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PORNOGRAPHY AS TRAFFICKING†

Catharine A. MacKinnon*

In material reality, pornography is one way women and children are trafficked for sex. To make visual pornography, the bulk of the industry's products,¹ real women and children, and some men, are rented out for use in commercial sex acts. In the resulting materials, these people are then conveyed and sold for a buyer's sexual use. Obscenity laws, the traditional legal approach to the problem, do not care about these realities at all. The morality of what is said and shown remains their focus and concern. The injuries inflicted on real people to make the materials, or because they are used,² are irrelevant to what is illegal about obscenity.³ Accordingly, as the trafficking constituted by the exhibition, distribution, sale, and purchase of materials that do these harms is ignored. Laws against sex trafficking, international and domestic, criminal and human rights laws—specifically their concept of

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1. Paul Fishbein, founding president of Adult Video News, estimated to CBS News that some 800 million so-called adult videos are rented each year in the United States alone, earning an estimated \$20 billion annually in a global industry estimated to earn \$57 billion annually. See Richard Corliss, *That Old Feeling: When Porno Was Chic*, TIME, Mar. 29, 2005, <http://www.time.com/time/columnist/corliss/article/0,9565,1043267,00.html>. Much of the pornography industry remains organized crime, making it unlikely that all earnings are reported anywhere. See U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 277-98 (July 1986), available at <http://www.communitydefense.org/lawlibrarylagreport.html> [hereinafter FINAL REPORT].

2. As to pornography, these injuries are documented in testimony in IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catharine A. MacKinnon & Andrea Dworkin eds., 1997) [hereinafter HARM'S WAY]. As to prostitution, they are documented in *Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 33 (Melissa Farley et al. eds., 2003) [hereinafter Farley I]. See also NOT FOR SALE: FEMINISTS RESISTING PROSTITUTION AND PORNOGRAPHY (Christine Stark & Rebecca Whisnant eds., 2004) [hereinafter NOT FOR SALE].

3. This analysis is argued in Catharine A. MacKinnon, *Not a Moral Issue*, in FEMINISM UNMODIFIED 146 (1987). Canadian obscenity law provides a partial exception, criminalizing the "undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence," Canada Criminal Code, R.S.C., ch. C-46, § 163(8) (1985). This provision and has been interpreted on a gendered harm theory. See Regina v. Butler, [1992] S.C.R. 452.

commercial sexual exploitation, around which international consensus is growing⁴—recognize the realities of the global sex industry increasingly well. These provisions are more promising for addressing pornography than has been recognized.

I. REALITIES AND CONCEPTS

Pimps are typically paid for the sexual use of the real people who are bought and sold to engage in the sex acts for money that are what most pornography is made of. The pornographers then are paid to re-pimp these people in the pornography itself, producing sexual pleasure for the consumers and immense profits for the pornographers, which both seek to repeat. From the standpoint of the person used to make the materials, the image of the person is still that person. And the sexual use of the person in the materials by the consumer is a real, actual, sexual act for the user. When Linda Boreman said, “every time someone watches that film, they are watching me being raped,”⁵ she did not say they are watching the rape of “an image of me” or “a representation of me” being raped. If these were anything but sex pictures, the rights of the people in them over the materials made by their use would be legally recognized.⁶ Defamatory lies about them in pornography, for example, destroying their reputations, would be actionable.⁷ Knowing the pornography of you is always out there is a particular kind of trauma.⁸

4. In addition to the other citations in this analysis, one example is the 2005 trafficking resolution adopted by the United Nations Commission on the Status of Women, *Eliminating Demand for Trafficked Women and Girls for All Forms of Exploitation*. E.S.C. Res. 49/2, U.N. ESCOR Commission on the Status of Women, 49th Sess., Supp. No. 7, at 13, U.N. Doc. E/CN.6/2005/11 (2005).

5. *The Minneapolis Hearings*, in HARM'S WAY, *supra* note 2, at 65 (testimony of Linda Marchiano).

6. For an early analysis of the largely unsuccessful attempts of women in sexual materials to protect their privacy rights, see Ruth Colker, *Pornography and Privacy: Towards the Development of a Group-Based Theory for Sex-Based Intrusions of Privacy*, 1 LAW & INEQ. 191 (1983). See also *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989) (dismissing all libel and privacy violation claims made against a pornographic magazine which had used Dworkin's name in sexually explicit cartoons and finding that she had no proprietary interest she could protect). For a discussion of a history of similar U.S. cases, such as one in which a judicial remedy was denied an actress in a Wasa Bread ad for its unauthorized modification in pornography, see Lisa R. Pruitt, *Her Own Good Name: Two Centuries of Talk About Chastity*, 63 MD. L. REV. 401, 475 (2004) (describing *Geary v. Goldstein*, 831 F. Supp. 269 (S.D.N.Y. 1993)).

7. That pornography has carved out for itself a de facto legal exemption from the law of libel, which in the United States is not that robust to begin with, is clear from the rulings in *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188 (9th Cir. 1989), *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988), and many others.

8. Preliminary results of a study of 854 prostituted women in nine countries reveal that women in prostitution who had pornography made of them in prostitution had signifi-

Although legitimate corporations increasingly traffic the materials, the pornography industry, like other means of human trafficking, remains at base an organized crime industry built on force, some physical, some not.⁹ As with all prostitution, the women and children in pornography are, in the main, not there by choice but because of a lack of choices. They usually "consent" to the acts only in the degraded and demented sense of the word (common also to the law of rape) in which a person who despairs at stopping what is happening, sees no escape, has no real alternative, was often sexually abused before as a child, may be addicted to drugs, is homeless, hopeless, is often trying to avoid being beaten or killed, is almost always economically desperate, acquiesces in being sexually abused for payment, even if, in most instances, it is payment to someone else. Many are children; most enter the industry as children.¹⁰ Most pornography is, in pure John Millerese, "made by slaves."¹¹

Need it be said (it still seems to), the individuals so used say they usually feel nothing sexually.¹² Most of the time, the sex they are shown

cantly more severe symptoms of posttraumatic stress disorder than did women in prostitution who did not report that pornography was made of them. Melissa Farley, "Renting an Organ for Ten Minutes": What Tricks Tell Us About Prostitution, Pornography, and Trafficking, Conference Proceedings, "Pornography: Driving the Demand in International Sex Trafficking," International Human Rights Law Institute of DePaul University, Chicago, Illinois, Mar. 14, 2005 (forthcoming 2005) [hereinafter Farley II] (presenting new analysis of data from the sample reported at Farley I, *supra* note 2, at 33).

