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Pornography. The Politics of Legal Changes. An Opinion article

Abstract
What are the similarities between pornography and climate change? The answer given by Max Waltman in a book about pornography is that both represent major problems of our times that society must intervene against\(^1\). Both relate to social dominance and multiply disadvantaged groups that will necessitate political and legal challenges in the future. Waltman claims that in light of the need for efficient and effective policy responses, the insights from a study of legal challenges to pornography might gain. He has conducted such a study providing empirical evidence of legal challenges undertaken in three diverse democracies. His message is that we need to grant real, substantial, and effective legal power to members of those groups most affected if the harms of pornography are to be successfully addressed. The book is unique being a politico-legal study. It is of relevance for lawyers, socio-legal scholars as well as for political scientists.

Pornography as something harmful
Waltman describes and underpin with statistical data that pornography as a social practice that contravenes equality by exploiting multiple disadvantages and contributing to gender-based violence. The exploitation and abuse that pornography production inflicts on members of the disadvantaged groups connected to sexual aggression and gender based violence. Pornography has a close link to prostitution. There is an association between increased pornography consumption and increased sexual aggression, greater support for attitudes promoting violence against women more frequent purchase of prostituted sex.

Robust and statistically significant data show that consumption of pornography contributes to substantially more gender-based violence and to an array of attitudes that minimize, trivialize or normalize it\(^2\). Studies confirm strong links among childhood abuse and neglect, homelessness, and prostitution. Poverty is a predominant reason for entering the sex industry.

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\(^2\) Ibid.
The pornography industry can use money to coerce prostitutes to participate in unsafe and more or less cruel practices.

Waltman raises the question: What conditions obstruct and enable legal challenges to the production and consumption harms of pornography, and what are the alternatives? He claims that examination of the politics of legal challenges to pornography may provide a blueprint to guide studies of other complicated, seemingly intractable, social problems such as challenges to climate change that face “problematic existing norms” that obstruct efforts to mitigate the emission of greenhouse gases in the atmosphere. Waltman recommends a problem-driven approach following the political theorist Ian Shapiro³.

**Theory and Method**

In order to build a theory that make legal challenges to exploiting practices more successful generally, and particularly with respect to pornography, Waltman uses a theory he calls hierarchy theory. This is derived in part from the scholarship of Catherine MacKinnon, who frequently uses the term “hierarchy” to describe the problem her feminist theory addresses⁴. This theory, Waltman asserts, can be tested by combining qualitative within-case methods that include pattern matching comparison of United States, Canada and Sweden. To the extent institutionalizing the perspectives and political and legal interests of subordinated groups, such as prostitution survivors and battered women, is likely to redound in progressive policy change, it supports hierarchy theory.

The study conducted employs the comparative case study method to explain what obstructs or enables legal challenges to pornography’s harms. Waltman argues for an analytical generalization rather than statistical generalization. He refers to pattern matching, also called the congruence method as a useful method for testing the explanatory power of theories, including the hierarchy theory⁵. It tests whether data conforms to theoretically predicted patterns⁶. The study adopts the most similar systems design as a means of strengthening the

³ Problems, Methods, and, Theories in the Study of Politics, or What´s Wrong with Political Science. Polit. Theory 30, no. 4, 2002:598. Shapiro’s approach is distinct from one which the problem analyzed is a “mere artifact of the theories and methods that are deployed to study it”.
within-case findings from pattern matching across units. United States, Canada and Sweden are similar on several key measures of democracy, principally in recognizing the imperatives of sex equality, non-exploitation, and freedom of expression. The last mentioned human right is the most used argument in favor of pornography.

**Different legal strategies**

United States, Canada and Sweden provide different legal strategies for combating gender-based violence. In the United States, there have been several legal approaches to challenge pornography. The influential Professor Catherine MacKinnon argued for a civil rights strategy. Pornography subordinates women to men and is therefore a form of discrimination on basis of sex. This formed the content of the Minneapolis ordinance, which 1984 adopted by preponderance of one voice in the City council. The ordinance provided remedies to those victimized by pornography. However, two years later the U.S. Supreme Court affirms a lower-court ruling that invalidates the pornography ordinance approved in Indianapolis. The civil rights anti-pornography movements in Minneapolis and Indianapolis had gathered enough public momentum by 1985 to produce widespread national debate. As a result, a Commission on pornography tasked “to determine the nature, extent, and impact on society of pornography in the United States, and to make specific recommendations”.

