitist tone. Allowing federal agencies and court systems teeming with white males to define the morals of society perpetuates dominant ideologies that are informed by bedrock sexism. These controls over depictions and exposure may not reflect the views of society as a whole but rather the loudest, most powerful views rendering minority opinions moot.

CONCLUSION

Democracy is intended to ensure that all voices are of equal importance and must be heard. The First Amendment calls for the allowance of free expression in order to create a robust and open marketplace of ideas. While these freedoms are not unlimited, restriction should not be used to stifle ideas that may be offensive to some but overall heighten societal understanding and acceptance. The far-reaching capabilities of broadcasting make it an important medium for the transmission of diverse ideas and speech. This medium can be used to set a moral tone of equality if used beyond the bounds of androcentric values. Depicting equality in terms of nudity dispels sexist views of the female breast and places censorship in the hands of individual parents rather than society-defining laws.

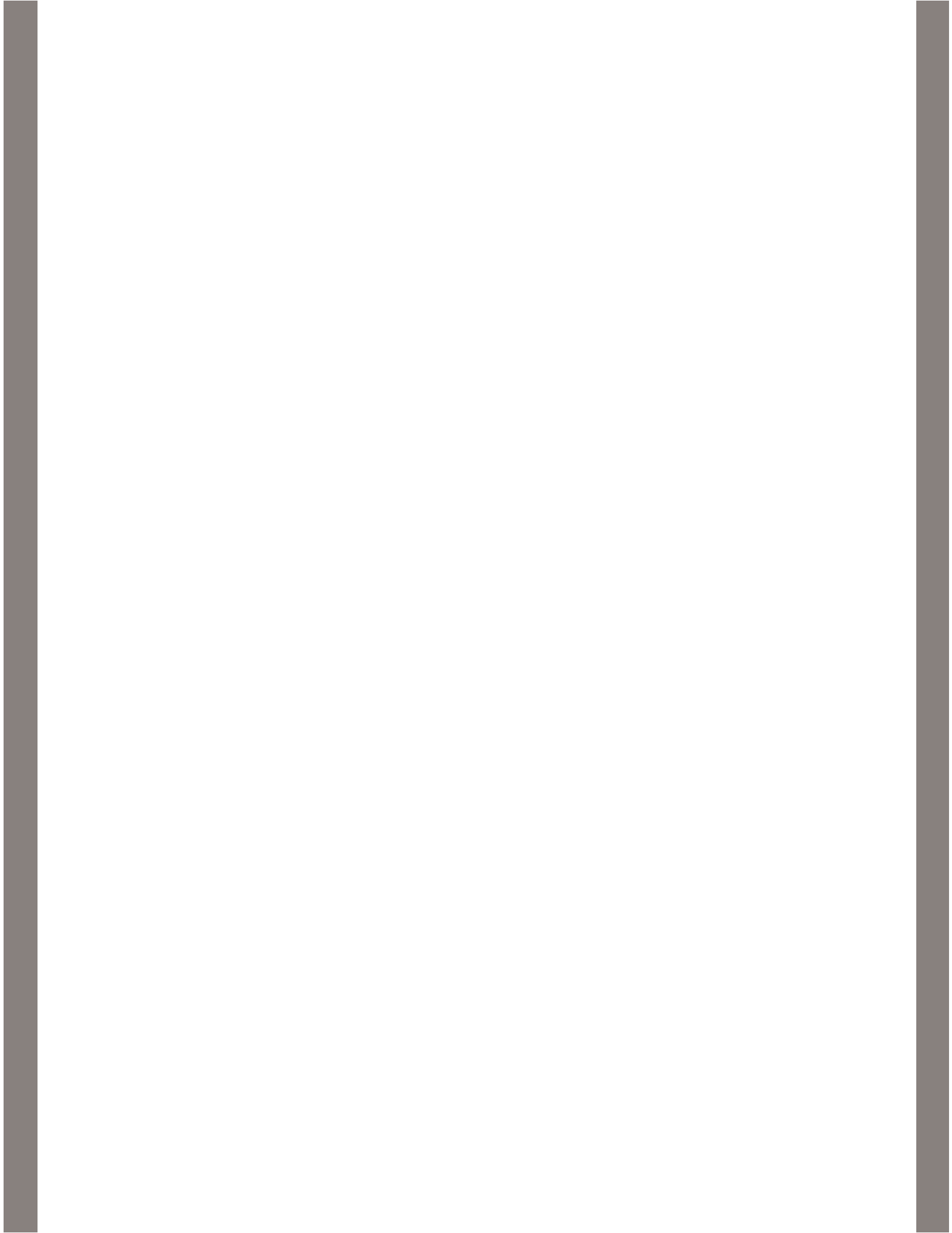
The “Free the Nipple” campaign is an important social movement alongside the many feminist movements of our time. It should not be undermined because of its perceived crudeness or absurdity. Many Americans believed the right for a woman to vote was absurd before 1920. The absurd is defined by the culture of the time and its understanding is bound to evolve. With the rise of the social feminist movement, it is important for policy makers and government agencies to listen, comprehend, and act. These entities represent society and if society is evolving and growing towards equality, so must their policies. Perhaps it is time we listen to the women who make our society great, including the wise words of Supreme Court Justice Ruth Bader Ginsburg: “In my view, the Court’s decision

204. Christopher M. Fairman, *Institutionalized Word Taboo: The Continuing Saga of FCC Indecency Regulation*, 2013 MICH. ST. L. REV. 567, 615 (2013).

205. *Id.*

in *FCC v. Pacifica* was wrong when it issued. Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."²⁰⁶

206. *FCC v. Fox Television Stations, Inc.* 567 U.S. 239, 259 (2012) (Ginsburg, J., concurring).



SEXUAL HARASSMENT AND WISCONSIN'S PROFESSIONAL RULES OF RESPONSIBILITY

Kathryn Potratz[†]

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INTRODUCTION

Several states have studied the ABA Model Rule of Professional Conduct 8.4(g) and have changed their state ethical rules accordingly. Wisconsin has not adopted the exact modernized rule and would benefit from adopting the rule to protect lawyers from harassment in the legal profession. Particularly, female lawyers are often called sexist names in the courtroom by various court players, including, but not limited, to judges and opposing counsel and deserve protection. Sexual harassment should be a recognized reason to impose professional conduct sanctions and disciplinary actions on attorneys. Although the Wisconsin Rules of Professional Conduct reference harassment in the rule, Wisconsin should address the specific issue of sexual harassment and adopt the ABA model rule 8.4(g) and the corresponding Comment 3 of the model rule to put attorneys of all genders on notice that both harassment and discrimination are unacceptable and will result in discipline. Such a rule will better protect lawyers from being both victims and unknowing perpetrators of discrimination.

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BACKGROUND

The general public does not easily understand the process of becoming a lawyer. Not only do candidates have to attend law school, but they must also pass the state-specific bar exam or meet Wisconsin's diploma privilege to be admitted into the Bar.¹ Lawyers do not earn degrees and automatically take to the courtroom; their previous actions are analyzed to determine whether or not they are fit to be an attorney. This practice is known as a character and fitness examination. With this examination in mind, most law schools will not admit prospective students who demonstrate any red flags of serious ethical misconduct that show a pattern of negative behavior.² In the event a candidate meets all of the requirements of bar admission, including the character and fitness examination, the J.D. recipient is then licensed to practice law in that specific state. However, along with a license to practice law comes heightened professional obligations and ethical responsibilities.