9. FINAL REPORT *supra* note 1, at 291-97. Since that time, legitimate corporations have increasingly gone into trafficking pornography on the distribution end, prominently General Motors (through its subsidiary DirecTV), AT&T (through its broadband cable company), EchoStar Communications Corporation (backed by media mogul Rupert Murdoch), along with Comcast, Time Warner, and Cox Communications. Gail Dines, *From Fantasy to Reality: Unmasking the Pornography Industry*, in SISTERHOOD IS FOREVER 312 (Robin Morgan ed., 2003) (citing Timothy Egan, *Technology Sent Wall Street into Market for Pornography: Erotica, Inc., a Special Report*, N.Y. TIMES, Oct. 23, 2000, at A1, and Frank Rich, *Naked Capitalists*, N.Y. TIMES MAG., May 20, 2001, at 51). Dines has continued to track major mainstream corporations' involvement in the pornography industry. See Gail Dines, *The Big Business of Pornography & Sex Trafficking*, delivered at "Pornography: Driving the Demand in International Sex Trafficking," co-sponsored by Captive Daughters and the International Human Rights Law Institute of DePaul University, Chicago, Illinois (Mar. 14, 2005).

10. See *The Minneapolis Hearings*, in HARM'S WAY, *supra* note 2, at 114 (testimony of T.S.).

11. John Miller is the current head of the Office to Monitor and Combat Trafficking in Persons in the U.S. Department of State. See <http://www.state.gov/g/tip>.

12. Just one articulate example is Linda Boreman, who had this to say in response to a question about her so-called "sexual past" in the porn industry: "It wasn't sexual. I never experienced any sexual pleasure, not one orgasm, nothing. I learned how to fake pleasure so I wouldn't get punished for doing a bad job." Quoted in Gloria Steinem, *The Real Linda Lovelace*, in OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS 266, 275 (1983); see also LINDA LOVELACE & MICHAEL MCGRADY, ORDEAL (1980) (Linda Boreman's autobiography).

having is with someone they have no sexual interest in, doing things that do nothing for them sexually. The pleasure is routinely faked. They certainly never meaningfully consent to be intimately accessible to the thousands or millions of men they are then sold to, for money to others, over years and miles, as and for sex. Consent to sex is intimate, not transitive. Yet every step in the making and use of these materials is defended as sexual freedom, referring to the people in it. Women must be the only group, and sex the only means, in which a form of oppression is openly defended, not to mention sold as pleasure and even accepted by some of the oppressed, as a means of their liberation.

The force it took to make the pornography is shown or not, depending on the taste of the consumer. *Deep Throat* and *Playboy*¹³ do not show it; Extreme Productions does.¹⁴ Whether the material itself shows less aggression or more, from the vulnerability of sexual body parts in the glossy men's entertainment magazines through the sexual servicing in the "fuck and suck" genre, to the torture of sadomasochism and the murder of snuff, just as throwing money at victims of sexual abuse does not make it a job, taking pictures of it does not make it freely chosen or desired.¹⁵ It makes it pictures of paid rape—rape in the real, if regrettably seldom in the legal, sense.¹⁶

No amount of fancy footwork built into one phony distinction after another in the law and public discourse on this subject can alter these realities of the pornography industry. But these distinctions do seem to confuse many people who cling to bright-line binaries that lack correlates in life. To distinguish pornography from prostitution, for example, California courts notwithstanding,¹⁷ is to deny the obvious: when you

13. For inside documentation of the force involved in making PLAYBOY, see the testimony of Miki Garcia to the Attorney General's Commission on Pornography. Public Hearing, U.S. Dep't of Justice, Attorney General's Commission on Pornography (Los Angeles, Cal., Oct. 17, 1985) (interview with Ms. Garcia), reprinted in CATHARINE A. MACKINNON, *SEX EQUALITY* 1539–43 (2001).

14. See *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578 (W.D. Pa. 2005). For a description of Zicari's film content, see Shannon McCaffrey, *Prosecutors Mount Attack Against Adult-Porn Market*, MIAMI HERALD, Apr. 4, 2004, at 18A (describing a video entitled "Forced Entry" which "shows simulations of women being spat on, raped and murdered"). One suspects that at least the spitting and probably the rape, and who knows what else, are not simulated.

15. The ideas stated briefly here are argued fully in Catharine A. MacKinnon, *Prostitution and Civil Rights*, in *WOMEN'S LIVES, MEN'S LAWS* 151 (2005) and Catharine A. MacKinnon, *Pornography Left and Right*, in *id.* at 327.

16. After I said this, I found this in the mouth of a trick: "Guys get off on controlling women, they use physical power to control women, really. If you look at it, it's paid rape. You're making them subservient during that time so you're the dominant person. She has to do what you want." Farley II, *supra* note 8, at 9.

17. See *People v. Freeman*, 758 P.2d 1128, 1134 (Cal. 1988) (affirming conviction of a pornographer for paying women for sex acts, but finding that the film of their acts was not

make pornography of a woman, you make a prostitute out of her. In the immortal words of one trick, "Yes, the woman in pornography is a prostitute. They're prostituting right before the cameras. They're getting money from a film company rather than individuals."¹⁸ It is also to deny the plain fact that pornographers are pimps, third-party sex profiteers, buying and selling human beings to johns, who are consuming them as and for sex. In some instances, women are directed to perform sex acts by a john from a computer terminal in real time.¹⁹ So what is it, prostitution or pornography? That the sexually used are transported on paper or celluloid or digitally may make the transaction seem more distanced, but it is no less real a commercial act of sex for any of the people involved. As a report of the UN Secretary-General on victims of crime, discussing exploitation of prostitution and trafficking in women, put it in 1985, "it is hard to make distinctions (if any should be made) between prostitution and other sexual services, including those of the pornographic media."²⁰ Sex from one person is exchanged for money from another, the media being the go-between, the trafficker.