The Commission has what is likely the single most extensive investigation to date of the harms caused by the production and consumption of pornography. The Commission reached the conclusion that the pornography industry systematically violates human rights with apparent impunity. Similar anti-pornography ideas continued to generate interest among American politicians. Among other things, a Pornography Victims Protection Act introduced. However, Congressional attempts to pass civil rights legislation against pornography obstructed. The closest route to challenge the harms of pornography that remained was obscenity law, despite not being victim-centered or concerned with sex discrimination. The problem remained, despite state prosecutions, online pornography flourished. Waltman claims that obscenity law facially protects no compelling or substantial interests, pornography’s harms.

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7 Waltman, 2021:216
A discussion of efficiency and consequences

Still, the most direct legal tool available in Canada against pornography is obscenity law. A special Committee on Pornography and Prostitution set up in 1983 after an intense public pressure. Pornography defined in gender-neutral term and the law that followed became toothless. The anti- pornography in Canada therefore used another strategy, to intervene in criminal cases regarding obscenity. However, courts relied on contemporary standards of tolerance rather than more objective tools, whereby a normalization of sexual assault determined the assessment of harm. Waltman would rather have seen an anti- pornography civil rights law enabling directly hurt by pornography who have the strongest incentives to initiate legal action on their own – with or without government assistance.8

Despite the fact that the great proportion of female members of parliament in Sweden in the first decade of the second millennium, almost 50 %, no legal efforts were undertaken to challenge pornography. When it comes to prostitution, Sweden has since 1999 criminalized those who buy prostituted people, not those being bought. Byers can be sentenced for purchase of sexual service to a fine or imprisonment for at most one year. Waltman concludes, irrespective of the legality of prostitution, a symmetrical treatment of the parties involved would have been inconsistent with the hierarchy theory. From the perspective of the hierarchy theory reducing the number of individuals in prostitution is imperative to the promotion of substantive equality. The Swedish law has accomplished such a reduction when it comes to street prostitution.9 The legitimacy and thereby public support of the law has increased dramatically over the years.10 There are indications that the level of prostitution in Sweden is reduced relative to that of other nations.

The Swedish law is also unique in the sense that it is from a formal point of view a victimless crime. This create a problem since the judicial system seems not (yet) regard prostituted people as victimized. Perpetrators of the law not regarded individually accountable for the harms accruing to those from whom they purchase sex. A discussion has taken place if the prostituted persons should pay taxes for the money they earn. However, this rejected for two reasons. One principle, it would be a public exploitation of those mired in prostitution and the

8 Waltman 2021:305
9 However, prostitution as such seems not to have decreased. Prostitution has simply moved from the streets to the internet.
10 Waltman 2021:346
second argument is that paying taxes had coerced to continue. Sex purchasing regarded as a crime against the public order, not against persons. The women not seen as an injured party and thereby deemed not warranted as consequence of the exploitation she experienced. This interpretation of the law confirmed in a Supreme Court case 2001. Prostitution regarded as caused by structural factors without individual responsibility for either the selling women or the perpetrators. However, the Swedish government in 2011 clarified the prostitutes could be regarded as an injured party and claim damages, but that has then to be determined on a case-by-case basis. So far, no such successful civil law suit seems been reported.

Conclusions
Some conclusions might be drawn from Waltman’s study. The most obvious is that pornography contributes to gender inequality. He refers to almost fifty years of social science research showing that pornography fuels sexual aggression and attitudes supporting violence against women and the demand for prostitution. Consumers often wish to imitate pornography with reluctant partners. The hardest resistance legal challenges to pornography meet is the conflict with freedom of expression. There are pros and cons from an empirical point of view based on the findings from the different cases of legal strategies used in the respective countries.

Seen through the lens of hierarchy theory, obscenity law predicted to be unreliable, vague, and vulnerable to misuse. In contrast to criminal obscenity laws, the empirical analysis of legal challenges indicates a stronger civil rights framework would amplify the perspectives, interests, and knowledge of survivors of the pornography industry and others harmed by it. Criminal obscenity law represent the perspectives of law enforcement, prosecutors, and not those harmed by pornography.