Character and Fitness Requirements for Admission to the Bar

Bar applicants must pass a Character and Fitness Examination to practice as attorneys, even after earning their Juris Doctorate. The degree in itself is not enough to become licensed in any particular state. Even Wisconsin, a state with diploma privilege for its law students, requires candidates to pass a Character and Fitness Background Investigation.³ The investigation is designed to ensure all applicants meet the requirements for character and fitness required to practice law. Good moral character and fitness are defined as "the ability to perform one's professional work in an open, honest, and forthright manner."⁴

Almost every U.S. jurisdiction also requires candidates to take and pass the Multistate Professional Responsibility Examination ("MPRE").⁵ The MPRE is a two-hour, 60 multiple-choice question exam developed by the National Conference of Bar Examiners.⁶ The purpose of the exam is to measure

1. See *Diploma Privilege*, U. OF WIS.-MADISON L. SCH., https://law.wisc.edu/current/diploma_privilege/ [<https://perma.cc/53V6-ZV2M>] (last visited Feb. 28, 2020).

2. Shawn O'Connor, *Address Academic, Criminal Mistakes With a Law Application Addendum*, U.S. NEWS (Feb. 2, 2015), <https://www.usnews.com/education/blogs/law-admissions-lowdown/2015/02/02/address-academic-criminal-mistakes-with-a-law-application-addendum> [<https://perma.cc/BF9A-Q3VF>].

3. See *Diploma Privilege*, *supra* note 1. Diploma privilege is a set of course and grade requirements which, if fulfilled, allow a student to be admitted to practice law without taking a bar exam. *Id.*

4. Timothy Dinan, *Bar Application Character and Fitness Background Check – Part 1*, NAT'L JURIST (Mar. 22 2018, 9:47 AM) <http://www.nationaljurist.com/national-jurist-magazine/bar-application-character-and-fitness-background-check-part-1> [<https://perma.cc/MAS2-DZCM>].

5. *Multistate Professional Responsibility Examination*, NAT'L CONF. OF B. EXAMINERS, <http://www.ncbex.org/exams/mpre/> [<https://perma.cc/BEB8-PWZX>] (last visited Feb. 11, 2019).

6. *Id.*

examinees' knowledge and understanding of established standards related to the professional conduct of lawyers.⁷

The good moral character requirement limits admission to the Bar. Candidates are only admitted if they demonstrate the required qualities of character and fitness that are meant to assure, to a reasonable degree of certainty, the candidate's integrity, competence of services performed for their clients, and ability to maintain high standards of professionalism throughout the administration of justice.⁸ The investigation looks at lack of candor, the existence of a criminal record, untreated mental illness or substance abuse, and financial irresponsibility.⁹ In essence, this requirement protects the public from individuals whose past conduct demonstrates an inference that they will not be ethical lawyers.¹⁰ The requirement and processes also are intended to protect the legal profession's reputation.¹¹

Wisconsin is an "integrated bar."¹² This means that to hold a Wisconsin license to practice law, you must belong to the State Bar of Wisconsin.¹³ Candidates are generally admitted to the State Bar of Wisconsin by being sworn-in before the Wisconsin Supreme Court.¹⁴ At the swearing-in ceremony, each candidate must recite the attorney's oath. To qualify for admission to the practice of law, the candidate takes the following oath:

I will support the constitution of the United States and the constitution of the state of Wisconsin; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land; I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge or approval; I

7. *Id.*

8. WIS. SUP. CT. R. 40.06(1).

9. Julie Ketover, *Understand Bar Exam Character, Fitness Requirements*, U.S. NEWS (Jan. 22, 2018), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/2018-01-22/law-school-applicants-understand-bar-exam-character-fitness-requirements> [https://perma.cc/DTD6-D3YA].

10. Mary Dunnewold, *The Other Bar Hurdle: the Character and Fitness Requirement*, 42 STUDENT LAW. 16 (2013).

11. *Id.*

12. *Graduation and Bar Admission*, U. OF WIS.-MADISON L. SCH., <https://law.wisc.edu/studenthandbook/04.0.html> [https://perma.cc/59WD-E6Y5] (last visited Feb. 11, 2019).

13. *Id.*

14. *Id.*

will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice. So help me God.¹⁵

By taking this oath, the candidate publicly acknowledges their professional responsibilities and ethical obligations as a new attorney.

Practicing Attorneys' Professional Responsibilities

A lawyer is not only an officer of the legal system but also a “public citizen having special responsibility for the quality of justice.”¹⁶ This exclusive responsibility mandates every lawyer to “demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.”¹⁷ All lawyers admitted to the Bar must follow the Professional Rules of Conduct.¹⁸ These rules vary from state to state, but the purpose of the rules stays consistent: to hold lawyers to a high standard of conduct and to be available as a self-assessment tool.¹⁹ Lawyers must have special ethical responsibilities to protect themselves and their clients. Furthermore, lawyers have an intimate relationship with the rule of law, making them more responsible than private speakers.²⁰ “Their speech can be limited along lines analogous to government actors because, in a sense, they embody and defend the law itself.”²¹

Consequences for Breaking the Professional Rules of Conduct

“Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”²² The process created by the Rules uses a disciplinary assessment of a lawyer's conduct based on facts and circumstances as they existed at the time of the conduct in question.²³ Additionally, the Rules presuppose whether or not discipline should be imposed for a violation.²⁴ The severity of a sanction depends on all of the circumstances, including willfulness and seriousness of the violation, extenuating factors, and

15. WIS. SUP. CT. R. 40.15.

16. MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE ¶ 1 (AM. BAR ASS'N 2019).

17. *Id.* at ¶ 5.

18. *See generally id.*

19. *See id.* at ¶ 20.

20. *See id.* at ¶ 13.

21. Rebecca Aviel, *Rule 8.4(G) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 34 (2018).

22. MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE ¶ 19 (AM. BAR ASS'N 2019).

23. *Id.*

24. *Id.* at ¶ 20.

whether there have been previous violations.²⁵ Therefore, violating a Rule by itself does not necessarily give rise to sanction.²⁶

The rules do not equate the violation of a rule to the breach of a legal duty.²⁷ However, a lawyer's violation of a Rule may be evidence of a breach of the applicable standard of conduct.²⁸ Every state addresses violations differently. In Wisconsin, the Office of Lawyer Regulation ("OLR") handles investigations and prosecutions.²⁹ The OLR was established "to carry out the supreme court's constitutional responsibility to supervise the practice of the law and protect the public from misconduct by persons practicing law in Wisconsin."³⁰

Following an investigation, the consequences of a rule violation can vary.³¹ In some instances, respondents may qualify for diversion into alternatives to the discipline program.³² Other cases may result in public or private reprimand, license suspension, or revocation of the license to practice law.³³ Suspensions and public reprimands can be embarrassing and potentially bring stigma to respondent attorneys because the public reprimands are published by the Wisconsin Bar and often printed in newspapers.³⁴ Private reprimands are also published by the Wisconsin State Bar but redact personal information.³⁵ The published summaries often include facts and circumstances.³⁶

For example, in May 2004, the Wisconsin State Bar published a private reprimand summary of a SCR 20:8.4(b) violation wherein an attorney was convicted of one count of misdemeanor domestic violence. Wis. SCR 20:8.4(b) states "it is professional misconduct for an attorney to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."³⁷ Under this example, although the reprimand was private, any prospective client could find the domestic violence charge on the attorney's criminal record.

In another example, an attorney that was found to have acted with "offensive personality" in violation of Wis. SCR 20:8.4(g) had his license

25. *Id.* at ¶ 19.

26. *Id.* at ¶ 20.

27. *Id.*

28. *Id.*

29. Office of Lawyer Regulation, WIS. CT. SYS., <https://www.wicourts.gov/courts/offices/olr.htm#about> [<https://perma.cc/89DG-FS5E>] (last updated Feb. 3, 2020).

30. WIS. SUP. CT. R. 21 (referencing the rule's preamble).

31. MODEL RULES OF PROF'L CONDUCT PREAMBLE & SCOPE ¶ 19 (AM. BAR ASS'N 2019).

32. WIS. SUP. CT. R. 22.10.

33. WIS. SUP. CT. R. 22.09, 22.19, 22.20.

34. *See Lawyer Discipline*, WIS. LAW., July 2018, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91&Issue=7&ArticleID=26496> [<https://perma.cc/QNG4-NCHL>].

