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USING GENDER EQUALITY ANALYSIS TO IMPROVE THE WELLBEING OF PROSTITUTES

BARBARA HAVELKOVÁ*

INTRODUCTION

The idea for this Article comes from my research on the legal treatment of prostitution in the Czech Republic since the fall of communism.¹ Right after the Velvet Revolution of 1989, prostitution was decriminalized² in Czechoslovakia. The subsequent “boom” in prostitution resulted in the adoption of various public order provisions by individual towns, the violation of which was punishable by fines for prostitutes only. The main proposals for change in the past twenty years in the Czech Republic have been for the regulation of prostitution, which would introduce obligatory registration and health checks for prostitutes, move prostitution indoors³ into registered establishments, and, in effect, outlaw “outdoor”⁴ prostitution. Neither the current legal response nor the proposals are concerned with the wellbeing of prostitutes as a legislative goal; instead, public order and morality, health, images of the town and fiscal considerations have been primary concerns. Nor is prostitution addressed as a gender equality problem. The fact that no feminist conceptualization—neither the sex-work nor sexual-domination understanding of the phenomenon—is present in the Czech policy debates can be seen as a specific post-communist phenomenon.⁵ However, it is contended that the lack of a gender equality analysis is a problem facing other legal systems, especially those which have not yet adopted an explicitly gender-conscious policy.

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¹ *Id.*

² Prostitution was not explicitly criminalized under state socialism (1948-1989) in Czechoslovakia but was in some circumstances prosecuted under the criminal offence of parasitism. *Id.* at 59-75.

³ Indoor prostitution refers to prostitution done in sex clubs—often dissimulating as “massage parlors,” night clubs, and cabarets—hotels, and private flats or by means of escort services.

⁴ Outdoor prostitution refers to street, road and highway prostitution.

⁵ I argue that due to its intellectual isolation and lack of freedoms of speech and association, the Czech Republic missed what in the West was the second wave of feminism, including the debates on sexuality, gender and gender-based violence.

This Article proposes a framework for a gender equality analysis of prostitution with the aim of offering national regulators and judges a tool for improving the wellbeing of prostitutes. It compares the treatment of clients and prostitutes, as they are the relevant parties to the transaction of exchange of sex for money. While the Article acknowledges the existence of male, transsexual and transgender prostitutes, its analysis is based on the observation that the distribution of men and women in the positions of buyers and sellers makes prostitution an extremely sex-segregated field where the demand is overwhelmingly created by men and the supply by women.

Part I presents a typology of regulatory regimes, based mainly on secondary literature about European Union member states and common law jurisdictions. Then, Part II offers a synthesis of the two feminist positions on prostitution. It observes that the two positions, sex-work and sexual-domination, conceptualize prostitution in vastly different manners and disagree strongly on the best policy solution: decriminalization with legalization and abolition, respectively. Most feminist writing adheres to one of these two seemingly irreconcilable positions. As a result, a legal gender equality argument that transcends this divide has yet to be fully developed. Part III provides a framework for a gender equality analysis based on a comparison of the treatment of the client and the prostitute. The Article discusses the steps of a gender equality test, extrapolated from constitutional review in European and common law jurisdictions, which often ask similar questions: (i) Is there a difference in treatment or impact (ii) between persons that are comparable? (iii) Is the ground for the distinction suspicious? (iv) Is the distinction fair? (v) Is it pursuing a legitimate aim? (vi) Is the measure proportionate to that aim?

There are three possible scenarios in terms of comparative treatment of the prostitute and the client. First, there can be asymmetric treatment benefiting the client, a still-existing practice—whether in statutory regulation or in enforcement—that violates the principle of gender equality. Second, the treatment can be symmetric, subjecting both parties to equal treatment. The principle of equality requires at least this standard. Third, an asymmetric treatment for the benefit of the prostitute can be adopted. This Article addresses these three types of regimes. In particular, it challenges existing justifications for asymmetric treatment benefiting the client, the arguments that the prostitute is a repeat offender and that she is the merchant or dealer—both which were prominently discussed in the decision of the South African Constitutional Court in *State v. Jordan*—⁶ and the argument of enforcement practicality. It further points out that even when the aim is legitimate, such as public health or public order, an asymmetric practice benefiting the client will often fail the test of proportionality, as it often is not suitable, necessary or properly tailored. The Article then suggests that areas in which the prostitute is particularly disadvantaged and vulnerable are aspects of prostitution which support symmetric measures and even asymmetric treatment benefiting the prostitute: (i) the negative social meaning of prostitution; (ii) the risk of harm to the prostitute; and (iii) the existing inequality between the prostitute and the client in terms of class, age, race, gender, nationality, immigration status and socio-economic status.

⁶ See *State v. Jordan* 2002 (6) SA 642 (CC) (S. Afr.). For a discussion of the case, see note 12.

I. A TYPOLOGY OF REGULATORY REGIMES

The term prostitution is in everyday parlance understood as commercial sex⁷ or “the exchange of sex or sexual services for money or other material benefits.”⁸ Rarely is prostitution defined in law,⁹ and states respond to it in different ways. The literature denominates the various approaches as prohibition, criminalization, abolition, decriminalization, regulation, legalization, and deregulation,¹⁰ but the actual understanding of these terms varies. Upon closer examination, these terms are not helpful, especially since they do not use a single reference framework; their categorizing criteria vary. In order to classify regulatory regimes, or to create a map or spectrum, it is imperative to consider at least the three interconnected issues: (i) the regime’s overall attitude to prostitution: whether prostitution is seen as a negative phenomenon to be eliminated, whether the state is resigned to it and controls or contains it, or whether it accepts prostitution and facilitates it; (ii) the treatment of the actors involved in prostitution: the prostitute, the client, and the procurer; and (iii) what legislative goals the regime primarily pursues and whether it is concerned with the wellbeing of the prostitute.

A. Overall Attitudes towards Prostitution

On the one side of the spectrum are regimes that consider prostitution a negative phenomenon and aim at its elimination. One way of suppressing prostitution is to prohibit it in its entirety by criminalizing the procuring, buying and selling of sex and related activities. Such a regime, often referred to as prohibitionist or criminalization, exists in the United States.¹¹ The second approach, which criminalizes the procurement of brothel keeping and the selling of

⁷ See Laurie Shrage, *Should Feminists Oppose Prostitution*, 99 ETHICS 348 (1989).

⁸ JOYCE OUTSHOORN, *Introduction: Prostitution, Women and Politics in THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE 3* (Joyce Outshoorn ed., 2004).

⁹ A comparative study of seventeen European countries revealed that only two of them—Austria and the UK—had a legal definition. See Blanka Hančilová & Camille Massey, *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States*, INT’L. CTR. FOR MIGRATION POLICY DEV. 107 (2009), available at http://ec.europa.eu/anti-trafficking/download.action?nodeId=519395a8-fe4e-417f-bf65-fb65d004779e&fileName=ICMPD+Report+on+EU+Legislation+on+trafficking_en.pdf&fileType=pdf.

¹⁰ Common is the distinction between three regulatory regimes: abolitionism (referring to Sweden), prohibitionism (often referring to the U.S.) and regulation (referring to the Netherlands). See OUTSHOORN, *supra* note 8, at 6; *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences*, NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE 47 (2004), available at http://www.regjeringen.no/upload/kilde/jd/rap/2004/0034/ddd/pdfv/232216-purchasing_sexual_services_in_sweden_and_the_netherlands.pdf. The term legalization is often used for the Dutch model as well. See Hinke Beukema, *Legalisation of Prostitution in the Netherlands: A Trial to Decriminalise Prostitution and to Improve the Economical, Physical and Emotional Situation of Prostitutes*, 9 FEMINA BOREALIS (2004). Prostitutes themselves often call for decriminalization or deregulation. See International Committee for Prostitutes’ Rights, *World Charter for Prostitutes’ Rights (adopted in Amsterdam in 1985)* SOCIAL TEXT (1993) [hereinafter ICPR]; KAMALA KEMPADOO, *Introduction, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* (Kamala Kempadoo & Jo Doezema eds., 1998). Other authors have created new terminology, similar to mine. For example Hančilová & Massey, *supra* note 9, distinguish between four approaches: a) legalization, b) criminalization of connected activities, c) criminalization of the client, and d) complete criminalization. See also MARJAN WIJERS, *Women, Labor and Migration: The Position of Trafficked Women and Strategies for Support, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* (Kamala Kempadoo & Jo Doezema eds., 1998).

¹¹ This is true for the entirety of the United States with the exception of parts of Nevada. See CATHARINE A. MACKINNON, *SEX EQUALITY* 1236 (Foundation Press; Thomson/West 2nd ed. 2007); see also RONALD JOHN WEITZER, *The Politics of Prostitution in America, in SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* (Ronald John Weitzer ed., 2000).

sex without criminalizing the buying, targets procurers and prostitutes but not clients. South Africa used to follow this approach, where the system was famously subject to constitutional review in the case of *State v. Jordan*.¹² Both of these repressive approaches have now been abandoned by an overwhelming majority of countries in the European Union.¹³

A third approach to the elimination of prostitution does not target the prostitute's behavior but instead focuses on stifling demand by criminalizing the clients as well as the procurers. Often referred to as abolitionist or neo-abolitionist,¹⁴ it is exemplified today by the "Swedish model."¹⁵ In Sweden, prostitution itself is neither legal nor illegal; however, the use of the prostitute is punishable. Since 1999, "A person who [. . .] obtains a casual sexual relation in return for payment, shall be sentenced for purchase of sexual services to a fine or imprisonment for at most six months."¹⁶ In addition, procurement—"promot[ing] or improperly financially exploit[ing] a person's engagement in casual sexual relations"—is punishable by up to four years in prison.¹⁷ This policy is accompanied by programs for reintegration into society or a range of social provisions for prostitutes, including shelter and training.¹⁸ The wellbeing of the

¹² *State v. Jordan* 2002 (6) SA 642 (CC) (S. Afr.). The case concerned a constitutional challenge to the provisions of the Sexual Offences Act 23 of 1957 that criminalized brothel-keeping and providing sex for reward (the offense of "living on earnings of prostitution" was defined in Art. 20(1)(A) as applying to "any person who... has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward"). The challenge was on several grounds, in particular dignity, privacy and equality. As far as equality is concerned, the majority dismissed the application, arguing that, because a client was criminally liable as an accessory or a conspirator in the act, there was no discrimination on the basis of sex. *Id.* at para. 11. The minority disagreed, arguing that the fact that the "prostitute [is] the primary offender of the actual offence... carr[ies] a difference in social stigma and impact." *Id.* at para. 63. They considered the provision to be unfair indirect discrimination on the basis of gender that is not justified. For a more detailed discussion of the case, see Denise Meyerson, *Does the Constitutional Court of South Africa Take Rights Seriously? The Case of S v Jordan*, ACTA JURIDICA (2004); Rosaan Kruger, *Sex Work from a Feminist Perspective: A Visit to the Jordan Case*, 20 S. AFR. J. HUM. RTS. 138 (2004). The purchase of sex was explicitly criminalized in 2007. South Africa is currently debating an overhaul of its legal treatment of prostitution. See SOUTH AFRICAN LAW REFORM COMMISSION, DISCUSSION PAPER ON SEXUAL OFFENCES AND ADULT PROSTITUTION, (2009) available at www.justice.gov.za/salrc/dpapers/dp0001-2009_prf107_2009pdf.

¹³ Romania was the last country to decriminalize prostitution in 2009. E-mail from Daniela Ortner to author (May 31, 2011) (on file with author).

