

## **RETHINKING THE LEGAL REGULATION OF SEX TRAFFICKING THE CASE OF ISRAEL**

Hila Shamir

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## I. INTRODUCTION

Sex worker migration and trafficking in women for the purpose of prostitution is a world wide phenomenon and a multi-billion dollar industry. It is also a highly complex human experience in which the migrant can be seen as both a criminal and a victim - on the one hand violating migration laws and criminal laws; and on the other a victim of human rights and workers' rights violations. At the heart of the trafficking and migratory scenarios there are women, usually young women of relatively poor backgrounds, coming from countries with struggling economies, aspiring for a better life. It is the dramatic situation of these young women, and their vulnerability, that spurred a vigorous feminist debate around trafficking. The different approaches to women's sexual agency, prostitution, and migration within feminism translate into different views regarding the appropriate legal regime, which are promoted by the opposing groups.

Israel is a destination country for sex worker migration and trafficking. Every year since the early 1990's, an estimated number of 3,000 women enter Israel for the purpose of prostitution.<sup>1</sup> The Israeli regulation of sex work presents a Janus-head approach: a de-jure abolitionist approach and a de-facto wide zone of toleration. This structure is an unintentional mix between the two regulative regimes promulgated by the opposing feminist positions. This paper seeks to be an investigation into the regulation of sex trafficking and sex work in contemporary Israel, building on an analysis of the feminist discourse that developed around sex

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<sup>1</sup> *Parliamentary Commission on Trafficking In Persons - Final Report*, 1 (2005); Nomi Levenkron et al., *National NGOs' report to the annual UN Commission on Human Rights: Evaluation of National Authorities activities and Actual facts on the Trafficking in Persons for the Purpose of Prostitution in Israel* (2003); Nomi Levenkron & Yosi Dahan, *Trafficking in Women in Israel – NGO report* 26-30 (2003).

trafficking, and the different legal regimes it yields. The following introduction will present the main themes and concepts that cut across the discussion throughout the paper.

#### A. WHAT IS “TRAFFICKING”?

The most widely used definition of trafficking derives from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, 2001 (hereinafter: the 2001 protocol). Article 3 of The Protocol defines trafficking as:

(a)...the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in . . . (a) . . . shall be irrelevant where any of the means set forth in . . . (a) have been used.

The 2001 protocol’s definition is purposefully not limited to trafficking for the purpose of prostitution. The protocol’s definition distinguished between the process of trafficking and the end purpose of prostitution or other forms of forced labor. Although the protocol’s language is gender neutral and does not focus on sex trafficking, the prevailing approach in relevant national legislation and in academic literature, both prior to the protocol and after it, most commonly uses the word ‘trafficking’ to signify the process of involuntary border-crossing for the purpose of forced prostitution. Using trafficking to describe both the process of border crossing and its end purpose loads the word with a complex meaning that often leads to a terminological confusion.

The common understanding of the word makes trafficking and coerced prostitution interchangeable terms, referring to the same practice.<sup>2</sup>

## B. THE DICHOTOMIZED DISCOURSE OF SEX TRAFFICKING

The Feminist discussion of trafficking in women for the purpose of prostitution is polarized in a manner that, since the American pornography debates of the mid 1980's, can be seen as a characteristic of various feminist debates around issues that are underlined by questions of power, resistance and female sexual agency.<sup>3</sup> The relatively new feminist legal discussion on trafficking follows a long established feminist split around prostitution:<sup>4</sup> One feminist camp is that of the *Structuralists*. Structuralists object to any form of sex work, and view all prostitution as violence against women. In this view trafficking is merely an extreme manifestation of the commodification of the female body that exists in any form of prostitution. Therefore, any migration of women for the purpose of prostitution is a-priori trafficking. The other camp can be characterized as promoting an *individualist* view. Individualists object to *forced* prostitution, yet perceive *voluntary* sex work as legitimate wage work. Individualists therefore focus on women's agency in making their life choices, and believe that women can *choose* - even if it is a choice between poor options - migration for the purpose of sex work as means of making a living.<sup>5</sup>

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<sup>2</sup> For a discussion of the importance of conceptually distinguishing the two categories see: Janie Chuang, *Redirecting the Debate over Trafficking In Women: Definitions, Paradigms, and Contexts*, 11 Harv. Hum. Rts. J. 65, 80-84 (1998).

<sup>3</sup> 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, 91-92 (1999); Chantal Thomas, *International Law Against Trafficking, In Perspective*, presented at the Wisconsin-Harvard Workshop on International Economic Law and Transnational Regulation, 53 (2004)(manuscript on file with writer).

<sup>4</sup> This categorization is borrowed from Chantal Thomas's analysis of the feminist debate around trafficking, see: Thomas, *id.*, at 49-57.

<sup>5</sup> This division could be complexified by further dividing the individualists into the human rights group and the workers rights group, each emphasizes slightly different aspects of the violations in trafficking. It can further be said that there is a third camp, of *post individualists*, who object to the forced v. voluntary distinction, based on the argument that focusing on this distinction conceals human rights violations and deplorable working condition that sex workers 'by choice' encounter. This third camp claims that an unintended by-product of the distinction is the division of sex workers to "innocent" sex workers (those who were coerced into prostitution) and "guilty" ones

The way the two camps envisage the problem of trafficking produces the frame for their lobbying efforts and legal reform suggestions. Although the measures adopted are not necessarily mutually exclusive the end outcome the different camps strive towards can be contradictory. While structuralists claim that demand for prostitution should be criminalized, and prostitution uprooted and abolished, individualists claim it should be legalized, regulated, and institutionalized. While some structuralists claim that tightening border control will put an end to migrant sex workers' exploitation, individualists call for issuance of working permits for sex workers.

### C. THE MULTIPLE TRUTHS OF SEX TRAFFICKING

Research about trafficking is hampered by a definitional problem, by the absence of accurate data due to the underground nature of both trafficking and sex work, and by the stigmatization that accompanies them. Despite the definition given to trafficking in international law, trafficking is not a stable term. As discussed above, its meaning is extensively debated. Further, the data collected by various groups is often biased by ideology and morality. A UNESCO report noted that:

(w)hen it comes to statistics, trafficking of girls and women is one of several highly emotive issues which seem to overwhelm critical faculties. Numbers take on a life of their own, gaining acceptance through repetition, often with little inquiry into their derivations. Journalists, bowing to the pressures of editors, demand numbers, any numbers. Organizations feel compelled to supply them, lending false precisions and spurious authority to many reports.<sup>6</sup>

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(those who chose prostitution as wage work), and thus to the reinforcement of 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.

<sup>6</sup> Quoted from: UNESCO, *Trafficking statistics project*, in Statistical Commission And UN Economic Commission for Statisticians Europe, *Churning out Numbers – Trafficking and Statistics*, Working paper 16 (Nov. 30<sup>th</sup> 2004) at: <http://www.unece.org/stats/documents/2004/10/gender/wp.16.e.pdf> (last visited, June 2005).

Further, much of the existing information is produced by NGOs, which are in direct contact with victims of trafficking either in receiving countries (when they escape from traffickers, or after they are caught by the police and prior to their deportation) or in origin countries when assisting trafficked women in the process of re-integration in their communities. Accordingly, NGOs are exposed mainly to one sector of migrant sex workers, the one that presumably suffered the most extreme form of exploitation and are therefore in need of rehabilitation and shelter. This leads to research that is oriented to documenting harm, and tends to exclude migrant sex workers that had a positive migratory experience. Women who had a satisfactory experience will most likely not turn to NGOs for help in receiving countries, they will not remain in the country after caught by the police since they will probably not testify against their traffickers, they will also probably not contact NGOs in the process of reintegration in their origin countries. On top of the fact that NGOs encounter women who represent a very specific migratory experience, the sample of women who turn to NGOs for assistance is known to be low in relation to the estimated number of women who cross borders every year to engage in prostitution.<sup>7</sup>

Due to these distortions in the available data about trafficking and migrants sex workers' working conditions is only partly known. The existing information reveals a terrifying reality of severe abuse, violence, exploitation, and degradation. There is no available information on migrant sex workers that is not told in the language of victimhood. This does not mean that the existing narratives of exploitation do not reflect the reality of many trafficked women and

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<sup>7</sup> Counter Trafficking Task Force Regional Clearing Point, *First Annual Report on Victims of Trafficking in South Eastern Europe*, IOM report 3, 10-11 (2003). The report suggests that in the ten countries covered by the it, between the years 2000-2003 only 203 victims were assisted. The rough estimation of women trafficked during this period from and through these countries is more than ten times this number. It can be speculated that the low rates might be rooted in women's lack of awareness to such a possibility, or because they are too embarrassed, ashamed or afraid to seek support, or because they feel that NGOs cannot help them, or that they do not need help at all.

migrant sex workers. But it just might be that the paradigmatic story about trafficking is not the *only* one and that NGOs do not encounter, or are rarely involved with, instances in which women had a satisfactory migratory experience.