Although the degree of force applied varies from one situation to the next, the distinction between forced prostitution and "voluntary" prostitution²¹ has similar dimensions of unreality. The point of the distinction is to hive off a narrow definition of force in order to define as voluntary the conditions of sex inequality, abuse, and destitution that put most women in the sex industry and keeps them there. By the same token, to analyze so-called voluntary prostitution as "work" and trafficking/forced prostitution as "crime"²² is, among other things, to decide that there is a

"obscene," the California Supreme Court explained, "[w]hen considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful"); *People v. Fixler*, 128 Cal. Rptr. 363, 365–66 (Cal. Ct. App. 1976) (upholding a pornographer's conviction for "pandering" by paying a 14-year old girl to commit sex acts, the court also noted, "[w]hile First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it").

18. Farley II, *supra* note 8, at 5.

19. See Donna M. Hughes, *Prostitution Online*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS 115 (Melissa Farley ed., 2003).

20. The Secretary-General, *Report of the Secretary-General on the Question of South Africa, delivered to the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Victims of Crime: The Situation of Women As Victims of Crime*, ¶ 51, U.N. Doc. A/CONF.121/16 (May 17, 1985).

21. One illustrative discussion can be found in Ann D. Jordan, *Human Rights, Violence Against Women, and Economic Development (The People's Republic of China Experience)*, 5 COLUM. J. GENDER & L. 216, 228 (1996).

22. On my reading, the first time the relatively redundant term "enforced prostitution" entered the deliberations of the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was in 1991, in a discussion of Burkina

class of women to whom human rights laws against sexual harassment at work—and other laws inconsistent with the realities of force inherent in being prostituted²³—will not apply. If this is work, what can it mean to prohibit sexual harassment at work when the sexual harassment *is* the work? This is a form of sex/violence distinction, two things that this industry of sexual violation makes into one thing.²⁴

To distinguish between children and adults—on the assumption or with the effect of suggesting that child pornography is a serious problem while pornography of adult women is not or is less so—lacks foundation in the real world as well. The majority of adults enter the industry as children and are exploited in ways that do not disappear when they reach the age of majority, including through materials in which children are used as women and women infantilized as children. To purport to address child sexual exploitation while doing nothing effective for adult women is to suppose that an age line is enforceable on, or respected by, an industry that is organized to exploit the powerless, and to accept the false notion that women become equal at age 18. For example, a law that invents scienter requirements²⁵ to regulate an industry that traffics fake IDs along with its children blinkers the fact that in this world, children and women are not two distinct groups of people. They are the same people at two increasingly indistinguishable points in time. Requiring that a john *know* that the person he uses is a child in order to be convicted also effectively drops the age of consent for use in pornography to puberty. Children will never be protected until adult women have rights that are respected.

Finally, building on these distinctions, to distinguish trafficking from prostitution, as if trafficking by definition is forced and prostitution by definition is free, is to obscure that both use money to compel sexual use, that the whole point of sex trafficking is to deliver women and children into prostitution, and that not crossing a jurisdictional line does not make the unequal equal or the forced free. Jurisdictional lines

Faso. See U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the CEDAW*, ¶ 109, U.N. Doc. A/46/38 (Apr. 3, 1991). The first time the relatively oxymoronic “voluntary prostitution” appeared there was in a 1993 discussion of Kenya’s compliance with art. 5. *CEDAW Committee Report*, U.N. GAOR, 48th Sess., Supp. No. 38, ¶ 109, U.N. Doc. A/48/38 (Feb. 25, 1994).

23. For documentation, see Mary Lucille Sullivan, *Can Prostitution Be Safe?: Applying Occupational Health and Safety Codes to Australia’s Legalised Brothel Prostitution*, in *NOT FOR SALE*, *supra* note 2, at 252.

24. Further discussion of this convergence can be found in Catharine A. MacKinnon, *Sex and Violence: On Introducing the Antipornography Civil Rights Law in Sweden (1990)*, in *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (Catharine A. MacKinnon ed., forthcoming 2006).

25. *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) (interpreting in scienter requirement to uphold federal child pornography legislation).

are drawn according to men's politics with other men. Being taken far away can make exit from a condition of prostitution more difficult, but being used for sex is being used for sex. Trafficked or local, the buyers of prostituted women do not much care, making this distinction irrelevant from a demand standpoint except for the exotics market. It is also irrelevant from the supply standpoint. Women can be enslaved without ever leaving home.

Thus the pornography industry, in production, creates demand for prostitution, hence for trafficking, because it is itself a form of prostitution and trafficking. As a form of prostitution, pornography creates demand for women and children to be supplied for sexual use to make it, many of whom are trafficked to fill that demand. The pornographers then traffic these same people in turn in various mediated forms.

Pornography then further creates demand for prostitution, hence for trafficking, through its consumption. Consuming pornography is an experience of bought sex, of sexually using a woman or a girl or a boy as an object who has been purchased. As such, it stimulates demand for buying women and girls and boys as sexual objects in the flesh in the same way it stimulates the viewer to act out on other live women and girls and boys the specific acts that are sexualized and consumed in the pornography. Social science evidence, converging with testimonial evidence of real people, has long shown the latter.²⁶ As observed by T.S. in the hearings on the antipornography civil rights ordinance that Andrea Dworkin and I organized for the Minneapolis City Council at its request: "Men witness the abuse of women in pornography constantly, and if they can't engage in that behavior with their wives, girlfriends, or

26. See, e.g., Neil M. Malamuth, *Rape Fantasies as a Function of Exposure to Violent Sexual Stimuli*, 10 ARCHIVES OF SEXUAL BEHAV. 33 (1981); Neil M. Malamuth & James V.P. Check, *The Effects of Mass Media Exposure on Acceptance of Violence Against Women: A Field Experiment*, 15 J. RES. PERSONALITY 436 (1981); Neil M. Malamuth, *Factors Associated with Rape as Predictors of Laboratory Aggression Against Women*, 45 J. PERSONALITY & SOC. PSYCHOL. 432 (1983); Dolf Zillmann & Jennings Bryant, *Effects of Massive Exposure to Pornography*, in PORNOGRAPHY AND SEXUAL AGGRESSION 115 (Neil M. Malamuth & Edward Donnerstein eds., 1984); Larry Baron & Murray A. Straus, *Sexual Stratification, Pornography, and Rape in the United States*, in PORNOGRAPHY AND SEXUAL AGGRESSION 186 (Neil M. Malamuth & Edward Donnerstein eds., 1984); Neil M. Malamuth & James V.P. Check, *The Effects of Aggressive Pornography on Beliefs in Rape Myths: Individual Differences*, 19 J. RES. PERSONALITY 299 (1985); Neil M. Malamuth et al., *Sexual Arousal in Response to Aggression: Ideological, Aggressive and Sexual Correlates*, 50 J. PERSONALITY & SOC. PSYCHOL. 330 (1986); Diana E.H. Russell, *Pornography and Rape: A Causal Model*, 9 POL. PSYCHOL. 41 (1988); Dano Demaré et al., *Sexually Violent Pornography, Anti-Women Attitudes, and Sexual Aggression: A Structural Equation Model*, 27 J. RES. PERSONALITY 285 (1993); Neil M. Malamuth et al., *Pornography and Sexual Aggression: Are There Reliable Effects and Can We Understand Them?* 11 ANN. REV. SEX RES. 26 (2000).