¹⁴ Abolitionism has its origins in the nineteenth century. The "old abolitionism," mainly characterized by opposition to regulation regimes which normalize prostitution, was an inspiration for many national regulatory regimes in the first half of the twentieth century as well as to the international instruments of that period, such as the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, 282. Today's abolitionism, also referred to as "neo-abolitionism," keeps the anti-legalization position and adds an emphasis on fighting demand.

¹⁵ BROTTSBALKEN [BrB] [CRIMINAL CODE] 4:1a (Swed.). Trafficking is punishable with up to life imprisonment.

¹⁶ Originally adopted by the Law of Sweden on the Prohibition of the Purchase of Sexual Services of 1999, it is now part of the Swedish Criminal Code. *Id.* 6:11.

¹⁷ *Id.* 6:12.

¹⁸ For more on the "Swedish model," see MACKINNON, *supra* note 11, at 1235–1236; YVONNE SVANSTRÖM, *Criminalizing the John - a Swedish Gender Model?*, in THE POLITICS OF PROSTITUTION: WOMEN'S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE (Joyce Outshoorn ed., 2004); NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, *supra* note 10; JULIE BINDEL & LIZ KELLY, CHILD AND WOMAN ABUSE STUDIES UNIT, LONDON METRO. UNIV., A CRITICAL EXAMINATION OF RESPONSES TO PROSTITUTION IN FOUR COUNTRIES: VICTORIA, AUSTRALIA; IRELAND; THE NETHERLANDS; AND SWEDEN (2003), available at <http://www.glasgow.gov.uk/NR/rdonlyres/C19E010B-1A4F-4918-97BD-F96AF7D7F150/0/mainreport.pdf>; Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings*, 10 VIOLENCE AGAINST WOMEN 1187 (2004); Max Waltman, *Sweden's Prohibition of Purchase of Sex: The Law's Reasons, Impact, and Potential*, 34

prostitute is a primary concern. Estimates of numbers of prostitutes in Sweden are considerably low with about 0.29 prostitutes per 1,000 inhabitants.¹⁹ The Swedish model has now been adopted in Iceland and Norway.²⁰

Most of the other regulatory regimes are based on the decriminalization of prostitution; neither the prostitute nor the client is criminally liable. The regimes range greatly in their further responses to prostitution; however, they may be broadly categorized into three main types: control, containment and legalization. The control approach, referred to here as “decriminalization with state control,” is resigned to the existence of prostitution but does not accept it as a normal, morally neutral activity. It decriminalizes the buying, selling and procuring of prostitution, but regulates and controls it. A highly controlling regulation approach was common in the nineteenth century,²¹ when prostitutes were policed through registers,²² obligatory regular health checks, strict zoning of street prostitution, and regulation of brothels.²³ The Czech 2005 proposal²⁴ falls under this category. I distinguish it from the “decriminalization with legalization” approach, the example of which is the “Dutch model,”²⁵ which views prostitution as morally neutral, treats it as work and is explicitly concerned with the wellbeing of prostitutes.

The “decriminalization with containment” regime, which is prevalent in Europe,²⁶ differs from the “decriminalization with control” regime in that procurement usually remains illegal, and thus brothels are prohibited. The state addresses only some aspects of prostitution, such as health or prostitution-related activities, such as soliciting in public places or curb-crawling.²⁷ Prostitution itself operates in a grey zone and is sometimes not even mentioned in statutes.²⁸ Its policing can occur under general public order or public health provisions. Fewer regulations surrounding prostitution indicates a more permissive regime. A regime which did not address prostitution specifically at all could theoretically be considered a “pure decriminalization” regime.²⁹

WOMEN’S STUDIES INTERNATIONAL FORUM 449 (2011).

¹⁹ Report by the Czech Parliamentary Institute cited by Deputy Karas (KDU-ČSL) speaking on 29 March 2005, *available at* http://www.psp.cz/sqw/tisky.sqw?F=H&PT=U&dx=1&o=4&na=prostituce&T=&ZA=&f_N=on&f_I=on&f_U=on&f_S=on&f_Z=on&f_P=on&f_R=on&f_V=on&f_O=on&ra=20.

²⁰ See Sheila Jeffreys, *Prostitution, Trafficking and Feminism: An Update on the Debate*, 32 WOMEN’S STUDIES INT’L FORUM 316, 319 (2009); SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA: THE POLITICAL ECONOMY OF THE GLOBAL SEX TRADE* 203-204 (Routledge 2009).

²¹ See ALEXANDRE JEAN B. PARENT-DUCHATELET, *DE LA PROSTITUTION DANS LA VILLE DE PARIS* (1836).

²² Prostitutes work on the basis of a license and have to register with local authorities. Practicing prostitution without a license makes the prostitute liable in administrative or criminal law.

²³ This approach existed for example in the Austro-Hungarian Empire. Havelková, *supra* note 1, at 59. Today, it still exists in some Länder in Austria. See BIRGIT SAUER, *Discourses on Prostitution in Austria*, in *THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE* (Joyce Outshoorn ed., 2004).

²⁴ Government Of The Czech Republic, Governmental Proposal Of An Act On The Regulation Of Prostitution (Print No. 1073) (2005), *available at* <http://www.psp.cz/sqw/text/tiskt.sqw?O=4&CT=1073&CT1=0>.

²⁵ MACKINNON, *supra* note 11, at 1235-1236.

²⁶ Hančilová, *supra* note 9, at 104.

²⁷ Curb-crawling, or in the UK terminology “kerb-crawling”, is the client activity of soliciting street prostitutes by driving along the curbside.

²⁸ This is for example the case in the Czech Republic. Havelková, *supra* note 1, at 76 and following.

²⁹ Under a pure decriminalization regime, prostitution would not be criminal and would be subject to the same regulatory requirements as other occupations and businesses—for example, in relation to occupational health and safety and municipal planning. The New Zealand Prostitution Reform Act 2003

Legalization of prostitution is usually the aim of regimes that openly accept prostitution as work or service. This approach has been adopted in the Netherlands and is thus often referred to as the “Dutch model.”³⁰ The state of the Netherlands lifted a ban on brothels in 2000 in a move from “passive tolerance”³¹ to “active tolerance” of prostitution.³² The state entitled municipalities to license brothels and regulate other aspects of the sex industry, such as setting time and place restrictions and regulating advertisements.³³ While maintaining criminal sanctions for trafficking and emphasizing the prosecution of exploitation of involuntary prostitution,³⁴ the state aims to normalize the status of voluntary prostitutes. The wellbeing of the prostitute is an important concern of this approach. Prostitutes can either be employed by brothel-keepers or be self-employed, and they are liable for tax and social security contributions.³⁵ While health checks are recommended, there is no obligation that they be undergone.³⁶ A failure to legalize their activities does not lead to criminal liability; however, “the sale and purchase of sexual services on the street outside the [tolerance] zone is a criminal offence [. . .] punishable by fines.”³⁷ The numbers of prostitutes are high under such a regime; it is estimated that about 3.13 out of 1,000 inhabitants in the Netherlands are prostitutes.³⁸

B. *Regulating the Actors Involved in Prostitution*

Of the actors—the prostitute, the client, and the procurer or brothel-keeper—the prostitute is often the primary target of criminalization, control, regulation or containment. Many “decriminalization with containment” regimes only address obligations and restrictions through the prostitutes. This was the case in the United Kingdom until 1985³⁹ and is still the case with many municipal ordinances governing public order in the Czech Republic.⁴⁰ A recent legislative

is often considered an example. NEW ZEALAND GOVERNMENT, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003 (2008). Because it legalizes prostitution and procurement and requires registration for both, it would however fall under a legalization regime in my typology.

³⁰ MACKINNON, *supra* note 11, at 1235-1236.

³¹ The ban on brothels has not, according to Dutch government, been enforced for the fifty years preceding the 2000 lift of the ban, and the “prostitution business” was not interfered with unless it caused “inadmissible nuisance” or breached other provisions of law. NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, *supra* note 10, at 26.

³² *Id.* at 26.

³³ NETHERLANDS MINISTRY OF FOREIGN AFFAIRS, DUTCH POLICY ON PROSTITUTION. QUESTIONS AND ANSWERS 2004 (2004), *available at* <http://www.mfa.nl/contents/pages/743/prost.pdf>.

³⁴ *Id.* at 8. For more on the “Dutch model,” see Beukema, *supra* note 10; A.L. Daalder, *Lifting the Ban on Brothels: Prostitution in 2000-2001 (English summary)* (2004), *available at* <http://www.wodc.nl/onderzoeksdatabase/01.035g-lifting-the-ban-on-brothels.aspx>; NORWEGIAN MINISTRY OF JUSTICE AND THE POLICE, *supra* note 10; REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES: MISSION TO THE NETHERLANDS (2007).

³⁵ *See* NETHERLANDS MINISTRY, *supra* note 33, at 6.

³⁶ *See id.* at 4.

³⁷ *Id.*

³⁸ *See* Report by the Czech Parliamentary Institute cited by Deputy Karas (KDU-ČSL) speaking on 29 March 2005, *available at* http://www.psp.cz/sqw/tisky.sqw?F=H&PT=U&dx=1&o=4&na=prostitute&T=&ZA=&f_N=on&f_I=on&f_U=on&f_S=on&f_Z=on&f_P=on&f_R=on&f_V=on&f_O=on&ra=20.

³⁹ In the UK, the 1959 Street Offences Act made it illegal for a “common prostitute” to loiter or solicit for prostitution. Only in 1985 did curb-crawling—soliciting by the client—receive the same treatment. *See, e.g.*, Nikki Adams, *Prostitute women, justice and the law*, 4 A CULTURAL REVIEW 295 (1993).

⁴⁰ *See* Havelková, *supra* note 1, at 79; Government of the Czech Republic, *supra* note 24.

governmental proposal in the Czech Republic, falling under the “decriminalization with state control” category, would have introduced restrictions, obligations and sanctions diametrically different for the prostitute and the client. The proposal foresaw eight different offenses for the prostitute, punishable by up to approximately \$2,900,⁴¹ and only three for the client, punishable by up to \$870. While selling sex without a license was an administrative offense for the prostitute, buying sex from a prostitute without a license was not. Repeated exercise of prostitution without a license by the prostitute was to be a crime, punishable with up to one year’s imprisonment or a fine. A client who repeatedly bought sex from an unlicensed prostitute, on the other hand, would not be punished, notwithstanding the fact that the lack of a license might have meant that the prostitute had been trafficked.

Many regulatory regimes ignore the client completely or pay much less regulatory attention to him. Restrictive regimes that aim to prohibit prostitution in its entirety sometimes do criminalize the client but other times choose not to criminalize his conduct.⁴² The exception is the “Swedish model,” under which the client is the sole target of criminalization.⁴³ A remark should be made regarding the implementation of the rules governing both the selling and the purchasing of sex in practice—large discrepancies exist between statutory provisions and their enforcement. Even where the legal treatment of client and prostitute is formally equal, an enforcement bias can exist against the prostitute. In repressive prohibitionist regimes that criminalize both buying and selling of sex, such as the United States, prostitutes are more often targeted than clients.⁴⁴ Even in regimes where prostitution has been decriminalized, such as France and Canada,⁴⁵ prostitutes are nonetheless disproportionately targeted and harassed in policing.