There is no available information on how many sex workers have a positive migratory experience. It is known that those exist but their stories are rarely heard. Such women might be a scarce minority of all migrants. It can be that given their vulnerability most migrant sex workers are terribly exploited. But there is no sufficient information to prove either way. With the current available information we cannot know if sex worker migration contains any transformative potential, and if it is possible to make this economic-globalized trend work for the benefit of women.

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The framework I will deploy in this paper is the following. In chapter II will present an overview of the well-rehearsed feminist debate around the commodification of sex and the possibility of women's consent to sex work. Following, in chapter III, I will move to show how a clone of the same polarized debate developed around the issue of trafficking, and the possibility of women's consent to migrate in order to engage in sex work. After presenting the discursive dichotomy, chapter IV will look at the juridical level of the dichotomy, mapping two main feminist legal regimes of prostitution – abolitionism in Sweden and regulation/legalization in the Netherlands - that are tightly linked to the two feminist ideological positions. Chapter V will present the main strands of the critique of the dichotomized discourse, and point at the costs of adhering to it. Bearing on the analysis of the flaws of such a discursive structure, the chapter will explore the inevitability of the conflict, and offer an analysis of the inner logic of the opposing positions, examining if the various assumptions that shape each polarized position necessitate the

approach to law promoted by the group who holds it. With the theoretical critique in mind, chapter VI will turn to the hybrid legal regime in Israel. Finally, the costs and benefits of the hybrid legal regime in Israel will be examined.

## II. PROSTITUTION OR SEX WORK? THE FEMINIST SPLIT ON THE COMMODIFICATION OF SEX

The schism in feminism around commercial sex is underlined by basic disagreement between feminists about power, resistance, and the possibility of female sexual agency under patriarchy. The ongoing feminist debate can be roughly divided into two polarized feminist positions, which I will call here *structuralist* and *individualist*.<sup>8</sup> Both positions in the polarized debate around prostitution claim to reflect the authentic, sex worker/prostitute voice. While structuralists point to quantitative researches proving the harms of prostitution,<sup>9</sup> individualists refer to various sex workers' narratives<sup>10</sup> and to sex workers' organizations<sup>11</sup> as support for their argument. In this polarized discussion "prostitutes come to function as both the most literal of sexual slaves and as the most subversive of sexual agents within a sexist social order".<sup>12</sup> The positions can be characterized by their answer to the basic question - can a woman choose to sell sex?

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<sup>8</sup> 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 feminist theory.

<sup>9</sup> For what is probably the most expansive structuralist research to date see: Melissa Farley et al., *Prostitution and trafficking in nine countries*, 33, *Prostitution, Trafficking and Traumatic Stress* (Melissa Farley ed., 2003).

<sup>10</sup> Various anthologies that compile narratives of sex workers have been published since the late 1980's, some examples are: Frédérique Delacoste & Priscilla Alexander eds., *Sex Work: Writings By Women In The Sex Industry* (1987); Jill Nagle ed., *Whores and Other Feminists* (1997); Wendy Chapkis ed., *Live Sex Acts: Women Performing Erotic Labor* (1997); Matt Bernstein Sycamore ed., *Tricks and Treats: Sex Workers Write About Their Clients* (2000).

<sup>11</sup> For a discussion of sex workers movement in different parts of the world see: Kamala Kempadoo & Jo Doezema eds., *Global Sex Workers: Rights, Resistance, and Redefinition* (1998).

<sup>12</sup> Chapkis, *supra* note 10, at 12.

**A. THE STRUCTURALIST APPROACH TO PROSTITUTION: PROSTITUTION AS COERCION**

The acts perpetrated on women in prostitution cause not only physical harm, they also psychologically define her as an object, as degraded, as “cunt”, as filthy whore. Her self, her individuality, her humaneness, is systematically destroyed in prostitution. (Melissa Farley)<sup>13</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. Sexuality is understood as “that which is most one’s own, yet most taken away,”<sup>14</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>15</sup> Therefore it is male sexuality that defines both male and female sexuality, which, in turn, lead to the naturalization of male sexual dominance and women’s sexual submission.

Prostitution, according to this structure, is “the fundamental condition of women.”<sup>16</sup> It is the strongest metaphor to women’s experience under patriarchy since it is not only prostitutes who objectify their sexuality but “all women live in sexual objectification the way fish live in water”.<sup>17</sup> The theoretical origins of the structuralist view are often said to be the Kantian moral imperative that persons should not be treated as means to an end, but rather as ends in themselves.<sup>18</sup> Sex is seen 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 the women’s conception of self. The causal relationship

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<sup>13</sup> Melissa Farley, *Preface: Prostitution, Trafficking and Traumatic Stress*, xi, xvi in *Prostitution, Trafficking and Traumatic Stress* xiv (Melissa Farley ed., 2003).

<sup>14</sup> Catherine MacKinnon, *Towards A Feminist Theory of the State* 3 (1989).

<sup>15</sup> *Id.*, at 118.

<sup>16</sup> *Id.*, at 243.

<sup>17</sup> *Id.*, at 124.

<sup>18</sup> For a discussion of Kant as the origin of a structuralist approach to prostitution see: Margaret Jane Radin, *Contested Commodities* 156 (1996); Carole Pateman, *The Sexual Contract* 204-205(1988).

between the commodification of sexuality, objectification and subordination, is therefore understood to be inherent.<sup>19</sup>

The alienation from one's sexuality, an intimate element of the self, and the objectification of attributes of personhood, distinguishes prostitution from other exploitative gendered occupations. Prostitution is unique in that the woman's body, her sexual self, is necessarily, and not incidentally, contracted. Unlike other poor women's jobs, prostitution leads to self alienation akin to slavery.<sup>20</sup>

Within this understanding of women's 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 oppression along with domestic abuse, sexual harassment, and rape.<sup>21</sup> Prostitution, much like domestic abuse, is a phenomenon that could never be the result of free choice, unless the woman who 'chose' it internalized the existing social order to an extent that her decisions are nothing more than the result of false consciousness. All prostitution, therefore, is a result of coercion - submerged or blatant.

The claim that any prostitution is coerced is supported by various researches showing, among other things, that high percentage of women who enter prostitution were sexually abused in their childhood, so that their 'choice' of prostitution is nothing more than internalization of the abused position. Other researches exemplify the coercive nature of prostitution in that high percent of prostitutes suffer from post-traumatic stress disorder (PTSD) as result of it.<sup>22</sup> Further,

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<sup>19</sup> Radin, *supra* note 18, at 163.

<sup>20</sup> *Id.*, at 204. ("to have bodies on sale on the market, as bodies, looks very much like slavery").

<sup>21</sup> Beverly Balos & Mary Lousie Fellow, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U.L. Rev. 1220, 1236-1269 (1999) (claiming that given this continuum of violence against women reforms of the laws of domestic abuse, sexual harassment, and rape have the potential to transfigure prostitution).

<sup>22</sup> Farley et al., *supra* note 9, at 33-34, 44, 55-56. The realities of prostitution around the world, as portrayed in Farley's research, are horrifying. 71% of the interviewees were physically assaulted during prostitution; 63% were raped; 95% were sexually harassed; 88% experienced verbal abuse and social contempt; 89% of the respondents

it is usually women of poor economic background that 'choose' prostitution. 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>23</sup>

Seeing prostitution as a practice inherently harmful to prostitutes themselves, and to all women, structuralist legal reform efforts focus on the abolition of prostitution.<sup>24</sup> Abolitionists call for the criminalization of activities surrounding prostitution (pimps, customers) procurement), but not of the act of prostitution itself.

#### **B. THE INDIVIDUALIST APPROACH TO SEX WORK: 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... can be understood as a place of agency where the sex worker makes active use of the existing social order. (Wendy Chapkis)<sup>25</sup>

The individualist approach is, to a large extent, a reaction to the structuralist analysis of prostitution as sexual oppression. The basic claim is that sex work<sup>26</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>27</sup> The individualist argument takes varying forms - it can originate from libertarian

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wanted to escape prostitution, but did not have other options for survival; A total of 75% had been homeless at some point in their lives; 68% met the criteria for PTSD; 59% reported that as children they were beaten by a care giver to the point of injury; 63% were sexually abused as children.

<sup>23</sup> Catharine MacKinnon, *Prostitution and Civil Rights*, 1 Mich. J. Gender & Law 13, 27-28 (1993).

<sup>24</sup> In chapter III I will conduct a detailed analysis of the proposed legal regimes stemming from the differing feminist views on the commodification of sex.

