

# Feminist Approaches to the Regulation of Sex Work: Patterns in Transnational Governance Feminist Law Making

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Worldwide, through the effective spread of feminist ideas and modes of governance (Governance Feminism), two main feminist regulatory approaches to sex work/prostitution became widely accepted: neo-abolitionism and regulation and decriminalization. This Article argues that in reality both feminist approaches are characterized by inherent flaws in their implementation that end up causing distinct harms to the most vulnerable sex workers. As a possible alternative to both of these regulatory approaches, this Article uses an Israeli case study to propose a hybrid approach to the regulation of sex work. This approach consists of a formally declared abolitionist goal with wide informal characteristics of decriminalization—a form of what Annelise Riles calls, in a different context, a formalist law with a “hollow core.” I argue that such postmodern law making of a symbolic gesture with no content, such an apparently contradictory approach, can be beneficial, in certain circumstances and political climates, to sex workers, compared with both of the traditional governance feminist approaches. The hybrid approach is far from perfect, but in an imperfect world, it can possibly lead to a better outcome from the perspective of the most vulnerable sex workers than that achieved by the

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two distinct feminist approaches. The Article stresses the advantages that are potentially embedded in a policy intended to create a gap between law in books and law in action, as well as its costs, and explores why transnational governance feminist regulatory stances tend to reject this regulatory approach.

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## Introduction

The question of the regulation of sex work/prostitution has been the subject of a long-lasting debate in and outside feminism.<sup>1</sup> The regulatory approaches adopted around the world can be roughly divided into three main approaches:<sup>2</sup> a complete criminalization approach, an abolitionist (or

1. See NILS JOHAN RINGDAL, *LOVE FOR SALE: A WORLD HISTORY OF PROSTITUTION* 5-7 (Richard Daly trans., 2004); Priscilla Alexander, *Feminism, Sex Workers, and Human Rights*, in *WHORES AND OTHER FEMINISTS* 83, 86-87 (Jill Nagle ed., 1997).

2. Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 395 (2006). Petra Östergren offers a new and useful typology based not on regulatory tools but on regulatory goals. She distinguishes between a repressive approach that sees sex work as a social harm and seeks to eliminate it, a restrictive approach that sees sex work as a negative phenomenon but seeks to deal with it more pragmatically via regulation, and an integrative approach that seeks to integrate sex work into existing social and legal structures. See PETRA ÖSTERGREN, *PREVENTING EXPLOITATION AND TRAFFICKING IN THE SEX WORK SECTOR, DEMAND AT EUROPEAN POLICY BRIEF*, 2 (June 2017), <https://www.demandat.eu/publications/european-policy-brief-preventing-exploitation-and-trafficking-sex-work-sector> [<https://perma.cc/WLG6-BLSG>] (last visited August 12, 2019). While this paradigm can be ana-

partial criminalization) approach, and a legalization and decriminalization approach. The complete criminalization approach—that criminalizes the sex workers as well as all other involved actors<sup>3</sup>—is viewed by most feminists as an approach that causes harm to sex workers, either because it criminalizes victims or because they view sex work as a form of labor.<sup>4</sup> Both of the other approaches are affiliated with competing governance feminist positions seeking to protect sex workers and to promote equality between men and women.<sup>5</sup> I relate to these positions to “Governance Feminism” (“GF”)<sup>6</sup> and “Governance Feminists” (“Gfeminists”) because they are part of (in this case successful) feminist campaigns to “conduct[ ] the conduct of men,”<sup>7</sup> and translate feminist ideas into legal and policy reform. This is therefore a classic example of a way in which “feminist ideas exert a governing will within human affairs.”<sup>8</sup>

*Neo-Abolitionism*, which is affiliated with the dominance feminism, is supported by those who believe that prostitution is inherently violence against women, and therefore the state must strive to completely abolish it.<sup>9</sup> According to this view, the appropriate legal approach to prostitution is the criminalization of all those profiting from the exploitation of prosti-

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lytically useful, for the purpose of this article, given the focus on different governance regulatory tools, I opted to use the more traditional terminology. Östergren’s terminology is useful to show that regulatory regimes in different contexts can look the same but have different outcomes (e.g. regulation can be either permissive or integrative). I will use this terminology later in the article to explain elements of the different regulatory models I describe (see Chap. II below).

3. As this Article deals with the feminist debate on the regulation of prostitution/sex work, I will refer to sex workers, by way of generalization, as women, and to prostitution as an issue concerning male-female relationships. However, there is a considerable number of male sex workers and transgender sex workers, usually, the customers of whom are also men. A possible critique of the entire framework of the debate that I am mapping in this Article and in which I am taking part is that it blatantly ignores male sex workers. For more on this issue, see Juline Koken, David S. Bimbi & Jeffrey T. Parsons, *Male and Female Escorts: A Comparative Analysis*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 205 (Ronald Weitzer ed., 2d ed. 2010); Ronald Weitzer, *Why We Need More Research on Sex Work*, in *SEX FOR SALE: PROSTITUTION, PORNOGRAPHY, AND THE SEX INDUSTRY* 1, 7-8 (Ronald Weitzer ed., 1st ed., 2000).

4. Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 530-42 (2000). Feminist and liberal approaches object to criminalization; those who support it are those siding with a conservative approach. For more on this position, see *id.* at 542-45.

5. See Halley et al., *supra* note 2, at 395-400.

6. For a detailed discussion of Governance Feminism, see JANET HALLEY ET AL., *GOVERNANCE FEMINISM: AN INTRODUCTION* (2018).

7. MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-79*, at 186 (Michel Senellart ed., Graham Burchell trans., 2008).

8. HALLEY ET AL., *supra* note 6, at ix. Though, it is important to note that, under the authors’ definition, governance feminism is not limited to legal change or to government-initiated change. Governance feminism can refer to a much wider set of feminist practices that are interested in governing human affairs as well as human-inflicted affairs through various and diffuse modes of governance. *Id.* at x-xi. The example of the regulation of sex work is an example of “efforts feminists have made to become incorporated into state, state-like, and state-affiliated, power.” *Id.* at x (emphasis omitted). See also Halley et al., *supra* note 2.

9. See Hila Shamir, *Anti-trafficking in Israel: Neo-abolitionist Feminists, Markets, Borders, and States*, in HALLEY ET AL., *supra* note 6, at 149-50 (2018).

tuted women—the pimp, the john, and any other third party involved, such as the owner of the property where prostitution takes place.<sup>10</sup> The woman herself is a victim of violence and therefore her part of the act must not be criminalized, but measures should be taken to rehabilitate her and help exit the cycle of prostitution.<sup>11</sup> In 1999, Sweden became the first country in the world to implement a complete neo-abolitionist approach, when a successful governance feminist campaign to “end demand” led to the criminalization of consumers of sex services.<sup>12</sup> There is a heated debate among scholars over the degree of success of the Swedish model.<sup>13</sup> In the last decade, the Swedish model was adopted in several other countries,<sup>14</sup> and bills in this spirit have become the spearhead for the neo-abolitionist (governance) feminist campaigns in several countries around the world.<sup>15</sup>

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10. See *id.* at 150, 165.

11. See *id.* at 150, 180.

12. LAG OM FÖRBUD MOT KÖP AV SEXUALLA [ACT PROHIBITING THE PURCHASE OF SEXUAL SERVICES] (Svensk författningssamling [SFS] 1998: 408) (Swed.). The act currently appears in Chapter 6, Section 11 of the Swedish Criminal Code: BROTTSBALKEN [BrB] [Penal Code] 6:11 (Swed.).

13. On the degree of success of the Swedish model, see 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, 1193–96 (2004); JAY LEVY, CRIMINALISING THE PURCHASE OF SEX: LESSONS FROM SWEDEN 109–13, 225–26 (2015); SUSANNE DODILLET & PETRA ÖSTERGREN, THE SWEDISH SEX PURCHASE ACT: CLAIMED SUCCESS AND DOCUMENTED EFFECTS 14–16 (conference paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges) (Mar. 3–4, 2011), <http://gup.ub.gu.se/records/fulltext/140671.pdf> [<https://perma.cc/6US4-MGJH>]; ANN JORDAN, THE SWEDISH LAW TO CRIMINALIZE CLIENTS: A FAILED EXPERIENCE IN SOCIAL ENGINEERING 1 (2012), [http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4\[1\]\\_0.pdf](http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4[1]_0.pdf) [<https://perma.cc/FFG8-A6AH>].

14. Sweden’s neighbors—Norway and Iceland—have adopted similar legislation. Section 202a of the Norwegian Penal Code criminalizes a Norwegian citizen or resident who purchases sex services in Norway or anywhere outside Norway: ALMINDELIG BORGERLIG STRAFFELOV [GENERAL CIVIL PENAL CODE] Ch. 19, § 202a (Nor.). Article 206 of the Icelandic Penal Code criminalizes prostitution users. ALMENN HEGNINGARLÖG [GENERAL PENAL CODE] Ch. XXII, art. 206 (Ice.). Finland rejected the Swedish model but introduced a partial ban. Since 2006, Finnish law stipulates that “a person who, by promising or giving remuneration, involving direct economic benefit induces a person” who is a victim of human trafficking or procuring to engage “in sexual intercourse or [in] a comparable sexual act shall be sentenced . . . for abuse of a victim of prostitution.” See Chapter 20, Section 8 of the Finnish Criminal Code 2006, available at [https://www.unodc.org/res/cld/document/fin/the-criminal-code-of-finland\\_html/Criminal\\_code\\_of\\_Finland.pdf](https://www.unodc.org/res/cld/document/fin/the-criminal-code-of-finland_html/Criminal_code_of_Finland.pdf) [<https://perma.cc/G9EG-ENAE>]. Other countries that adopted end demand legislation in recent years include Canada, France, Ireland, Northern Ireland, and Israel. See Eilis Ward and Gillian Wylie, *Introduction*, in FEMINISM PROSTITUTION AND THE STATE: THE POLITICS OF NEO ABOLITIONISM 1 (Eilis Ward & Gillian Wylie eds., 2017); Toi Staff, *Knesset approves penalties for prostitution clients*, THE TIMES OF ISRAEL (December 31, 2018, 5:59 PM), <https://www.timesofisrael.com/knesset-approves-penalties-for-prostitution-clients/> [<https://perma.cc/WRE3-DFM7>].

15. Countries currently considering the adoption of end demand legislation are Argentina, India, Fiji, the Philippines, Scotland, South Africa, and South Korea. See GLOBAL NETWORK OF SEX WORK PROJECTS (NSWP), POLICY BRIEF: THE IMPACT OF ‘END DEMAND’ LEGISLATION ON WOMEN SEX WORKERS 1 (2018), <http://www.nswp.org/resource/policy-brief-the-impact-end-demand-legislation-women-sex-workers> [<https://perma.cc/KUN6-599X>].

*Decriminalization and Regulation*, which is affiliated with the liberal and postmodern feminism and with sex workers' organizations, is supported by those who believe that sex work undertaken by choice is work like any other work; and that if currently working in the sex industry is dangerous, this is because of its illegality and due to the social marginality of sex workers.<sup>16</sup> According to this approach, the best way to deal with the problems that characterize the sex industry is to decriminalize it, so that sex workers will not be stigmatized, enjoy labor and employment rights, have access to the courts and to welfare systems, and can work with dignity.<sup>17</sup> This approach consists of two, sometimes conflicting, agendas: one, generally held by sex workers organizations, maintains that the decriminalization of the sex industry is sufficient, and the other holds that unique regulation should be implemented, tailored to the sex industry (legalization).<sup>18</sup> According to both viewpoints sex workers should be able to work independently or as employees, to unionize, receive police protection from violence, and enjoy access to the court in cases of violation of their contractual or other rights by employers or customers.<sup>19</sup> What distinguishes between decriminalization and legalization is the degree of restriction sex workers' work modes: under decriminalization, sex businesses and sex workers will have much greater choice in how and where they operate and work.<sup>20</sup>

In 2000, following a successful Gfeminist campaign, the Netherlands made sex work legal, and regulated its various forms, and since then it is the country most identified with the decriminalization and regulation approach.<sup>21</sup> Scholars strongly disagree as to the outcomes of the Dutch

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16. See Julie Bindel, *Why Prostitution Should Never be Legalized*, GUARDIAN (Oct. 11, 2017), <https://www.theguardian.com/commentisfree/2017/oct/11/prostitution-legalised-sex-trade-pimps-women> [https://perma.cc/DDY8-BULB].

17. See Elizabeth Bernstein, *What's Wrong with Prostitution? What's Right with Sex Work? Comparing Markets in Female Sexual Labor*, 10 HASTINGS WOMEN'S L.J. 91, 93, 97-98 (1999).

18. See *id.* at 93. Sex workers organizations generally support the decriminalization approach. For a review of sex workers' global call for the decriminalization of sex work, see Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://www.vox.com/2019/8/2/20692327/sex-work-decriminalization-prostitution-new-york-dc> [https://perma.cc/G6TT-BHHF] (last visited August 12, 2019). See also JUNO MAC & MOLLY SMITH, *REVOLTING PROSTITUTES: THE FIGHT FOR SEX WORKERS' RIGHTS* 177-78 (2018).

19. See Bernstein, *supra* note 17 at 92-93.

20. ANNA G. KORVINUS ET AL., BUREAU NRM, *TRAFFICKING IN HUMAN BEINGS: THIRD REPORT OF THE DUTCH NATIONAL RAPPORTEUR* 13 (2005); Prostitution Reform Act 2003 (N.Z.); *Prostitution Act 1992* (ACT) (Austl.). See also Standing Committee on Justice & Community Safety, Parliament of Australia, *Inquiry Into the Prostitution Act of 1992* (2012) (Austl.); *Prostitutionsgesetz* [Prostitution Act], Jan. 1, 2002, BUNDESGESETZBLATT [BGBl] I at 3983 (Ger.). For a fascinating study of the different impact of regulation and decriminalization in the Australian context of New South Wales and Queensland, see Alice Orchiston, *Is Legal Sex Work Safe? Applying A Work Safety Lens to Australian Brothels*, (presentation at the Labor Law Research Network Conference in Chile, in June 2019) (on file with author).

21. MINISTRY OF JUSTICE & THE POLICE (NORWAY), *PURCHASING SEXUAL SERVICES IN SWEDEN AND THE NETHERLANDS: LEGAL REGULATION OF THE PURCHASE OF SEXUAL SERVICES* 31-32 (2004); Hendrik Wagenaar et al., *Final Report of the International Comparative*

model.<sup>22</sup> This model has since been adopted by several other countries, and sex workers' organizations around the world are struggling to promote a version of it.<sup>23</sup>

In 2001, an international protocol on Human Trafficking, including human trafficking for the purpose of prostitution, was adopted under the auspices of the UN Office on Drugs and Crime.<sup>24</sup> This spurred a heated debate at the national and international levels as to the best way to combat "sex trafficking," and led to an intensification of the struggles between the different Gfeminist positions and the regulatory approaches affiliated with them.<sup>25</sup>

Since its inception, and in absorbing British mandatory legislation into its legal system, Israel has adopted a partially abolitionist approach to prostitution. Article Ten of the Israeli Penal Law, which deals with prostitution and obscenity, criminalizes procurers and the owners of the premises where the offense is committed, but not the act of prostitution itself, so that the prostitute and the customer involved in the act are not committing an offense.<sup>26</sup> However, an examination of the sex industry in Israel in recent decades reveals a different reality. While the law on the books manifests a partially neo-abolitionist approach, in practice, the Israeli regime has unintentionally developed in the direction of toleration and partial and informal regulation of prostitution.<sup>27</sup> In a series of uncoordinated decisions, different government actors—primarily the Labor Court, the State Attorney, the police, and National Insurance officials—contrary to the logic of neo-abolition and in a manner that changed the effective treatment to prostitution in Israel, turned the Israeli system into a hybrid approach, containing both neo-abolitionist and decriminalization aspects. After a decade long campaign to close this gap and move Israel to a regime that represses sex work, in December 2018 neo-abolitionist structuralist feminists succeeded. Israel adopted the Swedish Model of regulation and criminalized

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*Study of Prostitution Policy: Austria and the Netherlands*, PLATFORM 31, (2013), [http://kks.verdus.nl/upload/documents/P31\\_prostitution\\_policy\\_report.pdf](http://kks.verdus.nl/upload/documents/P31_prostitution_policy_report.pdf) [<https://perma.cc/D6KE-EKXU>] [hereinafter PLATFORM 31]; Wim Huisman & Edward R. Kleemans, *The Challenges of Fighting Sex Trafficking in the Legalized Prostitution Market of the Netherlands*, 61 CRIME L. & SOC. CHANGE 215 (2014).

22. See PRABHA KOTISWARAN, DANGEROUS SEX, INVISIBLE LABOR: SEX WORK AND THE LAW IN INDIA 4-6, 10-12 (2011).

23. See *id.* at 185-86. Sex workers' organizations generally prefer an approach of full decriminalization, following the New Zealand model, but in regulatory environments that do not allow for full decriminalization they will tend to prefer regulation over neo-abolitionist approaches.

24. See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 106, 114 Stat. 1464, 1466 (2000); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, November 15, 2000, S. Treaty Doc. No. 108-16, 2237 U.N.T.S. 319. See also Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 790-91 (2009); Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437, 438-39 (2006).

25. See Halley et al., *supra* note 2, at 347-60.

26. Penal Law, 5737-1977, art. 10 (Isr.).

27. See Shamir, *supra* note 9, at 157-158.

the purchase of sex. The law is supposed to come into force in June 2019. At the time this article is written the law did not come into force but its impact in changing the hybrid system are already apparent.<sup>28</sup>

This Article analyses the dualism that was created, before the recent transformation, by the regulation of prostitution in the Israeli regime, maps its disadvantages and advantages compared with the competing Gfeminist regulatory approaches, and asserts that from the perspective of those who engage in sex work, under the existing social and economic situation, this approach, with certain adaptations, may generally bring about better outcomes than those of both of the traditional Gfeminist approaches. This Article analyses the various regulatory approaches to prostitution/sex work, addressing the interests of the sex worker, paying significantly less attention to other normative commitments and social values that any particular policy can promote (such as protection of the sanctity of the family or prevention of the objectification of women's sexuality in a broad sense). This examination is consequentialist in nature and materialist, and gives relatively little weight to the symbolic and expressive implications of the law. The analysis offered here attempts to depart from the traditional feminist debate around sex work that is often deeply invested in the symbolic meaning of the law, and rather seems to concentrate on outcomes for sex workers, highlighting the blind spots of the dominant feminist debate around this issue. Having said that, it is clear that one cannot speak of a single uniform perspective of sex workers. The sex industry is a stratified industry, and women in and outside the sex industry have different interests in relation to it. Accordingly, this Article examines the effect of governance feminist approaches on the regulation of prostitution on various groups of women engaged in prostitution: immigrants and local women working in different settings (street prostitution, their own apartments, "discrete apartments," brothels, etc.).

This Article seeks to challenge the classic notion that feminists and all others concerned with the lives of sex workers, must, first and foremost, overcome and reduce the gap between law in books and law in action. Instead, this Article explores the benefits of postmodern law-making that seeks to exploit the difference between the symbolic and the actual, and expand the gap between the law on the books and the law in action. The Article explores the options that such legislation "with a hollow core,"<sup>29</sup> serving as a placeholder, can, at times, be pursued as an independent regulatory approach with considerable advantages. I put forward here a form of feminism that Prabha Kotiswaran calls a "middle ground" approach to

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28. . LAW PROHIBITING THE PURCHASE OF PROSTITUTION (INTERIM ORDER AND LEGISLATIVE AMENDMENT) - 5779-2019, *Sefer HaChukim No. 2779*, <https://www.haaretz.co.il/blogs/veredlee/BLOG-1.6878269> [<https://perma.cc/7AD2-KYZU>]; Vered Lee, *The Law Prohibiting Purchase of Prostitution is Already Felt on the Ground*, HAARETZ, January 28, 2019 [Hebrew], <https://www.nevo.co.il/Handlers/LawOpenDoc.ashx?id=159511> [<https://perma.cc/XJ99-5VDK>].

29. ANNELISE RILES, COLLATERAL KNOWLEDGE: LEGAL REASONING IN THE GLOBAL FINANCIAL MARKETS 212-214, 241 (2011).

sex work.<sup>30</sup> However, the strand developed here is animated from a pro-sex work position, seeking to improve sex workers working conditions, bargaining power, and options in a capitalist and gendered order that, at times, puts them at a significant disadvantage and that in some cases leads to deep precarity and vulnerability to exploitation. Accordingly, assuming that voluntary, adult prostitution is work, this position holds that “the system can be so highly exploitative and analogous to sweatshop, child, or bonded labor, that it should . . . undergo transformation.”<sup>31</sup> Kotiswaran is critical of middle ground feminism for various reasons, one of them being not proposing “how we might achieve their paradoxical suggestion.”<sup>32</sup> This Article is a tentative attempt to propose a regulatory path to empower transnational sex work while dismantling the more exploitative elements of the sex industry.

The Article further discusses why Gfeminists of both camps, as well as other social movements, tend to lobby for closing this gap, rather than to exploit it. Since Roscoe Pound’s classic 1910 essay, which observed the gap between law in books and law in action,<sup>33</sup> significant jurisprudential scholarship dealt with the question of this gap’s place and necessity. Pound and other realist writers such as Karl Llewellyn and Jerome Frank argued that legal scholars’ focus on the language of the law overlooks the practical life of the law.<sup>34</sup> They maintained that when legal rules get entangled with a complex reality of interpretation and enforcement by different agents and addressees of law, its meaning and implications may be entirely different from the meaning learned from reading the law on the books. Therefore, a full understanding of the implications of the legal rule requires an examination of the life of the law in the world of action. Since Pound’s essay, it has been articulated that legal systems must reduce this gap and ensure coherence, uniformity, and predictability in the enforcement and implementation of the law.<sup>35</sup> The gap is often perceived as undermining the rule of law, and therefore must be narrowed and fought against.<sup>36</sup> Yet realist, postmodern, and CLS (critical legal studies) scholars have found that for myriad of reasons—including the inherent vagueness of language, the multiplicity of possible interpretations for the legal rule, the sophistication of different legal players and limited enforcement resources, and the

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30. See generally KOTISWARAN, *supra* note 22, at 24–50.