C. Legislative Goals

Joyce Outshoorn, an editor of a multi-country study of policy debates about prostitution, distinguishes between four goals of state intervention: maintaining law and order, preserving morals, preventing the spread of sexually transmitted diseases (“STDs”), and protecting women from exploitation.⁴⁶ This Article is concerned with the wellbeing of prostitutes as a legislative goal and with the principle of gender equality as a standard and corrective for any legislative goal. Both the “Dutch model” and the “Swedish model” are influenced by feminist discussions of

⁴¹ The average wage in the Czech Republic in the last quarter of 2010 was 25803 CZK (\$1,500 USD), according to the Czech Statistical Office. <http://www.czso.cz>.

⁴² This has been the case in South Africa. See the discussion of *State v. Jordan*, *supra* note 6, *supra* note 12 & discussion *infra* Part III.A.

⁴³ See *supra* note 18.

⁴⁴ See DOROTHY MCBRIDE STETSON, *The Invisible Issue: Prostitution and Trafficking of Women and Girls in the United States*, in THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE (Joyce Outshoorn ed., 2004).

⁴⁵ See LESLIE ANN JEFFREY, *Prostitution as Public Nuisance: Prostitution Policy in Canada in THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE* (Joyce Outshoorn ed., 2004); see also AMY G. MAZUR, *Prostitute Movements Face Elite Apathy and Gender-biased Universalism in France*, in THE POLITICS OF PROSTITUTION: WOMEN’S MOVEMENTS, DEMOCRATIC STATES, AND THE GLOBALISATION OF SEX COMMERCE (Joyce Outshoorn ed., 2004).

⁴⁶ Most regimes have a mix of legislative goals. OUTSHOORN, *supra* note 8. The image of town and fiscal considerations came up as prominent aims in the Czech Republic. See Havelková, *supra* note 1, at 102.

the late twentieth century⁴⁷ and count the “wellbeing of the prostitute” prominently among their legislative goals. Their understanding of what is good for the prostitute is, however, dramatically different, and it mirrors the two different feminist positions. Thus, the Swedish government states that it criminalized the purchase of sex because “[t]he ability of men to purchase sexual access to women in order to gratify their own sexual needs runs contrary to the conviction of universal human equality and to the pursuit of full equality between women and men.”⁴⁸ The Dutch government’s goals in legalizing prostitution included the “amelioration of the prostitutes’ position: greater personal safety and more legal protection of their rights. Furthermore it was hoped that the taboos and stigmatization surrounding prostitution would disappear and that prostitution would become socially acceptable.”⁴⁹

Even today, however, some regimes or legislative proposals decline to consider the wellbeing of the prostitute. For example, the 2005 Czech Proposal, presented as liberal and permissive and inspired by the Dutch model,⁵⁰ was actually highly restrictive of prostitutes and was unconcerned with their wellbeing.⁵¹ This Article considers how the wellbeing of prostitutes can be improved using the principle of gender equality, especially in countries that have not yet chosen a legislative framework explicitly based on concern for the prostitute. To enable the discussion to go beyond the sex-work versus sexual-domination binary, it is important to first present the landscape of the feminist debate.

II. FEMINIST APPROACHES

The issue of prostitution has been difficult for feminists. The two things feminists agree on are that the act of prostitution itself should never be criminalized⁵² and that the exploitation of women by using coercion, deceit, abuse or violence to bring or keep them in prostitution always should be deemed illegal. However, feminists are diametrically opposed about whether a person can choose prostitution freely as a profession. Two distinct positions can be identified.⁵³ The first position conceptualizes prostitution as sex work and speaks about sex workers, clients and procurers; the second sees it as sexual domination and the essence of women’s oppression and speaks about prostituted persons or persons in prostitution, johns and pimps. These positions further disagree on the following: (i) whether prostituting oneself is a free choice and an expression of agency or whether people are coerced into prostitution; (ii) whether what is being sold is the service or the self; (iii) whether the harm of prostitution is merely the repressive laws or inherently prostitution itself; (iv) whether economic or sexual inequality is

⁴⁷ Historically, in the nineteenth and first half of the twentieth century, many regimes had a strong emphasis on public order, morality and health. The well-being of the prostitute was either a non-issue or a marginal concern.

⁴⁸ MACKINNON, *supra* note 11, at 1315.

⁴⁹ Beukema, *supra* note 10, at 152.

⁵⁰ A governmental proposal of an Act on the Regulation of Prostitution was presented to the Parliament in 2005. *See* Government Of The Czech Republic, *supra* note 24.

⁵¹ Havelková, *supra* note 1, at 101.

⁵² *See* GRAHAM SCAMBLER & ANNETTE SCAMBLER, *RETHINKING PROSTITUTION: PURCHASING SEX IN THE 1990S* 186 (Routledge 1997); Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. OF GENDER & L. 13 (1993); *see also* ICPR, *supra* note 10.

⁵³ *See, e.g.*, Joyce Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, 12 SOCIAL POLITICS 1 (2005).

at the root of prostitution; (v) whether or not a distinction should be drawn between voluntary and forced prostitution; (vi) whether policy should be informed by sex-workers speaking for themselves or by experiences of the most marginalized prostitutes extracted by qualitative research; and (vii) whether the appropriate legal response to prostitution is the “decriminalization with legalization” regime or the criminalization of the client under the “abolition” regime.

A. *The Sex-Work Position*

The sex-work position⁵⁴ emphasizes the autonomy, agency, choice and self-determination of prostitutes. Most of its proponents would argue that, like any other worker, the prostitute sells alienable labor power.⁵⁵ Than-Dam Truong⁵⁶ conceptualizes prostitution as “sexual labor,” which should be considered “similar to other forms of labor that humankind performs to sustain itself.”⁵⁷ According to most sex-work proponents, the inherent problem is not in the nature of sex work but rather with the conditions that such work exists in today. It is the laws criminalizing sex workers and repressing their migration that need changing, not prostitution itself. Many organizations of prostitutes⁵⁸ are among the proponents of the sex-work position. It also finds support among many feminists and has been identified as the currently predominant position in academic writing.⁵⁹ Moreover, it resonates with a liberal emphasis on personal choice and agency as well as with socialist feminism’s analysis of sex work as work that places prostitutes within the context of the international labor movement.⁶⁰

The sex-work position appears to be more diverse than the sexual-domination position, and is comprised of four principled sub-positions and one pragmatic sub-position. The first principled sex-work sub-position addresses sex and sexuality. Its proponents, such as Gayle Rubin and Pat Califia⁶¹ who are often referred to as “sex radicals,”⁶² stress positive aspects of prostitution. They celebrate consensual sexual practices that can be read as subverting binaries of normal versus abnormal, healthy versus unhealthy, and pleasurable versus dangerous sex. Subverting these

⁵⁴ See, e.g., FRÉDÉRIQUE DELACOSTE & PRISCILLA ALEXANDER, SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (1987); WENDY CHAPKIS, LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR 76 (1997); SHANNON BELL, READING, WRITING, AND REWRITING THE PROSTITUTE BODY (1994); THAN DAM TROUNG, SEX, MONEY AND MORALITY: THE POLITICAL ECONOMY OF PROSTITUTION AND TOURISM IN SOUTH EAST ASIA (1990); KAMALA KEMPADOO & JO DOEZEMA, GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION (1998).

⁵⁵ The use of the, originally Marxist, term “alienable labor power” equates prostitution to other types of work, where “contracts transfer powers of command from seller to buyer (the extent of those powers and the terms of the transfer being the subject of the contract), and so require the seller to temporarily surrender or suspend aspects of her will.” Julia O’Connell Davidson, *The Rights and Wrongs of Prostitution*, 17 HYPATIA 84, 86 (2002).

⁵⁶ TROUNG, *supra* note 54.

⁵⁷ KEMPADOO & DOEZEMA, *supra* note 54, at 4 (summarizing Truong’s arguments).

⁵⁸ See VALERIE JENESS, MAKING IT WORK: THE PROSTITUTES’ RIGHTS MOVEMENT IN PERSPECTIVE (1993).

⁵⁹ See Jeffreys, *supra* note 20.

⁶⁰ See D. KELLY WEISBERG, APPLICATIONS OF FEMINIST LEGAL THEORY TO WOMEN’S LIVES: SEX, VIOLENCE, WORK, AND REPRODUCTION (1996).

⁶¹ See, e.g., PAT CALIFIA-RICE, MACHO SLUTS: EROTIC FICTION (Alyson Publications 1988); PAT CALIFIA, PUBLIC SEX: THE CULTURE OF RADICAL SEX (Cleis Press 1st ed. 1994); GAYLE RUBIN, *Thinking sex: Notes for a radical theory of the politics of sexuality*, in CULTURE, SOCIETY AND SEXUALITY: A READER (Richard Parker & Peter Aggleton eds., 1999).

⁶² Davidson, *supra* note 55, at 95.

binaries transforms prostitution into a legitimate feature of “erotic diversity.”⁶³ Any repressive approach is blamed for “society’s negative attitudes *to all* women’s sexuality,”⁶⁴ and prostitution has a valuable social function of “facilitat[ing] the gratification of erotic needs that would otherwise go unmet.”⁶⁵ However, other sex-work proponents have criticized these “sex radicals.” O’Connell Davidson challenges the notion of a “transcendental human *need* for prostitution” and stresses the need to recognize the social construction of desire. Secondly, she criticizes the fiction of a sovereign sexual subject. Under patriarchy, an individual cannot liberate him or herself “from [a] fixed relationship to the sexual community” by “exchanging money for commodified sex,”⁶⁶ as sex radicals believe.

A second principled sub-position concerns the nature of work. To Chapkis, sex work is normal “emotional labor” like child care, massage work, psychotherapy, acting or other service work.⁶⁷ Similarly, Troung compares sex work to any other mental or manual labor, “all of which involve specific parts of the body and particular types of energy and skill.”⁶⁸ On the basis of its normalcy, prostitution should be treated exactly like any other work. This is a relatively common, but not universally held, sub-position among sex-work proponents.

A third sub-position stresses agency.⁶⁹ It argues that respecting choice is the basis of women’s empowerment. As many sex-worker organizations claim that prostitution is their work of choice, these sex-work proponents insist that the law should enable this choice. Moreover, recognition of agency is seen as a precondition for any bottom-up attack on patriarchal structures. This understanding is also quite common in sex-work writing, even though many socialist feminists⁷⁰ argue that prostitution is caused by women’s poverty and recognize that, as a result, choice can be limited. A fourth sub-position is the socialist feminist one. Like radical feminists, socialist feminists recognize external conditions to be the root of prostitution. Where radical feminists identify gender as the organizing axis of disadvantage,⁷¹ socialist feminists emphasize class and social conditions.

Whether they believe that prostitution is sexually liberating or not, normal work or not, the result of free choice or of external conditions, sex-work proponents are unified by a pragmatic argument: prostitution is a phenomenon that cannot be eradicated. Legalizing it would enable guarantees of equal rights for sex workers.

The sex-work position develops the distinction between forced or involuntary prostitution, known as trafficking, on one hand, and voluntary or consensual prostitution, referred to as “sex work”, on the other. Because trafficked women are coerced, involuntary prostitution must remain criminalized; however, voluntary prostitution, which is an expression of a woman’s agency, should be

⁶³ *Id.* at 88-98.

⁶⁴ HELEN VICQUA, *Scarlet Alliance internal communication, May 19th 1995*, in ALISON MURRAY, *Debt-Bondage and Trafficking. Don’t Believe the Hype*, in KAMALA KEMPADOO & JO DOEZEMA *supra* note 54, at 61.

⁶⁵ Davidson, *supra* note 55, at 89.

⁶⁶ *Id.*

⁶⁷ *See* CHAPKIS, *supra* note 54, at 76.

⁶⁸ KEMPADOO & DOEZEMA, *supra* note 54, at 4.