35. *See Private Reprimand Summaries*, WIS. LAW., May 2004, <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=77&Issue=5&ArticleID=718> [<https://perma.cc/78LE-BK4M>].

36. *Id.*

37. *Id.* (internal quotations omitted).

suspended for four months and was ordered to pay fees for his disciplinary proceedings.³⁸

The Authority of Rules Accompanied by Comments

The Rules of Professional Conduct are authoritative.³⁹ However, the Rules are accompanied by comments which explain and illustrate the meaning and purpose of the rules.⁴⁰ The comments are not authoritative but are intended to be used as guides to the interpretation of the rule.⁴¹ Therefore, important and crucial information and guidelines need to be identified in the text of the Rule itself.

ANALYSIS

Harassment and Discrimination Experienced by Women in the Legal Profession

All genders can be subject to harassment in a work environment; however, women, in particular, have been heavily subjected to harassment in the legal profession. Law is known as a male-dominated field.⁴² Women were not allowed to apply to the Bar until 1920 when women were given the right to vote.⁴³ Despite a woman's ability to be admitted into the Bar, historically, it was extremely difficult for that same woman to get hired by law firms.⁴⁴ Firms explicitly told female law graduates that the firms exclusively hired men.⁴⁵ The Great Depression emphasized the gender gap.⁴⁶ "Women were made to feel guilty if they applied for positions that could be held by a man with a family to support."⁴⁷ Some legislators went so far as to suggest passing legislation that forbade married women from working if their husbands were employed.⁴⁸ During World War II, firms began to hire female attorneys, but they were quickly replaced at the end of the war when the men returned.⁴⁹ It took time and social change to increase the percentage of women working in the legal field as lawyers.⁵⁰

38. *In re Disciplinary Proceedings against Kratz*, 2014 WI 31, 353 Wis. 2d 696, 851 N.W.2d 219.

39. WIS. SUP. CT. R. 20 Preamble ¶ 21.

40. *Id.*

41. *Id.*

42. Amanda Wilks, *What Women Need to Know Before Pursuing a Career in Law*, NOOMII CAREER BLOG, <https://career.noomii.com/everything-need-know-women-career-law/> [<https://perma.cc/6ZAM-NFTP>] (last visited Feb. 11, 2019).

43. Cynthia Grant Bowman, *Women in the Legal Professional From the 1920s to the 1970s: What Can We Learn From Their Experience About Law and Social Change?*, 61 ME. L. REV. 1, 3 (2009).

44. *See generally id.*

45. *Id.* at 4.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 5-7.

50. *See generally id.*

Today, a gender gap continues to exist in the legal profession. For example, only 17% of equity partners in big firms and 22% of general counsel in the Fortune 500 companies are women.⁵¹ Research has shown that women are also significantly less likely to appear in courtrooms, especially as lead counsel.⁵² Women are statistically underrepresented in the legal field.⁵³ Women in the field are often mistaken for custodial staff, administrative staff, or court personnel when going to court.⁵⁴ One female lawyer reports being frequently assumed to be a court reporter.⁵⁵ Even after making partner in her firm, she has been asked if she is a legal administrative assistant on multiple occasions.⁵⁶ Research indicates that while stereotypical and sexist remarks to female lawyers are among the more overt signifiers of discrimination, both stated and implicit discrimination contributes to women's underrepresentation in the legal field.⁵⁷

Name-calling and sexist beliefs further promote male dominance and create inequality in the Courtroom. Women must become accustomed to different treatment in the courtroom. Judges and opposing counsels have been reported as calling female attorneys as "honey" or "sweetie" in the courtroom.⁵⁸ Although some may find this endearing, it is ultimately inappropriate, disrespectful, and demeaning for the professional courtroom environment.⁵⁹

In one specific instance, a female lawyer was told by opposing counsel not to raise her voice at him because "[i]t's not becoming of a woman."⁶⁰ The presiding judge who witnessed the incident commented that the request made by opposing counsel "endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys."⁶¹ "According to a recent Pew Research Center survey, 52% of female respondents opined that a major reason

51. STEPHANIE A. SCHARF & ROBERTA D. LIEBENBERG (Comm'n on Women in the Profession, Am. Bar Ass'n ed.) *FIRST CHAIRS AT TRIAL: MORE WOMEN NEED SEATS AT THE TABLE*, 7 (2015) https://www.americanbar.org/content/dam/aba/marketing/women/first_chairs2015.pdf [https://perma.cc/Q4YV-NSE9].

52. *Id.* at 13.

53. *See generally id.*

54. Kim Elsesser, *Female Lawyers Face Widespread Gender Bias, According to New Study*, FORBES (Oct. 1, 2018, 3:34 PM) <https://www.forbes.com/sites/kimelsesser/2018/10/01/female-lawyers-face-widespread-gender-bias-according-to-new-study/#f75dcd94b55e> [https://perma.cc/7EC8-J3JJ].

55. *Id.*

56. *Id.*

57. SCHARF & LIEBENBERG, *supra* note 51, at 14.

58. Jessica Dafoe, *Lawyers Who Use Terms 'Honey' And 'Sweetie,' Among Others, Will Now Be Fined Or Suspended*, INQUISITR (Aug. 11, 2016), <https://www.inquisitr.com/3408240/lawyers-who-use-terms-honey-and-sweetie-among-others-will-now-be-fined-or-suspended/> [https://perma.cc/R3LT-M3ML].

59. Phil Rosenthal, *See This, 'Honey'? ABA Now Says Lawyers Shouldn't Discriminate, Harass*, CHICAGO TRIB. (Aug. 11, 2016, 6:00 AM), <https://www.chicagotribune.com/business/columnists/ct-rosenthal-lawyers-should-not-discriminate-0811-biz-20160810-column.html> [https://perma.cc/JBG7-Y3FF].

60. Dafoe, *supra* note 58.

61. *Id.*

more women are not in top leadership positions in business is that women are held to higher standards and have to do more to prove themselves; one-third of male respondents shared this view.”⁶²

“Firm culture can be a silent contributor to facilitate discrimination and harassment” because of discrimination by peers and co-workers.⁶³ Scholars have suggested that a “strong mentoring program can also help guide younger attorneys regarding what is and is not appropriate behavior.”⁶⁴ Company social events can also be an effective way to build camaraderie and reward attorneys and staff for their hard work.⁶⁵ However, some social events can be known to cause or encourage inappropriate behaviors or harassment.⁶⁶ Law firms need to be proactive and adjust to modern norms that avoid the dated and unwritten rules that deprive attorneys of equal opportunities within the firm.⁶⁷ For example, firms must abandon the old practice of advising male attorneys to be concerned about their appearance when seen alone with other women that are not their wives.⁶⁸ This practice has recently been referred to as the “Mike Pence Rule,”⁶⁹ the namesake of which is notorious for being vocally against one on one interactions with women who are not his wife.⁷⁰ Such rules emphasize dated notions of heteronormativity and imply that the presence of women is inherently unprofessional.

Some men and women who work together will find themselves targeted with baseless rumors regarding potential intimate relations.⁷¹ To avoid rumors or scandal, “some senior male attorneys in law firms might avoid traveling, attending social events or holding closed-door meetings with their female colleagues and likely would also decline act as a to mentor for a young female attorney.”⁷² An attorney who practices such behaviors ultimately deprives female colleagues of valuable career opportunities based on her sex.⁷³ Females are underrepresented in leadership positions because they are not given the proper mentoring and sponsorship opportunities that can result in promotion.

62. Abigail Perdue, *Man Up or Go Home: Exploring Perceptions of Women in Leadership*, 100 MARQ. L. REV. 1233, 1274 (2017).