31. See *id.* at 33–34. See also Berta E. Hernández-Truyol & Jane E. Larson, *Sexual Labor and Human Rights*, 37 COLUM. HUM. RTS. L. REV. 391, 392 (2006).

32. See KOTISWARAN, *supra* note 22, at 34.

33. See generally Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

34. See generally JEROME FRANK, *LAW AND THE MODERN MIND* 127–28 (6th ed. 1949); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

35. See Martin P. Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America—Major Themes and Developments*, 36 J. LEGAL EDUC. 441, 451 (1986).

36. See Jean-Louis Halperin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 59–60 (2011).



need for plasticity in the life of the law—this is an inherent gap<sup>37</sup> that in some cases may have productive value.<sup>38</sup>

In keeping with the tradition of the legal realist approach, this Article seeks to shift attention away from the language of the law and towards the life of the law. Further, this Article seeks to present the gap between law in books and law in action in a sympathetic light. It typifies the regulation of sex work in Israel as an example of a regulatory example where unplanned and uncoordinated regulatory developments—in which a significant discrepancy has been created between the law in books and the law in action—can serve as a starting point for the creation of an alternative regulatory model that differs from the distinct feminist models for the regulation of sex work.

I believe that this “hollow core,” or hybrid model has several advantages. The advantages of a policy that creates a gap between law on the books and law in action arise, *inter alia*, from partial knowledge we have of the implications of regulation on real life, and from the difficulty of adopting an “objective” interpretation to the reported implications. The realities in the sex industry in Sweden and the Netherlands demonstrate the great difficulty to discover what the “real” consequences of any regulatory policy on sex work are. A significant part of the debate as to which regulatory regime is preferable—complete neo-abolitionism (“end demand”) or decriminalization—arises from a deep disagreement as to the facts concerning the implications of these regimes on the realities of sex industry and on sex workers’ lives. The fact that the debate on the facts themselves—separately from the interpretation ascribed to them—has not yet been decided, indicates the limits of policy-makers’ ability to know, with certainty, how a policy affects all sex workers. Furthermore, the different interpretation given to reality, as it concerns issues that are undisputed, indicates the limits of our ability to separate ideological bias from the empirical analysis of the facts in the field. To the extent that this analysis of the regulatory discourse around sex work is correct, it may be possible to deduce from it something general about our knowledge regarding the regulation of areas of life with similar characteristics, in addition to the issue of the regulation of sex work. I wish to suggest that this view as to the limits of knowledge and the interpretative bias can justify a preference of ‘institutional humility’ or institutional experimentalism, which would lead us to avoid choosing extreme positions and prefer preservation of

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37. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* {FIN DE SIÈCLE} 133–56, 217–24 (1997); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458, 461–62, 466, 468 (1897); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222–23, 1231, 1240–42 (1931); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 68, 72, 115–16 (1984); Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 610, 615–16, 624, 644, 660 (2007).

38. Cf. RILES, *supra* note 29, at 421 (explaining that global financial regulations are legal fictions that allow uniformity while leaving room for diversity and flexibility. “[T]he way such a statute signals and ultimately channels future action can itself be extremely valuable.”).

alternatives, alongside each other.<sup>39</sup> This, I argue, is what the hollow core model of the regulation of sex work can allow.

Thus, this Article suggests that sometimes deepening the gap between law in books and law in action may be an intentional goal for policy-makers and not an indication of failure of policy.<sup>40</sup> This Article *does not* maintain that the legal situation in Israel represents a perfect balance between the law in the books—and the symbolic value neo-abolitionism carries—and the law in action, characterized by a wide zone of toleration and de-facto regulation of the sex industry. I merely seek to point out that the regulatory situation brought about by this hybridity has the potential to lead to better outcomes from the point of view of many sex workers, not merely a temporary means but as a permanent regulatory system. In this analysis law in books is of importance not because it reflects what actually occurs (because it doesn't) but because it allows sending a clear, if simplistic, symbolic message against violence and exploitation in the sex industry. At the same time law in action addresses the commonplace complex realities of sex work in cases that are not characterized by violence and exploitation and can therefore be sensitive to context and to changing empirical data and respond to it. The downside of such a regime is that it leaves significant discretion to street level bureaucrats. This downside will be further elaborated on below.<sup>41</sup>

This is perhaps the most normatively complicated article I ever wrote. I feel highly ambivalent about some of its takeaways and some of the positions it leads me to take. In recent years I have been part of a newly formed Israeli sex workers' organization—"Scarlet (Argaman): an Organization of Working Wo/men" that came together to resist the turn to a repressive model of regulation in Israel, and specifically to make sex workers' voices heard in the policy and public discussion around of End Demand legislation. Sex workers' organizations—that I admire and see myself as being in solidarity with—usually call for decriminalization. The position I take here may seem to contradict their position. However, from conversations with sex workers activists in Israel—in an outside Scarlet—I came to realize the benefits of the hybrid approach to many sex workers. It is from these conversations and from my legal realism—that sees the law and its unexpected and paradoxical operation under both feminist regimes—that this article comes from.

The argument is developed in three main parts. Part I presents three layers in the feminist discourse around sex work and its regulation: normative, factual, and strategic. In doing so, this part describes the classic femi-

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39. For a comparison, see Ori Aronson, *Best of Luck: on Randomness in Procedure*, in LAW, SOCIETY & CULTURE: PROCEDURES 135, 164-67 (Talia Fisher & Issi Rosen-Zvi eds., 2014) [Heb.] (suggesting the adoption of a mechanism for the random routing of cases to courts that have parallel jurisdiction with the aim, *inter alia*, of preserving the various institutional alternatives alongside each other in conditions of lack of knowledge as to which is preferable).

40. For a comparison, see Yochai Benkler, *Some Virtues of Vices; or, Qualified Praise for Illegality* 1, 2 (unpublished manuscript) (on file with author).

41. See Halley et al., *supra* note 2, at 401-05.

nist positions on prostitution/sex work and the regulation of sex work, and offers a critical analysis of the connection between a normative feminist position of a particular kind on the one hand, and the Gfeminist regulatory approach that accompanies it on the other hand, and raises questions as to the dichotomized structure of the Gfeminist discourse on this issue. Part II examines both Gfeminist regulatory approaches—neo-abolitionism and decriminalization—through a discussion of legislation in Sweden and the Netherlands, and overviews the heated debate on the implications of legislation on the sex industry in both countries. Finally, Part III describes the situation in Israel as an unintended case of reflexive hybrid regulation and discusses the disadvantages and advantages of the hybrid approach compared with both traditional feminist approaches to the regulation of sex work.

### I. Three Layers in the Feminist Debate Around Sex Work/Prostitution and its Regulation: Normative, Factual, and Strategic

The feminist discussion of the issue of sex work is one of the most polarized in legal feminism and in feminism in general.<sup>42</sup> The disagreement among feminist approaches to sex work has culminated in the 1980s, centering upon the debate in the United States on pornography, and resurfaced at the beginning of the 21st century, with the rise in international attention to the problem of human trafficking, which, for a long time, focused almost exclusively on trafficking in women for the purpose of prostitution.<sup>43</sup>

Underlying the schism in feminist thought on prostitution/sex work is a fundamental disagreement about the power, resistance, and sexual agency of women under patriarchy. The ongoing feminist debate can be roughly divided into two polarized positions; I shall call the first *structuralist* and the second *individualist*.<sup>44</sup> Both positions claim to reflect the authentic sex worker/prostitute voice.<sup>45</sup> While structuralists mostly point to quantitative researches that seek to prove the harms of prostitution,<sup>46</sup> individualists give voice to the various sex workers' narratives<sup>47</sup> and to sex workers' organizations<sup>48</sup> as support for their argument. In this polarized

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42. Bernstein, *supra* note 17, at 91–92.

43. Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. Rev. 76, 84–85 (2012).

44. This division is an over-simplified (yet useful) grouping of various feminist approaches to prostitution, reducing it to the basic elements of the discussion relevant to legal regimes, and to the approaches that were transcribed into the discussion around sex trafficking. This analysis does not assume to grasp the full nuanced complexity of the meaning of sex and its commodification in extra-legal feminist theory. See Halley et al., *supra* note 2, at 347.

45. *Id.* at 405.

46. See *id.* at 349–50, 372.

47. See *id.* at 370–71, 418.

48. For a discussion of the sex workers movement in different parts of the world, see generally Kamala Kempadoo, *Introduction: Globalizing Sex Workers' Rights*, in *GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION* 1–2 (Kamala Kempadoo & Jo Doezema eds., 1998).

discussion, the prostitute “comes to function as both the most literal of slaves and as the most subversive of sexual agents within a sexist social order.”<sup>49</sup> The positions can be characterized by their answer to the fundamental question, “can a woman choose to sell sex?” The *structuralist* camp, affiliated with the radical feminism (or dominance feminism) opposes any type of work in the sex industry, and views all categories of prostitution as violence towards women.<sup>50</sup> The *individualist* camp, affiliated with liberal and postmodern feminism, opposes forced prostitution but views work in the sex industry, undertaken by choice, as a legitimate source of livelihood, even if the choice is made out of a highly restricted set of options.<sup>51</sup>

The way the two camps envisage the problem of prostitution produces the frame for their lobbying efforts and legal reform suggestions. Although the measures they call for adopting are not necessarily mutually exclusive, the end outcome the different camps strive towards can be contradictory. While structuralists claim that in order to completely abolish prostitution all the persons involved in prostitution must be criminalized but the prostitute herself, individualists argue that prostitution must be made legal and be regulated.<sup>52</sup>

The debate on the proper way to deal with the phenomenon of prostitution has three layers: a normative layer, dealing with moral conceptions; a factual layer, dealing with our knowledge about sex work/prostitution; and a factual layer, dealing with the question of the appropriate regulatory intervention in dealing with prostitution.<sup>53</sup>

#### A. The Normative Layer

The feminist camps disagree among themselves on the basic question of whether women can choose to sell sex services. The answer to this question depends on the view on three aspects involved in sex work. First, how we perceive the power relations between men and women: are they always and necessarily hierarchical, so that men dominate women—or are they more diffuse, and male domination is not so uniform and clear, and therefore the patriarchy cannot provide a full explanation to the question of why

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49. WENDY CHAPKIS, *LIVE SEX ACTS: WOMEN PERFORMING EROTIC LABOR* 28 (1997).

50. *Id.* at 26-27.

51. This categorization is borrowed from Halley et al.'s analysis of the feminist debate around trafficking. See Halley et al., *supra* note 2, at 347. This division could be complexified by further dividing the individualists into the human rights group and the workers rights group, as each emphasizes slightly different aspects of the violations in prostitution. It can further be said that there is a third camp, of *post individualists*, who object to the forced voluntary distinction, based on the argument that focusing on this distinction conceals human rights violations and deplorable working conditions that sex workers “by choice” encounter. This third camp claims that an unintended byproduct of the distinction is the division of sex workers to “innocent” sex workers (those who were coerced into prostitution) and “guilty” ones (those who chose prostitution as wage work), and thus reinforces stereotypical views of women's sexuality. Nonetheless, I believe that this diverging standpoint is a stream encompassed in the individualist agenda and does not call for a separate discussion.

52. See Halley et al., *supra* note 2, at 347, 350, 373-74.

53. See *id.* at 338 n.7, 356-59, 395-405.

women sell sex? Second, how do we understand the choice of women with a very restricted set of options: is a choice made out of a narrow range of possibilities still significant and must it be respected—or is regarding such a situation as a “choice” a result of false consciousness, arising from the internalization of patriarchic values? Third, how do we perceive sex: is it an interaction materially different and separate from other social interactions, and such that should be limited to a family setting or to one that aspires to be like a family, or at least in some kind of a romantic setting—or are sexual relations similar to other social interactions, which can find expression in various spheres of activity, including market activity? Another way to discuss the issue of the role of sexual relations is through consideration of the market and the issue of commodification: does the commercialization of sex, in itself, cause harm to women—or perhaps the possibility of trading in sex is not problematic in itself, and is only objectionable where it amounts to exploitation? The different feminist approaches—structuralist and individualist—have different answers to these questions. As we shall see, these different answers also lead to different approaches to the regulation of sex work.

### 1. *The Structuralist Approach: Prostitution as Coercion*

... [T]he acts perpetrated on women in prostitution cause not only physical harm, they also psychologically define her as object, as degraded, as ‘cunt.’ as ‘filthy whore.’ Her self, her individuality, her humanness is systematically attacked and destroyed in prostitution.<sup>54</sup>

The structuralist position is affiliated with radical feminism, that sees sexuality as the primary site of women’s oppression, and sexual objectification as the key to women’s subjection.<sup>55</sup> Sexuality is understood as “that which is most one’s own, yet most taken away,”<sup>56</sup> since women under patriarchy never possess their sexuality—“what is termed women’s sexuality is the capacity to arouse desire in [someone else].”<sup>57</sup> Therefore, it is male sexuality that defines both male and female sexuality, which, in turn, leads to the naturalization of male sexual dominance and women’s sexual submission.

Prostitution, according to this structure, is “the fundamental condition of women”<sup>58</sup> It is the strongest metaphor for women’s experience under patriarchy, since it is not only prostitutes who objectify their sexuality, but rather all women “live in sexual objectification the way fish live in water.”<sup>59</sup> The theoretical origins of the structuralist view are often said to be, *inter alia*, Kant’s categorical imperative—the idea that people are never to be

54. Melissa Farley, *Preface: Prostitution, Trafficking, and Traumatic Stress*, in *PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS* xi, xiv (Melissa Farley ed., 2003).

55. Halley et al., *supra* note 2, at 349-50.

56. CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 3 (1989).

57. *Id.* at 118.

58. *Id.* at 243.

59. *Id.* at 149.

treated merely as a means to an end but as an end in and of themselves.<sup>60</sup> Sex is perceived as an intrinsic attribute of personhood, part of the individual's self-constitution as a person. Thus, the commodification of sex as a market good, used to fulfill the desires of (male) others, problematizes women's conception of self. The causal relationship between the commodification of sexuality, objectification, and subordination, is therefore understood to be inherent.<sup>61</sup>

Theoretically, structuralist writing identifies similarity between prostitution and marriage: in the former, the women's sexuality is exploited in the market and in the latter, within the family unit. At the center of both these institutions is reproductive labor, which consists of sex and care giving. According to the structuralist position, patriarchy and capitalism use women's reproductive labor both within marriage (sex and care giving) and outside of it (sex work).<sup>62</sup> The fact that at both sites these activities are not regarded as work is an exploitative patriarchic product that weakens women and regulates their behavior. Both institutions appropriate and use women's reproductive work in a mutually fortifying way. However, this approach proposes to deal with marriage not by trying to completely abolish the institution of marriage, but only by criminalizing aspects of physical violence within it, and ensuring that the distribution of resources in the marriage is, to the extent possible, more equal, through reforms in property division laws.<sup>63</sup>

As for prostitution, the structuralist position—translated into legal reform—advocates a fully abolitionist approach, arguing that prostitution is distinct from other exploitative gendered occupations in that it alienates the woman from her sexuality, which is an intimate element of the self, and objectifies the attributes of her personhood.<sup>64</sup> Prostitution has a unique characteristic: it necessarily contracts the woman's sexual self. Unlike other miserable jobs women undertake, prostitution leads to self-alienation akin to slavery.<sup>65</sup>

Within this understanding of female sexuality, prostitution is seen as an extreme manifestation of women's subordination; as a form of violence against women that is part of a continuum of forms of oppression along with domestic abuse, sexual harassment, and rape.<sup>66</sup> Prostitution, much

60. For a discussion of Kant as the source of inspiration for the structuralist approach to prostitution, see MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS* 156 (1996) and CAROLE PATEMAN, *THE SEXUAL CONTRACT* 204-05 (1988).

61. RADIN, *supra* note 60, at 163.

62. PATEMAN, *supra* note 60, at 153.

63. Prabha Kotiswaran, *Wives and Whores: Prospects for a Feminist Theory of Redistribution*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS* 285-86 (Vanessa E. Munro & Carl F. Stychin eds., 2007).

64. Jeffrey Gauthier, *Prostitution, Sexual Autonomy, and Sex Discrimination*, 26 *HYPATIA* 166, 168 (2011).

65. PATEMAN, *supra* note 60, at 203-04 ("To have bodies for sale on the market, as bodies, looks very much like slavery.")

66. Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 *N.Y.U. L. REV.* 1220 (1999) (claiming that this continuum of violence against

like domestic abuse, is a phenomenon that could never be the result of free choice, unless the woman who “chooses” this occupation has internalized the existing social order to an extent that her decisions are nothing more than the result of false consciousness.<sup>67</sup> All prostitution, therefore, is a result of coercion, submerged or blatant. According to this approach, prostitutes’ notion that they “choose” to do so is nothing but a defense mechanism, designed to enable them to operate in the exploitative system within which they operate.<sup>68</sup>

The claim that any prostitution is coerced is supported by studies showing, *inter alia*, that a significant percentage of women who enter prostitution were sexually abused in their childhood, so that their “choice” of prostitution is nothing more than an internalization of the abused position.<sup>69</sup> Other researches exemplify the coercive nature of prostitution through data showing that a significant percentage of prostitutes suffer from post-traumatic stress disorder (“PTSD”) as result of their occupation.<sup>70</sup> Further, it is usually women from poor socioeconomic backgrounds that “choose” prostitution.<sup>71</sup> Accordingly, MacKinnon asks: “If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?”<sup>72</sup>

Seeing prostitution as a practice that is violent and harmful to prostitutes in particular and to women in general,<sup>73</sup> structuralist legal reform efforts focus on the abolition of prostitution. Abolitionists call for the criminalization of activities surrounding prostitution (pimps, customers, the owners of a premises where a brothel operates), but not of the prostitute herself, who is seen as a victim of the patriarchal social order, and therefore as a person who needs protection, rescuing, and rehabilitation.<sup>74</sup>

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women reforms in laws dealing with issues such as domestic abuse, sexual harassment, and rape has the potential to transfigure attitudes towards prostitution).

67. SOROPTIMIST, PROSTITUTION IS NOT A CHOICE: LEARN ABOUT THE TRAFFICKING OF WOMEN AND GIRLS WORLDWIDE, AND FIND OUT WHAT CAN BE DONE TO END THIS WIDESPREAD PROBLEM 1 (2010).

68. *Id.*

69. *Id.* at 1, 2.

70. Melissa Farley et al., *Prostitution and Trafficking in Nine Countries*, in PROSTITUTION, TRAFFICKING, AND TRAUMATIC STRESS, *supra* note 54, at 33, 33–34, 44, 47, 55–56; Hyunjung Choi et al., *Posttraumatic Stress Disorder (PTSD) and Disorders of Extreme Stress (DESNOS) Symptoms Following Prostitution and Childhood Abuse*, 15 VIOLENCE AGAINST WOMEN 933, 940–44 (2009); Barry S. Cooper et al., *Traumatic Stress in Prostitutes: A Within-Subject Comparison of PTSD Symptoms Levels Across Sexual and Non-Sexual Traumatic Experiences*, 3 J. TRAUMA PRAC. 51, 62 (2004); Roberto J. Valera et al., *Violence and Post Traumatic Stress Disorder in a Sample of Inner City Street Prostitutes*, 16 AM. J. HEALTH STUD. 149, 153 (2000).

71. Jacquelyn Monroe, *Women in Street Prostitution: The Result of Poverty and the Brunt of Inequity*, 9 J. POVERTY 69, 70 (2005).

72. Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & L. 13, 28 (1993).

73. In Part C I shall present a detailed analysis of the legal regimes that are based on the various feminist approaches in the context of sex commodification.

74. Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1669 (2010).

## 2. *The Individualist Approach: Sex Work as Choice*

Sex [is] a cultural tactic which can be used both to destabilize male power as well as to reinforce it . . . Practices of prostitution . . . can be read in more complex ways than simply as a confirmation of male domination. They may also be seen as sites of ingenious resistance and cultural subversion . . . prostitution . . .<sup>75</sup>

According to the individualist approach, sex work<sup>76</sup> is not inherently harmful to women; rather, it is the stigma that accompanies sex work, coupled with its illegality, that causes the harm some prostitutes experience. Sex workers, it is suggested, can be, and often are, subversive strategists that “have the absolute right to fuck as many men as men fuck women.”<sup>77</sup> The individualist argument takes varying forms—it can originate from libertarianism,<sup>78</sup> from the politics of sex workers’ organizations, attempts to legalize and legitimize sex work,<sup>79</sup> or from postmodern feminism that does not see sex as an expression of violence (pro-sex feminism).<sup>80</sup>

The *libertarian argument* claims women’s association with sex is their source of power: “women are far from being victims, women rule; they are in total control . . . [men] have to buy women’s attention. It’s not a sign of power; it’s a sign of weakness.”<sup>81</sup> Also, according to this approach, every individual is free to act in any way he chooses that does not harm others—and sex work is certainly such an act.<sup>82</sup> This view has been heavily critiqued by structuralists (and also by parts of the individualist camp) as greatly oversimplifying the complex power dynamics between the sexes through “inverting the patriarchal standpoint,”<sup>83</sup> and ignoring power and domination structures in society, restricting the choice of individuals.

The *sex workers’ movement* emerged in the 1970s and spread throughout the world. This movement is based on the unionization of local groups of sex workers—some under traditional labor unions and some under various associations—seeking recognition of their work as any other work, respect for their choice to undertake it, the removal of criminalization from their occupation, and protection of their rights as workers.<sup>84</sup> This movement demands human, civil, and social rights for sex workers, and lobbies

75. CHAPKIS, *supra* note 49, at 28–29.

76. For the origins of the term “sex work,” see Amalia Lucia Cabezas, *Re-Orienting Law and Sexuality: Legal Challenges to and by Sex Workers/Prostitutes*, 48 CLEV. ST. L. REV. 79 (2000).