⁶⁹ *See, e.g.*, Davidson, *supra* note 55.

⁷⁰ *See, e.g.*, Stephanie A. Limoncelli, *The Trouble with Trafficking: Conceptualizing Women’s Sexual Labor and Economic Human Rights*, 32 *Women’s Studies International Forum* 261 (2009).

⁷¹ In equality law, this is the protected ground or characteristic.

decriminalized. In terms of regulatory regimes, the sex-work position mostly calls for decriminalization, often accompanied by legalization of voluntary prostitution. Under it, sex work should be treated as any other work or service and sex migration as any other labor migration. The proponents argue for equal human and labor rights, protection for all sex workers and working visas for migrant sex workers.⁷² It is thus also sometimes referred to as the “pro-rights” approach,⁷³ and the “Dutch model” is often seen as an example of good practice.

B. *The Sexual-Domination Position*

The sexual-domination approach argues that prostitution is a form of violence against women, and it contests the claims of choice, consent and voluntariness, citing prostitution survivors’ description of it as “the choice made by those who have no choice.”⁷⁴ Kathleen Barry argues that prostitution is a form of female sexual slavery.⁷⁵ In contrast to the sex-work approach, which concerns itself with conditions of labor, the sexual-domination claims that the nature of the activity is the problem and that it is inherently harmful. Unlike the sex-work proponents, sexual-domination theorists argue that what is being sold is the person herself and not just her services. Carole Pateman, describing what is wrong with prostitution, states that for the client to buy mastery of an objectified female body, the prostitute must sell *herself* in a different and much more real sense than that which is required by any other occupation.⁷⁶ This is inherently damaging to the prostitute.⁷⁷ Sexual-domination proponents do not dispute the fact that prostitution is often a result and an indicator of economic inequality, but they see sexual domination as a more fundamental basis and explanation of prostitution.⁷⁸

Radical feminists are proponents of the sexual-domination position,⁷⁹ which, unlike the relatively diverse sex-work position, is quite unified in terms of principled arguments. Sexual-domination proponents argue that patriarchy is at the root of the subordination that is prostitution and see the fight against prostitution as a necessary part of challenge to gender inequality in society. They try to attain an ideal—they hope for the eradication of prostitution by curbing its demand. The principles of the sexual-domination position cannot be compromised, and thus there is no pragmatic position. As a result, a permissive policy, such as legalization, becomes unacceptable even as a temporary solution, as it would create a culture accepting of prostitution and be in direct clash with the principle of gender equality.

In terms of evidence, sexual-domination proponents often use in-depth interviews and biographical narratives. These sources are combined with statistical data to show the violence inherent in prostitution. Citing extensive research

⁷² See KEMPADOO & DOEZEMA, *supra* note 54.

⁷³ Outshoom, *supra* note 53.

⁷⁴ Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order to Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 110 (2006).

⁷⁵ See KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 40 (1984).

⁷⁶ See CAROLE PATEMAN, *THE SEXUAL CONTRACT* 207 (1988).

⁷⁷ See also Dorchen Leidholdt, *Prostitution: A Violation of Women’s Human Rights*, 1 CARDOZO J. L. & GENDER 133, 135 (1993); MacKinnon, *supra* note 52.

⁷⁸ See BARRY, *supra* note 75, at 9-10.

⁷⁹ Andrea Dworkin, Catharine MacKinnon, Janice Raymond, Kathleen Barry, among others.

conducted in different countries, Melissa Farley points out that the overwhelming majority of women in prostitution report repeated instances of verbal abuse, physical assault, and rape by both procurers and buyers.⁸⁰ Cross-culturally, the prevalence of post-traumatic stress disorder (“PTSD”) is at 78 – 80 %, levels which are higher than those of Vietnam veterans,⁸¹ and a Canadian statistic shows that prostitutes are forty times more likely to become murder victims than the general populace.⁸² Sheila Jeffreys conceptually distinguishes between this “unpaid for” violence and the “paid for violence of everyday penetration.”⁸³ Sexual proponents understand not only the excess brutality inflicted on prostitutes in some cases, but rather all prostitution, to fall into the category of violence against women. Because lack of choice and harm are considered intrinsic to prostitution, prostitution is not seen as conceptually separate from trafficking; the distinction between involuntary and voluntary prostitution is contested. As a result, international anti-trafficking instruments⁸⁴ are given the broadest possible meaning. The preferred legislative response is the curbing of demand⁸⁵ through the criminalization of procurers and clients, accompanied by a support system for women to escape prostitution⁸⁶—the “Swedish model.”⁸⁷

C. Critique of Proposed Legal Responses

It is obvious from the above mentioned postulates that the two feminist positions will be highly critical of each other’s preferred legal response to prostitution. Sex-work proponents point out that the proposal for suppression of demand, the “Swedish model,” is blinded to the realities of prostitution by its naïve idealism. The wellbeing of women in or about to enter prostitution should be tantamount, and not an abstract goal of abolition. One result of the “Swedish model,” asserted by the sex-work proponents, is that the actual situation of prostitutes is not improved; they still cannot operate openly and claim equal rights. It is argued that clients’ fear of criminalization leads to two further negative effects: the negotiation time for transactions shortens, which makes it more difficult for the prostitute to assess whether the client is dangerous,⁸⁸ and clients, who are sometimes the only possible link between a victim of trafficking and the police, lose any incentive for reporting potential instances of trafficking.⁸⁹ According to a Norwegian government’s report, one Swedish prostitute informant stated, “There is great pressure on prices, demands for unprotected sex have increased and there is more violence.”⁹⁰

⁸⁰ See generally Farley, *supra* note 74.

⁸¹ See MacKinnon, *supra* note 11, at 1259.

⁸² See Farley, *supra* note 74, at 115.

⁸³ Jeffreys, *supra* note 20.

⁸⁴ See 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, 55 U.N. GAOR Supp. (No. 49), U.N. Doc. A/45/49 (Vol. I) (2001).

⁸⁵ See, e.g., MacKinnon, *supra* note 52; Barry, *supra* note 75; Kathleen Barry, *THE PROSTITUTION OF SEXUALITY* (1995); Farley, *supra* note 74.

⁸⁶ See Andrea Dworkin, *LETTERS FROM A WAR ZONE: WRITINGS 1976-1987* 147 (1988).

⁸⁷ The proponents of the sexual-domination approach also argue for the availability of civil remedies. MacKinnon, *supra* note 11, at 1322, 1327. A civil claim for coercion into prostitution exists in the state of Florida. FLA. STAT. § 796.09(1) (2011).

⁸⁸ See Norwegian Ministry of Justice and the Police, *supra* note 10.

⁸⁹ From interviews conducted by Hančilová. See Hančilová & Massey, *supra* note 9, at 103-11.

⁹⁰ Norwegian Ministry of Justice and the Police, *supra* note 10, at 19.

On the other side, sexual-domination proponents' critique of permissive approaches concentrates on the "prostitution culture"—an increase in both legal and illegal prostitution⁹¹ and an acceptance of objectification of women. They argue that legalization does not coincide with equal treatment, normalization and destigmatization. They point out that the preference for indoor prostitution and the fact that outdoor prostitution is permitted in very limited urban areas under the "Dutch model" show that the aim is to keep prostitution out of sight, which implies that prostitution is still not viewed as normal and is not destigmatized. They also criticize health checks as a measure that aims to secure an STD-free service to clients rather than protection to the prostitute. The target of legal control of prostitution is thus its "outward appearance rather than the conditions in which women find themselves. On the whole, governments are far more anxious about public order and public health than about abuse and violence."⁹² It is also often pointed out that only a small percentage of prostitutes have availed themselves of the registration option,⁹³ which shows that not all prostitutes are in the position to regularize their situation.

D. A Middle Ground?

It is difficult to locate a middle ground in the feminist debate, especially as far as legal solutions are concerned. Several writers have extremely important insights and avoid the binary. For example, many socialist feminists argue that prostitution should not be attacked directly but that women's poverty needs to be addressed. For example, Stephanie Limoncelli states that "strategies for social and economic justice [are needed], which at the same time, will help to combat the exploitation of women in prostitution."⁹⁴ Another solution is offered by Laurie Shrage, who sees prostitution as gendered and oppressive only under the current gender order⁹⁵ and argues for a change in the cultural context.⁹⁶ Shrage stated, "By striving to overcome discriminatory structures in all aspects of society—in the family, at work outside the home, and in our political institutions—feminists will succeed in challenging some of the cultural presuppositions which sustain prostitution."⁹⁷ Consequently, "if prostitution were sufficiently transformed to

⁹¹ For an example, *see* Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (2005), available at http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf.

⁹² MARJAN WIJERS & LIN LAP-CHEW, TRAFFICKING IN WOMEN FORCED LABOUR AND SLAVERY-LIKE PRACTICES IN MARRIAGE, DOMESTIC LABOUR AND PROSTITUTION *cited in* Farley, *supra* note 74, at 137.

⁹³ According to the Prostitution Information Center in Amsterdam, in the Netherlands only 5% to 10% of the nearly 20,000 prostitutes are registered and pay taxes. *See* Dan Bilefsky, *Belgian Experiment: Make Prostitution Legal to Fight Its Ills*, WALL ST. J., May 26, 2005 at 2, available at <http://www.aegis.org/news/wsj/2005/WJ050507.html>.

⁹⁴ Limoncelli, *supra* note 70, at 267.

⁹⁵ [A]lthough the commercial availability of sexuality is not in every existing or conceivable society oppressive to women, in our society this practice depends upon the general acceptance of principles which serve to marginalize women socially and politically. Because of the cultural context in which prostitution operates, it epitomizes and perpetuates pernicious patriarchal beliefs and values and, therefore, is both damaging to the women who sell sex, and as an organized social practice, to all women in our society.

Shrage, *supra* note 7, at 349.

⁹⁶ *See id.*

⁹⁷ *Id.* at 360.

make it completely non-oppressive to women, though commercial transactions involving sex might still exist, prostitution as we now know it would not.”⁹⁸

Both of these positions sidestep, rather than go beyond, the binary with regard to legal solutions. They neither help governments that might be pondering how to construct, amend, or change their legal response to prostitution nor judges who are asked to review an existing policy or its application in light of their constitutional, statutory or international requirements. This Article aims to offer a gender equality test that transcends the two positions, is agnostic to the “best solution,” and can be practically implemented.

E. On Whom to Base a Legal Response?

The two feminist positions accuse each other of disconnect with the reality and the homogenization of the phenomenon of prostitution. The sex-work position argues that the sexual-domination position disregards the heterogeneity of prostitution, ignores agency and imposes a victim narrative on everyone. The sexual-domination position argues that sex-work proponents ignore the violent reality of prostitution. Sex-work proponents who complain about homogenization argue that the diversity in sex-workers’ lives and experiences must be recognized. They are not always victims or objects.⁹⁹ An example is sometimes given of a rich university student who occasionally sells sex for luxuries.¹⁰⁰ It is argued that there is choice and possibly sexual enjoyment, and that these women need to be taken into account when designing a legal solution.

The sexual-domination proponents dismiss this argument¹⁰¹ with four counterarguments. First, conceptually, the possibility of exercising free choice under patriarchy is questioned.¹⁰² Second, it is argued that whether the prostitute accepts to be a victim or not, the context and social meaning of prostitution in patriarchal society still victimize her.¹⁰³ Third, the existence of prostitution harms women’s equality because it creates a “culture of prostitution.” In a society where prostitution is considered normal and the objectification of women is acceptable, men can base their understanding of all women on prostitution, whether as husbands and partners or as executives who decide about women’s advancement in the workplace.¹⁰⁴ Fourth, it is argued that the “creamy layer” in prostitution does harm by “false advertising”¹⁰⁵—creating an impression about the realities of prostitution which are not true for the majority of women involved.