63. Shari Klevens & Allana Clair, *Three Tips for Addressing Harassment and Discrimination in Law Firms*; in *Practice*, DAILY REPORT (Nov. 6, 2017, 9:49 AM) <https://www.law.com/dailyreportonline/2017/11/06/three-tips-for-addressing-harassment-and-discrimination-in-law-firms/> [https://perma.cc/3JY5-82JE].

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Aaron Blake, *Mike Pence Doesn't Dine Alone with Other Women. And We're All Shocked.*, WASH. POST (Mar. 30, 2017, 11:15 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/03/30/mike-pence-doesnt-dine-alone-with-other-women-and-were-all-shocked/> [https://perma.cc/28KB-VDFH].

71. Klevens & Clair, *supra* note 63.

72. *Id.*

73. *Id.*

Women already established in the field also experience discrimination. Leslie Vose, an employment lawyer, acknowledged that she has “worked way too hard to have access to golf tournaments and poker games to have a climate where because I’m a woman and I can’t be invited, because it may be misconstrued.”⁷⁴ She argues that her male colleagues are much more comfortable without women.⁷⁵ This likely stems from fear of being accused of sexual harassment, which in turn stems from either lack of education on the dimensions of sexual harassment or from a fear of accountability.

Sexual harassment is different from gender discrimination. It is aggressive behavior exhibited in individuals “who believe that they can use sex to marginalize someone to make them feel small, uncomfortable and vulnerable.”⁷⁶ Any form of unwanted body contact can be seen as harassment. California attorney Paul Kiesel reports that hugs are as common as handshakes in the Beverly Hills legal community.⁷⁷ A former president of the Los Angeles County Bar Association was previously known to hug judges.⁷⁸ However, Mr. Kiesel has stopped hugging people at the office given recent public accusations of sexual harassment involving high-profile figures.⁷⁹ He identifies that his co-workers should not have to express to him that they find hugs uncomfortable, but instead, it is his responsibility to modify his behavior.⁸⁰ He has modified his behavior to now include the verbal use of “air hug” in replacement of a physical hug.⁸¹

Other employment lawyers have also recognized that “[t]he awareness that one’s behavior may make colleagues uncomfortable, [accompanied by] the willingness to stop the conduct in question without resentment, is what’s needed to decrease sexual harassment at work.”⁸² These lawyers say that self-regulation is essential because “the justice system has not proven to be a hospitable venue for victims of sexual harassment or assault.”⁸³ In particular, they point out that an overall lack of gender diversity within the judicial system, an overwhelming male judiciary, high costs of litigation, and the existence of legal rules that prevent disclosure with the practical effect of protecting the accused can all act as deterrents to victims seeking redress in the nation’s courts.⁸⁴

Victims face many deterrents that keep them from reporting sexual harassment, including fear of job loss and limited career opportunities.⁸⁵ When

74. Stephanie Francis Ward, *Time's Up: As the Me Too Movement Continues to Shed Light on Sexual Harassment and Assault, Sparking Changes in Various Industries, the Legal and Judicial Systems Have Been Slow to Adapt*, 104 A.B.A. J. 47, 53 (2018).

75. *Id.*

76. *Id.* at 54.

77. *Id.* at 47.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

an individual does complain, more likely than not, nothing will come from the complaint.⁸⁶ The accused almost always denies the allegation, threatens to quit, and portrays the accuser as a liar or emotionally unstable.⁸⁷ According to a former director of the ABA Commission on Domestic & Sexual Violence, even when employers conduct an investigation, often, the investigation will not result in any changes.⁸⁸ A 2012 study found that when an employer filed for summary judgment in sexual harassment cases where the plaintiff had counsel, 94 percent of the claims were dismissed.⁸⁹

Most recently in 2018, the Seventh Circuit issued summary judgment in favor of the defendants in a sexual harassment claim stating that there is a “high bar” for sexual harassment claims with a presumption that “employees are generally mature individuals with the thick skin that comes from living in the modern world.”⁹⁰ Thus, employers “generally do not face liability for off-color comments, isolated incidents, teasing, and other unpleasantries.”⁹¹ The summary judgment was granted despite the court finding the actions in question were entirely inappropriate and offensive.⁹² This holding affirms the high bar for sexual harassment claims that are still in place.

Given the likelihood of sexual harassment claims being dismissed, many employment lawyers won’t represent a plaintiff unless multiple witnesses are willing to say that accuser harassed them.⁹³ This practice is sometimes referred to as “Bob Packwood syndrome,” stemming from the former U.S. Senator who resigned in 1995 after sexual harassment allegations from staff.⁹⁴ Potential plaintiffs have been told by lawyers that there must be between 5 to 10 others also targeted by the accuser.⁹⁵ Wendi Lazar, who was appointed to the ABA’s Commission on Women in the Profession, acknowledges that while sexual harassment may be less prevalent than gender discrimination in the legal profession, it is still a problem.⁹⁶ A report published in 2018 found that approximately one-quarter of women surveyed conveyed that they had experienced workplace sexual harassment in the form of unwanted romantic or sexual attention or touching.⁹⁷

In 2015, the Iowa Supreme Court disciplined a lawyer for sexually harassing four female clients and one female employee.⁹⁸ Such cases identify that

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Swyare v. Fare Foods Corp.*, 911 F.3d 874, 880 (7th Cir. 2018).

91. *Id.*

92. *Id.* at 881.

93. Ward, *supra* note 74.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Iowa Supreme Court Attorney Disciplinary Bd. v. Moothart*, 860 N.W.2d 598, 601 (Iowa 2015).

employees in law firms are not the only ones facing harassment. In 2013, the Minnesota Supreme Court disciplined a lawyer who, while acting as an adjunct professor and supervising law students in a clinic, made unwelcome comments about a student's appearance, engaged in unwanted physical contact of a sexual nature with the student, and attempted to convince the student to recant complaints she had made to authorities about him.⁹⁹ Sexual harassment claims occur in the legal profession and impact society as a whole. Lawyers communicate with many members of society and are often viewed as the professional upper class and thus are held to high standards of professionalism.

Although some individuals self-regulate their behavior to make colleagues feel comfortable, not everyone has the knowledge or ability to self-regulate behaviors. It is also likely that individuals cannot recognize behavior that is causing colleagues to feel uncomfortable. Self-awareness and regulation are not enough to protect the law firm environment.

History of Rule 8.4(d) and The Fight for its Adoption

Before adopting the new rule, there was no anti-bias language in Rule 8.4(d).¹⁰⁰ The included comments to the rule-expanded the application of the rule; however, the applicable comment, comment three, only covered limited conduct related to the effective administration of justice.¹⁰¹ This comment was adopted by the House of Delegates at the 1998 Annual Meeting with the intent to address three issues:¹⁰²

1) the context in which expressions of bias or prejudice will be subject to possible discipline; 2) the specific characteristics that must not be the basis for bias or prejudice; and 3) a guarantee that the Rule is not intended and will be ineffective to diminish a lawyer's advocacy where a listed characteristic is at issue in a matter.¹⁰³

In 2008, the ABA adopted four goals to serve its mission statement: to serve its members, improve the profession, eliminate bias and enhance diversity, and advance the rule of law.¹⁰⁴ In an effort to further the goal of bias elimination and diversity enhancement, in May 2014 the Commission on Women in the Profession, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Disability Rights, and the Commission on Sexual Orientation and Gender Identity asked the Standing Committee to amend the Model Rules of Professional Conduct to better address the issues of harassment and

99. *In re Disciplinary Action against Griffith*, 838 N.W.2d 792 (Minn. 2013).

100. Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 205 (2017).

101. *Id.* at 206.

102. *Id.* at 211.