<sup>25</sup> Chapkis, *supra* note 10, at 29-30.

<sup>26</sup> 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, 79-84 (2000).

<sup>27</sup> Margo St. James, *The Reclamation of Whores* 84, in *Good girls/Bad girls: Feminists and Sex trade Workers Face to Face* (Laurie Bell ed., 1987).

contractarianism,<sup>28</sup> from the politics of sex workers' organizations, attempting to legalize, and legitimize sex work,<sup>29</sup> or from pro-sex feminism and post-modern pragmatism.<sup>30</sup>

*The libertarian-contractarian argument* claims that positing oneself as a victim is a personal choice and that 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>31</sup> This view has been heavily criticized by structuralists and other individualists as oversimplifying the complex power dynamics between the sexes through "inverting the patriarchal standpoint," and embracing a sexist vision of women's sexuality.<sup>32</sup>

*Sex workers' movement* emerged in the 1970's and spread throughout the world, demanding human, civil, and social rights for sex workers, and lobbying for the legalization of sex work.<sup>33</sup> Through this movement Sex workers voice their needs and opinions not exclusively as victims but as active agents seeking to speak for themselves, be heard, and respected.

The sex workers' position inspired *post-modern pro-sex feminists*. Such feminists reject both the libertarian view that phantasmatically reverses the patriarchal order, and the radical feminist notion of female sexual victimization. Post-modern pro-sex 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. Further, post-modern pro-sex feminists acknowledge the multiplicity in women's experiences of sex, and

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<sup>28</sup> Camille Paglia, *Sex, Drugs, and American Culture* 251-252 (1992).

<sup>29</sup> Kamala Kempadoo, *Introduction: Globalizing Sex Workers Rights* 19-24, in *Global Sex Workers: Rights, Resistance, and Redefinition*, (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>30</sup> Shannon Bell, *Reading, Writing and Rewriting the Prostitute Body* (1994); Nagle, *supra* note 10.

<sup>31</sup> Melanie Wells, *Woman as Goddess: Camille Paglia Tours Strip Clubs*, *Penthouse* 132 (October 1994); quoted in Chapkis, *supra* note 10, at 22.

<sup>32</sup> Bell Hooks, *Outlaw Culture* 80 (1994).

<sup>33</sup> Kempadoo, *supra* note 29, at 19.

thus see paid for sex as having no inherent meaning.<sup>34</sup> The assumption that the patriarchal order is not total, and prostitution is not inherently coercive, opens room for exploration of sex work as potentially pleasurable, liberating and empowering.<sup>35</sup>

Individualists criticize the structuralist view of sex and its commodification, as rooted in traditional Victorian morality,<sup>36</sup> sanctifying intra-marital sex: sex that is tied to reproduction or to a long-term relationship. They find affirmation for their argument in that while structuralists call for the abolition of prostitution, marriage - the main sexual contract in patriarchy<sup>37</sup> - is not approached with similar prohibitionist energy,<sup>38</sup> thus overlooking the overlaps and continuities between marriage and sex work as two “economies of sexual labor under... patriarchy”.<sup>39</sup>

Individualists disagree with the structuralist understanding of the link between commodification of sex and women’s objectification and subjugation. Martha Nussbaum unties this connection, arguing that the harms of prostitution do not necessarily flow from the commodification of sex and the objectification of intimate parts of the self.<sup>40</sup> Nussbaum argues that “all of us ... take money for the use of our bodies.”<sup>41</sup> She suggests that there are various other occupations that are physically 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 to prevent physical harms to the workers. She further argues that

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<sup>34</sup> Bell, *supra* note 30, at 1-2.

<sup>35</sup> Nina Hartley, *In the Flesh*, 64, in *Whores and Other Feminists* (Jill Nagle ed., 1997).

<sup>36</sup> 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.” See: Jo Doezema *Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy*, in *Global Sex Workers: Rights, Resistance, and Redefinition*, 45 (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>37</sup> Pateman, focuses on marriage and prostitution as the two main arenas in which the modern patriarchal contract is constituted. Pateman, *supra* note 18, at 18.

<sup>38</sup> Chapkis, *supra* note 10, at 50.

<sup>39</sup> Prabha Kotiswaran, *Wives and Others: The Regulation of the Economies in Sexual Labor*, 1 (on file with writer, forthcoming 2005).

<sup>40</sup> Martha Nussbaum, *Sex and Social Justice* 277-297 (1999).

<sup>41</sup> *Id.*, at 277.

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>42</sup> Nussbaum concludes by proposing that the structuralist argument is not rationally defensible, and stems from class prejudice and stereotypes of race and gender. 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. She argues that “once sex and emotion have been stripped of their presumed unique relationship to nature and the self, it no longer follows that their alienation or commodification is simply and necessarily destructive.”<sup>43</sup>

Structuralists react to the individualist voice with great suspicion, and discredit it either as being the result of false consciousness,<sup>44</sup> as promoting political interests of sex industry profiteers,<sup>45</sup> or as a statistically insignificant minority of all prostitutes.<sup>46</sup>

The Individualist approach does not deny realities of exploitation and coercion, neither does it imply that all prostitution 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 the informal nature of the market, and the stigmatization of sex work. Accordingly individualist reform effort focuses on decriminalization and regulation, aiming at the empowerment and social inclusion of sex workers.

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<sup>42</sup> *Id.*, at 290.

<sup>43</sup> Chapkis, *supra* note 10, at 76.

<sup>44</sup> Janice J. Raymond, *Ten Reasons for Not Legalizing Prostitution and A Legal Response To The Demand To Prostitution*, 315, 325, in *Prostitution, Trafficking And Traumatic Stress* (Melissa Farley ed., 2003). (Raymond claims that the notion of choice is part of prostitute’s defense mechanism. They experience themselves as choosing since “to deny their own capacity to choose is to deny themselves”).

<sup>45</sup> Dorchen A. Leidholdt, *Prostitution and Trafficking in Women, An Intimate Relationship* 167, 179 in *Prostitution, Trafficking And Traumatic Stress* (Melissa Farley ed., 2003) (claims that the sex worker’s organization COYOTE is a mix of “libertarian activists and sex industry profiteers”).

<sup>46</sup> Lisa L. Kramer, *Emotional Experiences of Performing Prostitution* 187, 188, in *Prostitution, Trafficking And Traumatic Stress* (Melissa Farley ed., 2003). (Kramer suggests that it is ‘conceivable’ that individuals experience prostitution differently but dismisses research suggesting that it is ‘anecdotal’).

### III. TRAFFICKING IN WOMEN, OR SEX WORKER MIGRATION? THE FEMINIST SPLIT ON CROSS BORDER PROSTITUTION

Trafficking in women for the purpose of prostitution is a world-wide phenomenon, involving hundreds of thousands of women and children, and rolling billions of dollars every year.<sup>47</sup> It is by no means a new global trend. The first international treaty on trafficking was adopted as early as 1904.<sup>48</sup> Nonetheless its current manifestation is unique in that it is structurally enabled, shaped and enhanced by globalization.<sup>49</sup>

Despite attempts to define trafficking in international instruments, the concept of trafficking, in the international and human rights debate, is steamfully debated. The two main distinctions that researchers, activists and policy makers struggle with are the distinction between trafficking and prostitution and trafficking and migration. Both distinctions have been the locus for feminist debate. This polemic follows the fraction line in the feminist debate over prostitution and similarly focuses on questions of choice and agency. Yet the debate becomes multi-layered when complicated by the issue of illegal border crossing. The question of choice when it comes to sex worker migration is twofold - it encompasses the women's decision to engage in sex work, and the decision to migrate in order to do so.

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<sup>47</sup> There are various estimates about the number of women trafficked every year. This estimation is taken from: United Nations Office on Drugs and Crime, *Trafficking in Persons: The New Protocol*, at [http://www.unodc.org/unodc/en/trafficking\\_protocol\\_background.html](http://www.unodc.org/unodc/en/trafficking_protocol_background.html) (last visited June 2005); The U.S. Department of state reports that "Each year, an estimated 600,000-800,000 men, women, and children are trafficked across international borders (some international and non-governmental organizations place the number far higher)... The U.S. Government estimates that over half of all victims trafficked internationally are trafficked for sexual exploitation." See: U.S. Department of State, *Trafficking in Persons Report*, 6 (2004), available at <http://www.state.gov/documents/organization/34158.pdf> (last visited June 2005) (hereinafter: Trafficking in Persons Report).

<sup>48</sup> International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

<sup>49</sup> Saskia Sassen, *Is This The Way To Go? - Handling Immigration in a Global Era*, 4 Stan. Agora 1, 3 (2003).