Prostituted people in Sweden report having a bargaining advantage over their customers, who in turn know they can be reported for mistreating the person they purchased. This is something not found in countries like Germany, New Zealand and others, where prostitution is legal. The Swedish substantive equality prostitution law has been successful in reducing prostitution, and the exit programs do provide support for the prostitutes to leave the “business”\textsuperscript{11}. The apparent multiple disadvantages and problems that arise in seeking to

\textsuperscript{11}Waltman 2021:371
address the intersections between prostitution and pornography laws inadequate to the task of representing the perspectives and interests of those most directly harmed.

An alternative approach to criminal law along these lines is a civil rights strategy to pornography as sex discrimination, originally conceived by Catharine MacKinnon and Andrea Dworkin, attempted in several U.S. jurisdictions. In this initiative to use and apply the law is accorded to those harmed, who are able to sue for damages either in a court or in an alternative administrative body. This civil rights approach to pornography built upon the experiences and interests of those most harmed. In contrast to obscenity laws, criminal pornography law, or civil law approaches like sexual harassment, the ordinances based on civil rights strategy, were drafted as a means of promoting substantive equality from the perspectives of the “injured persons”. The Ordinances specifically address such intersectional problems as poverty, racial discrimination, childhood abuse, and the lack of alternative sources of income. Civil rights ordinances more than any other kind of law, would promote the interests of those most affected by the harms of pornography. They would for the first time, give those harmed a voice in the legal process and thereby incentive to testify publicly to the injuries caused by pornography. No such incentive exists today.

Waltman proclaims for a shift in legal authority away from the state to make it more accessible to members of disadvantaged groups and their legitimate representatives whose commitment to achieving redress is bound to be stronger. There are other social maladies, such as hate crimes, systemic discrimination, and other forms of gender-based violence as rape and domestic abuse, which would benefit from a similar change in focus towards the provision of civil rights. Waltman suggests an overall change in emphasis toward social groups, with support for autonomous organization and litigation, be a more appropriate approach for the twenty-first century? However, these arguments have not the same weight in a Swedish context where the government regarded benign and a protector of vulnerable groups.

Climate politics show the same aggravated by an arguably unjust requirement that a consensus reached among unequally situated parties, those who dominate and those who subordinate. These represent similar democratic problems as the fight against pornography. Both represent complex challenges to strong “vested interest” in society that contribute to the

12 Waltman 2021:398
existing norms, which reproduce harmful practices at the expense of those harmed. According to Waltman there are like pornography aspects of global warming that on a global scale are related to social dominance and multiply disadvantaged groups that will necessitate concerted legal challenges in the future\textsuperscript{13}. Climate change will affect populations around the globe asymmetrically and unequally which makes developing nations demanding compensation especially from industrial countries benefitted of cheap natural resources and the emission of green house gases. The problems attending global warming are, as with pornography, governed by a deliberative politics of consensus that is controlled by dominant nations and interests removed from those most adversely affected\textsuperscript{14}.

The most salient implication of the study as Waltman underscores is the intractable problems of inequality\textsuperscript{15}. Should it be in the hands of the civil society or should it belong to the state to take care of? The problem is somewhat of a dilemma, which Waltman illuminates through a huge amount of empirical examples commented upon throughout the book. The knowledge he exhibits into the different politico-legal systems of United States, Canada, and Sweden is impressive.

Waltman’s position is that pornography and global warming can successfully – though on different levels - be countered only by placing the perspectives and interests of those most immediately affected at the law’s center, which has not been the case over the years. The best way to achieve this is according to Waltman a legal design of the civil rights anti-pornography approach, which is consistent with the empowerment of organizations like women-led nongovernmental organizations representing and assisting individuals who would have difficulties attempting to enforce legal rights on their own. This strategy represent a private strategy. It requires mobilizing both human and economic resources. By contrast, criminal law is in the hands of governmental representatives, not those who victimized. The question of resources becomes then a democratic issue. Waltman’s point is that if the governments do not act to apply their laws against pornography, there are no means for those affected to intervene. The civil right law strategy would shift the distribution of power and put the legal initiative into the hands of those who are hurt, who have the most substantial incentives to act.

\textsuperscript{13} Waltman 2021:399
\textsuperscript{14} See Leigh Raymond et al., Making Change: Norm-Based Strategies for Institutional Change to Address Intractable Problems, Political Res. Quart.67 no, 2014: 1997-211, analyzing challenges to climate change and violence against women.
\textsuperscript{15} Waltman 2021:401