103. *Id.*

104. *Id.*

discrimination.¹⁰⁵ Together, they argued that Rule 8.4(d) did not address bias, discrimination, or harassment and did not thoroughly address the scope of the issue in the legal profession or legal system.¹⁰⁶ The Working Committee advocated moving anti-discrimination content from the comment to the rule.¹⁰⁷

The formal rule proposal, known as Resolution 109, took over two years to implement.¹⁰⁸ Several proposals and debates eventually led to the adoption of the new 8.4(g) Model Rule in August 2016.¹⁰⁹ Throughout the process, there were disagreements and arguments. For example, some stated that comment 3 was sufficient to guide the application of the Rule.¹¹⁰ Comment 3 stated that it was professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice.”¹¹¹ The new rule reaches much further than the aforementioned version of comment 3 to include conduct the lawyer knows or reasonably should know is harassment or discrimination based on ethnicity, gender identity, or marital status in conduct related to the practice of law.¹¹²

ABA Adoption of Model Rule 8.4(g)

One reason the ABA adopted Model Rule 8.4(g) was to eliminate bias and enhance diversity.¹¹³ The rule went through multi-faceted critiques and reviews before its passage.¹¹⁴ It was designed to prohibit discriminatory harassment not only in the practice of law but also at bar association meetings and other social functions.¹¹⁵ The ABA identified and acknowledged there was a need for a cultural shift in understanding the inherent dignity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, and for this new understanding to be captured in the rules of professional conduct.¹¹⁶

Attorney Johnson Roberts, chair of the ABA’s Commission on Sexual Orientation and Gender Identity, acknowledged that we have produced generations of lawyers who thought it was okay to act in a harassing or

105. *Id.* at 212.

106. *Id.*

107. *Id.*

108. Suzanne Valdez, *Recent Developments in Ethics: New ABA Model Rule 8.4(g): Is this Rule Good for Kansas?*, CLE AT KU LAW (May 17, 2018) (unpublished manuscript), <https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2018/valdez-materials-session-1.pdf> [<https://perma.cc/J9CS-UQTD>].

109. Halaby & Long, *supra* note 100.

110. Valdez, *supra* note 108.

111. *Id.*

112. Halaby & Long, *supra* note 100, at 202.

113. Valdez, *supra* note 108.

114. *Id.*

115. David Hudson, *States split on new ABA Model Rule limiting harassing or discriminatory conduct*, AM. BAR ASS'N J. (Oct. 2017), http://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct [<https://perma.cc/AV6Z-XQV4>].

116. George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J. L. ETHICS & PUB. POL'Y 135, 140 (2018).

discriminatory manner.¹¹⁷ A lack of regulation produced a culture in which most people think it is acceptable to act this way.¹¹⁸ He believed that by changing the legal culture through Model Rule 8.4(g), it would not only benefit lawyers but also benefit the public.¹¹⁹

The ABA refers to itself as “one of the world’s largest voluntary professional organizations, with nearly 400,000 members and more than 3,500 entities,” but is not a governing body.¹²⁰ Therefore, the Model Rules are not binding.¹²¹ The model rules for the ABA will not necessarily result in action against offenders; they serve as guides and can help state-level officials create their own enforceable rules of professional conduct.¹²² The ABA’s model rules, in other words, helps states set the bar for how attorneys should behave.¹²³ Although there was opposition to the new Model Rule 8.4(g), the rule passed at the August ABA meeting with sixty-nine individuals who wanted to speak in favor of the rule and no speakers in opposition.¹²⁴

New Model Rule 8.4(g) versus the old Rule.

The New Model Rule 8.4(g) reads as follows:

It is professional misconduct for a lawyer to engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹²⁵

The new Rule accomplishes several things. First, it extends its prohibition to behavior that a lawyer does not know, but “reasonably should know.”¹²⁶ This broadens the mens rea requirement. Second, it expands the scope of covered activities from conduct that is “prejudicial to the administration of justice” or that

117. Sarah Larimer, *Why America's Biggest Lawyers Group Finally Took a Stand Against Sexual Harassment*, WASH. POST BLOGS (Aug. 17, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/08/17/why-americas-biggest-lawyers-group-finally-took-a-stand-against-sexual-harassment> [https://perma.cc/7BWT-LURQ].

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2019).

126. Dent, *supra* note 116, at 135.

occurs “in the course of representing a client” to encompass all “conduct related to the practice of law.”¹²⁷ Third, it expands the list of prohibited bases for discrimination.¹²⁸ Comment [3] to the new Rule defines discrimination broadly and also offers a different justification for the new rule. The new Comment [3] reads:

Discrimination and harassment by lawyers in violation of paragraph(g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).¹²⁹

Model Rule 8.4(g) and its corresponding comments are a project that reshapes the norms of the legal profession so that discrimination and harassment become professional misconduct.¹³⁰

Arguments against Model Rule 8.4(g)

Despite the Model Rule’s landslide passage at the annual ABA meeting, there are still critics and states who are not in support of the Rule. The First Amendment supports freedom of speech.¹³¹ The government cannot impose content-based restrictions on speech unless it can survive strict scrutiny, which requires the government to prove that the restriction furthers a compelling state interest and is narrowly tailored to achieve that interest.¹³² The Supreme Court has ruled that “low-value” speech, such as obscenity, defamation, and fighting words, may be restricted because of their content.¹³³ However, the government cannot ban speech simply because it is offensive.¹³⁴

Rule 8.4(g) does impose content-based restraints, barring speech which discriminates “on the bases of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status.”¹³⁵ Therefore, the question is whether or not these restrictions further a compelling state interest and are narrowly tailored to achieve that interest.

127. Dent, *supra* note 116.

128. *Id.*

129. MODEL RULES OF PROF’L CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS’N 2019).

130. Aviel, *supra* note 21.

131. U.S. CONST. amend. I.

132. Dent, *supra* note 116, at 23 (quoting *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2231 (2015)).

133. Dent, *supra* note 116.

134. *Id.*

135. Dent, *supra* note 116, at 24.

Furthermore, the First Amendment forbids vague restrictions on speech.¹³⁶ A law is unconstitutionally vague if persons of “common intelligence must necessarily guess at its meaning and differ as to its application.”¹³⁷ The test does not require objective evidence of harm nor “severe, pervasive, and objectively offensive behavior.”¹³⁸ It only requires that the accused discriminator has uttered a statement about an included matter that someone considers “unreasoned” and, potentially, that someone has been bothered by the statement.¹³⁹ Accordingly, the rule is vaguer and more subjective than any other rule against discrimination or harassment.¹⁴⁰

Previous rules only forbade knowing conduct.¹⁴¹ However, the new rule forbids “conduct that the lawyer knows or reasonably should know is harassment or discrimination.”¹⁴² This is viewed as a negligence standard.¹⁴³ Model Rule 1.0(j) defines “reasonably should know” to denote “that a lawyer of reasonable prudence and competence would ascertain the matter in question.”¹⁴⁴ This develops an objective standard test that evaluates whether a lawyer of reasonable prudence and competence would have comprehended the facts in question.