As far as homogenization goes, I believe that both positions commit this error to some extent. Let us, for the sake of argument, say that there are three “segments” of prostitution— color-coded as traffic lights. The first is a “red segment,” where prostitutes are victims of coercion, and as such fall under the

⁹⁸ *Id.* at 359.

⁹⁹ *See* Davidson, *supra* note 55, at 91-92.

¹⁰⁰ Internationally, especially third wave feminists stress the difference between the First and the Third World and criticize the Western cultural imperialism in dominating the prostitution discourse, a lack of historical and geo-political contextualization. *See* KEMPADOO & DOEZEMA, *supra* note 54, at 13.

¹⁰¹ Often referred to as “happy hooker.”

¹⁰² “[P]rostitution is about the absence of meaningful choices.” Leidholdt, *supra* note 77, at 136.

¹⁰³ *See* Shrage, *supra* note 7, at 358.

¹⁰⁴ JEFFREYS, *supra* note 20.

¹⁰⁵ I thank Michelle Madden Dempsey for this insight.

trafficking definition of the Palermo Protocol,¹⁰⁶ or are underage. The second is a “yellow segment,” where the prostitutes are vulnerable by reasons of gender, race, homelessness, drug or alcohol addiction, immigration status, or poverty, and are often under the control of a pimp. The freedom of their choice to enter and remain in prostitution could be disputed. The third is a “green segment,” where the prostitute has other options but chooses prostitution and is independent and in control.

While the “red segment” is considered unacceptable to both positions and there is consensus for its criminalization, the proponents of the sex-work and sexual-domination positions disagree about the existence and the size of the “yellow” and the “green” segments. To sexual-domination proponents, the “green segment” is an illusion and the “yellow segment” is virtually indistinguishable from the “red.” To sex-work proponents, the “green segment” definitely exists and is substantial in size, but their policies are based on the argument that the situation of both prostitutes in the “green segment” and the “yellow segment” would be improved if prostitution were normalized, accepted and treated equally with other work or services.

It is very difficult to know which portion of the “sex industry” falls into which segment. While a proponent of the sex-work position might estimate the segments as 10% red, 50% orange, and 40% green, a sexual-domination proponent might believe it is 50% red and 50% orange without any green segment. Empirical research into prostitution faces difficulties of practical nature, but more importantly of theoretical nature, connected to the binary conceptualizations of prostitution. Sexual-domination proponents doubt that declarations of agency and freedom by prostitutes are creditable; as to them, these utterances are either made under coercion or are at any rate expressions of false consciousness. It is thus difficult to foresee a universally acceptable empirical answer about what happens in prostitution. And it is not the aim of this Article to provide it. However, it is important to briefly address what the division into “segments” means for a legal response to prostitution.

While I am sympathetic to the radical feminist analysis that under patriarchy all choice is problematic and that violence is an omnipresent threat, it is hard to entirely dismiss the existence of the “green segment.” It is difficult to tell prostitutes that they are victims of sexual slavery and of false consciousness, especially when they claim that they know what they are doing, that prostitution is the best they can do, and that they want to continue doing it. Rather, the questions to be asked are different: 1) Can a legislative response be based on more segments at once, or 2) should a legislative response be based on one segment only? The first question is answered in the affirmative by the current difference in treatment by most countries of trafficking on the one hand—criminalization of the “red

¹⁰⁶ “Trafficking in persons” shall mean the recruitment, transportation, transfer, harboring 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, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

G.A. RES. 55/25, U.N. GAOR 55th Sess.SUPP. No. 49, (Vol. I), U.N. DOC. A/45/49, at 2 (2001).

segment”—and the remaining “green” and “yellow” segments on the other. While not common practice, further distinguishing between legal treatment of the “green” and “yellow” segments is feasible. “Green segment,” or “voluntary” prostitutes, could be allowed to normalize their situation, but any identification as “green” would have to be made by the prostitute herself and be entirely voluntary. In other words, the prostitutes in the “yellow” segment should never be forced to conform to the rules applicable to the “green” segment, nor should they be punished for not conforming.

The second question basically asks whether, even recognizing that there is coercion and abuse, the overall legal response should be based on “green segment” prostitutes who would benefit from legalization, as sex-work proponents argue. Or whether, on the other hand, even recognizing that a certain percentage of prostitutes choose prostitution and want it legalized, the legislative response should be based on another vulnerable and endangered group of prostitutes in the “yellow” and “red” segments, as sexual-domination proponents advise. Here, I should admit to sympathy with the latter argument that the danger inherent in prostitution could justify legislatively limiting some prostitutes’ freedom, even if they made a voluntary decision to risk it. I accept the sexual-domination arguments of “false advertising”, as well as the argument that acceptance of prostitution leads to a “culture of prostitution” which threatens the achievement of a gender equal society. These observations show my preliminary thoughts on the ultimate solution and I disclose them to admit to my position. However, in the following, I aim to transcend the binary conceptualizations of prostitution and the opposed understandings of what the requirements of gender equality mean for the regulation of prostitution.

III. GENDER EQUALITY

To begin with, let us explore why prostitution is a matter of gender and also a matter of equality. Two reasons could be mentioned as to why prostitution is a gender issue. First, the distribution of men as buyers and women as sellers suggests that prostitution is an extremely sex-segregated field where the demand is overwhelmingly created by men and the supply by women.¹⁰⁷ This is a fact on which both feminist positions agree¹⁰⁸ and that few people generally would dispute.¹⁰⁹ Secondly, the sexual-domination position would further argue that prostitution is inherently gendered. Dorchen Leidholdt, an anti-pornography and anti-prostitution feminist, commented, “What other job is so deeply gendered that one’s breasts, vagina, and rectum constitute the working equipment? Is so deeply gendered that the workers are exclusively women and children and young men used like women?”¹¹⁰

As far as equality is concerned, the legal treatment of prostitution is a matter

¹⁰⁷ Rosaan Kruger, pointing to South African statistics, says that 95% of prostitutes are women. *See* KRUGER, *supra* note 12.

¹⁰⁸ *See* Outshoorn, *The Political Debates on Prostitution and Trafficking of Women*, *supra* note 53, at 145-46.

¹⁰⁹ *See, e.g.*, State v. Jordan (6) SA 642 (CC), at 60 (S. Afr.) (O’Regan, J. & Sachs, J. dissenting) (the agreement among the parties on this issue).

¹¹⁰ Leidholdt, *supra* note 77, at 138-39. While I agree with Leidholdt’s analysis, the first observation about the distribution of the sexes in the respective roles of the prostitute and the client is sufficient to support my argument that prostitution is a matter of gender.

of equality if two similarly situated parties to the same transaction are treated differently without good reason. In terms of the standard test of equality, national¹¹¹ understandings of it vary,¹¹² but they often ask similar questions: (i) Is there a difference in treatment or impact¹¹³ (ii) between persons that are comparable?¹¹⁴ (iii) Is the ground for the distinction suspicious?¹¹⁵ (iv) Is the distinction fair?¹¹⁶ (v) Is it pursuing a legitimate aim?¹¹⁷ (v) Is the measure proportionate to that aim¹¹⁸? Of these, difference impact, or “indirect discrimination” in European terminology, will be discussed in more detail below. Particular attention will further be paid to the questions of comparability and justification,¹¹⁹ as well as that of proportionality.

A formal and a substantive understanding of equality can be distinguished.¹²⁰ Whereas a formal understanding of equality calls for consistency of treatment

¹¹¹ I am drawing on comparisons of national standards, as these allow me to use existing national case-law. However, the international standard definition of sex discrimination, as contained in CEDAW, comprises many of the elements as well:

For the purposes of the present Convention, the term “discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 14.

¹¹² A comparative analysis of the definitions of equality and the judicial tests goes beyond the aims of this paper. My reasoning is based primarily on the case law of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECHR), the U.S. Supreme Court, the Supreme Court of Canada and the Constitutional Court of South Africa. I am using the analysis available in JANNEKE H. GERARDS, *JUDICIAL REVIEW IN EQUAL TREATMENT CASES* (2005); *and also* MACKINNON, *supra* note 11, at 2-40.

¹¹³ A difference in treatment is termed “direct discrimination” in the European and South African context and “disparate treatment” in the U.S., and a difference in impact of an otherwise neutral provision is termed “indirect discrimination” in the European and South African context and “disparate impact” in the US.

¹¹⁴ The emphasis on comparability varies. In the U.S., the question whether groups are “similarly situated,” is often crucial for deciding whether *prima facie* discrimination occurred or not. The CJEU refers to comparability seldom, almost never in indirect discrimination (disparate impact) cases.

¹¹⁵ Most jurisdictions consider some distinctions more “invidious” (to use the U.S. term) than others. Sex/gender is usually one of the grounds that raise suspicion. In the E.U., the specially protected grounds can be found in the competence provision of Art. 19 Treaty on the Functioning of the European Union; in the South African Bill of Rights, they are listed in Art. 9(3); in the U.S., the list is case-law based, and sex is subject to intermediate scrutiny.

¹¹⁶ Among the jurisdictions that I am looking at, this part of the test exists separately only in South Africa. *See* *State v. Jordan* 2002 (6) SA 642 (CC), discussed below in Part III.A.

¹¹⁷ This question is about “justification”—it inquires after the reasons for which this distinction has been made by the government. While in most cases, this is a judge-made part of the test; some countries have a constitutional legal basis for this. For example in South Africa, the general rule on limitations of rights is used in Art. 36(1) of the South African Bill of Rights, which states that “[t]he rights [...] may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors”. S. AFR. CONST., 1996.

¹¹⁸ Proportionality is a test used by the ECHR and the CJEU. *See* GERARDS, *supra* note 112, at 209 & 223. In the U.S., the requirement on the relationship between the measure and the aim depends on the standard of scrutiny.

¹¹⁹ Awarding great importance to comparability has been criticized by Gerards. She argued that too much depends on the choice of criteria which measure comparability—non-identical situations, or groups, are always in some ways the same and in some ways different. She proposed that such questions should be addressed in a more nuanced way under the rubric of justification and proportionality. *See id.* at 57.

¹²⁰ *See* SANDRA FREDMAN, *DISCRIMINATION LAW* (2002); *see also* MACKINNON, *supra* note 11, at 20.

without regard to the possibly disparate situations in which the subjects may find themselves, a substantive understanding of equality is context-conscious and reacts to the actual realities in which the individuals or groups find themselves.¹²¹ This Article is written from substantive equality perspective. The factual inequalities between prostitutes and clients are thus considered salient for the equality analysis.

In the following, I examine three possible legal scenarios for the comparative treatment of the prostitute and the client. First, there can be asymmetric treatment benefiting the client, which is still an existing practice and also a violation of gender equality. Second, the treatment can be symmetric, in which both parties are subject to the same treatment. The principle of equality requires at least this standard and this solution will resonate with the sex-work proponents, even though their comparison is usually to other workers or providers of services and not to the client. Third, an asymmetric treatment for the benefit of the prostitute can be adopted. While this approach would be more popular with the sexual-domination proponents, I argue that it is paradigmatically reconcilable with the sex work position as well.