77. Margo St. James, *The Reclamation of Whores*, in GOOD GIRLS/BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE 84 (Laurie Bell ed., 1987).

78. CAMILLE PAGLIA, SEX, ART, AND AMERICAN CULTURE: ESSAYS 251–52 (1992).

79. Kempadoo, *supra* note 48, at 19–24.

80. SHANNON BELL, READING, WRITING, AND REWRITING THE PROSTITUTE BODY 115 (1994); WHORES AND OTHER FEMINISTS, *supra* note 1, at 147.

81. Melanie Wells, *Woman as Goddess: Camille Paglia Tours Strip Clubs*, PENTHOUSE, Oct. 1994, at 58, cited in CHAPKIS, *supra* note 49, at 22.

82. Susan A. Lentz & B. Grant Stitt, *Women as Victims in “Victimless Crimes”: The Case of Prostitution*, 12 J. CONTEMP. CRIM. JUST. 173–74 (1996).

83. BELL HOOKS, OUTLAW CULTURE: RESISTING REPRESENTATIONS 94 (1994).

84. See Kempadoo, *supra* note 48, at 19.



for the legalization of sex work.<sup>85</sup> Through this movement, sex workers voice their needs and opinions not as victims but as active women seeking to speak for themselves, be heard, and respected.

Alongside and in solidarity with the sex workers' position, a *postmodern position* has developed. This position rejects both the libertarian view that phantasmatically reverses the patriarchal order and the radical feminist notion of female sexual victimization. Postmodern feminists see both the market and sexuality as terrains of struggle, constructed by the patriarchal culture, yet not fully determined by it, so that individuals and groups are capable of generating resistance.<sup>86</sup> Further, postmodern feminists acknowledge the multiplicity in women's experiences of sex, and thus see paid-for sex as having no inherent positive or negative meaning.<sup>87</sup> The assumption that the patriarchal order is not total, and sex work is not inherently coercive, opens room for exploration of sex work as potentially pleasurable, liberating, and empowering, and at the very least as a legitimate way of making a living.<sup>88</sup>

Individualists criticize the structuralist view of sex and its commodification, as rooted in a moralistic Victorian conception,<sup>89</sup> and despite the theoretical criticism of the institution of marriage, intra-marital sex—sex that is tied to reproduction or to a long-term romantic relationship—does not attract the same criticism. They find affirmation for their argument in that while structuralists call for the abolition of prostitution, marriage—the main sexual contract in patriarchy<sup>90</sup>—is not approached with similar prohibitionist energy,<sup>91</sup> thus overlooking the overlaps and continuities between marriage and sex work as two “economies of sexual labor inherent in marriage and sex work.”<sup>92</sup>

Individualists disagree with the structuralist understanding of the link between commodification of sex and women's objectification and subjugation. For example, Martha Nussbaum unties this connection, arguing that the harms of sex work do not necessarily flow from the commodification

85. See *id.*

86. See Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1053-59 (1992); Jane Scoular, *The 'Subject' of Prostitution: Interpreting the Discursive, Symbolic and Material Position of Sex/Work in Feminist Theory*, 5 FEMINIST THEORY 343, 348-9 (2004).

87. HOOKS, *supra* note 83, at 93-94; BELL *supra* note 80, at 110-15.

88. See Nina Hartley, *In the Flesh: A Porn Star's Journey*, in WHORES AND OTHER FEMINISTS, *supra* note 1, at 57, 64 (Jill Nagle ed., 1997).

89. Jo Doezema argues that “[A] number of today's campaigns have become platform to reactionary and paternalistic voices, advocating rigid sexual morality under the guise of protecting women.” Jo Doezema, *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 48, at 34, 45.

90. Pateman focuses on marriage and prostitution as the two main arenas in which the modern patriarchal contract is made and performed. PATEMAN, *supra* note 60, at 3-4.

91. See CHAPKIS, *supra* note 49, at 50.

92. Prabha Kotiswaran, *Wives and Whores: The Regulation of the Economies in Sexual Labour*, in REDEFINING FAMILY LAW IN INDIA: ESSAYS IN HONOUR OF B. SIVARAMAYYA 28, 28 (Archana Parashar & Amita Dhanda eds., 2008).

of sex and the objectification of the self.<sup>93</sup> Nussbaum argues that “all of us . . . take money for the use of our bod[ies],”<sup>94</sup> and that there are various other occupations that are harmful to workers and are not stigmatized or made illegal (e.g., soldier, model, boxer, mine worker). Such occupations are usually better paying, perceived as honorable, and are regulated by law to prevent physical harms to the workers.<sup>95</sup> She further argues that bodily invasion is not problematic if it is consented to and that objection to sexual bodily invasion can be morally problematic only if “one is prepared to make a moral criticism of all sexual contact that does not involve love or marriage.”<sup>96</sup> Nussbaum concludes by proposing that the structuralist argument is not rationally defensible, and stems from class prejudice and stereotypes of race and gender.<sup>97</sup> Chapkis further points out that sex workers, like many other ‘emotional laborers,’ are capable of maintaining boundaries between the commercial transaction and the private self.<sup>98</sup> She argues that “once sex and emotion have been stripped of their presumed unique relationship to nature and the self, it no longer automatically follows that their alienation or commodification is simply and necessarily destructive.”<sup>99</sup>

Structuralists react to the individualist voice with great suspicion, and discredit it either as being the result of false consciousness,<sup>100</sup> as promoting political interests of sex industry profiteers,<sup>101</sup> or as a statistically insignificant minority of all prostitutes, consisting of high-class call girls (“escorts”).<sup>102</sup>

The individualist approach does not deny realities of exploitation and coercion, nor does it imply that all sex work is freely chosen; it does mean that not all sex work is always and inherently coerced. Further, individualists see the source of the harms caused to some sex workers in their occupation being criminalization and stigmatization.<sup>103</sup> Accordingly,

93. See MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 277-98 (1999).

94. *Id.* at 276.

95. *See id.* at 277.

96. *Id.* at 290.

97. *See id.* at 278.

98. *See* CHAPKIS, *supra* note 49, at 77-78.

99. *Id.* at 76. For a more extensive discussion of “emotional labor,” see Amy S. Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147 (2009).

100. Janice J. Raymond, *Ten Reasons for Not Legalizing Prostitution and A Legal Response To The Demand To Prostitution*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS, *supra* note 54, at 315, 325 (claiming that the notion of choice is part of prostitutes’ defense mechanisms and that they experience themselves as choosing, since “to deny their own capacity to choose [is] to deny themselves”).

101. Dorchen A. Leidholdt, *Prostitution and Trafficking in Women, An Intimate Relationship*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS, *supra* note 54, at 167, 179 (claiming that the sex worker’s organization COYOTE is a mix of “libertarian activists and sex industry profiteers”).

102. *See* Lisa L. Kramer, *Emotional Experiences of Performing Prostitution*, in PROSTITUTION, TRAFFICKING AND TRAUMATIC STRESS, *supra* note 54, at 187, 188 (suggesting that it is “conceivable” that individuals experience prostitution differently but dismisses research suggesting that it is “anecdotal”).

103. NUSSBAUM, *supra* note 93 at 282-83.

individualist reform effort focuses on decriminalization and regulation, aiming at the empowerment and social inclusion of sex workers.

## B. The Factual Layer

Those in prostitution, like slaves and concentration camp prisoners, may lose their identities as individuals, becoming primarily what masters, Nazis or customers want them to be . . . . For the vast majority of the world's prostituted women, prostitution and trafficking are experiences of being hunted down, dominated, sexually harassed, and assaulted. Women in prostitution are treated like commodities into which men masturbate, causing immense psychological harm to the person acting as receptacle.<sup>104</sup>

At the age of forty-two, I became a prostitute. The immediate impetus was unemployment and disgust at the women's labor market, but my deeper motivation was the continuation of my quest for wholeness and meaning . . . . I have constructed a life that is extraordinarily sweet, to say nothing of confounding most of this culture's preconceptions around both female and male sexuality.<sup>105</sup>

In addition to the normative stance on sex work/prostitution, the formulation of a regulatory approach to sex work can also be constructed by dealing with the facts in the field, and from information on the attributes of sex work in a given society. The normative position can be connected to or disconnected from the factual, epistemological layer; thus, for example, all monotheistic religions view prostitution as an immoral institution regardless of the conditions of prostitutes' lives in a given society.<sup>106</sup> Feminist writing in this field tends to be based on factual information, but this poses some difficulties.

There is an objective difficulty in gaining access to reliable information on any social phenomenon taking place invisibly, out of public view.<sup>107</sup> Obtaining reliable information about sex work is particularly difficult because of the stigma attached to it and the suspicion of the men and women involved towards the establishment.<sup>108</sup> Like in other fields, the results of studies in the context of sex work often depend on the nature of the questioned population and on the setting in which the questions are asked.<sup>109</sup> When women who had been engaging in street prostitution (considered the most harsh and violent part of the sex industry) are questioned in shelters or aid centers for women seeking to exit the cycle of

104. Farley et al., *supra* note 70, at 58, 60.

105. Cosi Fabian, *The Holy Whore: A Woman's Gateway to Power*, in *WHORES AND OTHER FEMINISTS*, *supra* note 1, at 44, 44.

106. See, e.g., ABDELWAHAB BOUHDIBA, *SEXUALITY IN ISLAM* 187 (Alan Sheridan trans., 2008) (1975); RELIGION & SEXUALITY: *PASSIONATE DEBATES* 29-30, 34 (C. K. Robertson ed., 2006); Ram A. Cnaan, *Notes on Prostitution in Israel*, 52 *SOC. INQUIRY* 114, 115 (1982).

107. See generally SUDHIR ALLADI VENKATESH, *OFF THE BOOKS: THE UNDERGROUND ECONOMY OF THE URBAN POOR* (2006).

108. See SUSAN DEWEY & TIAN TIAN ZHENG, *ETHICAL RESEARCH WITH SEX WORKERS: ANTHROPOLOGICAL APPROACHES* 44-47 (2013).

109. See Ronald Weitzer, *Flawed Theory and Method in Studies of Prostitution*, 11 *VIOLENCE AGAINST WOMEN* 934, 941-42 (2005).

prostitution, these are usually women who had experienced violence or other difficulties in the occupation as sex workers;<sup>110</sup> when those questioned are independent prostitutes identifying themselves as such, and women who are members in prostitutes' organizations, then these are usually women who view sex work as a choice, often not even as a bad one.<sup>111</sup>

It is difficult to obtain uniform answers in the literature even to simpler factual questions such as the size, as opposed to the nature, of the sex industry. For example, in the two countries I shall discuss later in this Article, Sweden and the Netherlands, the authorities admit that they have no way of estimating the extent of the sex industry. When sex work is criminalized, this outcome seems reasonable, but even when sex work is legal and regulated, the authorities find it difficult to estimate its size,<sup>112</sup> *inter alia*, because even then parts of this sector operate without a permit and are far away from the scrutiny of enforcement agencies.<sup>113</sup>

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110. Studies by structuralist writers are often conducted in cooperation with women's organizations that help women leave the cycle of prostitution. Presumably women who do not perceive prostitution as an occupation that must be escaped will not ask such organizations for aid. Also, the proportion of women who apply to these organizations for aid is presumably lower compared with the estimated number of women in prostitution, so that these women also do not have a representative sample. For more on this topic, see Ronald Weitzer, *The Mythology of Prostitution: Advocacy Research and Public Policy*, 7 SEXUALITY RES. & SOC. POL'Y 15, 19 (2010).

111. This is also reflected in journalistic coverage of the issue of prostitution. See Neri Livne, "The Association for the Regulation of Sex Work Does not Give Up, Despite String Resistance", HAARETZ—WEEKEND MAGAZINE, July 18, 2013 [Heb.], [www.haaretz.co.il/magazine/.premium-1.2075326](http://www.haaretz.co.il/magazine/.premium-1.2075326) [<https://perma.cc/7N25-76JY>]. In this news article, Livne discussed the Association for the Regulation of Sex Work in Israel and its struggle for the legalization of prostitution. Women in prostitution are depicted as undertaking this profession as a choice to improve their financial condition and who want people to distinguish between them and women engaged in street prostitution. In response to this Article, Vered Lee wrote that instead of examining whether or not women choose to engage in prostitution, emphasis must be placed on the customer's criminal liability and motives. Lee also wrote that the legalization of prostitution will only perpetuate injustice, subjugation, and violence, and will "not [r]educe the [p]henomenon of [p]rostitution." Lee also noted that contrary to the distinction made in Livne's article between street prostitution and prostitution in apartments and escort services, there is no real difference between these arenas—both are just links in the chain of prostitution. Vered Lee, *Penalizing the Customer. The Legalization of Prostitution Does not Reduce the Phenomenon of Prostitution. It Just Perpetuates Injustice, Subjugation and Intolerable Violence*, HAARETZ—WEEKEND MAGAZINE (July 26, 2013) [Heb.], [www.haaretz.co.il/magazine/.premium-1.2081362](http://www.haaretz.co.il/magazine/.premium-1.2081362) [<https://perma.cc/8DXJ-Q685>].

112. Indeed, the 2010 Swedish Government Report that sought to evaluate the implications of the Act stated that there is no way of estimating prostitution carried on behind closed doors. SWEDISH INSTITUTE, SELECTED EXTRACTS OF THE SWEDISH GOVERNMENT REPORT SOU 2010:49: "THE BAN AGAINST THE PURCHASE OF SEXUAL SERVICES. AN EVALUATION 1999–2008" 19 (Mireille L. Key & Jennifer Evans trans., 2010), <http://www.regeringen.se/content/1/c6/15/14/88/0e51eb7f.pdf> [<https://perma.cc/KP8G-MZS3>] [hereinafter SWEDISH EVALUATION].

113. For example, see the lack of information in the Dutch Ministry of Justice information sheet: DUTCH MINISTRY OF FOREIGN AFFAIRS, DUTCH POLICY ON PROSTITUTION: QUESTIONS AND ANSWERS 11 (2012) ("No recent estimates are available of the number of prostitutes in the Netherlands."). For more information on the difficulty in estimating the sex industry, even where it is regulated, see PLATFORM 31, *supra* note 21, at 20–23 ("In the Netherlands there is no central registration of the number of sex workers. The Dutch authorities order periodical evaluations of the effects of the 2000 law that legal-

This is one of the fields where empirical research is very controversial, because it often transpires that the ideological position is what brings about a study that would lead to a particular conclusion, and it is hard to draw any single, clear conclusion from it as to the ‘nature’<sup>114</sup> of sex work. The result is that the depiction of the realities of sex work differs greatly from one study to another. Research conducted on sex work—both by structuralists and by individualists—is often accused of being ideological and unreliable.<sup>115</sup> Researcher Wendy McElroy writes, for example, as follows:

Emotion and ideology surround the issue of prostitution. And the people to whom the public looks for objective information . . . seem to distort the realities of the issue. It is difficult to trust studies or statistics, many of which contradict each other . . . . Yet there is a crying need to get beyond ideology to good data. The public discussion on prostitution has become an ideological brawl in which both sides bend research to promote political agendas and to slander opponents. Those on the sidelines who feel bewildered by a conflicting flood of arguments and evidence should find solace in the fact that some researchers are just as bewildered.<sup>116</sup>

Structuralist writing that sees prostitution as violence against women is supported by studies dealing with the experience of women who engage in prostitution.<sup>117</sup> The most extensive study to date has been carried out by Melissa Farley, who has examined the connection between prostitution and post-traumatic stress disorder.<sup>118</sup> The study was based on a questionnaire answered by 854 women (and some men) who engage in street prostitution, in strip clubs and in brothels in nine countries.<sup>119</sup> The realities discovered by the study are harsh ones, including violence, rape, and exploitation.<sup>120</sup> Of those questioned, 71% were physically assaulted in the

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ized the sex industry . . . in which educated guesses as to the size of the national population can be found. The Tax Office can only provide data on the number of sex workers who are registered tax-payers, and admits that their files are unreliable because they are incomplete and women who have left the country.”); A. L. DAALDER, PROSTITUTION IN THE NETHERLANDS SINCE THE LIFTING OF THE BROTHEL BAN 32 (2007) (“It is unknown what the total population of prostitutions exactly looks like, since a part of it is quite invisible. Moreover, prostitution is always characterized by a certain amount of fleetingness. On the bases of the municipalities’ data, it is impossible to make an estimate of the number of prostitutes.”); *New article: Does legalised prostitution generate more human trafficking?*, NATIONAL RAPPORTEUR ON TRAFFICKING IN HUMAN BEINGS AND SEXUAL VIOLENCE AGAINST CHILDREN (Nov. 29, 2013), [https://www.dutchrapporteur.nl/current/news/Newarticle\\_Doeslegalisedprostitutiongeneratemorehumantrafficking.aspx](https://www.dutchrapporteur.nl/current/news/Newarticle_Doeslegalisedprostitutiongeneratemorehumantrafficking.aspx) [<https://perma.cc/4KJQ-MYKM>]; Wendy McElroy, *Prostitution: Reconsidering Research*, SPINTECH (Nov. 12, 1999), <http://www.wendymcelroy.com/articles/spin1199.html> [<https://perma.cc/8NVT-YABR>].

114. See generally CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN (1994).

115. See McElroy, *supra* note 113.

116. See *id.*

117. See generally Farley et al., *supra* note 70.

118. See *id.* at 33.

119. The countries studied were Canada, Columbia, Germany, Mexico, the United States, Thailand, Zambia, Turkey, and South Africa. See *id.* at 33-34.

120. See *id.*

course of their work, 88% experienced verbal abuse and social contempt, 89% of the respondents wanted to escape prostitution, 75% had been homeless at some point in their lives, 68% were diagnosed as suffering from PTSD, 59% reported having been beaten in childhood by a caregiver, and 63% experienced sexual abuse as children.<sup>121</sup> Based on these results, these researchers have determined that:

We can no longer assume that the harm perpetrated against prostitutes is in any way accidental. The institution of prostitution is carefully constructed and promoted. Those of us concerned with global human rights must address the social invisibility of prostitution, the massive denial regarding its harms, its normalization as an inevitable social evil . . .<sup>122</sup>

Individualist researchers argued that there are methodological flaws in Farley's studies and in those of some other structuralist researchers.<sup>123</sup> Their main criticism is that the questionnaires are biased and based on interviews with an unrepresentative sample of women, usually women who sought help and are meeting the researchers in that context.<sup>124</sup>

The individualist position is mostly based on qualitative research and on the views of sex workers' organizations around the world. Since the early days of the sex workers' movement in the 1970's, several anthologies have been published, compiling sex workers' narratives.<sup>125</sup> These anthologies contain mostly—but not only—writing by sex workers who are activists in workers rights movement relating the story of how they chose prostitution and why they find this occupation enjoyable, subversive, or

121. See *id.* at 42, 48.

122. *Id.* at 65.

123. Law, *supra* note 4, at 524, 530–53 (discussing literature dealing with problems in structuralist research in general, and with Farley's study in particular); Weitzer, *supra* note 110, at 934, 937. Two articles were written in response: Melissa Farley, *Prostitution Harms Women Even if Indoors: Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 950 (2005) and Jody Rapahel & Deborah L. Shapiro, *Reply to Weitzer*, 11 VIOLENCE AGAINST WOMEN 965 (2005). Additionally, see Weitzer's article responding to these articles: Ronald Weitzer, *Rehashing Tired Claims About Prostitution: A Response to Farley and Raphael and Shapiro*, 11 VIOLENCE AGAINST WOMEN 971 (2005). See generally Bella Chudakov et al., *The Motivations and Mental Health of Sex Workers*, 28 J. SEX & MARITAL THERAPY 305 (2002). See also Teela Sanders et. al, *A Commentary on 'Challenging Men's Demand for Prostitution in Scotland': A Research Report Based on Interviews with 110 Men who Bought Women in Prostitution*, (Jan Macleod, Melissa Farley, Lynn Anderson, Jacqueline Golding, 2008), <https://maggiecneill.files.wordpress.com/2011/07/farley-critique.pdf> [<https://perma.cc/4YWY-F8WQ>]; Letter from Calum Bennachie to APA, <https://cyber-solidaires.typepad.com/files/complaint-to-apa-against-mfarley.pdf> [<https://perma.cc/K648-R693>] (The letter is a complaint lodged with the APA, requesting that Farley be disqualified. The complaint apparently was not addressed by the APA and Farley stated it was "[a] completely unethical accusation and a totally manufactured complaint." See JULIE BINDEL, *THE PIMPING OF PROSTITUTION* 273 (2017)).

124. See, e.g., Weitzer, *supra* note 111, at 938, 941.

125. See generally *SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY* (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998); *CHAPKIS*, *supra* note 49. See, e.g., *WHORES AND OTHER FEMINISTS*, *supra* note 1; *TRICKS AND TREATS: SEX WORKERS WRITE ABOUT THEIR CLIENTS* (Matt Bernstein Sycamore ed., 1st ed., 2000).

merely better than existing alternatives.<sup>126</sup> Such texts, usually written by eloquent, educated, reflexive, and politically involved women, were attacked by structuralist writers as being anecdotal and unrepresentative.<sup>127</sup> The position of the individualist writers is also based on the field work and activities of sex workers' organizations. Within this movement, "prostitutes . . . have assumed their own subject position and begun to produce their own political identity."<sup>128</sup> Individualist researchers seek to establish and reinforce the voice of sex workers, recognizing the existence of exploitation and violence in prostitution, with the aim of improving prostitutes' working conditions.<sup>129</sup>

As a result of these distortions in the available data on prostitution, the working conditions and life circumstances of women in sex work/prostitution are only partly known. Some of the existing information reveals a horrifying reality of severe abuse, violence, exploitation, and degradation; another part deals with a day-to-day, more mundane reality of prostitution as a routine occupation; still another part depicts prostitution as an enjoyable and fulfilling occupation.<sup>130</sup> The existence of alternative information does not mean that the existing information about exploitation does not reflect the realities of many women's lives or that the depiction of prostitution as an ordinary occupation or as a fulfilling one is not true. It seems that there is insufficient information to establish any single conclusion either way, and that we cannot make a sweeping determination, based on the information currently available to us, either that prostitution is "good" or that it is "evil." Presumably this stems, *inter alia*, from the fact that prostitution is a stratified, heterogeneous industry. Research tends to reduce the prostitute to one character—the complete victim or the model liberal agent—without addressing this complexity.<sup>131</sup> However, theoretically, this complexity can also find expression in proposed policy, as I shall discuss later in this article.<sup>132</sup>

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126. See generally WHORES AND OTHER FEMINISTS, *supra* note 1; TRICKS AND TREATS, *supra* note 125; MAC & SMITH, *supra* note 18.