The split around trafficking can be characterized as represented by the same two positions presented in the prostitution debate: *Structuralists* who argue that prostitution is always coerced and see all women's migration for the purpose of prostitution as trafficking, and *individualists* who view voluntary sex work as legitimate wage work, and therefore distinguish between trafficking (coerced migration, coerced sex work, or both) that should be abolished, and sex worker migration (chosen migration and chosen sex work) that should be facilitated.<sup>50</sup> The enormous gap between the positions and their different understanding of the reality of migrants' sex work, makes it almost impossible to speak of "sex trafficking" and expect a common understanding of what these words actually signify.

The international community has attempted to address trafficking in various agreements and conventions.<sup>51</sup> The most recent international attempt is the 2001 protocol that is considered to offer "a sophisticated international definition of trafficking that acknowledges the exercises of power that perpetuates and supports trafficking."<sup>52</sup> The drafting of this instrument has been a site of deep conflict between individualists and structuralists, mainly around the definition of trafficking and the role of consent.

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<sup>50</sup>Structuralists are represented in the debate by the Coalition Against Trafficking of women, CATW, led by Kathleen Barry at: <http://www.catwinternational.org/> (last visited June 2005), and individualists are represented in this debate by the Global Alliance Against Trafficking in Women – GAATW, at: <http://gaatw.net/> (last visited June 2005).

<sup>51</sup> International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244; n33 International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, *adopted* Mar. 21, 1950, 96 U.N.T.S. 271; Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex 2 at 60, art. 3(a), U.N. Doc. A/45/49 (Vol. 1) (2001)

<sup>52</sup> Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 Harv. Women's L.J. 137, 141-174 (2004) 162.

The definition (quoted above) takes a mid-way route between the opposing positions. The protocol frames consent as relevant in cases that do not involve coercion (following the individualist approach), but irrelevant when traffickers use one of the wide array of coercive means detailed in subsection (a) (following the structuralist approach). Balos suggests that by taking this route the instrument “seeks to avoid the debate whether prostitution is necessarily a form of violence or can be freely chosen.”<sup>53</sup>

#### **A. TRAFFICKING: GLOBALIZED PROSTITUTION - THE HORROR INTENSIFIED**

What a world we live in, a male-framed world, where global economics sets a system of winners and losers--with poverty, disadvantage, and minimal choices for many as the consequence. The climate is ripe for men's sexual exploitation of women without bounds, abuse of the worst kind. Women are set up to lose in this system, and like buzzards circling around an ailing member of the herd, businessmen prey upon the globe's most disadvantaged women, entrapping them within their web of despicable sex slavery enterprises, trading women far and wide as sex chattels...One wonders how such an insidious “meat trade”, a unique feature of the “first world” male ingenuity is tolerated in “developed”, “civilized” societies. (Onnie Wilson)<sup>54</sup>

Trafficking is seen by structuralists as a modern slave trade - a shadow market in which women are bought and sold as chattel - made legitimate by the language of choice and freedom. The mechanism of trafficking might be different than that of prostitution, the conditions that trafficked women work in, the limited control they have over their practice, and over many elements of their life while in the hands of their traffickers, and the instrumental use made of them, can be potentially even more extreme and horrifying than the situation of “regular” prostitutes. Trafficking therefore can be seen as taking prostitution to its darkest, most inhumane extreme and then taking one step further - women are not only sexually enslaved, raped, beaten

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<sup>53</sup> *Id.*

<sup>54</sup> Onnie Wilson, *Globalized Female Slavery*, at <http://www.prostitutionresearch.com/wilson-trafficking.html> (last visited June 2005).

and imprisoned; they are also turned into mere commodities, they are auctioned, bought, sold and resold.

Though the mechanism of trafficking might be somewhat different, and has the *potential* of being more harmful, structuralist argue that it is not necessarily so. In fact, prostitution and trafficking carry the exact same content - the patriarchal fingerprint of women's subjugation. The difference, if one exists at all, is a difference of *degree* and not a difference of *kind*.<sup>55</sup> Structuralists reject any separation between prostitution and trafficking, claiming that the gender-neutral terminology of 'trafficking in persons' collapses sex trafficking and labor trafficking, and hides the gendered effects and harms common to both trafficking and prostitution and unique to them. Trafficking, the structuralists insist, is no more than "globalized prostitution." Leidholdt, the executive director of CATW, says:

What most people refer to as prostitution can also be domestic trafficking.... The sex industry businesses in which trafficked and prostituted women are exploited are often one and the same... the injuries that prostitutes and trafficked women suffer are identical... [c]reating distinction between prostitution (or 'sex work') and trafficking protects business as usual in the sex industry.<sup>56</sup>

The structuralist argument about trafficking follows the logic of the structuralist approach to prostitution – as that which cannot be chosen - and expands it to include other decisions made by the women involved, i.e. migratory decisions. The structuralist argument against trafficking is often based on research proving that most women were deceived into cross border prostitution. If this is the case - if trafficking is always and only a result of coercion, fraud, violence, deceit and exploitation - then trafficking is obviously a human rights violation that has no positive added value to women's lives. Even in the less clear-cut cases of deceit (where women in fact knew they were going to be sex workers, or were sex workers before

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<sup>55</sup> E.g., see: Leidholdt, *supra* note 45, at 178 ("Certainly international trafficking intensifies the dynamics of power and control that characterize domestic prostitution... but the dynamics of trafficking and prostitution are the same dynamics, and their commonalities far overshadow their differences").

<sup>56</sup> *Id.*, at 177-178.

migrating) the choice of foreign women is quite convincingly depicted as irrelevant or unreal, when considering the harsh economic situation, and the highly patriarchal societies in many origin countries. Therefore Structuralists urge that all migrant sex workers will be a-priori treated as victims of trafficking and of severe human rights violations, and receive state protection and an opportunity for rehabilitation.

Beyond the *normative* justification for the structuralist position, the presumption of coercion in trafficking can be *instrumentally* justified as well. Such a presumption has the benefit of avoiding evidentiary problems that would necessarily arise if the law will leave room for the possibility of consent. A legal category of women who ‘consented-to-trafficking’ will blur the lines between voluntary migration and coerced trafficking. This will significantly decrease the number of women who will be treated as victims deserving of state protection, since each woman would have to prove an element of coercion.<sup>57</sup>

A major role in the structuralist approach to trafficking is given to traffickers. Traffickers, they claim, are an important driving force behind trafficking, as Donna Hughes notes:

The most crucial factor in determining where trafficking will occur is the activity of traffickers.... Women, in large numbers, do not make their ways across borders to enter prostitution, nor do they traffic themselves or organize themselves *en masse* to travel internationally to enter prostitution. Without recruiters, traffickers and pimps trafficking in women would not exist.<sup>58</sup>

Accordingly, a crucial aspect of any anti-trafficking reform should focus on criminal provisions and their strict enforcement against traffickers, and on tight border control.

Beside traffickers, structuralists see clients as another important driving force of trafficking. The sex industry is explained as a market of supply and demand, where “men create

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<sup>57</sup> Chuang, *supra* note 2, at 88-89.

<sup>58</sup> Donna M. Hughes, *The 'Natasha' Trade: The Transnational Shadow Market of Trafficking in Women*, 53(2) J. of Intl. Affairs, 625, 643 (2000).

demand and women are the supply.”<sup>59</sup> Men’s demand for prostitution is understood as both a result and a cause of gender inequality and is therefore in itself a violation of human rights.<sup>60</sup> Thus, structuralists, urge raising awareness among men to the exploitation of prostitutes, and at the same time (disbelieving that reform will begin from clients), call for the criminalization of demand.<sup>61</sup>

## B. MIGRATION: GLOBAL SEX WORK– TRANSFORMATIVE POTENTIAL

The emerging global economic order has already wreaked havoc on women’s lives... migration is a road many take to seek other opportunities and to break away from oppressive local conditions caused by globalization... within all this dislocation and movement, some migrant women become involved in sex work...traffickers take advantage of the illegality of commercial sex work and migration and are able to exert undue amount of power and control over those seeking political or economic refuge or security.” (Kamala Kempadoo)<sup>62</sup>

Trafficking is seen by individualists as an aspect of the wider field of labor migration.<sup>63</sup> Much as sex work is perceived by individualists as a legitimate wage work that can be chosen, so is border crossing for the purpose of sex work understood as the possible result of choice and the exertion of personal agency. While the structuralist argument concentrated on prostitution and trafficking as human rights violations, individualists treat both primarily as worker’s rights issues. Individualists therefore insist on the commonalities of experience - the vulnerability and

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<sup>59</sup> Donna M. Hughes, *Men Create The Demand; Women Are The Supply*, Lecture On Sexual Exploitation, Queen Sophia center, Valencia, Spain (2000) at <http://www.uri.edu/artsci/wms/hughes/demand.htm> (last visited June 2005).