children, they force a whore to do it.”²⁷ On the basis of the experiences of a group of women survivors of prostitution and pornography, she told how pornography was used to train and season young girls in prostitution and how men would bring photographs of women in pornography being abused, say, in effect, “I want you to do this,” and demand that the acts being inflicted on the women in the materials be specifically duplicated.²⁸ Research by Mimi Silbert and Ayala Pines on prostituted women in San Francisco also reported that the women spontaneously mentioned being raped by johns who said, essentially, “I [have] seen it in all the movies [Y]ou know you love it,” referring to a specific pornography “flick.”²⁹ Melissa Farley and her colleagues found that forty-seven percent of prostituted women in nine countries were upset by someone asking them to perform a sex act that had been seen in pornography.³⁰ Forty-nine percent reported that pornography was made of them in prostitution.³¹ Mary Sullivan’s research in Victoria, Australia, where prostitution has been legalized for a decade, reports women describing pornography videos running constantly in brothels—to set the tone and mood, apparently—making safe sex more difficult.³² Pornography is documented to create demand for specific acts, including dangerous and demeaning ones inflicted on prostituted people, as well as for bought sex in general. If this is right—and Melissa Farley’s preliminary results show that it is—the more men use pornography, the more they use prostitutes.³³

Most denials of the role of pornography in these dynamics come down to some version of a mind-body distinction—as though people, especially those who can get away with it, don’t do what they want to do, and as though sexuality is neither body or mind when it is both. This

27. *The Minneapolis Hearings, in HARM’S WAY, supra* note 2, at 116 (testimony of T.S.).

28. *Id.*

29. Mimi H. Silbert & Ayala M. Pines, *Pornography and Sexual Abuse of Women*, 10 SEX ROLES 857, 863–64 (1984).

30. Farley I, *supra* note 2, at 46.

31. *Id.*

32. See Mary Lucille Sullivan, *Making Sex Work: The Experience of Legalised Prostitution in Victoria, Australia* 279 (Nov. 2004) (unpublished Ph.D. dissertation, University of Melbourne) (on file with author) (quoting an article written by a woman working in one of Melbourne’s legal brothels, *STD Potential Videos*, in the Prostitutes’ Collective of Victoria’s magazine, *WORKING GIRL*, 1991, at 6, saying that the brothel where she worked ran “porno videos . . . continually” and that she believed the videos “give clients a false impression of what services are provided” and made safe sex difficult to enforce).

33. Comparing pornography use of men who said they were tricks with men who said they were not, pornography use was found to be statistically significantly higher among the tricks. Farley II, *supra* note 8.

denial runs under the rubric of "fantasy."³⁴ It plays out in distinctions especially ubiquitous in the United States between pictures and words, thoughts, attitudes, and speech on the one hand and acts, practices, policies, and crimes on the other. None of what I have described here is limited to the mind of the consumer. It takes acts to make the pictures and words; the so-called thoughts in pornography are predicated on practices and reproduce those practices through its consumers; the attitudes the pornography generates are lived out on women, including through being institutionalized in laws and policies; and the so-called "speech," the materials themselves, is actually a product of crimes against women and children, produces crimes against women and children, and is in itself one way that sex-based discrimination is socially practiced.

One distinction concerning these dynamics does make some sense. Pornography, I think, is supply-driven. Men do not want it until they see it. The more they use it, the more they want to use it. The desensitization and addiction so well-documented in its users³⁵ puts their sexuality under the control of pimps. (One waits for them to resent this. It severely limits their autonomy even if it builds their power.) Using pornography is like drinking salt water. It looks like the real thing but is not; the more you drink, the thirstier you become. Pornography creates demand for itself and for prostitution (of which it is one form). In a real sense, men do not use it because they want it, they want it because they use it; the more it is there, the more of it they get, the more of it they want. This makes pornographers pushers.

Prostitution, on the other hand, I think is meaningfully demand-driven. Women are in prostitution because men want to use them that way, pure, in this part of the sexual economy in which women and men are already otherwise socially organized. If men want pornography because it is there, prostitution is there because men want it. Pornography helps create that desire. So the relation between the two is ultimately circular: pornography supplies the objectified sexuality of male dominance, both creating and filling the demand for the trafficking that is prostitution, providing a pleasure motive for johns and a profit motive for pimps for paid rape.

34. For an analysis focused on gay male pornography, see Christopher N. Kendall & Rus Ervin Funk, *Gay Male Pornography's "Actors": When "Fantasy" Isn't*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 2, at 93.

35. Neil M. Malamuth et al., *Sexual Responsiveness of College Students to Rape Depictions: Inhibitory and Disinhibitory Effects*, 38 J. PERSONALITY & SOC. PSYCHOL. 399 (1980); John Briere & Neil M. Malamuth, *Self-Reported Likelihood of Sexually Aggressive Behavior: Attitudinal Versus Sexual Explanations*, 37 J. RES. PERSONALITY 315 (1983); *The Minneapolis Hearings*, in HARM'S WAY, *supra* note 2, at 44–60 (testimony of Edward Donnerstein).

II. PORNOGRAPHY UNDER CRIMINAL ANTI-TRAFFICKING LAWS

Under existing laws, these realities are better reflected in anti-trafficking laws, and in some human rights laws, than elsewhere. The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others (which the United States has not ratified),³⁶ binds states parties to punish "any person who, to gratify the passions of another . . . (2) exploits the prostitution of another person, even with consent of that person."³⁷ To make and sell pornography is virtually always to exploit the prostitution of another person. Pornographers are almost all third-party sellers of the prostitution of other people; few sell pornography of themselves. Under the 1949 law, "consent," usually involving being paid or someone else being paid (query again if either is what consent to sex means in real human language³⁸), expressly does not mean that the person is not being exploited.