127. See BINDEL *supra* note 123, 237-273. JAY LEVY, CRIMINALISING THE PURCHASE OF SEX: LESSONS FROM SWEDEN 51 (2015).

128. BELL, *supra* note 80, at 2.

129. See, e.g., Marjan Wijers, *Women, Labor, and Migration: The Position of Trafficked Women and Strategies for Support*, in GLOBAL SEX WORKERS: RIGHTS, RESISTANCE, AND REDEFINITION, *supra* note 48, at 1, 1-2; Maryann Seals, *Worker Rights and Health Protection for Prostitutes: A Comparison of The Netherlands, Germany, and Nevada*, 36 HEALTH CARE FOR WOMEN INT'L 784, 785-89.

130. See TRICKS AND TREATS, *supra* note 125. See Wijers, *supra* note 129, at 69. See generally Barbara Woolsey, *Confessions of a Part-Time Prostitute*, THRILLIST (Apr. 29, 2016), <https://www.thrillist.com/sex-dating/nation/the-life-of-a-part-time-prostitute> [<https://perma.cc/Y4TY-BBGU>].

131. Nomi Levenkron, *Can the Master's Tools Demolish His House? On the Power of Legislation as a Tool for Shaping the Sex Industry: The Criminalization of Clients in Sweden as a Test Case*, 54-57 (2011) (master's thesis, Tel Aviv Univ.) [Heb.].

132. See Part III.C. below.

### C. The Strategic Layer

Finally, the normative and factual layers are joined by a strategic one. This layer brings the feminist governance modes into the forefront and reveals the way Gfeminists, holding different positions, operating in transnational networks, develop their position regarding the appropriate manner to regulate sex work/prostitution given the gender, social, and economic order in which it is entrenched, and the limitations of the legal system to bring about change. The rest of the discussion in this Article will focus on this layer and on the relationship between strategy, normativity, and epistemology.

As discussed earlier in this Article, feminist attempts to regulation prostitution have led to the development of two main approaches<sup>133</sup>: decriminalization and abolitionism. The *individualist* camp believes sex work should be governed through *decriminalization* (and sometimes the legalization) of work in the sex industry, in order to ensure that prostitutes are afforded the same rights and protections other workers are entitled to

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133. There are two other legal regimes that do not derive from feminist approaches, and do not focus on the interests and needs of sex workers. One is *full criminalization*, that criminalizes all aspects of prostitution, so that both the act of prostitution itself, and any third-party involvement are penalized. Most states in the U.S. adopted a criminalizing regime, though there are exceptions. A few states are abolitionists, and one state—the state of Nevada—decriminalized and legalized. For a discussion of the history and the details of the law in Nevada, see Coty R. Miller & Nuria Haltiwanger, *Prostitution and The Legalization/Decriminalization Debate*, 5 GEO. J. GENDER & L. 207, 233-41 (2004); Law, *supra* note 4, at 559-62. For a brief overview of the laws of different states, see Law, *supra* note 4 at 554-57. Criminalization was rejected by feminists since it is understood as the cause of greater harm to women who engage in sex work—the illegality is what renders them dependent upon pimps, leads to imprisonment that might be accompanied by police violence, and entrenches the stigmatization and marginalization of sex workers. Criminalization is seen by feminists as motivated by moral revisionist arguments, viewing prostitution as a moral evil, and a source of social contamination. A second non-feminist approach is the *regulatory regime*. The regulatory regime often includes “toleration” of sex work and aims to ensure public order, public health, and tax generation. The “purest” manifestation of this regime was seen at times of social panic regarding sexually transmitted diseases, for which prostitutes are seen as main vectors. The regulatory regime is criticized by feminists as overlooking the exploitations and vulnerability of sex workers and further harming prostitutes by treating them as mere (contaminated) bodies in need of control. Examples of the regulatory regime can be found in late 18th and early 19th century Europe (mainly in France, Italy, and England, aimed at preventing syphilis). This approach reemerged in the 1980s with the growing awareness to AIDS. For discussion of 19th century regulatory regime, see Alexander, *supra* note 1, at 87-88. For a detailed description of the British legislation of the 1869 Contagious Disease Act, and the feminist struggle against it, see KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 24 (1979). For a discussion of the response to AIDS in the U.S. see Alexander, *supra* note 1, at 88-89 (“In the 1980s . . . [t]wenty-one states passed laws requiring HIV tests for anyone convicted . . . on prostitution charges. Eleven also increased prostitution to a felony for those arrested after testing positive.”). Sex worker’s advocates make the following distinction between the regulatory regime and the regime of de-criminalization and regulation: while the first regime regulates prostitutes, which they oppose, the latter regulates prostitution businesses, which they tend to support. See CHAPKIS, *supra* note 49, at 156.



under labor laws.<sup>134</sup> The *structuralist* camp calls for the governance of prostitution through its *abolition*, so that the activity of any third-party involved in prostitution is criminalized (pimps, landlords, and customers), but the act of offering sex services for money is not.<sup>135</sup> Both camps see law as a bearer of great symbolic power.<sup>136</sup> For the individualist camp, legalization and decriminalization are a symbol for sex workers' being part of society, for the protection of their human dignity, and for the eradication of the stigma attached to them.<sup>137</sup> From the point of view of the structuralist camp, legislation seeking to abolish the phenomena of prostitution is an important step towards the protection of all women and the preservation of their dignity.<sup>138</sup>

Each opposing feminist approach tends to perceive the other group's governance mode as harmful to the real interests of sex workers and to criticize the other's legislative projects with arguments similar to the ones employed to criticize traditional, non-feminist, legal regimes. Individualists describe abolitionism as reactionary, moralistic, Victorian, and paternalistic, and its outcome—albeit unintentional—as ensuring women's economic dependence on men and as the social exclusion of prostitutes.<sup>139</sup> Structuralists argue decriminalization ultimately serves the status quo and the interests of sex industry profiteers, normalizing and eroticizing women's subjugation and hiding and making the harms of prostitution invisible.<sup>140</sup>

Despite the close link between the normative view and the strategic one within the feminist camps, it should be noted that this connection is not necessary. First, the translation of the normative position into a strategic view depends, to a great extent, on our degree of faith in the law as a tool for social change, as a tool of governance. For example, in order to support abolitionism we must assume that criminal law can indeed abolish prostitution or at least significantly reduce it.<sup>141</sup> In an attempt to improve the condition of women in prostitution, we may wish—besides the symbolic effect of ensuring the State's commitment to combat—the commercialization of sexual services—to make sure that the harm caused to women in prostitution as a result of the unintended consequences of criminalization is lesser than the expected benefits of the abolition of prostitution. Similarly, in order to support decriminalization, we must believe in the power

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134. It should be noted that while individualists support decriminalization, the extent of regulation they are interested in is debated. Some sex workers' advocates claim that legal regulation will be used against sex workers, and will aim to control them, and therefore promote a minimal regulatory approach. Others think that decriminalization is only a first step that is necessary in order to formally place sex work under standard employment laws and other occupational regulations. See CHAPKIS, *supra* note 49, at 155-57.

135. Halley et al., *supra* note 2, at 351.

136. See *id.* at 340, 410.

137. See *id.*

138. See *id.*

139. Doezema, *supra* note 89, at 45; Wijers, *supra* note 129, at 71, 73, 74.

140. See Farley et al., *supra* note 70, at xix; Raymond, *supra* note 100, at 315.

141. Cf. James Pope's view. James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1857 (2010).

of labor and employment law and of other protective legislation to assist vulnerable workers in general and sex workers in particular. The severe enforcement difficulties associated with labor and employment law in the case of informal markets may cast doubts on the ability to help precarious workers. For each one of these approaches, a realist conception of law may raise questions as to the symbolic and real-life consequences of the proposed reform, once it meets a complex reality.

A similar argument, with a somewhat different point of emphasis, is that the strategic choice stemming from a normative view can be controversial not only in light of the perception of the power of the legal rule, but in light of the perception of the social background in which the policy-maker seeks to intervene.<sup>142</sup> For example, Radin argues that abolitionism as a reform solution is not necessitated by the structuralist position.<sup>143</sup> Radin reads MacKinnon to suggest that the ideal of non-monetized, equal, sharing relationships is unattainable between men and women under current conditions of patriarchy.<sup>144</sup> According to radical feminists, this ideal of equality is not only out of reach, it is also oppressive to women, since women try to define their relationships according to it and thus conceal from themselves the truth about their own oppressed condition of subordination. Radin suggests “[i]f we believe that women are deceived (and deceiving themselves) in this way, attempted non-commodification in the name of the ideal may be futile or even counterproductive. Non-commodification under current circumstances is part of the social structure that perpetuates false consciousness about the current role of the ideal.”<sup>145</sup>

Radin reads the structuralist strife for achieving women’s equality through the prohibition of the sale of sex as inconsistent with the structuralist view that all man-woman relations under patriarchy are unequal and oppressive.<sup>146</sup> If all relationships are unequal, why prohibit this specific transaction? This reading exposes the link between the abolitionist reform proposal and the structuralist view as not only *not* inevitable, but maybe even as incoherent.

The same dissociation can be implied between the individualist view and the decriminalization regime. An individualist can maintain that the emancipatory *potential* of sex work is far from being attained under current gender relations and economic conditions. In this sense although one can be an individualist in her perceptions of sexual agency she can still believe that at this political and economic neo-liberal moment—these times of deregulation, of greater labor market flexibility and of chronic enforcement difficulties associated with labor rights in general and in atypical markets in particular—extending workers’ rights can be helpful to sex workers.<sup>147</sup>

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142. See RADIN, *supra* note 60, at 129, 134.

143. See *id.* at 129.

144. See *id.* at 134.

145. *Id.*

146. See *id.* at 133–34.

147. See KOTISWARAN, *supra* note 22, at 213.

Moreover, the normative position may give rise to varied strategic choices, according to the view of the proper role of the State and the degree of its intervention in the choices of the individual concerning sexuality. The classic divergence between the feminist positions is structuralist support of abolitionism, stemming from belief in the symbolic and material power of criminal law to protect women, and in the need to put in place a legal prohibition and restrictions concerning all matters related to the commodification of sex. On the other hand, individualists oppose the abolition model, based on the view that State regulation would actually embody conservative conceptions of female sexuality, would not be able to protect and liberate them, and would lead to hyper-regulation of women's bodies.<sup>148</sup> Accordingly, postmodern individualists assume that the circulation and proliferation of sexuality may lead to a more dynamic society, "in which many kinds of sexuality coexist and compete with multiple, counter-vailing, and unpredictable effects on social power imbalances."<sup>149</sup>

It can be claimed that the individualist approach might lead to hyper-regulation. Thus, for example, the legalization approach may include a close monitoring of the state of health of women who engage in prostitution through a frequent and invasive regime of medical examinations.<sup>150</sup> In the context of pornography, Nathaniel Berman describes the individualist effect of hyper-regulation as follows:

Educating judges in the multiple forms of sexuality could well accompany advocacy of new and far-reaching forms of regulation. Judges could be given a mandate to root out pernicious forms of sexuality hitherto undetected and in a variety of forms of media hitherto not subjected to sexualized legal scrutiny. A truly sexually sophisticated judiciary on a regulatory mission would make the Puritans look like amateurs.<sup>151</sup>

This scenario of wide discretion in judicial deciphering of moments of consent and coercion in the context of sex work can lead to wide regulation of women's (and men's) sexuality, narrowing women's agency to consent, and limiting the possibility of consent to different types of sexual encounters. This level of judicial discretion does not exist under the structuralist presumption of coercion that leaves the judge with less room for discretion.

This duality towards the role of law also exemplifies that there is no necessary correlation between one's sexual epistemology—i.e. one's understanding of women's agency and sexual options—and one's position towards the appropriate regulatory approach.

Even though the discussion in this part suggests that hybrid positions are more than plausible, there are relatively few traces of it in feminist writ-

148. *See id.* at 14.

149. Karen Engle, *Round Table Discussion: Subversive Legal Moments?*, 12 *TEX. J. WOMEN & L.* 197, 216 (2003).

150. *See* Sofia Gruskin & Laura Ferguson, *Government regulation of sex and sexuality: in their own words*, 17 *REPROD. HEALTH MATTERS* 108, 108 (2009).

151. Engle, *supra* note 149, at 216.

ings about prostitution and trafficking.<sup>152</sup> Kotiswaran describes some authors holding a hybrid approach in her discussion of middle ground feminism.<sup>153</sup> She refers to their posture as an “experimental posture toward prostitution law reform.”<sup>154</sup> The argument below calls on this spirit of non-perfectionist experimentalism.

## II. Governance Feminism Lawmaking: The Regulation of Sex Work in the Netherlands and in Sweden

The analysis in this part seeks to demonstrate that each one of the main Gfeminist regimes for the regulation of sex work—abolitionism and decriminalization—improves the situation for some women and harms other women. Each approach offers certain advantages but also chronic disadvantages in different contexts. This part briefly overviews the feminist legal views as they are reflected in the legal arrangements adopted in Sweden and the Netherlands.

### A. Decriminalization and Regulation: The Dutch Model

Sex work has been legal in the Netherlands since 1996. In 2000, it was also made legal to employ sex workers and manage a sex business.<sup>155</sup> A prominent element of the Dutch sex work legal regime is the distinction between forced prostitution and trafficking that are illegal, and voluntary prostitution that is an occupation regulated by law.<sup>156</sup>

The regulation of sex work is delegated to municipal and regional authorities and is achieved through various means. Generally, brothels are required to apply to the local authority for a business license.<sup>157</sup> A violation of licensing regulations is a criminal or administrative offense, punishable by sanctions depending on the nature of the violation—like in the licensing of other businesses, sanctions range from a monetary fine to license revocation.<sup>158</sup> Brothels, clubs, and “windows” can receive a business license.<sup>159</sup> Licensing, *inter alia*, restricts their location and operation

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152. For a rare example of such a position, see Debra Satz, *Markets in Women's Sexual Labor*, 106 *ETHICS*, 63, 66 (1995) (“On the basis of my analysis of prostitutions wrongness, there is no simple conclusion as to what its legal status ought to be. Both criminalization and decriminalization might have the effect of exacerbating the inequalities in virtue of which I claim that prostitution is wrong.”). This position also appears outside of feminist writing. See Pope, *supra* note 141, at 1858.

153. See KOTISWARAN, *supra* note 22, at 32-33.

154. *Id.* at 34.

155. The information in this section is taken from several main sources. DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 116, at 3. See generally PLATFORM 31, *supra* note 21; U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT, 2001-2018, <https://www.state.gov/wp-content/uploads/2019/01/282798.pdf> [https://perma.cc/62EE-9P4Q] [hereinafter TIP Report].

156. See DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 115, at 3-4.

157. *Id.* at 4.

158. *Id.* at 8.

159. Sex workers who work in windows usually work independently and pay a fixed amount of rent to the window owner, who does not charge any commission or other additional amounts. Unlike this arrangement, employer-employee relationships exist in

hours and defines who may be employed (for example, minors or non-EU citizens may not be employed).<sup>160</sup> Supervision of compliance with the conditions of the license includes supervision of the working conditions of employees and health supervisions, e.g., the frequency of linen change and medical examinations for women and also safety supervision (e.g., ensuring adequate lighting).<sup>161</sup> A violation of these conditions may lead to fines being imposed on the employer or a withdrawal of the license.<sup>162</sup>

The law allows prostitutes to have access to pension schemes, social security benefits, and State organized health care schemes.<sup>163</sup> In principle, it also provides prostitutes access to the legal system, to pursue their rights if they are violated by brothel owners or customers.<sup>164</sup> Since both the contracts with the customer and brothel owner are legally valid, their breach by one party entitles the other to sue for contractual remedies.

EU citizens may work in the Netherlands (in any type of work) without a special work permit.<sup>165</sup> If an EU national wants to be self-employed (either as a sex worker or otherwise), a residence permit is needed, and is easily granted to all EU nationals.<sup>166</sup> There is no recognized way for a non-EU citizen to obtain a working permit to work as a sex worker in the Netherlands.<sup>167</sup> Migrant sex workers who are non-EU nationals and want to work in the Netherlands need to acquire a residence permit that is not restricted to a particular type of work.<sup>168</sup> Such a permit can be obtained only through marriage or registered partnership.<sup>169</sup> Undocumented migrant sex workers are therefore excluded from the benefits of the authorized brothels and are in a highly vulnerable and disempowered state due to their lack of protection as workers, coupled with the constant threat of deportation.

If a sex worker is thought to be a victim of trafficking<sup>170</sup> by the author-

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most brothels and clubs. Street prostitution is mostly prohibited, but some countries allow it in certain parts of the city. See Jo Bindman & Jo Doezema, Report by Anti-Slavery International, *Redefining Prostitution as Sex Work on the International Agenda*, (1997) at § 3d., <http://www.walnet.org/csis/papers/redefining.html#3d> [<https://perma.cc/2AKF-BDDT>]. For the repressive licensing of self-employed sex workers in the Netherlands, see Che Post et al., *Regulation of Prostitution in the Netherlands: Liberal Dream or Growing Repression?*, 25 *EU. J. CRIM. POLICY RES.* 99, 112-13 (2019).

160. Post, *supra* note 159, at 109-113.

161. See DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 113, at 5-6.

162. *Id.* at 8.

163. See *id.* at 10, 13.

164. See *id.* at 6-7.

165. *Id.* at 2.

166. Dutch Ministry of Justice and Security, *EU/EEA or Swiss Citizen*, NETHERLANDS IMMIGRATION AND NATURALISATION SERVICE, <https://ind.nl/en/eu-eea/Pages/EUEEA-or-Swiss-citizen.aspx> [<https://perma.cc/8LKU-YZMX>].

167. Maite Verhoeven, *Government Policies and Sex Work Realities: Human Trafficking in the Regulated Sex Industry*, 33 (2017) (dissertation).

168. See DUTCH MINISTRY OF FOREIGN AFFAIRS, *supra* note 113, at 15.

169. See Dutch Ministry of Justice and Security, *Spouse or (registered) Partner*, NETHERLANDS IMMIGRATION AND NATURALISATION SERVICE, <https://ind.nl/en/family/Pages/Spouse-or-partner.aspx> [<https://perma.cc/6UXL-R955>].

170. Human trafficking is defined in section 273f of the Dutch Criminal Code. See Art. 273f, SR (Neth.). See also Dien Korvinus et al., *Mensenhandel: het begrip uitbuiting in*

ities, she receives special rights and is entitled to various support services.<sup>171</sup> The main right concerns the residence permit: a woman recognized as a trafficking victim is entitled to a three-month residence permit—known as a “reflection period”—in which she can consider whether to testify against her traffickers.<sup>172</sup> During this time the woman is given safe accommodation and is entitled to receive support from non-State advisory centers.<sup>173</sup> If she decides to testify, she is granted a temporary residence permit (which includes a working permit) that is valid for one year and can be prolonged until the end of the trial.<sup>174</sup> If the trial ends with a conviction or if the woman has had temporary resident status for at least three years, she is eligible for permanent resident status.<sup>175</sup> In any other circumstances, at the end of the legal proceedings the woman is removed from the Netherlands, unless she seeks and is granted asylum.<sup>176</sup>

The regulation of the sex industry at the local level is based on the inclusion of many stakeholders in policy making. Thus, for example, besides women engaged in prostitution and owners of businesses in the sex industry, in most Dutch cities representatives of other bodies are also involved in policy making: the municipal public safety department, various police departments, the immigration authority, the State Attorney, the chambers of trade (with which prostitutes are required to be registered if they are self-employed), labor rights inspectors, public health experts,

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art. 273a Sr. [*Trafficking in Human Beings: The Concept of Exploitation in the Dutch Trafficking Provision*], TREMA - NR. 7, 286-87 (2006) (Neth.).

171. See TIP Report, *supra* note 155, at 321.

172. *Id.*

173. *Id.*; *Netherlands - 3. Implementation Of Anti-Trafficking Policy*, EUROPEAN COMMISSION, [https://ec.europa.eu/anti-trafficking/member-states/netherlands-3-implementation-anti-trafficking-policy\\_en](https://ec.europa.eu/anti-trafficking/member-states/netherlands-3-implementation-anti-trafficking-policy_en) [<https://perma.cc/93M5-X8E5>].