Based on the current evolving education and awareness of harassing and discriminatory behavior, it is not clear what a lawyer reasonably should know is harassing or discriminatory, and there is no authority outside of the model rules that explains what “reasonably should know” means.¹⁴⁵ The culpability standard or “reasonably should know standard” is troubling because professional discipline is the consequence for violating the Rule.¹⁴⁶ The United States Supreme Court has referred to the disciplinary process as quasi-criminal.¹⁴⁷ A lawyer could lose their ability to earn a living if he or she is found to have violated a Rule.¹⁴⁸ Therefore, the vagueness of the standard can be identified as a First Amendment issue.¹⁴⁹

Critics have suggested that Rule 8.4(g) could be applied to prohibit pure political speech because it is insulting or offensive.¹⁵⁰ This would make the rule a regulatory effort the Court has previously rejected.¹⁵¹ Both Attorneys General of South Carolina and Texas have expressed concerns that lawyers could be

136. U.S. CONST. amend. I; *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1050-51 (1991).

137. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

138. Dent, *supra* note 116, at 7.

139. Dent, *supra* note 116.

140. *Id.*

141. Dent, *supra* note 116, at 9.

142. Dent, *supra* note 116.

143. *Id.*

144. MODEL RULES OF PROF'L CONDUCT r. 1.0(j) (AM. BAR ASS'N 2018).

145. Dent, *supra* note 116 at 9.

146. Dent, *supra* note 116, at 10.

147. Dent, *supra* note 116.

148. *Id.*

149. *Id.*

150. Aviel, *supra* note 21, at 37.

151. *Id.*

subject to discipline for belonging to a religiously-affiliated group that opposes the acknowledgment of same-sex marriage, or simply discussing controversial topics that touch upon the protected categories: “candid dialogues about illegal immigration, same-sex marriage, or restrictions on bathroom usage will likely involve discussion about national origin, sexual orientation, and gender identity.”¹⁵² Model Rule 8.4(g) subjects many participants in such dialogue to discipline because a single comment could be grounds for disciplinary liability.¹⁵³ Based on some of the raised concerns, some states are still researching whether or not their state should adopt the Rule.

Arguments in favor of Model Rule 8.4(g)

Despite the counterarguments, Model Rule 8.4(g) is necessary to enforce anti-discrimination principles. The Rule does not raise any First Amendment problems.¹⁵⁴ It is not unprecedented or troubling for the Bar to regulate conduct that is related or connected to the practice of law.¹⁵⁵ The use of vulgar, abusive or racist/sexist language “is not in any proper sense . . . safeguarded by the Constitution.”¹⁵⁶

Rule 8.4 has yet to be held as unconstitutional.¹⁵⁷ The Rule is not vague and provides thorough detail and inclusions to protect certain types of discrimination and harassment from occurring.¹⁵⁸ Additionally, the inclusion of the “reasonably knows” requirement works to combat overaggressive prosecutions of 8.4(g) violations and is intended to put concerned lawyers at ease.¹⁵⁹ The argument against the Rule is based on a false view of bar authority as currently being limited to the public spheres of an attorney’s life, an idea that is easily refuted by analyzing the existing scope of professional responsibility.¹⁶⁰

Lawyers have such an intimate relationship with the law that they are not purely private speakers.¹⁶¹ Their speech can be limited along lines comparable with government actors because, in a sense, they embody and defend the law itself.¹⁶² Lawyers “do not enjoy the same freedom from restrictions on [free speech] rights as do ordinary citizens, especially with respect to actions undertaken in their professional capacity as attorneys.”¹⁶³ Professionals, and

152. Aviel, *supra* note 21, at 46-47.

153. Aviel, *supra* note 21, at 37.

154. *Id.*

155. *Id.*

156. *In re Gerstein*, M.R. 18377, 99 SH 1 (August 12, 2002).

157. *In re Gerstein*, M.R. 18377, 99 SH 1 (August 12, 2002); *See also In re Amu*, 2011 PR 106 (December 13, 2013).

158. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2019).

159. Katie Wroten, “G” Is More Than “PC” For Georgia: Why Prospective Adoption of ABA Model Rule 8.4(g) Is a Viable Measure to Combat Discrimination and Harassment, 52 GA. L. REV. 341, 373 (2017).

160. Aviel, *supra* note 21, at 37.

161. Aviel, *supra* note 21, at 34.

162. Aviel, *supra* note 21.

163. *In re Gerstein*, *supra* note 156.

lawyers in particular, are looked up to and admired by the general public.¹⁶⁴ Society assumes that lawyers will act ethically since they are in the profession of the administration of justice. Therefore, it is acceptable that the Rule reaches lawyerly conduct outside the courtroom, including at law firm gatherings, ABA meetings, and other law-related functions.¹⁶⁵ For example, when Attorney Horsch was passed out in a vehicle and violating both past OWI convictions and limitations on his license, his law license was suspended.¹⁶⁶ A lawyer who continuously violates the law and operates a motor vehicle while intoxicated putting the public in danger is not acting in a way that respects and upholds the law.

This new rule infuriates a small section of lawyers who believe that the rules of professional conduct should be confined to adjudication or dealings with clients.¹⁶⁷ This group wrongly believes that being a lawyer is merely wearing a transient cloak in a court of law, and no more.¹⁶⁸ For example, law firm social events can be a great way to build camaraderie and to reward attorneys and staff for their hard work.¹⁶⁹ However, some social events can be ripe for harassment or other inappropriate behaviors.¹⁷⁰ Lawyers need to be held accountable for their actions in all situations as officers of the court. Holding lawyers accountable for their actions outside of the courtroom and within society can further decrease the discrimination occurring in law firms across the country. The Rule affirms that no lawyer or law firm is immune from the law or ethics.¹⁷¹

The Rule also informs the bar as a whole that its licensing authority deems harassment and discrimination as unacceptable.¹⁷² It serves as guidance to young attorneys to teach them what is acceptable in the workplace.¹⁷³ This impacts the work environment and creates a new generation of societal norms.¹⁷⁴ The purpose of the Rule is not to limit or hinder the speech of lawyers. As stated earlier, the ABA created the Rule to help eliminate bias and enhance diversity.¹⁷⁵ The Rule was passed by the ABA, which is made up of lawyers who are currently

164. Marvin W. Mindes & Alan C. Acock, *Trickster, Hero, Helper: A Report on the Lawyer Image*, 7 AM. BAR FOUND. RESEARCH J. 177 (1982).

165. Liaquat A. Khan, *Disciplining Lawyers for Harassment and Discrimination*, HUFFINGTON POST (Jul. 12, 2017), https://www.huffingtonpost.com/entry/disciplining-lawyers-for-harassment-and-discrimination_us_5962c774e4b0cf3c8e8d59d [<https://perma.cc/U63X-U3DD>].

166. *In re Disciplinary Proceedings Against Horsch*, 2017 WI 105, 378 Wis. 2d 554, 905 N.W.2d 129.

167. Khan, *supra* note 165.

168. *Id.*

169. Klevens & Clair, *supra* note 63.

170. *Id.*

171. *Sexual Harassment: What If it Happened at Your Firm?*, FINDLAW, <https://careers.findlaw.com/legal-career-assessment/sexual-harassment-what-if-it-happened-at-your-firm.html> [<https://perma.cc/Q2M9-YCCM>] (last visited Feb. 12, 2019).

172. Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 200 (2017).

173. Klevens & Clair, *supra* note 63.

174. *Id.*

175. Halaby & Long, *supra* note 100.

in the profession. The ABA believes that the Rule is appropriate and necessary, and the few lawyers who oppose the Rule are insensitive and more worried about preserving their own choices than protecting the rights of other co-workers and individuals in the profession.

Discrimination and harassment have been highlighted in modern-day society and continue to be a growing issue across the globe. For lawyers and upstanding citizens of society, rules need to be implemented to continue to enforce professional morals and ethics. While some states already have pre-existing Rules similar to the ABA Model Rule 8.4(g), other states have no language in their Disciplinary Rules of Professional Conduct addressing discrimination. The Professional Rules of Conduct need to continue to evolve with the changing values and issues in modern-day society.