The 1949 Convention was intended to cover the gap in existing law on "the traffic in women of full age," as remarks by the Secretary General put it at the time, "with their consent, even if the victims were not taken abroad."³⁹ No mystification about age, consent, or jurisdictional lines here. This treaty came into force before pornography was as overwhelmingly the traffic in persons that it is today, with the ascendancy of visual technologies, requiring new women and children daily, dominating cognitively and culturally as well as sexually and economically. Yet even then the United Nations Educational, Scientific and Cultural Organization (UNESCO) glimpsed pornography's role in trafficking in persons. The travaux préparatoires show UNESCO's regret at pornography's omission from the Convention. Using the language of the time, UNESCO proposed restricting, for purposes of prevention, "the circulation of obscene publications or the public display of obscene works through the medium, more particularly, of the cinema, the radio or tele-

36. The United States did, however, ratify the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

37. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, art. 1, 96 U.N.T.S. 271, 272.

38. As one trick explained, "Prostitution is an act of force, not of love. She gives up the right to say no." Another said, "I paid for this. You have no rights. You're with me now." Farley II, *supra* note 8. These express the reality, well understood by the men who use the women, of what is euphemized as consent for women in prostitution.

39. U.N. Econ. & Soc. Council [ECOSOC], *Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Note by the Secretary General, at 17, U.N. Doc. E/1072 (1948), U.N. ESCOR (Jan. 19, 1949).

vision.”⁴⁰ In the context of prevention, UNESCO grasped the pornographer’s role in creating demand for prostitution: “Suppress the demand, and you suppress the supply and the part played in that supply by the intermediary, who is a corrupted corrupter.”⁴¹

The abolitionist rather than prohibitionist framework of the 1949 Convention provides a highly congenial approach to the elimination of pornography understood as a form of sexual exploitation. Prohibition criminalizes everyone involved. Abolitionists saw that this could be counterproductive as well as unjust, even discriminatory against the victims.⁴² The travaux of the 1949 Convention disclose a telling decades-long dispute over whether the term “for gain” should be included in the definition of trafficking. Those opposed to including this term opposed prosecuting the victims, the prostituted people, and sought instead to reach the entire range of their exploiters.⁴³ With “for gain” not being included, a space for criminalizing demand—both that of pornography pimps, who demand women and children from lesser pimps, and the ultimate demand by the johns who consume women and children in pornography, providing the profit motive for their sexual exploitation—was opened under international law.

Advances in the international laws against trafficking have built on this foundation.⁴⁴ Most important is the Palermo Protocol’s 2000 definition of trafficking in persons:

40. U.N. ECON. & SOC. COUNCIL [ECOSOC], at 4, U.N. Doc. E/CN.5/115/Add.5 (1949) (commenting on art. 17, which addresses “measures [for] . . . the prevention of prostitution”).

41. *Id.* at 5.

42. This was beautifully expressed by Edward M. Morgan, *Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, prepared on behalf of the Legal Division, Commonwealth Secretariat, U.K., at 8 (1989) (“[E]ven when both prostitute and client are legally culpable, enforcement of penal provisions is typically directed solely against the prostitute, thus leaving the demand for the prostitute’s services unquenched and ensuring the continued existence of the sex trade. Prohibition can therefore be not only ineffective, but may also be considered to be discriminatory and inequitable.”).

43. Commenting on the elimination of “for gain” from the definition of the offences, compared with the 1937 Draft Convention, the Secretary General remarked: “[A]lthough this convention is mainly directed against those who engage in the offences mentioned for the purpose of gain, its eventual aim is to protect the victims of such persons, regardless of the purpose of the offenders. The purpose of gain is therefore irrelevant. Moreover, the gainful intents may be difficult to prove, and its inclusion in the definition of the offence may therefore prevent effective prosecution of offenders.” See *Draft Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, Note by the Secretary General, *supra* note 39. The participants in the drafting discussions were also worried about proof problems.

44. The Convention on the Rights of the Child and the Convention to Eliminate the Worst Forms of Child Labor both expressly recognize that children are sexually exploited when they are used in pornography. Arts. 34 and 35 of the 1989 Convention on the Rights of the Child require state parties to take appropriate measures to prevent “the abduction of, sale

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include . . . the exploitation of the prostitution of others or other forms of sexual exploitation . . .⁴⁵

Pornography is clearly covered as sex trafficking under this definition. For pornography, women and children are recruited, transported, provided, and obtained for sex acts on account of which, typically, money is given to pornography pimps and received by lesser pimps. Then, each time the pornography is commercially exchanged, the trafficking continues as the women and children in it are transported and provided for sex, sold, and bought again. Doing all these things for the purpose of exploiting the prostitution of others—which pornography intrinsically does—makes it trafficking in persons.

Along similar lines, the U.S. Protect Act 2000 defines sex trafficking simply as "the recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act."⁴⁶ Pornographers participate in the commercial flow of these acts to make pornography. Often they do them directly themselves, then again when they sell the products. A "commercial sex act" is defined simply as "any sex act, on account of which anything of value is given to or received by any person."⁴⁷ That is, it is prostitution, through which commercial por-

of, or traffic in children for any purpose or in any form," "the inducement or coercion of a child to engage in any unlawful sexual activity," "the exploitative use of children in prostitution or other unlawful sexual practices," and "the exploitative use of children in pornographic performances and materials." Convention on the Rights of the Child, Nov. 20, 1989, arts. 34–35, 1577 U.N.T.S. 3, 55. The 1999 Convention Concerning the Prohibition and Immediate Action for Elimination of the Worst Forms of Child Labor, art. 3, prohibits "the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances," "all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced compulsory labor, including forced or compulsory recruitment of children for use in armed conflict." ILO Convention Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, June 1, 1999, art. 3, 38 I.L.M. 1207, 1208.

45. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Annex II, at 54, U.N. Doc. A/55/383 (2000).