174. TIP Report, *supra* note 155, at 321.

175. *Id.*

176. *Id.* In 2016, the Dutch government reported that 116 identified victims of trafficking made use of the three-month reflection period visa, 160 B-8 temporary residency permits. Trafficking victims that receive B-8 permits and permanent residency status can work in the Netherlands. Permanent residency permits are granted to victims if the case in which they cooperate results in conviction of their trafficker and to victims who had held B-8 status for three or more years. No data was provided on the number of permanent residency permits granted to trafficking victims as a result of an extended B-8 visa or due to an asylum process. *Id.* For information on the status granted to trafficking victims in the Netherlands, see *Together Against Trafficking in Human Beings: Netherlands*, EUROPEAN COMMISSION, <https://ec.europa.eu/anti-trafficking/member-states/Netherlands> [<https://perma.cc/TCS4-PSDB>]. It should be noted that for various reasons, many trafficking victims are not granted these rights. See CONNY RIJKEN ET AL., INT'L VICTIMOLOGY INSTITUTE TILBURG, *TRAFFICKING VICTIMS IN THE NETHERLANDS: AN EXPLORATORY STUDY* 143, 148 (2013), [https://www.tilburguniversity.edu/upload/855033a0-aa90-4fdc-90d1-547993fcf881\\_Human%20Trafficking%20Eng%20summary.pdf](https://www.tilburguniversity.edu/upload/855033a0-aa90-4fdc-90d1-547993fcf881_Human%20Trafficking%20Eng%20summary.pdf) [<https://perma.cc/8ZX9-2RU6>]. This study notes that even though cooperation with enforcement authorities is a condition for the granting of a residency permit to trafficking victims, many victims do not want to go to the police or do not consider themselves victims of trafficking and are unaware of the protection and assistance facilities available. Also, this study discovered a lack of understanding of the laws and regulations intended for providing assistance to trafficking victims, such as those concerning residency permits.

social workers, and representatives of youth aid services and tax authorities.<sup>177</sup>

The harshest criticism on the decriminalization and regulation regime in the Netherlands naturally comes from structuralists. Structuralists claim that the Dutch case proves that legalization does not lead to the empowerment of prostitutes but merely to the expansion of their exploitation, making the Netherlands an attractive, safe, and lucrative destination for pimps and traffickers.<sup>178</sup> The main argument in this context is that the expansion of the sex industry in countries that have adopted the decriminalization leads to the expansion of trafficking and of the exploitation of women in prostitution.<sup>179</sup>

The Dutch regime also garners criticism from the individualist camp: suggesting that, translated to Östergren's terminology, it is gradually moving from an integrative regime to a restrictive or even a repressive one.<sup>180</sup> One criticism concerns its limitation to EU nationals, making migrant sex workers "second class" workers within the already low class of sex workers."<sup>181</sup> Individualist researchers also claim that the Dutch regime has failed to ensure prostitutes' rights.<sup>182</sup> They argue that while the purpose of the Dutch Legalization Act was to improve the condition of women in prostitution, two policy decisions have made achieving this goal difficult.<sup>183</sup> First, labor rights issues have not been afforded special intervention tailored to the characteristics of the sex industry.<sup>184</sup> Consequently, until 2008 most proprietors of sex businesses in which women worked claimed that these women were not actually employees but self-employed.<sup>185</sup> This claim was based on their assertion that the independence of women who engage in prostitution is necessary for maintaining their sexual autonomy.<sup>186</sup> In practical terms, this meant that women were excluded from the application of labor laws and from the requirement imposed on employees to pay social security contributions for them. The Dutch tax authorities

177. PLATFORM 31, *supra* note 21, at 73.

178. Raymond, *supra* note 100, at 317.

179. Seo-Young Cho et al., *Does Legalized Prostitution Increase Human Trafficking?*, 41 *WORLD DEV.* 67, 75–76 (2013). See also Niklas Jakobsson & Andreas Kotsadam, *The Law and Economics of International Sex Slavery: Prostitution Laws and Trafficking for Sexual Exploitation*, 35 *EUR. J. L. ECON.* 87, 87 (2013).

180. Post et al., *supra* note 159. For a discussion of Östergren's typology, see ÖSTERGREN, *supra* note 2.

181. Bindman & Doezema, *supra* note 159, at § 3d.; ELIZABETH BERNSTEIN, *TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX* 162–63 (2007).

182. Mariëlle Kloek & Minke Dijkstra, *Sex Work Stigma and Violence in the Netherlands*, NSWP (2018), [https://www.nswp.org/sites/nswp.org/files/sex\\_work\\_stigma\\_and\\_violence\\_in\\_the\\_netherlands\\_reportdigital.pdf](https://www.nswp.org/sites/nswp.org/files/sex_work_stigma_and_violence_in_the_netherlands_reportdigital.pdf) [<https://perma.cc/8CYV-J95J>]; Post et al., *supra* note 159.

183. See Marjan Wijers, *Prostitution Policies in the Netherlands (May 2008)*, [https://www.sexworkeurope.org/sites/default/files/resource-pdfs/wijers\\_m\\_pros\\_policies\\_nl\\_2008.pdf](https://www.sexworkeurope.org/sites/default/files/resource-pdfs/wijers_m_pros_policies_nl_2008.pdf) [<https://perma.cc/VU3R-TWM2>].

184. See *id.*

185. See HENDRIK WAGENAAR ET AL., *DESIGNING PROSTITUTION POLICY: INTENTION AND REALITY IN REGULATING THE SEX TRADE* 102 (2017).

186. See *id.*

disagreed with this definition and found that an employer-employee relationship exists between such proprietors and workers.<sup>187</sup> The brothel proprietors appealed against this determination, and despite the fact that they had actually lost their case in court, indications from the field are that they still resist granting women full labor rights.<sup>188</sup> Second, when the Act passed in 2000, many local authorities froze the number of brothel licenses, fearing an expansion of the sex industry.<sup>189</sup> Thus, unintentionally, this policy created an oligopoly of businesses already operating in the field, gave them considerable power to determine prices and working conditions in the market, and limited the ability of other players to join the market and compete for customers and workers.<sup>190</sup>

Despite this criticism, individualists and sex workers' organizations generally believe that although insufficiently liberalized,<sup>191</sup> the Dutch regime is less misguided and more helpful to sex workers than the Swedish model. Supporters of this regime find that the regulation of prostitution has reduced, albeit partially, the stigma attached to it, made most of the sex industry less violent and exploitative (though regulation left a residue of violence), improved women in prostitution's access to law enforcement systems, and gave them important tools for asserting their welfare and labor rights.<sup>192</sup>

The Dutch example is far from realizing the individualist ideal but is one of the closest examples of its implementation.<sup>193</sup> In and of itself—even prior to any discussion of the problem of enforcement and the side effects of the licensing requirements—despite its potential, it clearly inflicts harms on non-EU migrant sex workers.<sup>194</sup> An examination of the situation on the

187. See *id.*

188. See *id.*

189. See *id.* at 95.

190. See *id.*

191. For example, see the sex workers' approach to the situation in the Netherlands in the 2005 declaration of rights of sex workers in Europe (The Int'l Committee on the Rights of Sex Workers in Eur., *The Declaration of the Rights of Sex Workers in Europe* (2005), [http://www.sexworkereurope.org/sites/default/files/userfiles/files/join/dec\\_brussels2005.pdf](http://www.sexworkereurope.org/sites/default/files/userfiles/files/join/dec_brussels2005.pdf) [<https://perma.cc/L5HK-3K25>]) and in the manifesto of sex worker in Europe, of the same year (The Int'l Committee on the Rights of Sex Workers in Eur., *Sex Workers in Europe Manifesto* (2005), <https://walnet.org/csis/groups/icrse/brussels-2005/SWRights-Manifesto.pdf> [<https://perma.cc/HM4C-4RMQ>]).

192. See Kloek & Dijkstra, *supra* note 182, at 8-10. For critical engagement with the Dutch model, that sees it generally as a step in the right direction in relation to more repressive models, but as requiring additional liberalization and a stronger integrative approach, see Kloek & Dijkstra, *supra* note 182 and Post et al., *supra* note 159.

193. The example seen as realizing the individualist conception, is the legal regime adopted in New Zealand. See, e.g., MINISTRY OF JUSTICE, REPORT OF THE PROSTITUTION LAW REVIEW COMMITTEE ON THE OPERATION OF THE PROSTITUTION REFORM ACT 2003, at 13-14 (May 2008), <http://prostitutescollective.net/wp-content/uploads/2016/10/report-of-the-nz-prostitution-law-committee-2008.pdf> [<https://perma.cc/BS3T-A38L>].

194. It appears that even the decriminalization regime in New Zealand still leaves migrant workers more vulnerable to abuse. See, e.g., Lynzi Armstrong, *Almost Legal: Migrant Sex Work in New Zealand, Beyond Trafficking and Slavery Blog*, OPEN DEMOCRACY (June 6, 2018), <https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/almost-legal-migrant-sex-work-in-new-zealand/> [<https://perma.cc/3V7J-K3TT>].



ground shows that even EU citizens do not necessarily receive all the protection that the Act aspired to ensure.<sup>195</sup>

## B. Abolitionism: The Swedish Model

In 1999, Sweden became the first country in the world to criminalize sex industry customers. The new act stipulated that purchasing or attempting to purchase sexual services is an offense punishable by fines or up to six months imprisonment.<sup>196</sup> Sweden has adopted the structuralist feminist position,<sup>197</sup> and therefore prostitutes were not criminalized, but were perceived as victims of the sex industry; prostitution itself is perceived as violence against women. The Swedish law sees a direct connection between prostitution and trafficking, and assumes that in order to eliminate trafficking, prostitution must be fiercely combated.<sup>198</sup> Customers that are caught are given the option to receive treatment by welfare services.<sup>199</sup> In addition to the criminal legislation, the law earmarked considerable funding for educating the public on the wrongs of prostitution.<sup>200</sup>

The law imposing criminal responsibility for trafficking for the purpose of sex exploitation was enacted in 2002.<sup>201</sup> In October 2004 Sweden extended the penal provisions in the Aliens Act, enabling the issuance of time limited residence permits to victims of trafficking when these are needed for the completion of a police investigation or a court trial.<sup>202</sup> The limited residence permit entitles women to health care and some welfare rights.

The documented effects of the law, as presented by official authorities in the years following its enactment, have been astounding. It is claimed that the number of women involved in street prostitution has decreased by

195. See, e.g., PLATFORM 31, *supra* note 21, at 43, 70; Huisman & Kleemans, *supra* note 21, at 220.

196. LAG OM FÖRBUD MOT KÖP AV SEXUALLA [ACT PROHIBITING THE PURCHASE OF SEXUAL SERVICES] (Svensk författningssamling [SFS] 1998: 408) (Swed.). An *attempt* to purchase sexual services or *preparation* for it is also an offense under Chapter 6 (section 15) of the Swedish penal code. It is considered an *attempt* to purchase when a buyer offers something, such as money, drugs, or a place to stay to a prostituted person as payment for a sexual service. For discussion of the legislative history of the prohibition to purchase sexual services, see Maria Grahn-Farley, *The Law Room: Hyperrealist Jurisprudence & Postmodern Politics*, 36 NEW ENG. L. REV. 29, 39-41 (2001). For more information, see Translation of the Swedish Penal Code, *Prostitution and Trafficking in Human Beings*, EUROPEAN CRIME PREVENTION NETWORK (EUCPN), [http://eucpn.org/sites/default/files/content/download/files/po\\_se\\_pt\\_leg\\_.pdf](http://eucpn.org/sites/default/files/content/download/files/po_se_pt_leg_.pdf) [<https://perma.cc/D3GD-BCBT>]; SWEDISH EVALUATION, *supra* note 112, at 6.

197. Ekberg, *supra* note 13 at 1191.

198. *Id.* at 1189; Raymond, *supra* note 100, at 326-27.

199. Ekberg, *supra* note 13, at 1192.

200. See *id.* at 1202.

201. In 2004, amendments to Swedish legislation were made to extend criminalization to trafficking for other exploitative purposes as well (forced labor, organ removal, etc.). The punishment for the offense is a prison sentence lasting between two and ten years. See, e.g., BROTTSBALKEN [BrB] [PENAL CODE] 4:1a. (Swed.).

202. NAT'L CRIMINAL INVESTIGATION DEP'T, TRAFFICKING IN HUMAN BEINGS FOR SEXUAL AND OTHER PURPOSES: SITUATION REPORT NO. 9, JANUARY 1-DECEMBER 31, 2006, 6 (2009) [hereinafter SITUATION REPORT NO. 9].

30-50%, the recruitment of new women has come almost to a halt, and the numbers of men buying sex has decreased by 70-80%.<sup>203</sup> Police claim that the decrease in the sale of sex is absolute, and that prostitution is disappearing altogether rather than merely going underground.<sup>204</sup> It is also claimed that the law has facilitated a more effective struggle against trafficking.<sup>205</sup> Following the success of the law, Norway and Iceland also enacted legislation adopting the Swedish model, and other countries have considered or are considering such legislation.<sup>206</sup> In 2014 the European Parliament adopted a non-binding resolution that all EU countries should adopt this approach.<sup>207</sup> Thus, the Swedish regime is seen by structuralists as the solution to the problems of prostitution and trafficking<sup>208</sup>—an ideal regime, based on structuralist premises, that enjoys generous government funding and broad social support.<sup>209</sup>

As time has passed, the positive outlook painted by Swedish authorities has been cast into doubt. A 2008 report by the Swedish Ministry of Social Affairs shows that street prostitution has apparently returned to its levels before the law,<sup>210</sup> and that there is no evidence that other forms of prostitution have decreased.<sup>211</sup> Other studies show that prostitution has

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203. Raymond, *supra* note 100, at 327.

204. *Id.*

205. Ekberg, *supra* note 13, at 1199; SITUATION REPORT NO. 9, *supra* note 202, at 5-6.

206. On January 1st, 2009, Section 202a of the Norwegian Penal Code, which criminalizes customers of the sex industry, came into effect. The Code provides for the criminalization of any person who purchases sex services in Norway or anywhere outside Norway and imposes the sanction of a fine or up to one year's imprisonment. ALMINDELIG BORGERLIG STRAFFELOV [GENERAL CIVIL PENAL CODE] Ch. 19, § 202a (Nor.). In Iceland, Article 206 of the Penal Code provides for the criminalization of customers of the sex industry. ALMENN HEGNINGARLÖG [GENERAL PENAL CODE] Ch. XXII, art. 206 (Ice.). In Finland, the amendment of the Criminal Code, to criminalize the consumption of sex services provided by victims of trafficking or procurement, with knowledge of the prostitutes being such victims, came into effect in 2006. See Chapter 20, Section 8 of the Finnish Criminal Code 2006, available at [https://www.unodc.org/res/cld/document/fin/the-criminal-code-of-finland\\_html/Criminal\\_code\\_of\\_Finland.pdf](https://www.unodc.org/res/cld/document/fin/the-criminal-code-of-finland_html/Criminal_code_of_Finland.pdf) [<https://perma.cc/G9EG-ENAE>]. A bill following the Swedish model was rejected in Finland. See NSWP, *supra* note 15, at 1.

207. See European Parliament Report on Sexual Exploitation and Prostitution and its Impact on Gender Equality, 2013/2103(INI) (March 2, 2014).

208. Raymond, *supra* note 100, at 327 (“Women’s and human rights groups should be advocating for study and replication of Swedish law”); Marie De Santis, *Sweden’s Prostitution Solution: Why Hasn’t Anyone Tried It Before?* WOMEN’S JUSTICE CTR. (2007), [http://www.justicewomen.com/cj\\_sweden.html](http://www.justicewomen.com/cj_sweden.html) [<https://perma.cc/L8T2-J824>].

209. It is estimated that 81% of the Swedish population supports the law. See SWED. MINISTRY OF INDUS., EMP’T & COMM’N, PROSTITUTION AND TRAFFICKING IN WOMEN, FACT SHEET (2004).

210. See SOCIALSTYRELSEN [NAT’L BOARD OF HEALTH & WELFARE], PROSTITUTION IN SWEDEN 2007, 33 (2008) (“The overall picture emerging from the interviews is that the sex trade virtually disappeared from the street during a brief period immediately after the law went into effect. It later returned, albeit to a lesser extent. For instance, representatives of the Stockholm Prostitution Centre say that prostitution initially vanished from the streets when the law was passed, only to later return at about half the former extent. Now about two thirds of street prostitution is back, compared to the situation before the law against purchasing sexual services went into effect.”).

211. SWEDISH EVALUATION, *supra* note 112, at 19 (“When it comes to indoor prostitution in which contact is made at restaurants, hotels, sex clubs or massage parlors, the

migrated across the border, or is practiced by trafficking victims and by women who cross the border into Sweden temporarily.<sup>212</sup> Thus, it is at least clear that the Swedish law has not been successful in abolishing prostitution.<sup>213</sup>

Although some official Swedish authorities present the legislation as a great success,<sup>214</sup> sex workers' organizations in Sweden and across Europe<sup>215</sup> are less content with the outcomes of the reform.<sup>216</sup> The main critique is that while there was no "real" decrease in prostitution and trafficking, very real harm is caused to sex workers by the reform.<sup>217</sup> Individualists claim that levels of trafficking, as noted above, stayed the same, and resist the official reports showing a decrease in demand and in the sale of sex, arguing that the industry just changed its modes of operation and became more sophisticated in its underground nature.<sup>218</sup> The effect of this, individualists claim, is worse working conditions<sup>219</sup> and greater

available information on the extent to which this occurs is limited. We have not been able to find any in-depth studies of these forms of prostitution in the past decade.").

212. See NAT'L BOARD OF HEALTH & WELFARE, *supra* note 210, at 44. See also Levenkron, *supra* note 131, at 92-89; TIP Report, *supra* note 155, at 401-02.

213. See JORDAN, *supra* note 13, at 1.

214. See Ekberg, *supra* note 13, at 1204 ("Does the Law fulfill its expectations? The Swedish women's movement and groups that work with prostituted women respond to this question with a firm 'yes.'"); SWEDISH EVALUATION, *supra* note 112, at 7. This report and Ekberg's writings have been critiqued by those opposed to the Act, maintaining that it suffered from serious methodological flaws. See Laura Agustin, *Big Claims, Little Evidence: Sweden's Law Against Buying Sex*, LOCAL (Jul. 23, 2010), <http://www.thelocal.se/20100723/27962> [<https://perma.cc/SR5P-S9MH>]. See also JORDAN, *supra* note 13, at 1.

215. Levenkron, *supra* note 131, at 101, 132. Levenkron has noted that there was real opposition to the Act among a small group of prostitutes who formed the Rose Alliance organization and whose voices were joined by the European and international sex-worker movement.

216. See Petra Östergren, *Sex Workers Critique of Swedish Prostitution Policy* (May 2015), [http://www.petraostergren.com/pages.aspx?r\\_id=40716](http://www.petraostergren.com/pages.aspx?r_id=40716) [<https://perma.cc/D3DD-SGA2>]. See also Press Release, Prostitutes Education Network, The first Nordic Conference for Sex Workers (Oct. 27-28, 2004), <http://www.bayswan.org/swed/nordicpros.html> [<https://perma.cc/R3KJ-SKBS>] (the press release from the first Nordic conference on sex workers in Oslo). See also Isabella Lunds, *Is It Harmful to Have Sex With Strangers? Is It Harmful to Make Money?*, ATT ARBETA SOM ESKORT: ISABELLA LUNDS BLOGG (May. 26, 2007), <http://sensuellqkonsult.wordpress.com/2007/05/26/lies-about-sexwork-in-sweden/> [<https://perma.cc/5JKY-7QQ8>]. See also "Hands Off Our Clients"—*Advocacy and Activism Toolkit Against the Criminalisation of Clients*, SEX WORK EUROPE, <http://www.sexworkeurope.org/campaigns/hands-our-clients-advocacy-and-activism-tool-kit-against-criminalisation-clients> [<https://perma.cc/5AEJ-8R7T>] (campaign of the International Committee on the Rights of Sex Workers in Europe).

217. See Petra Östergren, *Prostitution in Sweden (English Summary)*, BAYSWAN, [http://www.bayswan.org/swed/flashback\\_sweden.html](http://www.bayswan.org/swed/flashback_sweden.html) [<https://perma.cc/5ZEC-QHL6>] (last visited August 12, 2019); NSWP, *supra* note 15, at 1 (explaining that the real effects of End Demand legislation are "that women are made more vulnerable to violence, discrimination and exploitation. Women sex workers face harassment, persecution and arbitrary arrest by authorities; and the focus of antitrafficking organisations on eradicating sex work is detrimental to the identification of victims of human trafficking.").

218. See Östergren, *supra* note 216.

219. See *id.* A few years after the enactment of the Act, Östergren claimed that "sex workers that are still in street prostitution have a tough time. This . . . is because customers are fewer, prices are lower and competition harder for the women . . . . The buyers are "worse" and more dangerous, and the women who cannot stop or move their business

health risks for sex workers.<sup>220</sup> Those opposing the law claim that the criminalization of customers has reduced women's ability to choose their customers and to negotiate their terms of employment because of the secrecy and haste in which "deals" are "closed."<sup>221</sup> They add that the law led to the persecution and harassment of women undertaking prostitution—particularly street prostitutes—by the police, which led to the sex industry going underground.<sup>222</sup> The social marginalization of prostitution has led to the introduction of criminal elements into the industry and increased the prostitutes' dependence on pimps.<sup>223</sup> The industry going underground also makes it more difficult for the welfare authorities to reach and aid women who are interested in exiting prostitution.<sup>224</sup> It is also claimed that due to the increase in demand for weakened and migrant women, who would not put the customer at risk of being blackmailed and exposed to the authorities, the law increased trafficking in Sweden and "reverse sex tourism," where women come to Sweden for prostitution purposes and remain there only for a few days.<sup>225</sup> Finally, it is claimed that despite its feminist guise, the covert agenda of the law was nationalist, with Sweden's policy functioning as a moral and geographical separation from the EU countries in an attempt to prevent the migration of sex workers from east European countries, the newcomers to the European Union.<sup>226</sup>

The difficulty of assessing the success of the Swedish regime is considerable. However, even if we accept the most generous view—according to which the extent of prostitution has somewhat reduced—there is no dispute that criminalization caused harm to women who continue to engage in prostitution, and created even greater difficulties and risks for these

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are dependent on these more dangerous men, since they cannot afford to turn them down as before . . . . [T]he law mostly affected the already socially marginalised women." *Id.* See also Rosinha Sambo, Address at the Taipei Sex Worker Conference: The Situation of Sex Workers in Sweden (2001), <http://www.bayswan.org/swed/rosswed.html> [<https://perma.cc/AWY7-VYNA>] (last visited August 12, 2019).