A. *Asymmetric Treatment Benefiting the Client*

An asymmetric rule benefiting the client can either be directly or indirectly discriminatory. A case of direct discrimination would require an explicit reference to the sex of the prostitute or the client, while a case of indirect discrimination would entail different treatment of groups consisting mostly of persons of one sex.¹²² Until recently, some jurisdictions criminalized prostitution only when a woman was engaged in it. Catharine MacKinnon points out that the state of Louisiana used to define prostitution as “the practice by a female of indiscriminate sexual intercourse with males for compensation.”¹²³ At the time, the court reviewing it for compatibility with the Equal Protection Clause ruled that “[D]ifferences between the sexes does bear a rational relationship to the prohibition of prostitution by females.”¹²⁴ Arguably, such directly discriminatory provision would be found unconstitutional today, especially following a later United States Supreme Court decision in *Craig v. Boren*, in which the Court applied intermediate scrutiny rather than rationality review.¹²⁵ It is difficult to imagine a government policy on prostitution that would require a distinction to be made between the sexes in regulating prostitutes. As such, the provision should fail any test of legitimate

¹²¹ Substantive equality, in recognizing the context—existing de facto inequality and disadvantage—allows for different treatment for the benefit of the individual or the group that is worse off culturally and socio-economically. I argue that a substantive understanding of equality is implicit in any jurisdiction’s acceptance of affirmative action—or positive action in European terminology. The substantive equality approach has been explicitly adopted by various courts. *See, e.g.*, *Andrews v. Law Society of British Columbia*, [1989] S.C.R. 143 (Can.). In the area of prostitution, it was the approach of the dissent in the *State v. Jordan* case 2002 (6) SA 642 (CC) (O’Regan, J. & Sachs, J. dissenting), which is discussed below in IV.A and which this Article endorses.

¹²² Without explicit reference to the sexes of the groups, indirect discrimination would entail different treatment of clients, mostly men and prostitutes, mostly women.

¹²³ *State of Louisiana v. Devall*, 302 So. 2d 909, 910 (La. 1974) (quoting LA. REV. STAT. ANN. § 14:82).

¹²⁴ *Id.* at 913. *See also* Julie Lefler, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN’S L. J. 11, 24 (1999).

¹²⁵ Two years after *DeVall*, the United States Supreme Court established that different treatment or impact based on sex is subject to intermediate scrutiny—a policy is only constitutional when it furthers an important government interest in a way that is substantially related to that interest. *See Craig v. Boren*, 429 U.S. 190, 197 (1976).

aim or justification.

Most statutes today, at least in the European and common law jurisdictions referred to in this Article, use gender-neutral formulations. They do not distinguish between male and female prostitutes, nor do they identify prostitutes as female and clients as male. A more common problem would be that of indirect discrimination consisting in the different treatment of prostitutes and clients.

Practices of indirect discrimination are still wide-spread. The legal provisions can either foresee rules that only apply to prostitutes and not clients—for example, the sole criminalization of selling of sex as in *State v. Jordan*¹²⁶—or the rules can apply differently to the prostitute and the client, being stricter on the prostitute. More serious offenses and harsher sanctions for the prostitute are still common in criminal law.¹²⁷ For example, the Czech 2005 proposal foresaw criminal punishment for repeated prostitution without license for the prostitute but none for repeated use of prostitutes without license for the client. Areas of regulation other than criminal law need scrutiny as well, including administrative, police, social, and health law.¹²⁸ The Czech 2005 Proposal foresaw obligatory registration and information duties vis-à-vis various public authorities on the prostitute, obligatory health checks for the prostitutes and not clients, and various activity restrictions for the prostitutes, such as time and space limits in outdoor prostitution. The breach of these obligations would impose liability and would be punishable by fines or even imprisonment. It should be mentioned that even if different treatment is not explicit in the legal regulation, it often occurs in its implementation. Application and enforcement should be subject to gender equality scrutiny as well.

A question which needs addressing under an equality test is whether there are differences between the groups of clients and prostitutes that warrant their differential treatment. This question is in some jurisdictions framed as one of comparability; in others, it is a question of justification.¹²⁹ A good starting point is the South African case *State v. Jordan*, which involved a constitutional challenge to provisions of the Sexual Offenses Act which criminalized providing sex for reward but did not explicitly criminalize paying the reward for sex.¹³⁰ The argument in the case is of general interest and applies to any legal response to prostitution, not just to “criminalization” regimes.

The court’s majority in *State v. Jordan* did not find that provisions of the Sexual Offenses Act discriminated unfairly against women because the client was criminally liable as an accomplice and conspirator under the Riotous Assemblies Act.¹³¹ The court found substantive differences between the prostitute and the client, which warranted making the prostitute the primary offender. The majority pointed out that the prostitute was more likely to be a repeat offender and was the

¹²⁶ See *State v. Jordan* 2002 (6) SA 642 (CC).

¹²⁷ Julie Lefler cites several examples of different criminal sanctions from the U.S. See Lefler, *supra* note 124, at 17.

¹²⁸ Julie Lefler, who provides a convincing case for equality within criminalization, is overoptimistic when she states that “[o]bviously legalization or decriminalization would obviate the need for a discussion of differential treatment since neither male patrons nor female prostitutes would be within the grasp of the justice system.” *Id.* at 12 n.1.

¹²⁹ See *supra* notes 114 & 119.

¹³⁰ See *supra* note 12.

¹³¹ See The Riotous Assemblies Act 17 of 1956 §18(2) (S. Afr.).

“merchant” and “dealer,” whereas the client was the “customer.”¹³² It likened prostitution to other areas, such as the sale of dangerous weapons, medicines and liquor.¹³³ The majority considered both the potential higher stigma on the prostitute,¹³⁴ as well as disparate enforcement targeting the prostitute¹³⁵ to be irrelevant. Before looking at the majority’s position in more detail, the dissenting opinion merits discussion.

The dissent disagreed with the majority’s representation of the difference between prostitutes and clients and saw only three differences between the prostitute and the client:

The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one’s actions are rendered criminal by section 20(1)(A) but the other’s actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping which is itself in conflict with the principle of gender equality. The differential impact between prostitute and client is therefore directly linked to a pattern of gender disadvantage which our Constitution is committed to eradicating.¹³⁶

As far as the criminalization of the client as an accessory or conspirator is concerned, the dissent conceded that “[t]he difference between being a principal offender and an accomplice or co-conspirator may have little impact in formal legal terms;” however, it saw an important “difference in social stigma and impact.”¹³⁷ Moreover, the dissenting judges argued that, “[i]n imposing a direct criminal liability for the prostitute, the law chooses to censure and castigate the conduct of the prostitute directly. . . [T]he primary crime and the primary stigma lie in offering sexual intercourse for reward, not in purchasing it.”¹³⁸ Unlike the majority, the dissent was very concerned about the context and the social reality of prostitution:

The female prostitute has been the social outcast, the male patron has been accepted or ignored. She is visible and denounced, her existence tainted by her activity. He is faceless, a mere ingredient in her offence rather than a criminal in his own right, who returns to respectability after the encounter. In terms of the sexual double standards prevalent in our society, he has often been regarded either as having given in to temptation, or as having done the sort of thing that men do. Thus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion. A woman who is a prostitute is considered by most to be beyond the pale. The difference in social stigma tracks a pattern of applying different standards to the sexuality of men and women.¹³⁹

The primary criminalization of the prostitute, according to the dissenting judges, “reflects and reinforces” “harmful social prejudices against women” and

¹³² State v. Jordan 2002 (6) SA 642 (CC) at 10.

¹³³ See *id.*

¹³⁴ The majority commented: “If the public sees the recipient of reward as being ‘more to blame’ than the ‘client’, and a conviction carries a greater stigma on the ‘prostitute’ for that reason, that is a social attitude and not the result of the law.” *Id.* at 16.

¹³⁵ The majority commented: “What happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional defect in it.” See *id.* at 19.

¹³⁶ *Id.* at 60 (O’Regan, J. & Sachs, J., dissenting).

¹³⁷ *Id.* at 63.

¹³⁸ State v. Jordan 2002 (6) SA 642 (CC) at 63 (O’Regan, J., and Sachs, J., dissenting).

¹³⁹ *Id.* at 64.

“stems from and perpetuates gender stereotypes.”¹⁴⁰ The dissenting judges identify one very important element of the reality of prostitution that shows a particular vulnerability and should be considered in a legal response – the social meaning of prostitution. Under my analysis, the social meaning of prostitution, which is in most societies stigmatizing to the prostitute, is one of justifications for equal treatment of the client and the prostitute and even for asymmetric treatment benefiting the prostitute.

B. Challenging Justifications of Asymmetric Treatment Benefiting the Client

The majority in *State v. Jordan* proposed two justifications: (1) the prostitute as a repeat offender and (2) the prostitute as a dealer. This section will also analyze the potential justification of (3) targeting prostitutes for enforcement practicality and (4) will look at how to assess other possible justifications, especially highlighting the requirement of proportionality and correct tailoring.

First, the argument that prostitutes can legitimately be the primary target of criminal provisions because they are more likely to be repeat offenders is an example of flawed circular reasoning. When prostitutes are the explicitly named offenders in criminal or administrative law, they are, logically, the primary target of enforcement and are more often prosecuted and become repeat offenders. That this is then held against them as a justification for a different treatment in criminal law is a serious logical fallacy in reasoning about legal regulation.

Second, courts, including the majority in *State v. Jordan*, have allowed a harsher treatment of the prostitute based on their understanding of prostitutes as “merchants,” “dealers,”¹⁴¹ or as “profiteers in commercial crimes,”¹⁴² and they have used analogies to drugs, liquor and arms.¹⁴³ There are, however, fundamental differences between prostitution and the drug trade in the potential harms that they pose to the “consumer.” A drug dealer sells a product that is potentially deadly and addictive. The same can be said of alcohol and at least the former for arms. The only potential physical harm to the client from prostitution is that resulting from sexually transmitted diseases, and here, both sides of the transaction share the risk and the blame at least equally. Actually, it is the prostitute and not the client who is at greater risk of serious physical and psychological harm, as I discuss below; a fact which justifies symmetrical treatment of both parties or special treatment for the prostitute, but makes preferential treatment of the client perverse.

Another aspect of the “dealer” narrative is the underlying belief that it is the prostitute who controls the transaction. While it is the dealer in the drug industry that can dictate the price and has the power over a drug addict customer, the situation in prostitution is rather the reverse. It is the prostitute who typically needs the money and has little power and control of negotiation over price and other conditions. Moreover, when a pimp is involved, the prostitute has virtually no control over the transaction or her earnings, and when a trafficker is involved, she does not even have control over being a prostitute. In such situations, she is not in the position of the dealer or the merchant. There are inequalities between clients

¹⁴⁰ *Id.* at 65.

¹⁴¹ *Id.* at 19.

¹⁴² This narrative is not uncommon in court decisions in the U.S. *See, e.g.*, *People v. Superior Court*, 19 Cal. 3d 338 (1977).

¹⁴³ *See State v. Jordan* 2002 (6) SA 642 (CC) at 10; Lefler, *supra* note 124, at 21.

and prostitutes that need to be taken into account in devising a legal response. These are issues of class, age, race, gender, nationality, immigration status and socio-economic status,¹⁴⁴ as I argue below, not the prostitutes' recidivism or profiteering as was argued by the majority in *State v. Jordan*.