<sup>60</sup> Balos, *supra* note 52, at 164.

<sup>61</sup> Balos, *supra* note 52, at 221 (calling for the international arena to “include provisions to address directly the role of the customer and the demand for sexual exploitation of trafficked women...states should be encouraged to enact civil and criminal sanctions to hold customers accountable for their behavior”); Hughes, *supra* note 59, at 57; Raymond, *supra* note 44, at 326-329 (calling for a close study of the Swedish model that “recognizes that without male demand there would be no female supply” *id.*, at 326); Michelle R. Adelman, *International Sex Trafficking: Dismantling The Demand*, 13 S. Cal. Rev. L. & Women's Stud. 387, 398 (2004) (arguing that American federal law misconstrues the problem of trafficking when it ignores the demand side of it).

<sup>62</sup> Kempadoo, *supra* note 29, at 16-17.

<sup>63</sup> Therese Blanchet, *Beyond Boundaries: A Critical Look at Women Labour Migration and the Trafficking Within*, paper submitted to USAID, 3 (2002) (on file with writer).

exploitation - of migrant sex workers and other migrant workers in informal industries. Jo

Bindman notes:

The designation of prostitution as a special human rights issue emphasizes the distinction between sex work and other forms of female, dangerous, and low status labor...it hides the commonalities, the shared experience of exploitation which links people in all such work. The distinction...helps to perpetuate [the prostitute's] exclusion from the ordinary rights which society offers to others...the sex industry is not always where the worst conditions are to be found.<sup>64</sup>

It has been well documented that women in poverty stricken areas of the world have few or no opportunities to find work in the formal sector in their home countries and abroad.<sup>65</sup>

Women in these economies are relegated to perform traditional women's work (housework, care work, and sex work) that is mostly informal. It is therefore not surprising to find that illegal migration and trafficking patterns reflect the traditional gendered division of labor, so that women mainly migrate to participate in the informal economy. The few legal and independent ways available for women's migration within the informal sector, lead many women to resort to traffickers as the only path to realize their migratory plan.<sup>66</sup> It can therefore be said that traffickers do not create supply and demand, but rather exploit a volatile socio-economic situation, and in fact equally serve both demand for migratory routes in sending countries, and demand for cheap labor in receiving countries.<sup>67</sup>

Individualists argue that the exploitative and dangerous conditions of work many sex workers endure are not unique to sex work but are a characteristic of the informal labor market,

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<sup>64</sup> Jo Bindman, *An International Perspective on Slavery in the Sex Industry*, 65, 65-66 in *Global Sex Workers: Rights, Resistance, and Redefinition*, (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>65</sup> Alexandra V. Orlova, *From Social Dislocation to Human Trafficking*, 51(6) *Problems of Post-Communism* 14, 14-15 (2004); Chuang, *supra* note 2, at 81; Marjan Wijers, *Women, Labor and Migration: The Position of Trafficked Women and Strategies for Support*, 69, 71, in *Global Sex Workers: Rights, Resistance, and Redefinition* (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>66</sup> Wijers, *id.*

<sup>67</sup> Andreas Schloenhardt, *Organized Crime and the Business of Migrant Trafficking: An Economic Analysis*, Australian Institute of Criminology 10-11(1999). ("To date, there is no information available on whether it is more common for recruiters to seek out migrants, or whether the migrant customers initially contact the traffickers").

and can “be found across a range of industries internationally.”<sup>68</sup> The sex industry can be distinguished from other forms of informal low-paid labor in that in many countries it is not fully decriminalized and therefore women - trafficked or migrants - are not merely in an illegal status as undocumented workers, they are also engaged in a highly stigmatized, and often criminal practice. Individualists therefore see border policies restricting sex workers migration, and laws that prevent sex work as the major obstacles migrant sex workers face, and as the main cause for their vulnerability and ensuing exploitation.<sup>69</sup>

Individualists further resist the gendered aspect of the term ‘trafficking’ - i.e. that it is mainly women who are talked about as trafficked. Blanchet sees this trend as directly related to the construction of gender and femininity. She says:

One man we met in Kuwait in the course of this study explained that men could not be trafficked because "a man can sleep anywhere at night". He was referring to a construction of male sexuality, which makes men unrapable, and untraffickable. He is associating trafficking to a kind of vulnerability inherent to women's nature (read bodies) and a corresponding invulnerability in men is a common assumption... Positing as a premise that men migrate, while women are trafficked, is a normative statement about gender wrongly taken as a “fact”.<sup>70</sup>

Following this line of analysis, some individualists reject the use of the word “trafficking” to describe sex worker migration.<sup>71</sup> The word trafficking entails passivity - a woman cannot traffic herself, she can only be trafficked. Something is done to her, usually by men, presumably against her will. Saying instead that women migrate, suggests an acknowledgment that an active agent made a decision of relocating. Individualists claim, that naming the process ‘migration’ does not

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<sup>68</sup> Allison Murray, *Debt Bondage and Trafficking: Don't believe the hype*, 51, 55 in *Global Sex Workers: Rights, Resistance, and Redefinition*, (Kamala Kempadoo & Jo Doezema eds., 1998).

<sup>69</sup> Kempadoo, *supra* note 29, at 17; Sassen, *supra* note 49, at 2; *Counter Trafficking in Eastern Europe and Central Asia*, IOM research report, 184 (2003).

<sup>70</sup> Blanchet, *supra* note 63, at 4-5.

<sup>71</sup> A good example is Murray's position claiming that “Trafficking is one of the monsters evoked since western sex workers on our own turf have used our own structures of support and advocacy to challenge some of the middle class feminists who claim to represent us”. Murray, *supra* note 68, at 59.

mean closing our eyes to the role of traffickers and to the realities of exploitation, but it does mean opening them to the needs, dilemmas, motivations and decisions of migrants themselves.

Stressing the importance of choice and agency in the migratory decision - notwithstanding that options are scarce - individualists suggest that the best way to combat trafficking and slavery-like practices, is not to overlook the real and dire options that women face, but rather to strive - while working to expand economic options - to make the existing options less exploitative and more safe and dignified. Empowering women, de-stigmatizing sex work, and ensuring that sex workers receive the same rights and protections as other workers, is seen by individualists as reform proposals that are tuned to the actual and immediate needs of migrant sex workers.

Individualists see the structuralist position that no meaningful choice is involved as promoting paternalistic neo-Victorian ideals, conservative moral fears of women's sexuality and economic independence. Doezema, a sex worker activist, says:

A number of today's campaigns have become a platform for reactionary and paternalistic voices, advocating a rigid sexual morality under the guise of protecting women, and including racist and classist perception in their analysis of the sex industry in developing countries. This is particularly the case when campaigns actually succeed in getting governments to do something about "trafficking", for then the focus shifts from women's rights to a hysterical and paranoid reaction to women's increasing sexual autonomy, the breakdown of the family and migration...<sup>72</sup>

Doezema questions the automatic categorization of migrant sex work as women's victimization, and expresses disbelief in the stories of trafficking as they are told by structuralists. Others share her suspicion towards the structuralist 'data', claiming it is either meant to induce or is the result of 'moral panic'. Murray goes as far as suggesting that the exploitative situations reported are

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<sup>72</sup> Doezema, *supra* note 36, at 45.

made up. She says: “the shadowy nature of ‘trafficking’ may be due to the cunning of the ‘traffickers’, or *it may be because they don’t exist*”.<sup>73</sup>

Assuming that both sex work and trafficking can be consented to, individualists stress the analytical importance of distinguishing between abusive or deceitful recruitment and transportation processes (trafficking) and the end purpose of trafficking (forced labor and slavery-like practices).<sup>74</sup> The conceptual separation of the practices is crucial for encompassing the full complexity of the trafficking phenomenon, since it enables the understanding that “[n]ot all trafficking victims are subjected to forced labor/slavery-like practices, and not all women subjected to forced labor/slavery-like practices are also victims of trafficking.”<sup>75</sup> According to the individualist analysis, one practice can be an act of choice, while the other an imposition of coercion or deceit. For example, a woman might agree or even initiate border crossing for the purpose of working in the sex industry, but not consent to subjugation, confinement and slavery-like conditions.<sup>76</sup> This analysis ensures respect for the woman’s decision to migrate and engage in sex work, yet sees her as deserving protection when her vulnerability is exploited, and advocates lessening her vulnerability through the application of workers’ rights and the issuance of working permits. This analytical separation can therefore aid in avoiding paternalistic, over-inclusive reform prescriptions that mainly end up increasing state control over women’s bodies, and lead to the creation of more precise formulation of policies and strategies to combat abuse.<sup>77</sup>

The individualist position to trafficking is therefore complex. It clearly stems from the individualist approach to sex work, but becomes more intricate in its interface with migration. It

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<sup>73</sup> Murray, *supra* note 68, at 55; see also Doezema, *id.*, at 64: (“situations which the anti traffickers rail against, *insofar they do exist*, are a result of economic, political, and gender inequalities, and it is those inequalities which should be our central cause of concern”).