46. Victims of Trafficking and Violence Protection Act of 2000, as amended, 22 U.S.C. §§ 7101–7110 (2000).

47. *Id.* § 7102(3).

nography is customarily made. When a john buys pornography, it is for sex.

The U.S. Department of State's model law includes a definition of trafficking for purposes of exploitation that defines exploitation to include "commercial sexual exploitation, including but not limited to pimping, pandering, procuring, profiting from prostitution, maintaining a brothel, [and] child pornography."⁴⁸ It does not explain why only child pornography is listed, but it is only an "including," so adult pornography is not precluded. It does include the Palermo Protocol's definition of sex trafficking, encompassing not only force, coercion, abduction, fraud, and deception, but also "abuse of power or of a position of vulnerability, or by the giving and receiving of payments or benefits to achieve the consent of a person having control over another person."⁴⁹ The latter is not limited to children, nor is pornography made by these means limited to children. This law squarely describes how most pornography is made, defining pornography as a form of sex trafficking. The U.S. Presidential Directive on the subject mentions pornography explicitly, saying that "trafficking in persons refers to actions, often including use of force, fraud or coercion, to compel someone into a situation in which he or she will be exploited for sexual purposes, which could include prostitution or pornography"⁵⁰

Pornography is most expressly recognized as a form of sexual exploitation in the trafficking context by the European Union. Pursuant to the Palermo Protocol and other developments, the European Council

48. Model Law to Combat Trafficking in Persons, art. I, § 100, State Dep't News Release (Mar. 12, 2003), available at http://www.humantrafficking.com/humantrafficking/toolkits_ht3/DOS_Model_Law.htm.

49. *Id.* § 102.

50. Press Release, White House Office of the Press Secretary, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003), at <http://www.whitehouse.gov/news/releases/2003/02/20030225.html>. Actually, slavery often refers to the difficulty of leaving as much or more than the means of entry. "Female sexual slavery is present in ALL situations where women or girls cannot change the immediate conditions of their existence; where regardless of how they got into those conditions they cannot get out; and where they are subject to sexual violence and exploitation." KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 40 (1979). Taken together, *United States v. Kozminski*, 487 U.S. 931 (1988) and *United States v. Mussry*, 726 F.2d 1448 (9th Cir. 1984) support the view that a person's belief because of physical or legal threat that they have no alternative but to perform the work demanded is partially constitutive of a Thirteenth Amendment slavery claim. For additional discussion, see MacKinnon, *Prostitution and Civil Rights*, *supra* note 15, at 151-61. Moreover, Congress specifically repudiated a narrow reading of *Kozminski* that would confine it to violent coercion in the Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. § 7101(b)(13). Tellingly, the Appeals Chamber for the International Criminal Tribunal for the Former Yugoslavia has recognized that when rights of ownership are proven exercised over a person, such that they are enslaved, their lack of consent, for example to rape, does not need to be proven. See *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment of the Appeals Chamber, ¶ 120 (June 12, 2002).

Framework Decision of July 2002 on combating trafficking in human beings enacted a definition covering recruitment, transport, transfer, and harboring, including exchange or transfer of control over the person where coercion, force, threat, deceit, or fraud is used, or authority or position of vulnerability is abused "such that the person has no real and acceptable alternative but to submit to the abuse involved." The Framework Decision also covers⁵¹ payments made to one person to get consent by another "for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, *including in pornography*."⁵² Laws of members of the EU are to conform to this decision.

III. PORNOGRAPHY UNDER HUMAN RIGHTS LAWS AGAINST TRAFFICKING

The UN's Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002) direct that "[s]trategies aimed at preventing trafficking shall address demand as a root cause of trafficking."⁵³ Since pornography both creates and fills demand for trafficked persons, it should be a part of these demand-focused strategies. The flow of sex for money (supply side) and money for sex (demand side) is a mass market in human flesh, one technological level of mediation removed from skin-on-skin or, with the internet, two. But it is a form of sexual trafficking in human beings nonetheless. The UN High Commission for Human Rights Sub-Commission on Human Rights Resolution 2002/51 effectively recognized this when it "[u]rge[d] Governments to take appropriate measures to address the root factors . . . that encourage trafficking in women and children, in particular girls, for prostitution and other forms of commercialized sex."⁵⁴

In its interpretation and application of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the CEDAW Committee is increasingly moving in the direction of this recognition as well, as are some countries who report to it. Article 6 of CEDAW directly prohibits "all forms of traffic in women and exploitation of prostitution of women" as a form of discrimination against

51. See Council Framework Decision 2002/629/JHA of 19 July 2002, art. 1.1(d), 2002 O.J. (L 203/2) 1.

52. *Id.* (emphasis added).

53. U.N. Econ. & Soc. Council [ECOSOC], *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Addendum to the Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. E/2002/68/Add.1, Substantive Sess. 2002, Agenda Item 14(g), at 3, U.N. ESCOR (May 20, 2002).

54. U.N. High Commissioner for Human Rights, Sub-Commission on Human Rights, *Traffic in Women and Girls*, Res. 2002/51, at 5, U.N. Doc. E/2002/23 (Apr. 23, 2002).

women, which states must "take all appropriate measures, including legislation, to suppress."⁵⁵ Exploitation of prostitution, of course, is not "prostitution." But the distinction is the same as that between prohibition and abolition in the 1949 Convention: the exploited, the prostituted women, are victims of crime and sex discrimination, not criminals or sex discriminators. Who is exploiting the poverty and discrimination and sexual abuse in childhood that put women in prostitution if not the buyers who use them, whose demand for their use is the reason the industry exists? What greater inducement or incitement to prostitution is there than being paid for sex when no one will pay you for anything else? In other words, criminalizing the buyers of prostitutes promotes sex equality: voilà, the Swedish model. Sweden's law criminalizing buying people in prostitution has, in fact, been reported by Sweden to CEDAW as evidence of its compliance with its article 6 obligations.⁵⁶ The CEDAW Committee itself has read article 6 consistent with this interpretation from the beginning, asking question after question about "clients," "customers," "sex tourists," and "men" (now that we say "demand," we do not need to say "men"), and many about "eradicating" prostitution per se.⁵⁷ The CEDAW Committee has taken the view that the

55. Convention on the Elimination of All Forms of Discrimination Against Women, July 17, 1980, 1249 U.N.T.S. 13.

56. See Sweden's Fifth Periodic Report to CEDAW, *Report of the Comm. on the Elimination of Discrimination Against Women*, 25th Sess., 23, U.N. Doc. CEDAW/C/SWE/5 (Dec. 8, 2000).