Third, the true reason for targeting the prostitute in a legal response is often that of enforcement practicality. In the "decriminalization with state control" regimes, the prostitute is registered, and she is much more easily accessible. In any other regime, she can be easily found at her "usual workplace." The same cannot be said of the client, and as a result, the prostitute is the more easily regulated side of the transaction. I argue that enforcement practicality has to be discarded when presented as a justification when the equality of the sexes, a suspect characteristic that is given special constitutional protection, is at stake. The prohibition of discrimination is in place precisely so that legal regulation does the fair thing and not the easy thing. Laws should not be made to suit enforcement. Ideally, full and effective enforcement would follow a legal rule. However, a legal rule, especially when promoting gender equality, still has important educative,¹⁴⁵ symbolic¹⁴⁶ and expressive¹⁴⁷ value. It is surely better if the educational, symbolic or expressive value of the law is morally correct rather than morally wrong, whether or not it can be fully enforced. Many authors acknowledge that these values are particularly important elements of equality and anti-discrimination law.¹⁴⁸ The British legal sociologist Cotterrell observes that several purposes of the United Kingdom Race Relations Act of 1965 went "well beyond the use of law to redress grievances or to control behavior, and [the aim to reduce prejudice by discouraging the behavior in which prejudice finds expression] point[ed] unequivocally to the educative function of law."¹⁴⁹ Similarly, he points to the importance of the rhetoric of the desegregation decision of the United States Supreme Court in *Brown v. Board of Education*.¹⁵⁰

Catherine Fieschi cites the example of the United Kingdom Racial and Religious Hatred Act of 2006 as a statute which sends ". . . a signal . . . to the Muslim minority . . . that its concerns are taken seriously [like those of Sikhs and Jews which were already protected through race legislation], and then the law is drafted and enforced on the assumption that it will only rarely, if ever, be used."¹⁵¹ She argues that:

[p]artly because policing and enforcement elude us in increasingly borderless situations, the trend, and not just in law, is away from sanction and punishment towards changing attitudes and modifying behaviour. Governments are warming to

¹⁴⁴ See discussion *infra* Part III.C.3.

¹⁴⁵ "'Educative legislation' aims to promote ideas through governmental action." An example given by Roger Cotterrell is the first British Race Relations Act of 1965 which stressed conciliation rather than redress. ROGER COTTERRELL, *THE SOCIOLOGY OF LAW: AN INTRODUCTION* 53 (Butterworths 2d ed. 1992).

¹⁴⁶ See *id.* at 102.

¹⁴⁷ See Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1504 (2000).

¹⁴⁸ See generally, W.G. CARSON, *Law Making: Symbolism and Instrumentality*, in *LAW AND SOCIETY* 236-246 (Colin Campbell & Paul Wiles eds., 1979).

¹⁴⁹ COTTERRELL, *supra* note 145, at 53 and therein cited ANTHONY LESTER & GEOFFREY BINDMAN, *RACE AND LAW* 85 (Longman. 1972).

¹⁵⁰ See *Brown v. Board of Education*, 347 U.S. 483 (1957); COTTERRELL, *supra* note 145, at 106.

¹⁵¹ Catherine Fieschi, *Symbolic Laws*, *PROSPECT MAGAZINE* (2006).

the notion that it is in part through moral persuasion and debate created by legislation that attitudes and behaviour will change.¹⁵²

The legal response to prostitution is one area where the state has to be particularly careful to espouse norms and values that are compatible with the principle of gender equality and to set aside those which are not. As such, mere enforcement practicality of provisions targeting the prostitute cannot stand as justifications for such discriminatory legislation.

Fourth, it is possible that specific measures will have specific legislative aims that are not discussed in this Article. For example, a government might try to justify obligatory health checks with public health concerns and zoning rules with public order concerns. An important distinction to be made from the perspective of the equality test is between the legitimacy and justifiability of the aim on one hand, and the proportionality of the measure, especially its appropriateness, necessity¹⁵³ and its tailoring,¹⁵⁴ on the other. While the aim might be legitimate, a careful examination will often show that a measure is not suitable or necessary to achieve it. It may also fail the test of narrow tailoring by being under-inclusive, such as targeting only prostitutes where clients should logically also be the object of regulation. For example, the one-sided prostitute's obligation to undergo health checks, which was included in the Czech 2005 proposal, was intended to prevent the spread of STDs. This is a laudable, legitimate legislative aim. However, the question is whether targeting only the prostitute is an appropriate way of achieving that objective. Experience from various countries shows that compulsory health checks make the client feel safer to practice unprotected sex,¹⁵⁵ resulting in a serious danger to the health of the prostitute.¹⁵⁶ As a consequence, obligatory health checks seem to be more of a consumer protection measure for the benefit of the client than a genuine public health protecting measure that stops STDs from spreading. As a result, it fails the suitability test. It can also be argued to be underinclusive—why are only prostitutes but not clients the target of health provisions? Similarly, zoning rules that only target soliciting by the prostitute but not curb-crawling or soliciting by the client are too narrowly tailored. This rigorous examination of suitability, necessity and tailoring would uncover many other measures as inappropriate for the proclaimed aims of public health and public order.

C. A Gender Equal Approach

I argue that in order for the requirement of gender equality to be fulfilled, the

¹⁵² Fieschi particularly highlights the importance of symbolic law for prompting a re-examination of the law, as a trigger and shaper of political debate and as the creator of constituencies. *Id.*

¹⁵³ See EVELYN ELLIS, *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* (Hart Publ'g. 1999).

¹⁵⁴ The requirement of narrow tailoring is sometimes referred to as a test of degree of fit, or of over- or under-inclusiveness. In the European context, it is often taken to form part of a proportionality assessment; in the U.S., it is often assessed as part of the strict or intermediate scrutiny. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974) (Brennan, J., dissenting); Grutter v. Bollinger, 539 U.S. 306 (2003).

¹⁵⁵ Nina Lopez-Jones, *Legalising Brothels*, 1 THE NEW L.J. 594 (1992). *See also* HANA MALINOVÁ, *Připomínky organizace R-R k Návrhu zákona o regulaci prostituce Zastupitelstva hlavního města Prahy* (“*mn Suggestions of Rozkoš bez rizika to the Proposal of an Act on Regulation of Prostitution by the Municipal Assembly of the Capital City of Prague*”) (2008), available at www.rozkosbezrizika.cz/.../35_zakon_regulace_prostitute_pripominky_rr.doc.

¹⁵⁶ Farley, *supra* note 74, at 138-39.

prostitute and the client need to be treated at least symmetrically, but an asymmetric regime benefiting the prostitute is also justified. There are at least three aspects of the phenomenon of prostitution which are important to this equality analysis: 1) the social meaning of prostitution; 2) the risk of harm to the prostitute; and 3) the de facto class, age, race, gender, nationality, immigration status and socio-economic status and other inequalities between the client and the prostitute.

1. The Social Meaning of Prostitution

The dissent in *State v. Jordan* correctly identified that the social stigma of prostitution is connected with the prostitute, who is the “social outcast . . . visible and denounced, her existence tainted by her activity.”¹⁵⁷ They noted that “the stigma [of prostitution] is prejudicial to women, and runs along the fault lines of archetypal presuppositions about male and female behavior, thereby fostering gender inequality.”¹⁵⁸ The stigma is a result of the social meaning of prostitution in the Western societies.¹⁵⁹ The “social meaning” of prostitution, to apply Jon Herring and Michelle Madden Dempsey’s analysis of social meaning of sexual penetration,¹⁶⁰ is not based on an intention or purpose of the individual client or sufficient majority of clients, nor on the experience or registering by the individual prostitute or sufficient majority of prostitutes.¹⁶¹ It means that “*one* of the current social meanings of [prostitution] under current social conditions can only *credibly* be explained as devaluing women *qua* women and disrespecting women’s humanity.”¹⁶² Herring and Madden Dempsey use examples of the language which we use to describe the act of sexual penetration,¹⁶³ and the depictions of it in “literature, film, advertising, television, pornography and internet discourse”¹⁶⁴ to support their claim that the current social meaning of sexual penetration make it *prima facie* wrongful. As sexual intercourse, often in the form of penile penetration, is a core element of prostitution, this analysis applies to prostitution as well.¹⁶⁵ Prostitution, however, has further degrading, devaluing and disrespecting social meanings as “whores” and “sluts” engage in sexual contact repeatedly and for money. While Herring and Madden Dempsey use their analysis to argue that sexual penetration is a *prima facie* wrong which requires justification as a preliminary analysis for the construction of criminal offences,¹⁶⁶ I would use it to

¹⁵⁷ *State v. Jordan* 2002 (6) SA 642 (CC) at 64 (O’Regan, J. & Sachs, J., dissenting).

¹⁵⁸ *Id.* at 65.

¹⁵⁹ I believe that the analysis of social meaning of prostitution is valid in any patriarchal society, and is thus almost universal.

¹⁶⁰ See Michelle Madden Dempsey & Jonathan Herring, *Why Sexual Penetration Requires Justification*, 27 OXFORD JOURNAL OF LEGAL STUDIES 467, 482 (2007).

¹⁶¹ The point that an individual’s perspective cannot alter the social meaning of prostitution is shared by many authors. Laurie Shrage writes, “Although the prostitute may want the meaning of her actions assessed relative to her own idiosyncratic beliefs and values, the political and social meaning of her actions must be assessed in the political and social context in which they occur.” Shrage, *supra* note 7, at 358. This argument is highly relevant for the debate about who—green, orange, or red segments—to base the legal regulation of prostitution on.

¹⁶² Dempsey & Herring, *supra* note 160, at 485 (emphasis added; the term “penile sexual penetration” appearing in the original text substituted for “prostitution”).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ It can possibly be a matter of discussion whether the social meaning of prostitution disrespects “women *qua* women” or “women *qua* the gender associated with prostitutes” (emphasis added). See *id.*

¹⁶⁶ They conclude that “a man who penetrates the vagina or anus of a woman with his penis commits a *prima facie* wrong in virtue of the negative social meaning of the conduct.” *Id.* at 488.

argue, together with the dissenting judges in *State v. Jordan*, that it is wrong for any law to be complicit or “partly constitutive of invidious social standards” and “sexual stereotypes which degrade the prostitute.”¹⁶⁷

Admittedly, the argument of social meaning would be more acceptable to sexual-domination proponents. Most sex-work proponents would argue that the current poor image of prostitution and prostitutes is not inherent in its social meanings but is rather caused by unequal legal provisions and that if prostitution was normalized by a permissive legal regime, the stigma would disappear.

2. The Risk of Harm to the Prostitute

As noted earlier, some governments’ arguments for maintaining asymmetric provisions against the prostitute are often based on seeing her as a dealer and a potential source of harm. However, the reverse is true. Empirical research has shown that there is a serious risk of harm to the prostitute that is not faced by the client and is, moreover, often inflicted by him.

There is little dispute between the sex-work and sexual-domination proponents that some prostitutes experience violence.¹⁶⁸ However, there is disagreement about its extent. The sexual-domination proponents draw a harrowing picture. Melissa Farley states that “in order to keep the business of sexual exploitation running smoothly . . . we cannot know that prostitution is extremely violent” and “that prostitution, pornography and trafficking meet or exceed legal definitions of torture.”¹⁶⁹ She argues that there is a very high risk of both physical harm in the form of beating, whipping, rape, other forms of sexual assault and even murder and psychological harm resulting from the physical abuse or frequent verbal abuse.¹⁷⁰ Many sex-work proponents, however, criticize both the methodologies and the results of this research. Furthermore, the sex-work proponents disagree with the sexual-domination proponents’ conceptualization of prostitution as inherently constituting violence against women—they accept the existence of some “unpaid for” violence but disagree with understanding of prostitution as a “paid for violence of everyday penetration.”¹⁷¹ For my analysis, it is sufficient to observe that there is some risk of harm to the prostitute and that it is greater than that to the client.