<sup>74</sup> Chuang, *supra* note 2, at 80.

<sup>75</sup> *Id.*, at 82.

<sup>76</sup> Wijers, *supra* note 65, at 75.

<sup>77</sup> Chuang, *supra* note 2, at 82.

emphasizes the possibility of consent and the possibility of coercion at each stage - choosing migration doesn't imply the choice of sex work; choosing sex work and migration does not imply consent to slavery-like working conditions upon arrival at the destination country; consent to working conditions at one brothel does not imply consent to being sold to another, or to the working conditions in it, and so forth.<sup>78</sup> Therefore, unlike the clear cut structuralist position that views all trafficking situations as coerced, in the individualist positions there are no presumptions; this creates a need to develop delicate and sophisticated legal tools to distinguish between a victim of trafficking and a migrant sex worker. This contextual sensitivity is both the biggest strength and the biggest weakness of the individualist position. It renders it supposedly highly humane, and at the same time costly, leaving a lot of room to judicial discretion to decide who is coerced and therefore a victim, and who is not.

The policy prescription that derives from the individualist standpoint is one calling for sex workers' empowerment and sex work legitimization. Individualists demand legalization of sex work, full and equal labor protection to migrant sex workers, issuance of sex worker visas and working permits, and emphasis on non-stigmatization, non-victimization of sex work and sex workers. It leaves unclear how the exact legal distinction between choice and coercion needs to be made, and seems to rely heavily on a sympathetic judiciary.

#### **IV. LEGAL REGIMES OF PROSTITUTION AND THEIR EFFECT ON TRAFFICKING**

Two main regimes of prostitution's regulation evolved from the feminist efforts to combat the harms of sex work and trafficking - decriminalization and abolitionism. The

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<sup>78</sup> For example Agustin explains: "knowing beforehand that one will sell sex may be a poor measure of potential exploitation and unhappiness, because it is difficult, if not impossible, to know what working conditions will *feel* like in future jobs (a problem not unique to sexual occupations)". Laura Agustin, *Migrants in the Mistress's House: Other Voices in the Trafficking Debate*, 12(1) Social Politics, 96, 102 (2005).

*individualists* call for the *decriminalization and regulation* of sex work, ensuring sex workers receive the same rights and protections other workers are entitled to by employment and labor laws.<sup>79</sup> *Structuralists* call for the *abolition* of prostitution so that all third party involvement in prostituting is criminalized (i.e. pimps and customers), while the act of offering sexual services for money, in itself, is not penalized. Both groups see great symbolic power in legislation. Individualists see regulation and decriminalization as symbolic of inclusion, dignifying and destigmatizing sex workers and sex work. Structuralists see the abolitionist legislation as an important step towards protection and dignity of all women.

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 *prohibitionism* that criminalizes all aspects of prostitution, so that both the act of prostitution itself, and any third party involvement are penalized.<sup>80</sup> Prohibitionism was rejected by feminists since it is understood as the cause of great harm to women who engage in sex work - the illegality renders them dependant upon pimps, leads to imprisonment that might be accompanied by police violence, and entrenches the stigmatization and marginalization of sex workers. Prohibitionism 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 prostitution, and aims to ensure public order, public health, and tax

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<sup>79</sup> It should be noted that while individualists support de-criminalization, 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 must be accompanied with formally placing prostitution under standard employment laws and other occupational regulations. See: Chapkis, *supra* note 10, at 155.

<sup>80</sup> Most states in the U.S. adopted a prohibitionist regime, though there are exceptions. A few states are abolitionists, and one state - the state of Nevada - decriminalized sex work. 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 (2004); Sylvia Law, *Commercial Sex: Beyond Decriminalization*, 73 *S. Cal. L. Rev.* 523, 559-562 (2000). For a brief overview of the laws of different states see: Law, *id.*, at 526-531.

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.<sup>81</sup> 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.<sup>82</sup>

Each opposing feminist approach tends to perceive the other group’s legal reform as harmful to the real interests of sex workers/prostitutes and to criticize each other’s legislative projects with arguments similar to the ones used to criticize traditional, non-feminist, legal regimes. Individualists blame structuralist abolitionism for being as harmful as prohibitionism, and similarly reactionary, moralistic, Victorian, paternalistic, aimed at controlling women’s bodies and sexuality, and ensuring their economic dependence on men.<sup>83</sup>; structuralists blame individualist decriminalization for being as harmful as the regulatory regime, similarly serving the interests of sex industry profiteers, normalizing and eroticizing women’s subjugation and making the harm of prostitution invisible, for the benefit of customers and pimps.<sup>84</sup>

The following chapter will briefly look at the *feminist* legal regimes through their manifestation in the domestic laws of Sweden and the Netherlands. The regimes will be

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<sup>81</sup> Examples of the regulatory regime can be found in late 18<sup>th</sup> and early 19<sup>th</sup> century Europe (mainly in France, Italy, and England - aimed at preventing Syphilis). This approach re-emerged in the 1980s with the growing awareness to AIDS. For discussion of 19th century regulatory regime see: Priscilla Alexander, *Feminism, Sex Workers, and Human Rights*, 83, 87-88 in *Whores and Other Feminists* (Jill Nagle ed., 1997). 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, *id.*, at 88-89 (“in the 1980’s...22 states passed a law requiring HIV tests for anyone convicted...on prostitution charges. Eleven also increased prostitution to a felony for those arrested for testing positive”).

<sup>82</sup> Sex worker’s advocates make the following distinction between the regulatory regime and the regime of decriminalization 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 10, at 155-157.

<sup>83</sup> Doezema, *supra* note 36, at 45; Wijers, *supra* note 65, at 73.

<sup>84</sup> Farley, *supra* note 13, at xvii-xix; Raymond, *supra* note 44, at 315-329.

examined as ‘ideal types’ (in the Weberian sense), in that the overview will overlook the details causing the law in action to drift away from the law in the books.

#### A. DE-CRIMINALIZATION AND REGULATION - THE DUTCH MODEL

Prostitution 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>85</sup> 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 decriminalized and regulated.

The regulation of sex work is delegated to municipal and regional arrangements. The cities regulate sex work through various means such as licensing of brothels and zoning. The legality allows prostitutes to have access to pension schemes, social security benefits, and state organized health care schemes. In principle, it also provides access to the legal system. 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.

The Dutch regime includes various regulations that restrict sex work. Sex work is limited to certain districts and areas of the city and to certain times - working outside the physical and temporal zones is an offence and the worker may be fined. Sex work is allowed only in licensed businesses - mainly brothels, clubs or “windows”.<sup>86</sup> Sex workers' employers are not allowed to employ workers under the age of 18, and are not allowed to employ sex workers who do not

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<sup>85</sup> The information in this section is taken from several sources: The first is the Internet site *Femmigration*. The site is an EU project that offers an easily accessible and comprehensive information concerning women’s migration to work in the sex industry and sex trafficking in the EU. See: <http://www.femmigration.net> (last visited June 2005). The second is an online report written by the individualist activists Jo Bindman & Jo Doezema, *Redefining Prostitution as sex work on the international agenda*, at <http://www.walnet.org/csis/papers/redefining.html#3d> (last visited June 2005) (1997); I also used the Trafficking in Persons Report, *supra* note 47, at 160-161, 177-178.

<sup>86</sup> ‘Window workers’ usually work independently, paying a fixed amount of rent to the window owner, who takes no further commission on earnings. In contrast, in most *brothels and clubs* the relationship is that of an employer and employee. *Street prostitution* is mostly prohibited - some states allow in certain parts of the city. See: Bindman & Doezema, *id.*

have a residence permit. If coercive or abusive practices are proved to occur - the business license is withdrawn.

EU citizens may work in the Netherlands (in any type of work) without a special work permit. 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. There is no recognized way for a non-EU citizen to obtain a working permit to work as a sex worker in the Netherlands. Migrant sex workers who are non-EU nationals and want to work at the Netherlands need to acquire a residence permit that is not restricted to a particular type of work. Such a permit can be obtained only through marriage, or registered partnership. 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>87</sup> by the authorities, she receives special rights and is entitled to various support services. An undocumented sex worker who was trafficked is entitled to a three-month residence permit - known as a "reflection period" - in which she can consider whether to testify against her traffickers. During this time the woman is given safe accommodation and is entitled to receive support from non-state advisory centers. If she decides to testify she is granted a residence permit (but not a working permit) that is valid for

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<sup>87</sup> Trafficking in Human beings is defined in article 250 of the Dutch criminal code. Trafficking is recognized in the following situations: when a woman is actively encouraged - through false promises regarding work possibilities and earnings - to come to the Netherlands, regardless of whether a job in another field was promised to her or whether she was willing to work in prostitution; when a sex worker's identity papers or earnings are taken away from her; when a woman is forced into prostitution or into giving sexual services; when a sex worker is blackmailed, threatened, humiliated, beaten, raped or imprisoned. (available at: [http://www.femmigration.net/victims/victims\\_netherlands.html](http://www.femmigration.net/victims/victims_netherlands.html) (last updated Sept. 2004; last visited June 2005).

one year and can be prolonged until the end of the trial.<sup>88</sup> At the end of the legal proceedings the woman is deported.