Wisconsin's current Ethical Rule

Wisconsin's current misconduct rule does not include or reference discrimination explicitly. While harassment is referenced, the Rule is mute on the overarching issue of discrimination. It is necessary that Wisconsin expand and modernize the current misconduct rule to put lawyers on notice of behaviors that constitute misconduct, to ensure that everyone understands the rule in its entirety for the main goal of protecting lawyers from being both victims and perpetrators of discrimination. Like any other state, Wisconsin has had disciplinary proceedings regarding discrimination by lawyers.¹⁷⁶

In October of 2009, Wisconsin District Attorney ("DA") Ken Kratz sent multiple inappropriate text messages to the victim of a domestic abuse case he was prosecuting. One text read, "are you the kind of girl that likes secret contact with an older married elected DA ... the riskier the better?"¹⁷⁷ This type of conduct is sickening and unacceptable. Victims should not have to suffer further victimization by legal professionals whose job it is to protect victims and the public.

This specific victim reported the Attorney Kratz's conduct to her local police department, who referred the matter to the State of Wisconsin Department of Justice ("DOJ").¹⁷⁸ The DOJ determined that there had not been any criminal activity, but strongly suggested that Attorney Kratz self-report his conduct to the Office of Lawyer Regulation ("OLR").¹⁷⁹ Kratz followed the suggestion and sent a letter to the OLR in December 2009.¹⁸⁰ However, in his letter to the OLR, he framed his conduct as trying to seek a personal "friendship" with the victim.¹⁸¹

The OLR brought a complaint against Attorney Kratz, which included an additional count against the involving verbal statements Kratz made to a Calumet

176. See, e.g., *In re Disciplinary Proceedings against Kratz*, 2014 WI 31, ¶ 12, 353 Wis. 2d 696, 851 N.W.2d 219.

177. *Id.*

178. *Id.* at ¶ 15-16.

179. *Id.* at ¶ 17.

180. *Id.* at ¶ 19.

181. *Id.*

County Social Worker.¹⁸² During a court proceeding, Kratz commented that the social worker had “big beautiful breasts.”¹⁸³ Kratz was not only an appointed government judicial actor, but also the chairman of the Wisconsin Crime Victims’ Rights Board.¹⁸⁴ The OLR held that Kratz’s conduct violated Wisconsin’s Rule 8.4(i).¹⁸⁵ He subsequently had his license suspended for four months.¹⁸⁶ He was also forced to resign from his chairman position.¹⁸⁷ In September 2010, the executive committee of the Wisconsin District Attorneys Association issued a letter asking for his resignation.¹⁸⁸ However, he did not resign from his position as DA of Calumet County until October 2010, when the then-Governor James Doyle began removal proceedings against him pursuant to Chapter 17 of the Wisconsin Statutes.¹⁸⁹

This specific example of misconduct identifies the modern-day issue of harassing behavior. Attorney Kratz’s behavior was directed towards vulnerable women who were subordinate to him. He used his position as a legal professional to further victimize victims. Lawyers must be regulated to deter harassing conduct that hinders the Criminal Justice System and causes discrimination.

Wisconsin is able to sanction the aforementioned behaviors based on its professional responsibility rules and guidelines. However, based on the complaints made to the OLR, Attorney Kratz likely engaged in other acts of misconduct similar to those explicitly identified. Harassment does not typically occur once or twice but develops into a pattern or habit, and can be sometimes be viewed as actions taken “all in good fun.” That is not the case.

Wisconsin’s current Misconduct Rule states that:

[I]t is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; (d) state or imply an ability to influence improperly government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; (e) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or (f) violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers; (g) violate the attorney’s oath; (h) fail to cooperate in the investigation of a

182. *In re Disciplinary Proceedings against Kratz*, 2014 WI 31, ¶ 25.

183. *Id.*

184. *Id.* at ¶ 18.

185. *Id.* at ¶ 28.

186. *Id.* at ¶ 2.

187. *Id.* at ¶ 18.

188. *In re Disciplinary Proceedings against Kratz*, 2014 WI 31, ¶ 21.

189. *Id.* at ¶ 22.

grievance filed with the office of lawyer regulation as required by SCR 21.15(4), SCR 22.001(9)(b), SCR 22.03(6), or SCR 22.04(1); or (i) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with the lawyer's professional activities. Legitimate advocacy respecting the foregoing factors does not violate par. (i).¹⁹⁰

The comment is followed by a committee comment identifying that

[F]ailure to cooperate, paragraph (h), was previously enforced as a violation of paragraph (f). Paragraph (h) was added to the rule to provide better notice to lawyers of the obligation to cooperate. Other statutes, rules orders, and decisions continue to be included within the definition of misconduct and are enforceable under paragraph (f).¹⁹¹

Wisconsin is already ahead of several states which do not reference harassment in their ethical rules. Wisconsin has attempted to provide notice to Wisconsin lawyers. Wisconsin has taken steps to identify misconduct more explicitly, although the rule still lacks the overall inclusion of discrimination. Harassment and discrimination are two words that are often used interchangeably. However, these words do not have the same legal meaning. Harassment can be defined as unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.¹⁹² Discrimination is a concept broader than harassment and is understood as a prejudicial outlook, action or treatment.¹⁹³ Harassment is a form of discrimination.¹⁹⁴ It is possible that an individual can be discriminated against without being harassed. Therefore, the two words are not interchangeable. For example, when female attorneys are not invited to various law firm golf outings or parties, the female attorneys are being discriminated against on the basis of their sex and their careers suffer. They miss out on opportunities that they otherwise would have had if not for their sex; however, this conduct would not classify as a hostile work environment.

Wisconsin relies on its lawyers to know not only the Rules of Professional Responsibilities but also every comment to those Rules. This is a lot to ask of

190. WIS. SUP. CT. R. 20:8.4.

191. *Id.*

192. *Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/9R3A-DSJS>].

193. *Discrimination*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/discrimination> [<https://perma.cc/J3VY-4RE8>].

194. *Laws & Guidance*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/> [<https://perma.cc/C854-2HU4>]; *Discrimination in Employment*, DEP'T OF WORKFORCE DEV., <https://dwd.wisconsin.gov/er/civilrights/discrimination/default.htm> [<https://perma.cc/QY3F-BBZS>].

lawyers who are continuously learning new statutes, local rules, and regulations. The law is subject to change, but fundamental values and guidelines should be held constant and upheld by every jurisdiction. Regulation committees and Judges also need to know and be familiar with the rules and the comments to follow constitutional due process allowing notice.¹⁹⁵

Wisconsin mandates law students take a course in Professional Responsibilities during law school. This helps ensure that new lawyers are aware of the professional guidelines that must be followed once they are licensed attorneys. However, this is just another course added to a student's course load. Students are not given the time to give full attention to the course when attending to other courses and other law school extracurriculars. Each professor may also teach the course differently, focus on specific rules that they deem important, and skip others over they find irrelevant. In addition to different teaching methods, there is a vast difference in how students are evaluated on their knowledge.

Passing the course is not a good indication that the students are truly understanding of the professional rules. Every semester, law students are given different examinations. This means that if Student A took Professional Responsibilities in the Spring of 2018, and Student B took the class in the Fall of 2018, they would not be taking the same exam. This practice is implemented to assure that students are not looking at old tests, memorizing the answers, and regurgitating the information. Instead, it is intended to assure that students' knowledge and understanding of the material is being adequately tested. This is problematic because there is no standard exam. Wisconsin is one of the last states not to require students to take the MPRE.¹⁹⁶ Therefore, the Bar cannot simply rely on students knowing and understanding every Wisconsin Rule. It is essential that Wisconsin take action to make Rules understandable, easily accessible and all encompassing.

Clear rules allow lawyers to have notice of the actions and behaviors that may be considered misconduct. This will limit the likelihood that constitutional challenges will be brought against the Rules. The Wisconsin Rules do not require intent for misconduct.¹⁹⁷ The ABA's Model Rule 8.4(g) does require a knowledge component.¹⁹⁸ Clear Wisconsin Rules will ensure that lawyers are aware of behavior that constitutes misconduct and will, therefore, have notice and time to avoid participating in such behavior.