220. This claim also found support in a report published by a group of UNDP public health experts that stated that the criminalization of sex industry customers puts prostitutes' health at risk and increases the risk of AIDS and other venereal diseases, mainly because the use of a condom has become evidence of the sexual act—which reduces the use of condoms. GLOBAL COMM'N ON HIV & THE LAW, RISKS RIGHTS & HEALTH, at 36–37 (July 2012), <https://hivlawcommission.org/wp-content/uploads/2017/06/FinalReport-RisksRightsHealth-EN.pdf> [<https://perma.cc/EA6Q-EES3>].

221. *Id.* at 37.

222. *Id.*

223. *Id.*

224. *Id.*

225. DODILLET & ÖSTERGREN, *supra* note 13, at 13–14. For a detailed discussion of the impact of the Swedish model on migrant sex workers, see NiinaVuolajärvi, *Governing in the Name of Caring—the Nordic Model of Prostitution and its Punitive Consequences for Migrants Who Sell Sex*, 16 SEXUALITY RES. & SOC. POL'Y 151 (2018).

226. Don Kulick, *Sex in the New Europe: The criminalization of clients and Swedish fear of penetration*, 3 ANTHROPOLOGICAL THEORY 199, 207–09 (2003), <http://ant.sagepub.com/cgi/content/abstract/3/2/199> [<https://perma.cc/NW43-LCVD>]; Gregg Bucken-Knapp & Johan Karlsson Schaffer, *The Same Policy but Different Ideas: The Ideational Underpinnings of the Norwegian and Swedish Bans on the Purchase of Sexual Services*, Paper Prepared for the 2nd European Conference on Politics and Gender (Budapest, Jan. 13–15, 2011); BERNSTEIN, *supra* note 180, at 149–50.

women.<sup>227</sup> Therefore, it can hardly be argued that this regime absolutely improves the condition of women in general and of those who engage in prostitution in particular. The Swedish regime has led to increased police activity, such that helps some women but inflicts harm on others—those more exposed to the harms associated with working in an illegal sector, including social marginality and stigma.<sup>228</sup>

### C. Analysis of the Implications of the Competing Regulatory Approaches

A comparison of the Swedish regime and the Dutch regime shows that each one of them has advantages and disadvantages for different groups of sex workers, and that none of them inherently benefits the most vulnerable sex workers. Each one of these regimes redistributes power in the sex industry, empowering some elements and eliminating others, but none of them has been successful in its core goal: to abolish prostitution on the one hand or to make it a legitimate, respected, and protected profession on the other hand.

Abolitionism is based on faith in criminal law's power to abolish prevalent social phenomena. Its necessary implications are an increase in the stigma attached to the criminalized occupation and enhancement of police involvement which entails all concerned being at the focus of enforcement, even if not everyone involved are perceived as offenders.<sup>229</sup> Police attention being directed at the criminalized activity tends to lead to harassment at best and to violence at worst.<sup>230</sup> This is also the reason for the criminalized activity going underground, with the multiple risks involved, and all this without there necessarily being any decrease in the extent of the activity itself.<sup>231</sup>

Decriminalization is characterized by regulation and by faith in the positive force of labor laws and private law.<sup>232</sup> This faith is often unjustified. The mere existence of a right does not guarantee its realization, particularly where the right is conferred upon an excluded and weakened group, characterized by lack of faith in State institutions. Moreover, decriminalization is liable to increase the extent of the activity without eliminating the stigma attached to it and without a significant improvement in the working conditions of those involved.<sup>233</sup>

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227. GLOBAL COMM'N ON HIV & THE LAW, *supra* note 220, at 38.

228. *See id.*

229. DODILLET & ÖSTERGREN, *supra* note 13, at 22.

230. Sambo, *supra* note 219; DODILLET & ÖSTERGREN, *supra* note 13, at 22.

231. Other contexts where these implications of criminalization can be seen are the prohibition of the sale of alcohol in the United States, and the debate around the decriminalization of the use and sale of light drugs. *See* Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242 (1991). *See also* Charles H. Whitebread, *Freeing Ourselves from the Prohibition Idea in the Twenty-First Century*, 33 SUFFOLK U. L. REV. 235, 236 (2000).

232. GLOBAL COMM'N ON HIV & THE LAW, *supra* note 220, at 41.

233. An example for this is the work of domestic workers (housekeepers, nannies, and caregivers). This sector is mostly comprised of minority or migrant women, documented and undocumented, and is characterized by harsh working conditions and

It is interesting to point out that studies show that despite the apparent dichotomy between the two different approaches to prostitution, they can bring about surprisingly similar outcomes. Sociologist Elizabeth Bernstein has found that despite the difference between the feminist approaches and in the purposes of the legislation in Sweden and in the Netherlands, there is actually considerable similarity between the implications in these two cases.<sup>234</sup> She maintains that the policy of exclusion of non-Dutch (in the Netherlands) and non-Swedish (in Sweden) work migrants, and the desire for the gentrification and real estate development of areas in Amsterdam and Stockholm are what eventually led to a series of similar implications in both countries;<sup>235</sup> most of the sex industry, which operates out of public view (e.g., in apartments and brothels) has remained intact, street prostitution has been restricted or eliminated, and the immigration policy against migrant sex workers has toughened.<sup>236</sup> Similarly, researcher Jane Scouler has found that the distinction between abolitionism and decriminalization is not that significant when it comes to actual outcomes, and that in reality there is a gap between a social goal and its implementation on the ground:<sup>237</sup> “Sweden and the Netherlands . . . appear to display remarkably similar results on the ground in terms of the increased marginalization of more public forms of sex work (street sex work) and its participants, and a relative inattentiveness to many forms of indoor work.”<sup>238</sup> The consequence of this similarity, according to Scouler, does not mean that the legal tool is unsuitable for dealing with the sex industry,<sup>239</sup> but that in designing a legal reform we must be sensitive to the manner in which legal power may preserve and enhance the existing hegemonic power relations, despite its desire to intervene in and change them.<sup>240</sup>

The discovery of the absence of a necessary link between normative positions and the reforms suggested by the Gfeminist camps (as described in Part II), combined with the surprising similarity in the consequences of the legal regimes in the countries that have adopted two divergent Gfeminist policies (as described in Part III) allow us to begin thinking

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sometimes even by sexual exploitation and violence. The fact that their activity is legal and the application of labor law protections is not enough to ensure that these women enjoy better working conditions, recognition, and respect. See generally Int'l Labour Office (ILO), *Decent Work for Domestic Workers Report IV(1)* (2010), [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_104700.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_104700.pdf) [<https://perma.cc/7UJM-LGVM>].

234. BERNSTEIN, *supra* note 180, at 165.

235. *Id.* at 165-66.

236. *Id.* For a similar conclusion in another study, see PHIL HUBBARD ET AL., *REGULATING THE SPACES OF SEX WORK: ASSESSING THE IMPACT OF PROSTITUTION LAW (2007)* (ESRC end of award report).

237. Jane Scouler, *What's Law Got To Do With It? How and Why Law Matters in the Regulation of Sex Work*, 37 J. L. & SOC'Y 12, 13 (2010).

238. *Id.*

239. That was the conclusion reached by Laura Agustín, one of the major individualist researchers. See Laura Agustín, *Sex and the Limits of Enlightenment: The Irrationality of Legal Regimes to Control Prostitution*, 5 SEXUALITY RES. & SOC. POL'Y 73, 83 (2008).

240. Scouler, *supra* note 237, at 14.

about the potential there is in severing the Gordian knot between the normative position and the proposed regulatory reform. The Israeli case, that will be discussed in the next part, provides such a regulatory alternative to both of the feminist approaches overviewed in this part.

### III. Between Abolitionism and Toleration: The Gap Between Theory and Practice in Israel

In recent decades, Israel presents an interesting hybrid of regimes. On the one hand the Israeli legislature is committed to an abolitionist approach that criminalizes procurers and owners of property used for prostitution; on the other hand, prostitution in Israel is mostly practiced visibly, with a certain degree of institutional recognition, and at a wide zone of toleration from the authorities.<sup>241</sup> Scrutinized through the perspective of the “law in action,” the Israeli version of abolitionism is transformed into what seems to be a non-cognizable regime in the language of the dichotomized Gfeminist discourse. To be clear, I do not think Israel is unique in the mixture of sex work regimes it embodies. I suspect that there is no legal regime that traces exactly the imprint of its *de jure* origins. As we have seen in the Swedish regime, and even more so in the Dutch regime, a certain hybridity arises from tension between the law in books and the enforcement policy in Sweden, and between the legal rule and the position of the local authorities in the Netherlands. Such hybridity therefore exists, to a certain degree, in every legal regime. However, it seems that the hybridity in the Israeli system runs deeper because it is manifested, *inter alia*, in many authorities acting directly contrary to criminal law, in a manner undermining, to a considerable extent, some of its purposes. However, the distinction is only a question of degree. It is clear, then, that the gap between law in books and law in action exists, to a certain degree, in every legal regime for the regulation of prostitution. Accordingly, an analysis of the Israeli case might be helpful in speculating about the consequences of “mixed” regimes of sex work beyond Israel’s geographical boundaries.

#### A. The Law in Books: Partial Abolitionism

The Israeli Penal Code is based on British legislation that took root when Palestine was under the British Mandate.<sup>242</sup> After the establishment of the State of Israel, the Israeli legislature adopted the partially abolitionist approach to prostitution, inherited from British law, and that was the result of earlier Gfeminist struggles in England.<sup>243</sup> This approach criminalizes procurers, any person maintaining or renting out a place for the practice of prostitution, and any person living on the earnings of a prostitute, but not

241. See Cnaan, *supra* note 106, at 114.

242. Shamir, *supra* note 9 at 157.

243. See generally Lisa Severine Nolland, Josephine Butler and the Repeal of the Contagious Diseases Acts (1883/1886): Motivations and Larger Vision of a Victorian Feminist Christian (Mar. 2001) (unpublished Ph.D. dissertation, Trinity College, University of Bristol), <https://research-information.bristol.ac.uk/files/34495472/364980.pdf> [<https://perma.cc/3KLR-PFZX>].

the person practicing prostitution herself and not johns.<sup>244</sup> Hardly any research has been done on the extent of prostitution in Israel, in the past so the exact scope of the sex industry over the years is difficult to estimate. From the 1990's and until 2006, most sex workers were victims of trafficking and undocumented migrant workers; since 2006, as a result of the successful attempts to combat human trafficking, a vast majority of those who engage in sex work are Israel residents or citizens.<sup>245</sup> A recent, highly controversial research, commissioned by the ministry of welfare and ministry of public security, estimate is that in 2014 there were approximately 11,000-12,000 people in prostitution.<sup>246</sup>

In 2000, the Israeli legislature amended the Penal Code by adding section 203A,<sup>247</sup> which criminalized human trafficking for the purpose of prostitution. This section was later replaced by the Prohibition of Human Trafficking (Legislative Amendments) Law, 5767-2006,<sup>248</sup> which added

244. See Penal Law, 5737-1977, art. 10 (Isr.) (which deals with prostitution and obscenity, primarily §§ 199-200, 204-05).

245. See Minutes of Session No. 21 of the Knesset Subcommittee on Trafficking in Women, the 17th Knesset, 2, 7, 16 (29.10.08). In this session, the subcommittee discussed the increase in the number of women trafficked for prostitution. Thus, for example, the Chairperson, MK Zehava Galon said, "One of the things human rights organizations have made me aware of is that as a result of the very significant and enhanced enforcement by the Israel Police, and also as a result of more severe penalties and more severe treatment by the State Attorney and the courts, this serious attitude has led to a very very significant reduction. Now I understand that there are a few or a few dozen women trafficked in Israel for the purpose of prostitution. One of the things that these organizations noticed was that at the same time, these authorities—but now I refer more specifically to the Israel Police—have been overlooking similar offenses, that is, trafficking offenses, committed against Israeli women engaging in prostitution and against foreign women, not from the Soviet Union, mostly work migrants." See also *State Attorney Directive* No. 2.2 "Enforcement Policy for Prostitution-Related Offenses", paragraph 5 of the 2012 version [Heb.] ("Since 2006, the phenomenon of human trafficking for the purpose of prostitution in Israel has greatly decreased, and Israel is no longer a target country for the commission of this offense."). This paragraph changed in the 2019 version. It was moved to a footnote and states that "[d]uring the 1990's and during the first decade of this century Israel became a destination for sex trafficking. Following legislation and enforcement efforts, since 2006, the phenomenon diminished significantly, yet we cannot say it disappeared altogether even though victims of crimes are held in better conditions". See FN 13 on p. 9-10 of the 2019 version of the directive.

246. Yoav Santo & Avraham Carmeli, *THE NATIONAL SURVEY ON PROSTITUTION IN ISRAEL* (Ministry of Welfare and Ministry of Public Security) (2016) [Heb.]. For the history of prostitution in Palestine and Israel, see Debbie Bernstein, et al., *Immigration and Sex Work: The Case of Tel Aviv and Jaffa, 1918 - 2010*, in *SELLING SEX IN THE CITY: PROSTITUTION IN WORLD CITIES, 1600 TO THE PRESENT* 329 (Magaly Rodríguez García, Lex Heerma van Voss & Elise van Nederveen Meerkerk eds., 2017).

247. Penal Law, 5737-1977, art. 10 (Isr.), §§ 203A-203D (added by the Penal Law (Amendment No. 56), 5760-2000, *Sefer HaChukkim* No. 226 (of 21.7.2000)). § 203A was repealed by § 1(2) of the Prohibition of Human Trafficking (Legislative Amendments) Law, 5767-2006, *Sefer HaChukkim* No. 2 (of 29.10.2006). See Explanatory Notes, Penal Law Bill (Amendment no. 91) (Prohibition of Human Trafficking), 5766-2006, Government Bills No. 236. [Heb.].

248. Prohibition of Human Trafficking (Legislative Amendments) Law, 5767-2006, *Sefer HaChukkim* No. 2 (indirect amendment of sections 203A-203B of the Penal Law, 5760-2000) (Isr.); Penal Law, 5737-1977, art. 10 (Isr.), § 377A (added by the Prohibition of Human Trafficking (Legislative Amendments) Law, 5767-2006, *Sefer HaChukkim* No. 2.) [Heb.].



section 377A to the Penal Code. This section expanded the crime of human trafficking to include various severe forms of exploitation including organ removal, forced labor, and slavery.

Due to increasing awareness to human trafficking brought about by pressure from the United States Department of State and as a result of the activities of feminist organizations,<sup>249</sup> an extensive regime for the protection and rehabilitation of victims of trafficking has gradually developed in Israel.<sup>250</sup> First, undocumented (“illegal”) immigrants caught by the police in brothels received special treatment, tailored to their situation. Despite their being undocumented, women identified as trafficking victims were not immediately deported from Israel, but were referred to a shelter for trafficking victims,<sup>251</sup> and received a temporary work visa.<sup>252</sup> Initially, this visa was conditioned on cooperation with the State Attorney’s office in giving testimony against traffickers, but this condition was removed in 2006.<sup>253</sup> In 2004, the Ministry of Welfare established a shelter for trafficking victims, where women received psychological support and medical treatment and a variety of other rehabilitative services such as job training,

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249. In the last two decades, Israel has climbed from Tier 3, the lowest Tier, to Tier 1, the highest. See Asif Efrat, GOVERNING GUNS, PREVENTING PLUNDER: INTERNATIONAL COOPERATION AGAINST ILLICIT TRADE 341 (2012); Halley et al., *supra* note 2, at 362–68; TIP Report, *supra* note 155 at 54. See generally Daphna Hacker, *Strategic Compliance in the Shadow of Transnational Anti-Trafficking Law*, 28 HARV. HUM. RTS. J. 11 (2015); TIP Report, *supra* note 155.

250. For a more elaborate description and assessment of Israel Anti-Trafficking efforts, and the role feminists played in it, see Shamir, *supra* note 9, at 149–200.

251. Initially the police would place these women under arrest. Only pursuant to court instructions, the first shelter for trafficking victims was established, in a youth hostel. See MApp (Tel-Aviv District) 91548/00 *The State of Israel v. Julia Veriubkin* (unreported, 12.7.2000). Later, a dedicated shelter named “Maagan” was established as well as a shelter for male trafficking victims named “Atlas.” See also DAPHNA HACKER & ORNA COHEN, RESEARCH REPORT: THE SHELTERS IN ISRAEL FOR SURVIVORS OF HUMAN TRAFFICKING 37–39 (submitted to the United States Department of State) (2012), [https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media\\_server/Law/faculty%20members/Daphna%20Hacker/The%20Shelters%20in%20Israel.pdf](https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media_server/Law/faculty%20members/Daphna%20Hacker/The%20Shelters%20in%20Israel.pdf) [<https://perma.cc/M6ER-PERT>].

252. Minutes of Session No. 18 of the Parliamentary Commission of Inquiry on Trafficking in Women, the 16th Knesset, 9–11 (6.7.04). The then Minister of Interior, Avraham Poraz, announced his intention to extend work permits and visas. 6.3.06 Ministry of interior—Population Authority “Procedure for Processing Victims of Trafficking in Women Who Wish to Testify” (1.8.05); 6.3.07 Ministry of interior—Population Authority “Procedure for Granting Status to Victims of Trafficking in Women on Humanitarian Grounds” 72 (1.6.06) [hereinafter 2006 Ministry of Interior Procedure]. For more on the number of visas granted in Israel, see TIP Report, *supra* note 155, at 238–39. See also Gilad Nathan *Migrant Workers and Victims of Human Trafficking: the Government’s Policy and Activity of the Immigration Authority* (The Knesset, the Research and Information Center) 2009 <http://www.knesset.gov.il/mmm/data/pdf/me02294.pdf>; Minutes of session No. 2 of the Knesset Subcommittee on Trafficking in Women, the 17th Knesset, 11 (25.10.06); HACKER & COHEN, *supra* note 251, at 55. For more information on the process of granting visas, see Tal Raviv & Nomi Levenkron, *Visas for the Victims of Human Trafficking in Israel: Vision and Reality*, Hotline for Migrant Workers report, 2006 [www.law.tau.ac.il/Heb/\\_Uploads/dbsAttachedFiles/oshrot.pdf](http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/oshrot.pdf) [Heb].

253. HACKER & COHEN, *supra* note 251, at 80; 2006 Ministry of Interior Procedure, *supra* note 252.

language training, etc.<sup>254</sup> After having given testimony and upon completion of the criminal proceedings, or at the end of a defined period of rehabilitation, these women are returned to their countries of origin.<sup>255</sup>

On December 31 2018, following a long and successful campaign of structuralist governance feminists to transform the Israeli approach to prostitution<sup>256</sup> Israel criminalized the purchase of prostitution.<sup>257</sup> The law will take effect in June 2019. The description below is of the hybrid period that preceded the adoption of the new law.

## B. The Law in Action: Toleration and Legalization

Since the mid-90's, a series of decisions can be seen as such that brought about a change in the Israeli approach—a change leaving the abolitionist aspect intact but at the same time creating a wide zone of toleration of sex work was created; a change that led to a kind of informal legalization of some aspects of sex work.<sup>258</sup> Several authorities—the State Attorney's Office and the police, labor courts, and National Insurance Institute officials—have taken, in an uncoordinated manner, a series of independent and unrelated decisions, showing toleration and even partial regulation of sex work.<sup>259</sup> These authorities acted in a manner that did not advance the abolition of prostitution but regulated aspects of it in ways that could promote protection of the rights of sex workers. This series of decisions effected a *de jure* change of approach in Israel—from abolitionism to a hybrid approach, which includes both abolitionist and decriminalizing aspects. However, as this series of decisions was not entrenched in law but instituted by administrative and bureaucratic discretion, this is a dynamic situation that can easily change. As aforementioned, these decisions were taken without coordination and without any clear directives dictating uniform policy; in fact, as the following description demonstrates, the policy is not completely uniform, nor is it necessarily uniform for long within any single institution. Presumably—even though there is no evidence of it in documents or internal directives—this approach can be explained as the

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254. HACKER & COHEN, *supra* note 251, at 55.

255. *Id.* at 169-71.

256. Shamir, *supra* note 9. For the online description “feminist sex wars” that preceded this change online, see Yeela Lahav-Raz, *Narrative Struggles in Online Arenas: the Facebook Feminist Sex Wars On The Israeli Sex Industry*, FEMINIST MEDIA STUDIES (2019).

257. Law Prohibiting the Purchase of Prostitution (Interim Order and Legislative Amendment) - 5779-2019, *Sefer HaChukim No. 2779*.

258. Tehila Sagy, *It Takes a Village to Create Prostitution: The Struggle of Human Rights Organizations against the trafficking of Women in Israel and Their Contribution to the Institutionalization of Prostitution*, in INQUIRIES IN LAW, GENDER AND FEMINISM 583, 611-15 (Dafna Barak Erez, Shlomit Yanisky-Ravid, Yifat Bitton & Dana Pugach eds., 2007) [Heb.]. Sagy supports the structuralist position. She sees the gap between law in books and law in action as hypocrisy of the Israeli regime of prostitution.