Jo Bindman, an individualist and a sex worker's activist, supports the direction of the Dutch regime but opposes its limitation to EU nationals. She criticizes this regime for the harm it inflicts on migrant non-EU sex workers, making them "second class" workers, within the underclass of sex workers."<sup>89</sup> The harshest criticism on the decriminalization 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 traffickers.<sup>90</sup>

The Dutch example is far from realizing the individualist ideal but is the closest existing example of its implementation. When taken as is, prior to problem of enforcement, and corruption, it clearly inflicts harms on non-EU migrant sex workers. Though this is a fatal flaw of the Dutch case, the situation of EU sex workers should be further examined. Given that legalization will always be exclusive, the question should be one of distribution. While structuralists see the Dutch case as an example of the flaws of the individualist approach, individualists see it as an improvement, a step in the right direction, a regime that needs to be further developed in order to lead to the empowerment of sex workers, and to a deep change in societal attitudes towards sex work.

## B. ABOLITIONISM: THE SWEDISH MODEL

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<sup>88</sup> In 2004, the government agreed to allow such permit holders the right to work, but the policy was not implemented yet, according to the U.S. Trafficking in Persons Report. (Trafficking in Persons Report, *supra* note 47, at 160-161).

<sup>89</sup> Bindman & Doezema, *supra* note 85.

<sup>90</sup> Raymond, *supra* note 44, at 317.

Since January 1999 buying sex services is illegal in Sweden. Purchasing or attempting to purchase sexual services is an offence punishable by fines or up to six months imprisonment.<sup>91</sup> Sweden is the first country in the world to criminalize demand and is celebrated by structuralists for its commitment to the abolition of prostitution, seeing it as a crucial step on the way to gender equality. Adopting a feminist structuralist position,<sup>92</sup> the Swedish law perceives prostitution as violence against women, and is part of a wider Act on Violence Against Women, which was enacted on July 1998.<sup>93</sup>

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>94</sup> However, Criminal responsibility for trafficking for the purpose of sex exploitation was enacted as late as July 2002.<sup>95</sup> In October 2004 Sweden amended 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. The limited residence permit entitles women to health care and some welfare rights.

The documented effects of the law, as presented by official authorities, have been astounding. It is claimed that in the years following the enactment of the law the number of women involved in street prostitution has decreased by 30%-50%, the recruitment of new

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<sup>91</sup> Act Prohibiting the Purchase of Sexual Services (1998:408); an *attempt* to purchase sexual services or *preparation* for it are also offences under chapter 23 to the Swedish penal code. It is considered an attempt 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).

<sup>92</sup> Gunilla Ekberg, *The Swedish Law that Prohibits the Purchase of Sexual Services*, 10 *Violence Against Women*, 1187, 1191 (2004).

<sup>93</sup> For detailed information about the bill see: *Fact Sheet About the 1999 Swedish Law on Prostitution* (1998), at <http://www.prostitutionresearch.com/swedish.html> (last visited June 2005).

<sup>94</sup> Raymond, *supra* note 44, at 326-327; Ekberg, *id.*

<sup>95</sup> 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 offence is a prison sentence of between two and ten years.

women has come almost to a halt, and the numbers of men buying sex decreased in 70%-80%.<sup>96</sup> Police claims that the decrease in the sale of sex is absolute, and that prostitution is disappearing altogether rather than merely going underground.<sup>97</sup> Various studies and police reports suggest that Sweden became an undesirable destination country due to the high risk for customers and traffickers.<sup>98</sup> However despite the alleged dramatic decrease in local prostitution and demand, there is no conclusive evidence that trafficking into Sweden has actually decreased.<sup>99</sup>

Although official authorities view the law as a great success<sup>100</sup> individualists in Sweden are less content with the outcomes of the reform.<sup>101</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. 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 has gone deeper underground and changed form.<sup>102</sup> The effect of this, individualists claim, is worse working conditions, lower pay, and higher health risks to sex workers. Petra Ostergren, a Swedish writer and researcher, claims that even official reports suggest that the situation of sex workers under the reform has worsened. She describes the graveness of sex workers' situation:

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 are dependent on these more dangerous men, since they cannot

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<sup>96</sup> Raymond, *supra* note 44, at 327.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*; Farley, *supra* note 13, at xv; Ekberg, *supra* note 92, at 1200-1201.

<sup>99</sup> Ekberg, *id.*, at 1200.

<sup>100</sup> Ekberg, *id.*, at 1200-1204 ("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'.")

<sup>101</sup> *Press release from the first Nordic conference for sex workers in Oslo*, (2004) at: <http://www.bayswan.org/swed/nordicpros.html> (last visited June 2005).

<sup>102</sup> Petra Ostergren, *Sex workers Critique of Swedish Prostitution Policy* (2004) at: <http://www.petraostergren.com/english/studier.magister.asp> (last visited June 2005).

afford to turn them down as before. The...law mostly affected the already socially marginalized women.<sup>103</sup>

The Swedish regime is seen by structuralists as the solution to the problems of prostitution and trafficking<sup>104</sup> - an ideal regime, based on structuralist premises, that enjoys generous funding and wide social support.<sup>105</sup> However, it is also clear that the reform made the life of sex workers (local and migrant) much harder. Sweden's structuralist approach to prostitution leads it to over look special circumstances and needs of migrant sex workers and of trafficked women. As far as trafficked women are concerned, unlike the Netherlands, Sweden takes very little responsibility for their well-being, rehabilitation and reintegration. The lack of attention to the needs of migrant sex workers<sup>106</sup> might change under a new national action program that is underway. Until then Sweden can be characterized as promoting a sovereigntist agenda: tightening border control and enhancing police activity.<sup>107</sup> Nonetheless, the journey Sweden embarked on did change the patterns of prostitution and the demand for it in Sweden. The perspective of time, examining social views and practices of generations born into this regime, is needed in order to realize the effects of the reform.

## V. THE STRUCTURE OF THE DICHOTOMIZED DISCOURSE AND ITS CRITIQUE

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<sup>103</sup> *Id*; see also Rosinha Sambo, *The Situation of Sex Workers in Sweden*, Speech given at the Taipei Sex Worker Conference (2001) at: <http://www.bayswan.org/swed/rosswed.html> (last visited June 2005).

<sup>104</sup> Raymond, *supra* note 44, 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 Center, at [http://www.justicewomen.com/cj\\_sweden.html](http://www.justicewomen.com/cj_sweden.html) (last visited June 2005).

<sup>105</sup> It is estimated that 81% of Swedish population supports the law. see: Fact Sheet - Sweden, *supra* note 93.

<sup>106</sup> The lack of protection to trafficked women was mentioned in the U.S. state department trafficking report, see *Trafficking in Persons Report*, *supra* note 47, at 177 ("Victim assistance in Sweden is currently provided on an ad hoc basis... Of the approximately 50 victims... the police arranged for shelter and assistance for 10 to 15 victims involved in legal investigations").

<sup>107</sup> *Id*; for a discussion of the sovereigntist agenda see: Thomas, *supra* note 3, at 57-58.

The polarized feminist debate about prostitution and sex trafficking mirrors a wider north-American feminist debate about the depiction of women's sexuality that emerged in the 80's around the issue of pornography.<sup>108</sup> At the heart of the debate lie diverging views about women's sexual agency.

The feminist legal scholar Kathryn Abrams suggests that this polarized structure emerged when feminist-individualist critique was directed at the position of structuralist-dominance feminism, that "has become the ascendant feminist legal theory... helping women see the systematic oppression cloaked and perpetuated under the guise of legal neutrality."<sup>109</sup> The individualist critique "questioned the implications of dominance-based depictions for the ways that women are viewed by themselves and by others," objecting to the victim status assigned to women by dominance feminism, claiming that it "encourage[s] a wounded passivity on the part of women and a repressive regulatory urge on the part of state authorities".<sup>110</sup>

In an attempt to better understand this "fundamental feminist dialectic"<sup>111</sup> this chapter, seeks to present the main critiques of the dichotomized discourse in the context of sex work/trafficking, and question the inevitability of the contradiction.