3. De Facto Inequalities Between Clients and Prostitutes

Class, age, race, gender, nationality, immigration status and socio-economic status inequalities exist between the prostitutes and the clients. The socialist feminist Christine Overall summarizes:

The inherent asymmetrical exchange in sex work, in which some persons sell sexual services to others, provides the context for other forms of asymmetry, all of them with important implications for its moral assessment. Prostitution is a classist,

¹⁶⁷ *State v. Jordan* 2002 (6) SA 642 (CC) at 72 (O’Regan, J. & Sachs, J., dissenting).

¹⁶⁸ See Bridget Anderson & Julia O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, IOM MIGRATION RESEARCH SERIES (Dec. 2003) http://www.compas.ox.ac.uk/fileadmin/files/pdfs/Bridget_Anderson/BA1_Anderson%20IOM%20report.pdf.

¹⁶⁹ Farley, *supra* note 74, at 122.

¹⁷⁰ See *id.*

¹⁷¹ Jeffreys, *supra* note 20.

ageist, racist, and sexist industry, in which the disadvantaged sell services to those who are more privileged. It is classist because for the most part it uses the sex labor of poor and disadvantaged persons largely for the service of those with disposable income to spend on sexual gratification. It is ageist because it recruits and preys upon very young people, often people who are still children, and discards them when they are past the artificially created stage at which they are considered sexually attractive. It is racist because it often victimizes black and Asian women and thrives on race stereotypes of sexually insatiable yet subservient women of color who exist only to serve the sex needs of whites. Last, and most important, it is sexist because it is an industry in which, for the most part, women are exploited for the purpose of serving men's desires.¹⁷²

The insight into the class differences in prostitution is also present in the dissent in the *State v. Jordan* case: "We see no reason why the plier of sex for money should be treated as more blameworthy than the client. If anything, the fact that the male customers will generally come from a class that is more economically powerful might suggest the reverse."¹⁷³

These pre-existing structural inequalities and disadvantages can constitute important external pressures to enter or stay in prostitution. They interact with and compound individual problems. Former sex worker Amber Hollibaugh writes:

The bottom line for any woman in the sex trades is economics. However a woman feels when she finally gets into the life [of prostitution], it always begins as survival - the rent, the kids, the drugs, pregnancy, financing an abortion, running away from home, being undocumented, having a 'bad' reputation, incest - it always starts at trying to get by.¹⁷⁴

Different feminist positions would disagree on defining the primary axis of disadvantage. Sexual-domination proponents would consider it to be gender. Marxist and socialist feminists would highlight class and socio-economic status. Those sex-work proponents who emphasize choice would contest the importance of these inequalities, but most would not dispute that some vulnerabilities exist.

D. *Symmetric Approach*

The three points about the context of prostitution need to be taken into account for an equality analysis. As the dissenting judges argued in *State v. Jordan*, they need to be balanced against any suggested justifications brought for the maintenance of an asymmetric regime benefiting the client. They are also in their own right justifications for symmetric treatment of client and prostitute. When making a previously asymmetric regime symmetric, two options are available: leveling down and leveling up. Leveling down, for example in the area of public health protection from STDs, would involve *not* creating an obligation for individuals to undergo health checks. This is currently the case in the Czech Republic's "decriminalization with containment regime" but also under the "Dutch model" of legalization where health checks are not required. Leveling down could be considered preferable, as it means less state control and a lower likelihood that

¹⁷² Christine Overall, *What's Wrong with Prostitution? Evaluating Sex Work*, 17 SIGNS 705, 717 (1992).

¹⁷³ *State v. Jordan* 2002 (6) SA 642 (CC) at 68 (O'Regan, J. & Sachs, J. dissenting).

¹⁷⁴ Amber Hollibaugh, *On the Street Where We Live*, 5 WOMEN'S REV. OF BOOKS 4 (1988) (citing Overall, *supra* note 172).

the prostitute will face prosecution. Leveling up would involve creating an equivalent burden for the client, such as a requirement of health checks or condom use. Creating such an obligation might seem impractical. Should clients also have health cards and regularly visit the doctor? How could public authorities ever check for the use of condoms? As argued above, regardless of an enforcement practicality argument, even an apparently impractical obligation might be worth creating for its symbolic value. An obligation like condom use could even have practical empowerment value for the prostitute.

The question of whether to level up or down, in order to achieve equal treatment, rises in most areas of regulation of prostitution. For example the Czech 2005 contained an asymmetric provision benefiting the client in that it foresaw administrative and criminal sanctions for the prostitute when selling sex without a license without a corresponding liability for the client for buying sex from a prostitute without a license. Leveling up would mean creating symmetric obligations and sanctions for the client. We have seen, however, that any criminalization of the prostitute, while unobjectionable from a formal equality perspective, is criticized by both sex-work and sexual-domination proponents. Thus, in this case, leveling down, for example by eliminating any administrative and criminal sanctions, would be the preferable solution.¹⁷⁵

Both given examples show that in order to arrive at a solution, the formal requirement of symmetry might need to be complemented with a substantive analysis. This Article, in an attempt to present a schema for assessing the legal treatment of prostitution from a gender equality perspective that transcends the binary between sex-work and sexual-domination conceptualizations, mostly avoided substantive questions about the nature of prostitution and the best legislative solution. When choosing between leveling up and leveling down, however, this analysis sometimes cannot be avoided. Let us take the example of obligatory registration of prostitutes that occurs in “decriminalization with control” and “legalization” regimes. The licensing of prostitutes in the “Dutch model” without a corresponding registration obligation for the client would be considered entirely adequate by most sex-work proponents because it would mean that prostitution is treated like any other trade. A sexual-domination proponent would abhor it. Under my analysis, which considers the asymmetric regimes benefiting the client as contrary to the principle of gender equality, the obligatory registration by prostitutes is unacceptable. A measure creating an obligation with possible sanctions for the prostitute that benefits the client as a consumer cannot be justified. This does not mean that my framework is fundamentally incompatible with the sex-work position. My analysis would be compatible with options for the prostitute—optional as opposed to obligatory registration and health checks. A regime that gave the prostitute the full choice of whether to enter the “green segment” or stay in the “yellow segment,” and that offered legalization merely as one of possible options, would be considered gender equal.

The requirement of symmetry must not end with statutory provisions but has to extend to enforcement. Julie Lefler cites an example of a judge “who refused to hear cases involving prostitutes unless the police arrested the customer of the

¹⁷⁵ While not entirely achieved, the elimination of such sanctions is the aim of the legalization “Dutch model.”

prostitute as well.”¹⁷⁶ While this example comes from a prohibitionist regime of the United States and thus concerns criminal law, it could be adopted as practice for any authority dealing with prostitution in other regimes as well, from local police enforcing public order provisions to health authorities enforcing public health provisions.

E. Asymmetric Approach Benefiting the Prostitute

The three points made about prostitution—its social meaning, risk of harm to prostitutes and *de facto* inequality between the parties—also serve as justifications for an asymmetric regime. An asymmetric measure would be acceptable if it benefited the prostitute, especially if it decreased her disadvantage and the existing inequality with the clients, lowered the risk of harm to her, or positively acted against the existing negative social meaning of prostitution.

While it is foreseeable that the requirement of symmetric treatment of the prostitute and the client would be tolerable to most feminists, the asymmetric approach benefiting the prostitute *prima facie* resonates with the sexual-domination proponents. A difference can be made between measures benefiting the prostitute and measures targeting the client. Measures benefiting the client are the cornerstone of sexual-domination proponents’ agenda, and the “Swedish model” that criminalizes only the client is a prime example of it; they are, however, not truly reconcilable with the sex-work position. Measures benefiting the prostitute, on the other hand, while supported by sexual domination proponents, can be reconciled with the sex-work position as well. In theory, measures benefiting the prostitute could be conceived of as protective legislation or affirmative action. Protective provisions for women, disabled or young workers in labor law reflect special vulnerabilities of these groups. Affirmative action remedies inequality and disadvantage based on race and sex. As sex-work proponents conceptualize prostitution as work, the same protective measures and affirmative action that are available to workers could be created for prostitutes as well. Such measures would be paradigmatically reconcilable with the sex-work position. Applied to prostitution, these provisions specifically benefiting the prostitute could include the establishment of shelters and other specific social services and welfare benefits, as well as counseling, legal aid, and reintegration programs such as training and work placement.¹⁷⁷

As far as measures targeting the client are concerned, the following have been tried or proposed in the context of the United States: car forfeiture or revocation of driver’s licenses when clients are caught curbside, publication of names of clients in various media, educational programs for clients, and the institution of civil causes of action for prostitutes against clients and procurers.¹⁷⁸ In “decriminalization” regimes, the asymmetric approach might imply addressing all legislative goals through the client and not the prostitute. To continue using the example of public health and the prevention of STDs, creating an obligation

¹⁷⁶ Lefler, *supra* note 124, at 21.

¹⁷⁷ The ideological basis for these measures would remain different. Sexual-domination abolitionists would support programs that enable the prostitute to temporarily or permanently leave prostitution. For sex-work, they would be meant to improve conditions of prostitution and empower prostitutes.

¹⁷⁸ For an analysis of these measures or proposals, *see* Lefler, *supra* note 124, at 26-34.

specifically and only for the client could, for example, take the form of obligatory use of condoms by clients with liability for non-compliance. Similarly, public order issues could be addressed with anti-curb-crawling measures without an equivalent liability for soliciting by the prostitutes.

CONCLUSION

This Article presented a framework for testing the compatibility of legal responses to prostitution with the principle of gender equality with the aim to offer a tool for improvement of the wellbeing of prostitutes. The proposed analysis was based on the comparison of the treatment of the prostitute and the client. It argued that an asymmetric preferential treatment of the client, which is still common in many countries in criminal but also administrative, police and health law, as well as in enforcement practice, is in breach of the principle of gender equality. It proposed that the principle of gender equality requires at a minimum symmetric equal treatment of both parties. This can either be achieved by leveling up—creating a restriction or obligation for both—or leveling down—abolishing it for both. It also submitted that an asymmetric approach benefiting the prostitute or targeting the client can be justified.

The Article identified three aspects of the phenomenon of prostitution which are important to the gender equality analysis: 1) the negative social meaning of prostitution, 2) the risk of harm for the prostitute, and 3) the de facto class, age, race, gender, nationality, immigration status and socio-economic status and other inequalities between the client and the prostitute. These describe the context of prostitution and need to be balanced against any justification brought for the maintenance of an asymmetric regime benefiting the client. They are also in their own right justifications for symmetric treatment of client and prostitute and even for an asymmetric treatment benefiting the prostitute.

There is much feminist writing on the issue of prostitution. The literature, however, has been divided between those who see prostitution as sex work that should be normalized, and those who see it as an inherently violent and exploitative practice that should be abolished. This Article transcends the binary. First, it is primarily concerned with what should not be the legal response to prostitution—an asymmetric treatment harsher on the prostitute—rather than with proposing an ultimate best legal regime. This critique of regimes repressive toward the prostitute resonates with both feminist positions. A legal gender equality analysis based on the comparison with the client has rarely been used, however. Second, when the Article explores the proposed scenarios—symmetric treatment of prostitutes and clients and asymmetric treatment benefiting the prostitute—, it discusses the perspectives of the two feminist positions and incorporates both of their insights: agency, as argued by the sex-work proponents, as well as vulnerabilities and violence, as argued by radical feminists. The analysis presented, it is hoped, could improve gender equality and the wellbeing of prostitutes in applying existing legal frameworks, in adopting their changes and amendments, and in their judicial review.