259. These decisions can be described as a kind of resistance of officials and decision makers to the existing legal regime. For a discussion of the significance of the resistance of public employees to the legal situation through taking decisions which are inconsistent with the applicable law, and for a discussion of the possible implications of this situation, see Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601 (2013).

effect of a wide-spreading liberal- individualist ideological position. This position is compatible with the socioeconomic changes that occurred in Israel in these decades, and with the rise of a neo-liberal position supporting limited intervention in the market, as long as market behavior satisfies the Millian principle of doing no harm to others.<sup>260</sup>

The main support to the claim that sex work has been invisibly decriminalized can be found in State Attorney Directive No. 2.2, “Enforcement Policy for Prostitution- Related Offenses” first issued in 1994 and revised several time since, most recently in 2019, following the adoption of End Demand legislation in Israel.<sup>261</sup> During this period, the rhetoric employed in these directives changed, but the operative part remained the same. The version most relevant to this article is the version from 2012, and quotes will therefore be taken from there, yet the operative clauses cited below did not change in the 2019 version. The 2012 directive makes clear that:

Nothing in this directive diminishes from the goal of reducing, to the extent possible, the phenomenon of prostitution in general—which in itself harms human dignity, and also creates a convenient ground for the development of offenses of trafficking for the purpose of prostitution. However, it should be emphasized that the providing an overall solution for the problem of women and men who engage in prostitution (which is not in itself prohibited) is not within the purview of the law enforcement authorities, and requires public debate and an interdisciplinary handling of this problem by all the relevant bodies, including rehabilitation facilities.<sup>262</sup>

Following these opening statements, the directive goes on to provide as follows: “In view of the need to concentrate resources on the abolition of this phenomenon, the enforcement policy requires giving preference to cases of suspected human trafficking or where there is a suspicion of other grave offenses related to prostitution or to the exploitation of individuals in prostitution.”<sup>263</sup>

The directive asserts that when the police receive information about “regular” prostitution (that which does not involve trafficking) it shall not further investigate unless there is suspicion of involvement of minors, or when there are other aggravating circumstances such as drug dealing, other serious crime, or the brother being a meeting place for offenders or a nuisance to the neighbors.<sup>264</sup> As aforementioned, the outcome is the creation of a zone of toleration of prostitution, and non-enforcement of the

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260. For an extensive description of the relationship between John Stewart Mill’s principle of doing no harm to others, the neo-liberal ideology, and the regulation of the market relations and criminal law, see the writings of Bernard Harcourt on “neo-liberal punishment.” See generally BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011); Bernard E. Harcourt, *Neoliberal Penalty: A Brief Genealogy*, 14 *THEORETICAL CRIMINOLOGY* 1, 4 (2010).

261. *State Attorney Directive No. 2.2 supra* note 245. This 2019 directive is available (in Hebrew) on the Ministry of Justice website <https://www.justice.gov.il/Units/StateAttorney/Guidelines/002.2.pdf> [<https://perma.cc/VE5D-E6FZ>] [Heb.]

262. *Id.* at ¶ 2.

263. *Id.* at ¶ 6.

264. *Id.* at ¶ 8.

provisions of the law in offenses related to prostitution other than under aggravating circumstances or such constituting a nuisance.<sup>265</sup> Indeed, it can be said that in recent decades there are in Israel “prostitution zones” and prostitution sites that are informal but known to all, and they operate without police interference, as long as there are not aggravating circumstances.<sup>266</sup>

Such toleration and non-enforcement depend on the priorities of the investigative and are subject to change. As a result of the activity of the Knesset Subcommittee on Trafficking in Women, since 2000 police raids on brothels in Tel Aviv have increased,<sup>267</sup> and consequently sex work has changed form and moved, in part, into discrete apartments. In addition, in 2005, the Restriction of Use of a Place for Purposes of Preventing the Commission of Offenses Law, 5765-2005, was enacted.<sup>268</sup> This law allows the issuance of an administrative order for the cessation of the activities of places used for committing offenses, including prostitution-related offenses. This law and the enhanced police activity have led, *inter alia*, to raids on brothels and on the businesses of women undertaking prostitution without pimps at the Tel Aviv Central Bus Station or in private apartments, and to increasing police harassment of women in prostitution.<sup>269</sup>

Presumably other official institutions that operate in accordance with internal directives also recognize sex work as an “occupation.” Brothel

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265. *Id.*

266. *See id.*

267. See Raanan Caspi, Comments in the Minutes of Session No. 3 of the Knesset Subcommittee on Trafficking in Women, the 17th Knesset, 13 (Nov. 14, 2006) (Discussing the Restriction of Use of a Place for Purposes of Preventing the Commission of Offenses Law: “This law is relatively new, from 2005. Between January and October over 30 brothels were closed pursuant to administrative judicial orders under the new law, and during this period 200 investigation files concerning the operation of a brothel were opened. Not every investigation file concerning the operation of a brothel requires administrative closure because evidence must be obtained and brought before the District Commander or the Court that the place continues to operate and that there are reasonable grounds to assume that it will continue to operate. 22 places were closed in Beer Sheva and 8 in Tel Aviv. We are constantly trying to improve. We are now suggesting to the State Attorney to see there is a different way to close these places in order to enforce the closure, one that I’d rather not specify.”). *See also* Zehava Galon, Comments in the Minutes of Session No. 21 of the Knesset Subcommittee on Trafficking in Women, the 17th Knesset, 2-3 (Oct. 29, 2008) (“One of the most apparent things is that we no longer see visible brothels, hardly ever. It used to be that wherever you went at the Tel Aviv Central Bus Station, there would be a brothel. As a result of enforcement there are less visible brothels. We know that this has probably caused them to go underground, to use discreet apartment, to use more sophisticated means, via the internet, by means of the telephone, escort services at hotels. Their modes of operation have changed.”). *See also* Nomi Levenkron, *What is a Law Student Doing in a Brothel? Notes on Legal Clinics, Police Officers and Women in Prostitution*, 17 *HAMISHPAT* 161, 164 (2012) [Heb].

268. The Restriction of Use of a Place for Purposes of Preventing the Commission of Offenses Law, 5765-2005, *Sefer HaChukkim* No. 426.

269. For an extensive discussion of the interaction between the police and prostitutes after the decrease in trafficking in women in Israel and of police harassment of women who engage in prostitution through criminal and administrative tools, see Levenkron, *supra* note 267, at 187-92.

owners and sex workers;<sup>270</sup> the National Insurance Institute considers sex work a source of income, and therefore woman who receive benefits conditioned on satisfying the means (income) test may lose their eligibility because of it;<sup>271</sup> also, prostitutes are sometimes considered “workers” by the National Insurance Institute for the purpose of receiving worker’s injury compensation.<sup>272</sup>

The toleration and partial legalization of sex work can also be seen in the approach of the Labor Courts in Israel to sex work. In the past, the Labor Court’s guiding rule had been that a sex worker and a procurer have an employment relationship, and thus the procurer carries all the legal obligations a regular employer does towards the sex workers he employs.<sup>273</sup> The court (Judge Adler) carefully justified its decision:

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270. See Press Release, The Tax Authority, Suspects have been Arrested for Operating a Brothel and for Concealing Income Stemming from them” (Aug. 22, 2012), [taxes.gov.il/about/spokesmanannouncements/pages/ann\\_220812.aspx](http://taxes.gov.il/about/spokesmanannouncements/pages/ann_220812.aspx) [Heb.]; Amir Helmer, *A Brothel Owner Is Accused Concealing Income*, HAARETZ (Jan. 3, 2005) [Heb.], [www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=522533&contrassID=1&subContrassID=1&sbSubCoNtrassID=0](http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=522533&contrassID=1&subContrassID=1&sbSubCoNtrassID=0) [https://perma.cc/E3TW-Z7FY]. See also PARLIAMENTARY COMMISSION OF INQUIRY ON TRAFFICKING IN WOMEN “MINISTRY OF FINANCE - INCOME TAX AND VAT,” ch. 7 in THE PARLIAMENTARY COMMISSION OF INQUIRY ON THE SUBJECT OF TRAFFICKING IN WOMEN: FINAL REPORT (JERUSALEM: THE KNESSET, 2005) 2012 [Heb.]; Israel Tax Authority, [www.knesset.gov.il/committees/heb/docs/sachar10.pdf](http://www.knesset.gov.il/committees/heb/docs/sachar10.pdf) [https://perma.cc/7VGN-3627] [Heb]. The Parliamentary Commission on Trafficking in Women noted in the final report and throughout its discussions its objection to charging brothel operators income tax “because of the concern that it would legitimize the activity of the traffickers and the legalization of prostitution.”

271. The National Insurance Institute requires women arrested in raids on brothels who receive income support benefits to refund money to the Institute, because their income from prostitution is treated as income precluding their eligibility for benefits. See Levenkron, *supra* note 267, at 190, 198. See also Minutes of Session No. 6 of the Knesset Subcommittee on Trafficking in Women, the 18th Knesset (Dec. 2, 2009); Gilad Nathan, *Authorities Assistance to Victims of Human Trafficking in the Welfare and Health* JERUSALEM: KNESSET RESEARCH AND INFORMATION CENTER (2009) [Heb.].

272. At least in one case, a migrant sex worker who was injured when the brothel she worked in was set on fire was found to be eligible for worker’s accident compensation by the National Insurance Institute. The case was presented by her attorney, Ahuva Zaltsberg, at the Conference “Oppression-Compensation”, Tel- Aviv University, July 2004. See also Ruth Sinai, *The Pimp Must Pay the Prostitute Minimum Wage and Allow her Annual Leave*, HAARETZ (May 22, 2002), [www.haaretz.co.il/misc/1.796067](http://www.haaretz.co.il/misc/1.796067) [https://perma.cc/7TNT-3RXE] [Heb.].

273. NLCH (National) 56/180-3 Eli Ben-Ami Mechona Classa v. Rachel Glitzcensky, 31 IsrLC 389 (1998). See also the discussion at Sagy, *supra* note 258, at 610-15; Shulamit Almog, *Prostitution and Labor Law*, 12 LAB. SOC’Y & L. 306 (2010) [Heb.]; LabA (National) 480/05 Ben Shitrit v. Anon. (published by Nevo, 8.7.08); LabA (National) 628/07 Leonid v. Anon. (published by Takdin, 27.8.09). The National Labor Court ruled that in view of the special circumstances of employing a woman as a prostitute, there is no need to prove the exact amount that she received and delivered to the pimp. It is sufficient that the Court can estimate the amount based on the evidence. LabC (Regional Beer Sheva) 1528/05 Anon. v. Anon (published by Nevo, 24.8.09). In this judgement, it was determined that an employer-employee relationship existed between the plaintiff, who was employed by the defendant as an escort, and the defendant, and that the defendant was required to pay the plaintiff the amounts she was entitled to under labor laws, and also proper wages for the entire period of her “employments.” See also LabC (Regional Tel Aviv) 5307/04 Raro v. Kuchik (published by Nevo, 8.1.07) (a single case in which the Court went in a different direction). In this judgement the

The proper social policy in this case is to ensure that the women performing work within the business of her operator enjoys the protection of protective laws and social benefits. Even a woman who engages in the profession of prostitution is entitled to be employed with minimally fair terms of employment, since even a woman who is exploited and is employed as an escort is a human being . . . . This ruling does not encourage this profession neither does it make it legal. This policy makes it more difficult to carry on a prohibited prostitution business, because imposing taxes and the requirement to pay benefits prescribed in protective laws on brothel managers will make the business less feasible . . . . It should be noted that we are not discussing the contractual relationship between the parties or the legality of the contract, we are merely dealing with providing minimal protections set in the relevant labor laws.<sup>274</sup>

The most recent judgment dealing with this issue took a slightly different route, following the development, in the Labor Courts, of the doctrine on the tests for determining “who is an employee.” In the *Kuchik*<sup>275</sup> case, where the plaintiff was recognized as a trafficking victim, President (then Judge) Nili Arad avoided recognizing the relationship as an employer-employee relationship, but applied the purpose test in order to derive eligibility for rights, with respect to each right claimed in the statement of claim.<sup>276</sup> The Judge explained that:

A woman employed as a prostitute in conditions of trafficking and coercion cannot be recognized as having the status of an ‘employee,’ even if she is deemed to have given so called ‘consent’ to the trafficking of her body and to her being employed as a prostitute by her traffickers is attributed to her. Proper judicial policy avoids giving constitutional, legal, moral or social legitimacy to trafficking women’s bodies, by way of recognizing the existence of an ‘employment relationship’ between traffickers and trafficking victims employed by them as prostitutes. However, non-recognition of the existence of an ‘employment relationship’ between a trafficking victim and her offending employers does not preclude, in itself, recognition of her labor law and social security protective rights, as shall now discuss.<sup>277</sup>

Judge Arad ruled as follows:

In view of the severity of the circumstances of coerced ‘employment’ of trafficking victims, it is highly important that their protective labor law and social security rights be upheld. In doing so, the rights of trafficking victims

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Court ruled that as the woman who engaged in prostitution did so of her own free will, no employer-employee relationship existed between the parties, and she was not entitled to the protective rights. This position was rejected in the appeal by the National Labor Court, who upheld all the appellant’s rights even though no full employer-employee relationship existed between the parties. LabA (National) 247/07 Raro v. Kuchik (published by Nevo, 24.9.09). For a discussion of the judgement, see *infra* notes 275–78 and the accompanying text.

274. *Ben-Ami*, *supra* note 273, at 393.

275. LabA (National) 247/07 Raro v. Kuchik (published by Nevo, 24.9.09).

276. In this case, the plaintiff sued for and won wage differentials, with the addition of wage delay compensation; severance pay and severance pay delay compensation; pay in lieu of annual leave; recuperation pay; and compensation for the mental anguish caused to her as a result of her confinement and the physical and mental subjugation that she was forced into. *Id.* ¶ 3 (Judge Arad), and the conclusion.

277. *Id.* ¶ 14 (Judge Arad).

will be ensured without giving rise to concerns regarding legalization of trafficking in women, and social norm of protection of such women from exploitation will be realized. Also, the offending trafficking procurers will not be able to escape and find sanctuary from their obligations under law to the trafficking victims, alleging an absence of an ‘employer-employee’ relationship in its strict sense. Therefore, and in view of a purposive interpretation and proper judicial and social policy, protective labor law and social security rights can be conferred upon a trafficking victim even in the absence of a conclusive employer-employee relationship, between the trafficking victim and the employer- trafficker-procurer.<sup>278</sup>

The position of the Court in the *Kuchik* case reflects the hybrid approach developed in Israel. On the one hand, as law on the books, this is an abolitionist decision, in that the Court refuses to recognize the relationship as an employment relationship for all matters and purposes.<sup>279</sup> Judge Arad’s judgment mostly deals with the position that prostitution in general and trafficking in women in particular must be abolished. On the other hand, in the operative outcome—and without calling this relationship an “employment relationship”—is that Judge Arad applied the purposive interpretation doctrine, under which a person can be recognized as an employee for the purposes of a particular right, even if not for all matters and purposes, and in doing so she recognized all the plaintiffs’ labor rights.<sup>280</sup> Thus, the outcome was that the Court regulated the relationship and determined that the plaintiff was entitled to all workers’ rights under the protective laws. In doing so, the Court revealed the duality of the Israeli system in a rather broad manner: an abolitionist trend on the one hand, and on the other hand a policy of partial regulation.

Another site of toleration and regulation of sex work had existed in the past in the field of tort law. Until the issue came before the Supreme Court in 2006, courts usually ruled that in compensating men who are injured mentally or physically in accidents (mostly road accidents), the injured person’s expenses of purchasing sex services can be taken into account.

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278. *Id.* ¶ 17 (Judge Arad).

279. It should be noted that Judge Plitman critiqued this position in his minority opinion, stating that the relationship should be recognized as an employment relationship: “This conception of non-recognition of the appellant as an employee, but in fact recognizing her as such for the purposes of employee rights under protective labor law—seems to us as conflicting with itself from within itself. Determining one thing and also the opposite, taking the most convoluted path instead of the straightforward one. This conception creates an artificial distinction, in the case before us, between an employee for the purposes of an employment relationship, and an employer under protective labor law.” And later: “The question is—does the trampling of the rights of the working person by the employer actually justify a determination of non-existence of an employment relationship between them; or maybe an employer-worker relationship has another aspect to it; and in fact, the more the working person’s human spirit is being roughly trampled upon, the greater the need to confer upon him the protective labor law rights by virtue of this relationship . . . . Why is a person whose human spirit was taken away from him by exploitation and coercion still regarded as a human being and as such he is entitled to protection of his dignity; but the working person, who, as such, is humiliated and abused—ceases, for some reason, to be a ‘working person,’ and is not entitled as such to protection of his dignity?” *Id.* ¶ 6 (Judge Plitman).

280. *Id.* ¶¶ 22-40 (Judge Arad).

This trend was brought to an end in the Supreme Court's ruling in the *Migdal* case.<sup>281</sup> This case concerned a man in his twenties who was involved in a car accident.<sup>282</sup> The District Court judge ordered the insurance company to pay the plaintiff a sum of 150,000 NIS (approximately \$32,000 U.S.) to cover the expenses of medication for the improvement of sexual function and of buying sex services once a week until the age of 70.<sup>283</sup> The insurance company appealed, and Deputy President Rivlin accepted the appeal based on the argument that no evidence was presented showing that the plaintiff needed this compensation.<sup>284</sup> However, the Deputy President added that even had this need been proved, it would not have justified such compensation because it would have conflicted with public policy, as such compensation "verges on the criminal."<sup>285</sup>

### C. Assessing Outcomes: The Hybrid Approach Compared with Gfeminist Approaches

An examination of the unplanned and informal zone of toleration and regulation of sex work in Israel reveals a mixed approach that dichotomized discourse cannot identify. Even though the Israeli Penal Law has adopted structuralist abolitionism, other institutions operate in the spirit of individualism, as though this does not constitute an internal conflict with respect to the overall legal approach. The Israeli legal regime is therefore characterized by ambiguous discourse and vague procedures that are incompatible with the polarized feminist discourse. The legal approach that was created is, at the same time, both structuralist and individualist, and therefore does not represent any one of these approaches. On the symbolic level, the State of Israel recognized the harms caused by prostitution and demands its abolition; on the material level, the State recognized that sex workers also have rights, and attempts to afford them the minimum protections stipulated in the labor laws and minimum welfare rights. This system, because it is unplanned, is also unstable. Opposition to the trend of recognition of the rights of sex workers can be found in each one of the authorities whose decisions are described above, because many of those who support abolition maintain that the invisible regulation of prostitution operates to the detriment of women and shows a lack of real commitment

281. CA 11152/04 *Anon v. Migdal Ins. Co.* 61(3) PD 310 (2006); CA 1249/04 *Rabach v. Rabach*, 16-18 (published by Nevo, 8.11.06).

282. CA 11152/04 *Anon v. Migdal Ins. Co.* 61(3) PD 310 (2006).

283. *Id.* ¶ 1 (E. Rivlin, J.).

284. *Id.* ¶ 3 (E. Rivlin, J.).

285. *Id.* ¶ 21 (E. Rivlin, J.). Rivlin clarified that, "Based on the provisions of law and the policy the court implements in view of the current state of affairs concerning the 'sex industry' in Israel, we find it difficult to accept the argument that '*restitutio in integrum*' requires awarding compensation whose purpose is paying for escort services." It is interesting to note that despite non-recognition of the right to compensation in this case, Justice Rivlin noted that "We should be careful not to apply legal rules which would eventually harm the victim—deny him rights and benefits and add to his suffering," and gave as an example a case where a woman who worked as a prostitute and was injured in an accident received compensation for loss of earning capacity. *Id.* ¶ 22 (E. Rivlin, J.). See also CC (Tel Aviv) 2191/02 *Anon. v. Anon.*, 1, 12, 13 (published by Nevo, 8.3.06).



by the State to the abolition of prostitution.<sup>286</sup> Feminist organizations that support the abolition of prostitution are also fighting this hybrid approach, in a way that might change it.

Indeed, from a structuralist standpoint this state of affairs is construed as a form of hypocrisy; the State lets women down by failing to live up to its promise to protect them from violence through the abolition of prostitution. Even from an individualist standpoint, this is a problematic approach, because, symbolically, it marginalized sex workers and prevents them from being fully socially and economically integrated. The hybrid approach that was created sends two messages: a message of abolition of and fighting against prostitution on the symbolic level, and a message of partial normalization and regulation of prostitution at the consequential level.

Despite the normative inconsistency of the hybrid approach, an examination of its implications and of the potential there is in expanding it shows that it may be capable of improving the situation of sex workers compared with both distinct feminist approaches. Indeed, this legal approach is far from perfect—it still contains broad toleration of the exploitation of sex workers and of their social exclusion, and it neither attempts nor succeeds in dealing with the stigma attached to prostitution—but considering the disadvantages of each of the feminist approaches, it seems that from the perspective of sex workers the hybrid approach can potentially benefit them more than any one of the pure feminist approaches of either Swedish abolitionism or Dutch decriminalization. How?

Unlike the situation under the decriminalization approach, the State, on the symbolic level, recognized that prostitution is not like any other work: it involves a special (although not inherent) risk, and it often harms those who undertake it. Therefore, the State is committed/intent on abolishing this phenomenon, or more precisely, to abolishing its negative aspects. This, of course, has implications beyond the symbolic level.

Since 2008, government ministries are making efforts to help women leave the “cycle of prostitution.”<sup>287</sup> The Ministry of Welfare funds several

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286. Other forces should be mentioned, which may be a threat to the hybrid approach, primarily economic forces interested, for example, in the development of areas where sex work is prevalent, such as the Tel Aviv Central Bus Station. For a discussion of these forces in the Dutch and Swedish context, and of how they affect the prostitution regime in these countries, see BERNSTEIN, *supra* note 181, at 164-66.