Adding discrimination explicitly to the Rule would further promote and serve the goal of clarity. If lawyers are to be held accountable by their actions, the Rule should explicitly identify what actions are misconduct and should protect lawyers from all types of discrimination. This would avoid ambiguity.

If the model rule had previously been adopted, the Calumet County Social Worker harassed and discriminated by Attorney Kratz may not have had to been

195. See U.S. CONST. amend. XIV.

196. *Multistate Professional Responsibility Examination*, National Conference of Bar Examiners, <http://www.ncbex.org/exams/mpre> [<https://perma.cc/3EFP-E64Y>] (last visited Feb. 11, 2019).

197. WIS. SUP. CT. R. 20:8.4.

198. Halaby & Long, *supra* note 100, at 243.

victimized. If the rule was clear that discrimination was misconduct, Attorney Kratz may have been able to avoid engaging in such behaviors for as long as he did. Instead of arguing that he did not find his actions and comments to be harassing, he would have to show that they were also not discriminatory in nature. This would be difficult if not impossible to do. Additionally, the precise letter of the Rule would follow Constitutional Due Process rights. All individuals are entitled to fair treatment under the United States Constitution, the State of Wisconsin Constitution, and procedural due process.

Instead of using the Model Rule as a simple guideline, Wisconsin should implement the Rule studied, reviewed, and approved by the ABA. The clear, studied rule provides appropriate guidelines for misconduct and protects the legal profession. Vermont has already adopted the exact language of Model Rule 8.4(g).¹⁹⁹ Other States, including, but not limited to Colorado, Connecticut, Maine, and Michigan, are studying Rule 8.4(g) before implementing the Model Rule.²⁰⁰ Wisconsin is currently not studying Model Rule 8.4(g).²⁰¹ Other states are evaluating their current rules and modernizing their professional responsibilities as they see fit. Wisconsin needs to follow in order to promote an equitable justice system for those who both go through the system and work within the system.

CONCLUSION

Harassment and discrimination based on sex is a prevalent issue in the legal profession. Women are not treated equally and are still seen as inferior to their male colleagues. As professionals, lawyers need to be able to treat everyone with dignity and respect and act in accordance with the law. Female lawyers should not encounter obstacles as they seek to work towards partnership with a law firm. Victims and other court players should not be harassed and victimized by offensive behavior that goes against not only the professional rules of conduct but also the attorney's oath. Lawyers need to uphold public confidence in the legal profession to foster trust in lawyers as professionals, which will have a positive effect on the relationship between attorneys and their clients.²⁰² This will further build and foster an environment conducive to strong attorney-client relationships leading to a higher quality of legal services and work environments.²⁰³

Lawyers are taught how to argue and see loopholes in the law. Creating a Rule that is clear, authoritative, and enforceable is essential to following a uniform regulation process. The Rules should not leave room for arguments to be made by lawyers who engaged in misconduct. Lawyers should not have the ability to argue that they did not know that it was a violation or sanctionable behavior because the Rule was not clear. If Lawyers want to continue to be

199. *Variations of the ABA Model Rules of Professional Conduct, Rule 8.4: Misconduct*, 2019 A.B.A. CTR. FOR PROF. RESPONSIBILITY, CPR POL'Y IMPLEMENTATION COMM.

200. *Id.*

201. *Id.*

202. Wroten, *supra* note 159.

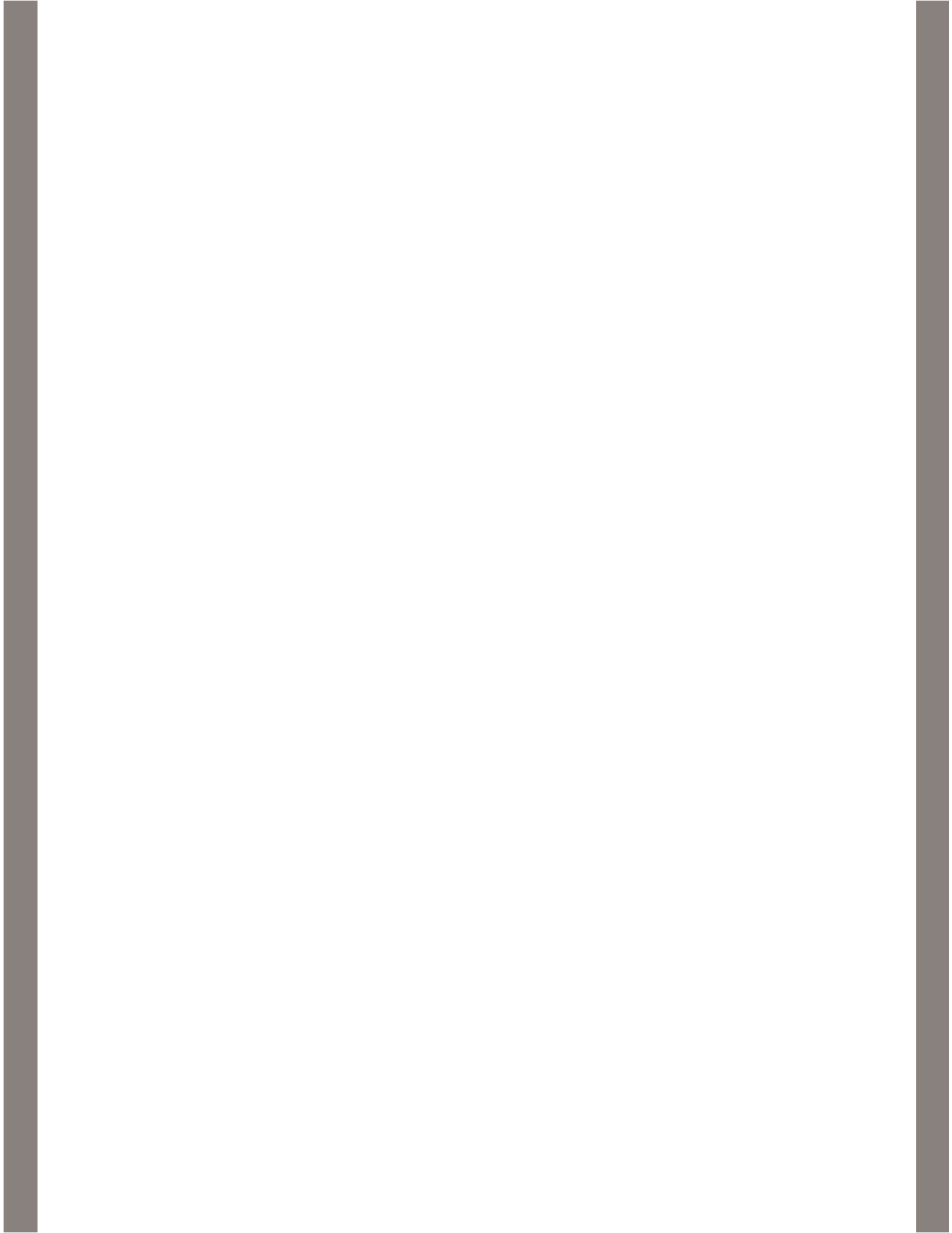
203. *Id.*

identified as professionals who regulate themselves and hold each other accountable for their behavior, the Rules need to help with this process and not hinder it through vague unauthoritative guidelines.

Wisconsin should avoid this issue by addressing discrimination and making such misconduct clear, easy to enforce, and identifiably authoritative. Adopting this change would assure attorneys and the public that Wisconsin is taking affirmative steps towards creating an environment of inclusion and equity within the legal profession.

Unfortunately, no rule will ever reach perfection because the language of a Rule is an art and not an exact science. However, Rule 8.4(g) drafters carefully considered constitutional issues and sought to address these concerns in the Model Rule.²⁰⁴ Adopting a carefully drafted anti-bias and discrimination rule is a positive step towards advancing the profession, its integrity, and its commitment to justice.

204. Wroten, *supra* note 159, at 374.





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