57. The CEDAW Committee members in its first ten sessions (1982 to 1991) often asked specifically not only whether prostitution was outlawed in a given state but, if it was, whether its sanctions also applied against the "client." For example, The Philippines was asked about the "client . . . who benefited from the trade in white slavery" and whether he "walked away with impunity while the real victims were severely penalized." *Report of the Comm. on the Elimination of Discrimination Against Women*, 3d Sess., ¶ 95 (1984); see also *Report of the Comm. on the Elimination of Discrimination Against Women*, 4th Sess., ¶ 139 (1985) (several experts asked Panama "whether prostitution related only to the prostitute or also to clients and procurer"); *Report of the Comm. on the Elimination of Discrimination Against Women*, 6th Sess., ¶ 61 (1987) (asking the Republic of Korea under art. 6 "whether not only the client but also the prostitute were punishable"); *id.* ¶¶ 144, 220 (regarding Sri Lanka); *Report of the Comm. on the Elimination of Discrimination Against Women*, 7th Sess., ¶¶ 254 (1988) (regarding Japan, asking "whether the law against prostitution contained punitive measures against men"); *id.* ¶ 277; see also *id.* ¶ 681 (noting that in Hungary, prostitution was a crime regardless of sex, but "the other party was not liable to prosecution"); *Reports of the Comm. on the Elimination of Discrimination Against Women*, Volume IV, 8th Sess., ¶ 82 (1989) (asking Ireland for details of legal treatment under law of clients in prostitution); *Report of the Comm. on the Elimination of Discrimination Against Women*, 10th Sess., ¶ 206 (1991) (mimeo), reprinted in *Official Records of the General Assembly*, 46th Sess., Supp. No. 38 (A/46/38) (The Philippines reporting under art. 6 concerning "sanctions imposed on customers of prostitutes, such as sex-tourists"); *Report of the Comm. on the Elimination of Discrimination Against Women*, 11th Sess., ¶ 173 (1992) (mimeo), reprinted in *Official Records of the General Assembly*, 47th Sess., Supp. No. 38 (A/47/38) (China reporting that prostitutes' "customers might be rounded up and provided with legal and

demand for prostitution is covered by the Convention against discrimination against women.

The demand for pornography, as a form of the exploitation of prostitution, is encompassed under the same principles. Pornography is occasionally mentioned in CEDAW reporting under article 6,⁵⁸ and sometimes under article 5, where it is referred to as a "harmful relic and custom" of the (one wishes) past. Neither prostitution nor pornography is treated as an institution of sex equality just waiting to be legalized for its discriminatory harm to women to be eliminated. CEDAW's General Recommendation 19, recognizing violence against women as a violation of CEDAW's prohibition on discrimination against women, expressly sees pornography as a product of sex inequality. It also observes that gender-based violence is produced by pornography, in part because it promotes subordinate roles and constricted options for women, which in turn "contribute to the propagation of pornography and the depiction

moral education" or "required to engage in productive labour"); *Report of the Comm. on the Elimination of Discrimination Against Women*, GA 48th Sess., Supp. No. 38 (A/48/38) (Feb. 25, 1994), 12th CEDAW Sess. (1993), ¶ 554 (United Kingdom replying to a question under art. 6 of "how many men had been convicted for accosting women on the street and what their sentences were"). Thanks to Ali Fawaz for his research assistance. Since that time, inquiry into pornography has often been added. *See infra* note 58.

58. *See, e.g., Report of the Comm. on the Elimination of Discrimination Against Women*, 12th Sess., ¶ 553, U.N. Doc. A/48/38 (Supp.) (1993). Of the United Kingdom, CEDAW Committee members asked whether the government considered its current law adequate with regard to rape and pornography. The government conceded that the legislation was inadequate but said the continued exploitation of women in the media by means of sexually explicit pictures was a grave concern and needed to be remedied. The UK government stated that it was committed to enforcing laws in a manner that excluded improper publications, controlled proper standards, and upheld decency. In 1993, Committee members also asked the government of France for its position on pornography. France said that pornography was punished by imprisonment or monetary fines. *Id.* ¶ 336. The Netherlands, asked in 1994 to explain an increase in sexual violence, said it was not influenced by the fact that pornography was not prohibited. It conjectured that the availability of pornography for adults had had a restraining influence on the incidence of violence against women. *Report of the Comm. on the Elimination of Discrimination Against Women*, 13th Sess., ¶ 274, U.N. Doc. A/49/38 (1994). In 1995, the representative of Norway explained that sex business has been considered to be comparatively limited there but a recent tendency towards more hardcore pornography was observed. It was assumed that prostitution may be increasing because of the internationalization of the sex trade, a matter regarded as serious by the Government. Norway's focus on combating child pornography and persons that profit from prostitution resulted in sharpening the provisions in its Penal Code prohibitions of pornography and pimping. *Report of the Comm. on the Elimination of Discrimination Against Women*, 14th Sess., ¶ 470, U.N. Doc. A/50/38 (1995). In 1996, the Committee noted the adoption of a landmark law against trafficking in persons, prostitution, and pornography with extraterritorial applications in Belgium as a decisive step to address the issue of sexual exploitation of women. *Report of the Comm. on the Elimination of Discrimination Against Women*, 15th Sess., ¶ 178, U.N. Doc. A/51/38 (1996). In Singapore, pornography was reportedly banned and advertising codes enacted prohibiting the portrayal of women as sex objects. *Report of the Comm. on the Elimination of Discrimination Against Women*, 25th Sess., ¶ 58, U.N. Doc. A/56/38 (2001). Thanks to Kirsten Erickson for her research on this point.

and other commercial exploitation of women as sexual objects, rather than as individuals.”⁵⁹ The circular causality of reality registers here. When it undertook to adapt the commands of CEDAW and other world standards for the treatment of women, the African Union’s protocol on women’s rights required states parties to “take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.”⁶⁰