287. As part of the efforts dedicated to aiding women in 2012, a permanent inter-ministerial team for the promotion of joint activity for improving the handling of trafficking for the purpose of prostitution and related offenses was established. The team was headed by Dr. Merav Shmueli and examined aspects of the phenomenon of prostitution. Maria Rabinovitz, *Survey of the Actions Taken by Israel to Combat Human Trafficking: Dealing with Trafficking in Women* (Jerusalem: Knesset Research and Information Center, 2013), 4, 70 [Heb]. This team recommended: “To ensure focused training of the relevant professionals, including police officers, physicians, social workers, attorneys, teachers, etc . . . . Raising public awareness, a joint campaign with the Authority for the Advancement of the Status of Women, maybe on television, deterrence from commercial sexual exploitation, informing the public of the relevant criminal prohibitions.” Minutes of Session No. 15 of the Knesset Subcommittee on Trafficking in Women, the 19th Knesset, 32 (3.2.14). For the recommendations of the Committee, see the inter-ministerial

facilities and programs for this purpose; other facilities and programs are provided by the main organizations currently operating for sex workers—non-profit associations Ofek Nashi and Saleet, the Levinsky Clinic, and the Haifa Mobile Clinic. The most comprehensive of these programs is the one provided by Saleet, which provides a treatment and support system for women in the cycle of prostitution—a hotline, a day center, a hostel, an emergency apartment, and also occupational guidance for those interested.<sup>288</sup> Such programs are important but insufficient. They are capable of providing a response for a small number of women, and many women in need find themselves without a bed for the night and without the support they require. Projects of this kind are prevalent under abolitionism but conflict with the legalization approach and do not exist under it.

In these circumstances, enforcement efforts can be dedicated to prostitution with aggravating circumstances. Theoretically this can also be done under decriminalization, but the Dutch experience shows that the broad toleration of sex businesses by the decriminalization regime, and the autonomy it affords them, makes it difficult for the police to regularly monitor their activities.<sup>289</sup> In fact, it can be argued that the abolition of the difficult cases of trafficking of women which characterized the Israeli sex industry during the '90s and until about 2006 was a product of this hybrid approach.<sup>290</sup> The focused enforcement policy, combined with the relative visibility of the sex industry enabled by toleration, allowed considerable police resources to be directed at sites in the sex industry that were sus-

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team for the promotion of joint activity for improving the handling of trafficking for the purpose of prostitution and related offenses *Minors' Prostitution: Policy Paper* (2013). In addition, the Knesset Subcommittee on Trafficking in Women is promoting issues related to ways of treatment and rehabilitation. Thus, for example, one of the committee's previous chairs, MK David Tsur, has called upon the education system to dispel consumers' myths and norms through education. Minutes of Session No. 15 of the Knesset Subcommittee on Trafficking in Women, the 19th Knesset, 20, 40 (18.2.14).

288. This center is funded by the Prime Minister's Office—the Authority for the Advancement of the Status of Women, the Ministry of Welfare, the Ministry of Health and the Ministry of Education—and it is operated mostly by volunteers. For details see <https://saleet.org.il/en/> [<https://perma.cc/8Y4B-DZHX>] (last visited August. 12, 2019).

289. PLATFORM 31, *supra* note 21, at 69–71. One of the stories that shocked the Netherlands was the violence and severe exploitation inflicted on 120 by a Turkish trafficking-in women network that operated in the “red light” district in Amsterdam. The fact that these women worked in a licensed business in the “red light” district cast a doubt on the notion that decriminalization ensured careful monitoring. The writers concluded that “the monitoring of licensed facilities had not prevented the exploitation of the women of the Dürdan gang. The monitoring had been mostly administrative and had focused on the women's papers, but many of the women in the Dürdan investigation had legal papers. Signals that the women were criminally exploited were missed entirely.” *Id.* at 71.

290. THE MINISTRY OF PUBLIC SECURITY, REPORT OF THE INTER-MINISTERIAL TEAM TO CONSIDER FUTURE MEASURES IN VIEW OF POSSIBLE CHANGES IN THE PATTERNS OF HUMAN TRAFFICKING FOR THE PURPOSE OF PROSTITUTION AND RELATED OFFENCES (2013) [Heb.] (“There is broad agreement that the State of Israel has been able to significantly reduce, as of today, the extent of human trafficking for the purpose of prostitution . . . . Thus, this year no trafficking victim has been reported to have entered Israel whereas in the past, the police has estimated that approximately 3,000 women that had arrived from abroad were being trafficked in Israel each year.”).

pected of trafficking in women.<sup>291</sup> The result was frequent police raids on brothels, focusing on locating non-Israel nationals, with the assumption that such women were exposed to exploitation and may be trafficking victims. In these raids, women were removed from the brothels by the police; those that were identified as trafficking victims were directed to a shelter where they could begin a rehabilitation process, and the others were arrested and deported. While work migrants (sex workers who were not trafficking victims) may have paid a heavy price in this process—being deported and returned to their countries of origin—many others were freed from a situation of violence, exploitation, and coercion. The result was a comprehensive change in the sex industry and the near elimination of some of the most severe forms of exploitation.<sup>292</sup> This was enabled by the criminalization of most of the characteristics of the sex industry on the one hand, and by a policy of toleration and relative cooperation between the police and the brothels and the women engaging in prostitution on the other hand. The abolition of international trafficking of women for the sex industry is an extraordinary accomplishment, unique to Israel.<sup>293</sup>

At the same time, abolitionist criminal legislation also has negative implications for prostitutes' lives, because it increases the stigma and paternalism towards them. This anecdotal example can demonstrate the seriousness of these implications: when a custody dispute is brought before Family Court judges, and the mother is a prostitute, the courts tend to award custody to the father, for the reason that the mother's lifestyle is not normative and is associated with criminal activity, despite the mother herself not being perceived as an offender.<sup>294</sup> However, it should be noted that decriminalization also does not ensure the normalization of sex work. Mothers who are sex workers in a country like the Netherlands can also suffer from the perception that a prostitute is not normative.

In addition to the advantages of abolitionist legislation, invisible regulation also has significant advantages for sex workers. Such regulation

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291. Israel's classification on the third and lowest tier in the TIP Report brought about the change in police priorities and led to this diversion of resources to the fight against trafficking. See Halley et al., *supra* note 2, at 362–64. See also Hana Safran & Rita Haikin, *Between Trafficking in Women and Prostitution: The Evolution of Social Struggle*, in *BLOOD MONEY: PROSTITUTION, TRAFFICKING IN WOMEN AND PORNOGRAPHY IN ISRAEL* 237, 241, 243 (Esther Hertzog & Erella Shadmi eds., 2013).

292. Inbal Wilamovsky, FROM LOCKED APARTMENTS TO THE PUBLIC SPACE THE PHENOMENON OF TRAFFICKING IN WOMEN IN THE PAST AND NOW, 29 Isha L'isha Report (2016), <http://isha2isha.com/wp-content/uploads/2017/12/From-Locked-Apartments-to-the-Public-Space-%E2%80%93-The-Phenomenon-of-Trafficking-in-Women-1.pdf> [https://perma.cc/NPG8-MFKN] (last visited August 12, 2019).

293. HALLEY ET AL., *supra* note 6, at 149–200.

294. Safran & Haikin, *supra* note 291, at 254. It is interesting to note that there are also opposite rulings. See, e.g., FC (Rishon LeZion) 22360/03 Anon. v. Anon, 4 (published by Nevo, 11.12.06). In this case, it was stated that “The defendant's work in an escort service (an allegation denied by the defendant) does not, in itself, preclude her from having the capacity to parent. The defendant's occupation is irrelevant to the question of custody, provided that it does not harm the minor.” See also Ziv Goldfisher, *Court Rules: a Prostitute Can Raise Her Children*, NRG (May 24, 2012), [www.nrg.co.il/online/54/ART2/371/342.html](http://www.nrg.co.il/online/54/ART2/371/342.html) [Heb].

allows access to the courts for those who have the resources for it, and allows prostitutes to enjoy the labor law and national insurance rights afforded to workers.<sup>295</sup> When a sex worker deals with the authorities, some of these authorities try to make sure that her dignity and rights are protected through conferring rights under protective labor laws, granting National Insurance benefits, or even through prevention of police harassment.

The prevention of police harassment is an important aspect mainly—but not only—for women who work as independent sex workers, without pimps. Studies around the world show that abolitionism tends to be associated with police violence, extortion, and harassment.<sup>296</sup> Under the State Attorney Directive, until recent years the police dedicated little enforcement efforts to prostitution without aggravating circumstances, and accordingly, sex workers did not suffer much from police harassment. Consequently, women felt able (some still do) to call the police in order to protect themselves from threatening customers and violence.<sup>297</sup> Such a reality cannot exist under a fully abolitionist regime.

However, the hybrid approach is dynamic and unstable. Indeed, in 2018 it was transformed when Israel adopted the Swedish mode of End Demand Legislation. Yet even prior to its enactment, the reinforcement of Israeli abolitionism and the enhancement, in recent years, of enforcement directed at trafficking in women influenced to Israeli sex workers, have increased police harassment against these women.<sup>298</sup> Legislation such as the Restriction of Use of a Place for Purposes of Preventing the Commission of Offenses Law, and increased use of sections 204-205 of the Penal Law, prohibiting renting out and maintaining a place for purposes of pros-

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295. Indeed, it should be noted that the recognition of the rights of women in prostitution by the National Insurance Institute can also lead to obligations being imposed on them. See Levenkron, *supra* note 267, at 198; MCrimA 11596/05 Anon. v. State of Israel (published by Nevo, 16.1.06); Minutes of Session No. 12 of the Knesset Subcommittee on Trafficking in Women and Prostitution, the 19th Knesset, 7-8 (31.12.13).

296. Both in Sweden and in Israel, bills for the criminalization of customers and risk of an increase in police involvement are what led to the organization of sex workers. Levenkron, *supra* note 131, at 101; SEX WORKERS' RIGHTS ADVOCACY NETWORK [SWAN], ARREST THE VIOLENCE: HUMAN RIGHTS ABUSES AGAINST SEX WORKERS IN CENTRAL AND EASTERN EUROPE AND CENTRAL ASIA (Nov. 2009); MELINDA CHATEAUVERT, SEX WORKERS UNITE: A HISTORY OF THE MOVEMENT FROM STONEWALL TO SLUTWALK 153-56 (2013).

297. See Livne, *supra* note 111 (comments of the Chair of the Association for the Regulation of Sex Work: "Once I rent an apartment and rent out rooms to my friends . . . [s]uddenly I am considered a brothel operator. This is how this absurd situation is created, where on the one hand the police protects us and knows exactly where our apartments are operated, and on the other hand this situation actually puts us and our customers at risk. Which means that if prostitution in Israel is not regulated, we will be thrown out into the streets, like the girls you see on Buki Nae's tours, who make 30 Shekels per customer in back alleys at the Central Bus Station, and are exposed to violence, to serious diseases and exploitation."). See also Gadi Taub, *The Best interests of the Prostitutes Come First*, SEVENTH EYE (July 16, 2013), [www.the7eye.org.il/71587](http://www.the7eye.org.il/71587) [Heb.]. Taub describes how the criminalization of customers law primarily harms the prostitutes themselves: "Brothels will go deep underground, far from the police's reach, and then it will become impossible to call the police in cases of violence, attack and rape."

298. See Levenkron, *supra* note 267, at 200-07.

titution, also mark a weakening of the hybrid approach and some loss of its advantages.<sup>299</sup>

Linda Hirshman and Jane Larson, in discussing sexual bargaining and offering a distributive analysis of the effects of the criminalization of prostitution, suggest understanding anti-prostitution as a form of collective bargaining, in which the bargaining unit of women bargain for sexual access.<sup>300</sup> They argue that it is not the interests of middle class women who should prevail but rather the interests of the weakest actors, in order to improve the bargaining condition of all women.<sup>301</sup> They therefore come up with a regulatory solution that bears some similarity to the one developed here. They suggest

to decriminalize adult, consensual prostitution, removing all criminal laws . . . . We proposed instead to regulate sex commerce through existing labor laws, protecting prostitutes as workers and treating pimps and patrons as employers. Prostitution would be an illegal labor contract, subject to the civil and administrative penalties already applicable to, for example, child or sweatshop labor . . . . Thus prostitutes could demand payment for work performed under an illegal contract, protest harsh working conditions, or act collectively without suffering legal penalty, even though their employment would remain illegal.<sup>302</sup>

I believe the model suggested here improves on the Larson Hirshman model in that it does not view prostitution as socially undesirable labor, when practices with no coercion. Furthermore, by keeping the applicability of criminal law, it provides sex workers with more legal strategies to transform exploitative working conditions, because they can, potentially use criminal law—the most coercive power of the state—for their protection.

The suggested hybrid approach, on the one hand, can potentially recognize the damage caused by prostitution and attempt to reduce its harmful aspects and to aid its victims, and on the other hand, it can potentially give sex workers tools for asserting their rights, obtaining proper working conditions, enjoying the “protective net” of social security benefits, and being free from police harassment. This middle ground regulatory approach is far from perfect, as a residue of harm to sex workers and their exploitation can still remain; nevertheless, this approach provides protections and rights to sex workers without falling into the liberal “free choice” paradigm that can at times characterize the individualist approach. The hybrid approach expresses an understanding that even in cases in which sex workers are victims of a capitalist chauvinist system, and are vulnerable to exploitation, this does not mean that the law should make their situation worse by preventing them access to legal remedies and protections.

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299. See Penal Law, 5737-1977, art. 10 (Isr.), §§ 204-205; Law for Restricting Use of the Place to Prevent Offenses, 5765-2005, SH No. 426 (Isr.); Caspi, Minutes of Session No. 3 of 17th Knesset, *supra* note 267, at 14.

300. See LINDA HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX* 23-24 (1998).

301. See *id.* at 292-93.

302. *Id.* at 289.

This regulatory approach can be characterized as postmodern and experimentalist in that it does not assume sex work has one necessary essence. It does not view sex work as either inherently good or bad, and it leaves room to permit and support sex work, whenever it is not exploitative. In a sense this follows what Annelise Riles, in the very different context of the regulation of global financial markets, termed regulation with a hollow core.<sup>303</sup> In the context she was studying—the manifestation and practices of the regulation of global markets in Japan—this regulatory practice provided “sufficient global uniformity but preserve[d] room for diversity, . . . plac[ing] real limits on certain market practice while preserving room for necessary flexibility . . . [S]uch tools are not culturally specific precisely because they are understood by all to be nothing more than placeholders, to be fictional.”<sup>304</sup> In the context of sex work too, I argue, regulation will function best if it is a gesture with a hollow core, leaving room for flexibility and adaptation to changing conditions of work and market patterns in this heavily stratified, and frequently changing, labor sector.

The regulatory approach suggested here—under which the law on the books gestures in one way, and the law in action heads in another—can be countered with two related objections: first it can be criticized as contradicting notions of an orderly rule of law, and second it can be seen as leaving too much room for discretion. The critiques are related since it is the discretion of street level bureaucrats that creates the mismatch between the law in the books and the law in action.

Both criticisms, therefore, relate to the imperfect relation between the law on the books and the law in action. Riles, for example, explains that

in regulatory reform debates, the notion that the law should reflect market and social realities as closely as possible is taken pretty much as common sense, true dogma across the political spectrum—such that any deviation from this position seems almost silly. Who would dare to claim that the law should be out of touch with the market?<sup>305</sup>

Indeed, a downside of such reflexive hybridity is that the hollow core will necessarily be filled by the discretion of street level bureaucrats:<sup>306</sup> policemen, tax officials, social workers, prosecutors, and trial court judges are the ones who get significant input in the decision whether to utilize the rule or not, whether to see a certain situation as including aggravating cir-

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303. See RILES, *supra* note 29, at 241.

304. *Id.*

305. *Id.* at 212.

306. For an introduction and analysis of the inherent discretion of street level bureaucrats, see MICHAEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 13-50 (1964); JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR—THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 2-15, 278-99 (1968); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 23-28 (1989); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 13-25 (2010); BERNARDO ZACKA, *WHEN THE STATE MEETS THE STREET: PUBLIC SERVICE AND MORAL AGENCY* 33-65 (2018); William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *YALE L. J.* 1198, 1223-45 (1983).

cumstances or not. This approach requires enhancing the power of bureaucrats and as such meets the feminist critique of bureaucracy as a site of hierarchy and domination.<sup>307</sup> Moreover, this regulatory approach requires imagining that discretion will be used appropriately, at least most of the time, to capture and prevent exploitative and abusive working conditions and permit uninterrupted other sexual transactions.

However, as the discussion of the Dutch and Swedish cases shows, none of this is avoidable under any regulatory approach, and in fact denying these elements in other sites is one of the causes of the characteristic flaws in the two traditional feminist approaches to the regulation of sex work. Moreover, as the literature on street level bureaucracy shows, the problem of bureaucratic discretion is inherent in the operation of all bureaucratic systems. This approach includes a built-in bias towards the decision makers that have the most information about the situation because they are on the ground. Of course, if police (or any other public agent) are corrupt, racist, chauvinist, or are criminals, then this will backfire. However, this is not unique to the hybrid approach. Corrupt street level bureaucrats will thwart any policy. What the proposed system provides, however, is more levers for sex workers to pull to protect themselves, stand for themselves, and promote their rights—including the levers of criminal law—and as such, I argue, it holds promise. Following Riles, I argue that such a limited view may miss the power and transformative promise of such reflexive processes, that, as Riles explains, may “set[ ] in motion new ways of collaborating that [has] profound transformative effects.”<sup>308</sup>

## Conclusion

Each position within the dichotomized Gfeminist discourse on prostitution/sex work regards the legal approach it supports as a direct and necessary consequence of its normative position on sex work and the sexual agency of women. Investigating the complex set of effects of the feminist legal regimes in the Netherlands and in Sweden—the “purest” implementation of the opposing Gfeminist views to date—proves that these legal regimes are not *necessarily* beneficial for sex workers, certainly not for *all* sex workers.

The hybrid legal regime that used to exist in Israel—unintentionally—presents an occasion to break away from the polarized discourse and to explore other forms of regulation of sex work. Some Israeli feminists, in line with the transnational Gfeminist inclination towards removal of public servants’ discretion and a perfectionist understanding of the role of law, criticize this regime as incoherent, not living up to the promise to protect women from the harms of prostitution. But are sex workers really worse off due to this incoherence? The legal regime in Israel seems to offer an improved situation for sex workers, precisely because it encompasses an

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307. See KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 4–5 (1984).

308. See RILES, *supra* note 29, at 214.

alleged contradiction—both acknowledging the violence and exploitation that sometimes characterize the labor relations in the sex industry, and at the same time being attentive to the needs of sex workers and capable of treating them and their choices with respect.

Through this hybrid approach, the gap between law in books and law in action can be utilized in order to signal that the sex industry may employ vulnerable populations and may enhance vulnerability, thus calling for distinct regulatory treatment, and at the same time, extend sex workers comprehensive social rights and access to courts and to legal remedies.

Perhaps this approach does not need to exist within a defined “gap,” but can be formalized by determining clear rights for sex workers and by amending the criminal law so that prostitution-related offenses are defined more narrowly. However, it seems that precisely the gap that exists between law and enforcement policy, with the uncertainty and ambiguity arising from it, is what allows the institutional experimentation of various authorities in Israel, and their dualistic treatment of sex work as an occupation, that requires, at the same time, both special attention due to widespread worker vulnerability, as well as access to welfare authorities and the full protection of private law.

In situations of uncertainty as to the realities of a given social phenomenon and as to the implications of regulation, and in an era of economic and geopolitical changes (such as the American pressure on Israel regarding human trafficking), there may be a systemic benefit in leaving the regulatory fabric open, allowing ad hoc policy changes, or different enforcement mechanisms designed to meet the changing needs of sex workers and to allow regulatory adjustment to changing realities. It seems that the hybrid approach allows this more readily than the traditional Gfeminist approaches. Moreover, uncertainty as to the legality or criminality of sex work can leave more room for the agency of excluded social actors, whose voice is hardly ever heard in policy processes, and who can take advantage of loopholes in the system, make creative arguments, and locate institutional units more attune to power disparities (such as the Labor Courts in the Israeli case, etc.). While vulnerable actors may typically tend towards risk aversion and fear of confrontation with the establishment and of making claims, the Israeli experience shows that this tendency can be attenuated through the actions, representation, and creativity of an active and supportive civil society.<sup>309</sup>

The above is not to say that the legal regime in Israel was ever perfect—far from it. It is certainly a problematic regime that creates uncertainty and leaves a residue of tolerance of violence towards women, a regime that does not invest enough resources in the rehabilitation of women who are interested in finding another job, and in the empowerment of women who wish to improve their working conditions and their lives as sex workers. This is also an unstable regime that can change; it has even begun to

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309. See the rulings referred to in *supra* notes 273, 275.



change in recent years. Nevertheless, the legal regime in Israel manages to do what both traditional feminist approaches fail to do: to respond to the vulnerability of sex workers, while avoiding paternalism on the one hand and without falling into the trap of liberal discourse of free choice on the other. It can be argued that the gap between law in books and law in action, whether designed to create regulatory openness or not, harms the rule of law, and that therefore we must always strive to narrow it. However, a realist and pragmatic perspective will lead us to the conclusion that it is better to recognize that this gap exists in every system, and therefore, insofar as it can promote a positive outcome, it should be acknowledged and preserved.

Precisely in a context where we encounter an epistemological deficiency—not knowing what is the reality, or the many realities, of sex work, the size of the market, the relative size of different sectors within the industry, and the exact working conditions in different sectors—it is important to preserve some regulatory humility. Moreover, in situations where the implications of regulation are difficult to ascertain and the interpretation of the alleged facts is ideologically controversial, it seems that there is value in retaining as many alternatives as possible and a broad arsenal of tools for protecting sex workers—tools from the criminal law toolkit as well as tools from private law (including labor) and welfare law. Retaining these alternatives alongside one another allows women who are able to exercise their power and assert their rights to do so, and also provides a response to those in need of protection and rehabilitation.

Considering Scoular's concern that the pure feminist approaches reinforce the existing power system and the status quo,<sup>310</sup> perhaps a hybrid approach can actually offer more openings for challenging this power system. It seems that this solution can manifest institutional humility and encourage regulatory experimentation, which will ensure a broad possible arsenal of responses in a field inflicted by epistemological deficiencies. If we untie the knot between normative conceptions regarding sex work and its regulation, and if our regulatory goal is to improve the lives and working conditions of sex workers, it seems that a hybrid regime has promising potential for improving the situation of these women, which exceeds that of each one of the traditional Gfeminist regimes.

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310. See Scoular, *supra* note 237, at 39.