Long before, the Beijing Platform for Action (1995), setting standards countries that agreed to achieve, recognized that “the use of women and girls as sex objects, including pornography”⁶¹ is a “factor[] contributing to the continued prevalence of . . . violence” against women.⁶² Beijing directs governments to “take appropriate measures to address the root factors . . . that encourage trafficking in women and girls for prostitution and other forms of commercialized sex” and to protect their rights through both criminal and civil measures.⁶³ A strategic objective on violence against women finds pornography “incompatible with the dignity and worth of the human person,” along with racism, xenophobia, ethnic cleansing, and terrorism.⁶⁴ At Beijing, states committed themselves to “take effective measures including appropriate legislation against pornography” and to “establish, consistent with freedom of expression, professional guidelines and codes of conduct that address violent, degrading or pornographic materials concerning women in the media.”⁶⁵ Like most everything else to which governments committed themselves in the Beijing Platform for Action, this has yet to be done.⁶⁶

One of the most insightful developments in the international system on the subject of pornography can be found in the Human Rights Committee’s General Comment 28 on Equality of Rights Between Men and

59. Comm. on the Elimination of Discrimination Against Women, 11th Sess., *General Recommendation No. 19*, ¶ 12, U.N. Doc. A/47/38 (Jan. 30, 1992) (discussing arts 2(f), 5, and 10(c) of CEDAW).

60. Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, art. 13(m), July 11, 2003, O.A.U. Doc. CAB/LEG/66.6 (entered into force Nov. 26, 2005).

61. Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, ¶ 118, U.N. Doc. A/CONF.177/20/Rev. 1.

62. *Id.*

63. *Id.* ¶ 130(b).

64. *Id.* ¶ 225.

65. *Id.* ¶ 244(b).

66. For a sampling of expressly sex discriminatory laws that have remained in force since Beijing, see EQUALITY NOW, WORDS AND DEEDS: HOLDING GOVERNMENTS ACCOUNTABLE IN THE BEIJING + 10 REVIEW PROCESS (2005), at www.equalitynow.org. On pornography, *American Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986), stands for precisely the opposite of this commitment and has remained in effect, ratified by the highest court of the nation.

Women under the International Covenant on Civil and Political Rights (ICCPR) (which the United States has ratified⁶⁷). Article 19 guarantees freedom of expression; the Human Rights Committee took the view that all states should inform it of laws or other factors that impede women in exercising these rights:

As the publication and dissemination of obscene and pornographic material which portrays women and girls as objects of violence or degrading or inhuman treatment is likely to promote these kinds of treatment of women and girls, States Parties should provide information about legal measures to restrict the publication or dissemination of such material.⁶⁸

Dissemination, precisely trafficking, is recognized here to silence women's speech! The United States did not reserve to article 19, only to Article 20, which provides that advocacy of national, racial, or religious hatred that constitutes incitement to discrimination shall be prohibited.⁶⁹ That reservation seeks to reduce obligations under the ICCPR to the size of existing U.S. First Amendment law. If article 20 does not mention sex-based or sexual hatred that constitutes incitement to sex discrimination, as pornography arguably does, neither does the U.S. reservation on the point. Sometimes invisibility works to your advantage. The point is, there is no "speech" barrier in the international law of human rights to proceeding against pornography. On the contrary, there is closer to an invitation to address it, based on the realization that pornography silences speech.⁷⁰

The one legal provision that squarely recognizes pornography as trafficking is the trafficking provision of the civil rights antipornography ordinances conceived and drafted by Andrea Dworkin and me. Trafficking is defined there as the production, sale, exhibition, or distribution of pornography, which in turn is defined as graphic sexually explicit subordination of women through pictures and words, that also includes a

67. The U.S. Senate ratified the ICCPR on February 23, 1978. See S. Res. 95-20, 95th Cong., S. Exec. Report 102-23 (1978).

68. Human Rights Comm., 68th Sess., 1834th Mtg., *General Comment No. 28*, ¶ 22, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

69. ICCPR, Dec. 16, 1966, 993 U.N.T.S. 3, art. 20; U.S. Reservation (1), S. Res. 95-20, 95th Cong., S. Exec. Report 102-23 (1978) ("That article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States").

70. For fuller discussion of this theme, see ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 9 (1980) ("The question . . . is not whether the First Amendment protects pornography or should, but whether pornography keeps women from exercising the rights protected by the First Amendment."); Andrea Dworkin, *Against the Male Flood: Censorship, Pornography, and Equality*, in *LETTERS FROM A WAR ZONE* 253, 268-70 (1988); Catharine A. MacKinnon, *Francis Biddle's Sister*, in *FEMINISM UNMODIFIED* 192-97 (1987).

list of specific presentations.⁷¹ *American Booksellers Association v. Hudnut* found this ordinance unconstitutional in the United States by holding that while pornography is sex discrimination, its effectiveness in doing the harm it does makes it constitutionally protectable.⁷² This holding was summarily affirmed by the United States Supreme Court.⁷³ Although the Committee's interpretation is permissive, the United States is clearly out of step with its understanding of the meaning of the ICCPR's guarantee of freedom of speech. Accession to the ICCPR could become one of several intervening developments in the reassessment of the constitutionality of the antipornography ordinance in the United States. Passage of the ordinance, federally authorized under the Commerce power—pornography being nothing if not commerce, its trafficking taking place in a national as well as global markets—would put the United States back in conformity with the direction of international law.

The United States could also ratify the 1949 Convention, although it does not provide for an obligatory cause of action. Both the 1949 Convention and the Swedish model, for all their crucial advances against demand, leave out the people in the materials: the trafficked. That is,

71. The ordinance defines pornography as:

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.

Indianapolis and Marion County, Ind., Code Ch. 16, § 16-3(q) (1984), in *HARM'S WAY*, *supra* note 2, at 444. "The production, sale, exhibition, or distribution of pornography" is a cause of action for discrimination against women. *Id.* at 442.

72. *Hudnut*, 771 F.2d at 329 (holding that "we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, '[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].' Indianapolis Code sec. 16-1(a)(2). Yet this simply demonstrates the power of pornography as speech.").

73. *Hudnut*, 475 U.S. 1001 (1986).

these approaches get the criminal law off their backs but give them no positive rights against their abusers. Empowering the industry's first victims is the most direct and effective route to its abolition; it cannot survive paying the cost of operation if it has to pay its victims the cost of what it does to them. This, the antipornography civil rights ordinance would do, simultaneously addressing pornography's contribution to demand for prostitution and its role in and as trafficking—upon awareness of which international law is increasingly converging.