## A. CRITIQUE OF THE DICHOTOMIZED DISCOURSE

The polarized structure of the discourse, some claim, is costly to the women the two camps are supposedly representing. This section will explore the three main critiques of the effects of the discourse on the lives of women.

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<sup>108</sup> Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 Colum. L. Rev. 304, 308 (1995).

<sup>109</sup> *Id.*, at 304.

<sup>110</sup> *Id.*, at 305.

<sup>111</sup> Jane Gallop, *Feminist Accused of Sexual Harassment* 69-70 (1997).

*i. The contextual critique*

One critique of the dichotomized discourse is its tendency to a flat, essentialist view of sex worker's experience. This line of critique claims that both individualists and structuralists tend to mistake "one part of the practice for the whole."<sup>112</sup> Contextualist research finds that prostitution is a diverse phenomenon with a range of potential meanings, that different aspects of prostitution (e.g. high class call girl, street walker, male prostitution ect.) deserve different responses, and that regulation should be informed by the more complex view a richer study could offer.<sup>113</sup>

The contextualist position is highly critical of the dichotomized discourse for flattening the complex reality of prostitution, using a paradigmatic image of either the poverty driven street walker (structuralists) or the educated call girl (individualists) to promote legal regulation that often harms sex workers that do not fit the paradigm. This position is unique in that it allows diversity of view points within it. However, the contextual view is problematic, mainly since it seems improbable that different contextualized regulation will evolve beyond the rough distinction of choice or coercion. Yet it can be speculated that such approach is a starting point for a richer more nuanced theory of the commodification of sex.

*ii. The 'world of service' critique*


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<sup>112</sup> Debra Satz, *Markets is women's Sexual Labor*, 106 *Ethics*, 63, 66 (1995). Satz makes this claim with regards to the structuralist view, yet I believe it can be generalized to both camps, given that individualists seem to believe that all prostitution can be un-harmful, just as structuralists view all prostitution as harmful.

<sup>113</sup> Lynn Sharon Chancer, *Prostitution, Feminist Theory, and Ambivalence: Notes from the Sociological Underground*, 37 *Soc. Text* 163, 167 (1993). Chancer discusses the lack of detailed ethnographic and 'participant-observational' study of various prostitution practices. She believes that dissolving the 'subject/object' divide in theory might also dissolve it in practice. For two examples of the contextualist methodology and analysis see Satz, *supra* note 112, at 85, who reaches the conclusion that although prostitution is not inherently wrong, under current conditions it is wrong in virtue since it "contributes to perpetuating a pervasive form of inequality". For a different conclusion through a similar contextualist methodology (based on her own fieldwork and research) see Bernstein, *supra* note 3, at 116.

Laura Agustin sees sex work as part of a wider ‘world of service’ in which many migrant women participate.<sup>114</sup> This approach views sex work as part of a line of marginalized ‘unproductive’ informal market services, and claims that sex work should not be understood outside of the context of other poor women’s market work, namely domestic-care work.

Agustin claims that women’s traditional work of domestic care work and sex work is part of an informal economy of service that involves intimacy, often takes place in the privacy of the home and considered non-productive labor.<sup>115</sup> Such jobs are mostly done by women migrant workers and are stigmatized and undervalued.

Agustin’s critique of the current dichotomized discourse is that while both sides agree that it is mainly poor women that engage in sex work, the discussion obstructs from view the exploitation of more legitimate women’s jobs that are de-facto often just as exploitative and for many of the same reasons. She claims:

The obsession with trafficking obliterates not only all the human agency necessary to undertake migration but the experiences of migrants who do not engage in sex work.... Though domestic and caring work are usually treated as two separate jobs, very often workers do both, and these jobs also often require sexual labor, though this is seldom recognized.<sup>116</sup>

Positing sex work on the continuum of gendered informal service, done mostly by illegal migrants, exposes the arguments of both sides in the polarized discussion as narrow, partial, and naïve.<sup>117</sup> The framework created by Agustin leads to a critique of the structuralist view as excessively emphasizing sex work when other types of gendered work are similarly exploitative, stigmatizing, and contributing to gender inequality. It also leads to a critique of the individualist belief that legalizing sex work is enough. The case of domestic workers - a group of highly

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<sup>114</sup> Laura M. Agustin, *A Migrant World of Service*, 10(3) *Social Politics*, 377 (2003).

<sup>115</sup> *Id.*, at 379-380.

<sup>116</sup> *Id.*, at 377-378.

<sup>117</sup> Agustin, *supra* note 78, at 97 (“my project is not to participate in either side of the debate but to destabilize the two sided tensions...”).

vulnerable workers, mostly illegal stayers, that are often reported to be abused and exploited - shows that when disempowered groups of women (such as legal or illegal migrants) engage in socially acceptable gendered work they are still highly vulnerable to exploitation. "Most of the abuses denounced in the trafficking debate are closely associated with the unregulated and uncontrolled sectors in which migrant women find employment - domestic service no less than the sex industry".<sup>118</sup>

The structure of the current debate is problematic under this lens, since the rival positions focus on women's sexual agency, and do not extend the debate to the agency and options of poor (migrant) women in general. Thus it focuses attention merely on sex work, while the realities of many thousands of poor women working in gendered jobs in the informal service, jobs that are more 'mainstream' and less sensational or morally loaded, disappear from the agenda of feminist organizations, human rights organizations, and consequently from that of policy makers.

*iii. The critique of feminist NGOs involvement in writing the 2001 protocol*

The 2001 protocol is the latest in a long line of international instruments attempting to define and regulate sex trafficking.<sup>119</sup> The definition of trafficking adopted in it, as quoted and explained above, reflects the tension between the opposing conceptions of prostitution, consent, and coercion held by the opposing feminist views. The process of drafting the protocol included input from NGOs that offered their competing regulatory discourses. The feminist groups' humanist agendas clashed with each other and with the sovereigntist agenda - that sees

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<sup>118</sup> *Id.*, at 104.

<sup>119</sup> See footnote 51 for the full list of international instruments regulating trafficking.

trafficking as an issue of criminal law and illegal migration - promoted by many western countries.<sup>120</sup>

The conflict between structuralists and individualists centered on the definition of trafficking. The individualists lobbied for an acknowledgement of the possibility of consent to sex work, and sex work migration, and the structuralists lobbied for a wide protective definition that will recognize all migration for the purpose of sex work as trafficking.

As discussed in chapter III, the definition adopted in the protocol is a mid way solution that “neither considers consent wholly irrelevant nor provides protection for all women in prostitution.”<sup>121</sup> Thomas points out that this “mid-way” solution left each camp with a notion of a discursive victory: structuralists celebrated the marginalization of choice and consent, rendering it practically impossible in a migratory context, and individualists triumphed the acknowledgment of the possibility of voluntary adult sex work.

Although both sides see the protocol as a victory Thomas argues that “the victories ring hollow”. Indeed, the protocol’s definition of trafficking is vague and weak enough to support almost any position, while not addressing the gender and economic inequalities that drive women into trafficking and render their working conditions so miserable. Thomas therefore suggests that the main outcome of the ‘new and improved’ definition is endorsement of the sovereigntist agenda, i.e. increase in state control over sex workers' bodies and tighter border control.<sup>122</sup>

Indeed the 2001 protocol seems to be an occasion in which the polarizing energies had significant costs. One can only wonder how the 2001 protocol would have looked like if the energies directed at the definitional debate would have been directed at weakening state power

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<sup>120</sup> Thomas, *supra* note 3, at 57.

<sup>121</sup> Balos, *supra* note 52, at 162.

<sup>122</sup> Thomas, *supra* note 3, at 57-58.

over the bodies of migrant sex workers and enhancing their rights. As the case of the 2001 protocol suggests a movement needs to be aware of the potential costs of an internal schism, and in times of need, be able to re-identify the parallels, similarities, and common goals.

## **B. THE LOGIC OF THE OPPOSING POSITIONS**

As mentioned above the feminist discourse about sex work and trafficking follows a well-established pattern of feminist debate. This pattern produces opposing positions that embody both different assumptions about women's sexual agency, and correlated views about the role of law in feminist struggles. The following section will explore the nature of this pattern and question its inevitability and inner logic.

### *i. The choice/coercion dichotomy and its limits*

One of the main splits the antagonistic views produce is around the question whether women can willingly choose to sell sex. As explained above the voluntary v. coerced dichotomy is a crucial aspect of this debate: the structuralist position answers by a firm "no" while individualists insist on the possibility of choice and consent.

It is interesting to note that structuralists and some individualists seemingly converge in criticizing the "choice-coercion" argument, and in particular anti-trafficking campaigns that utilize it. Leidholdt, a structuralist, claims that "the old dichotomy of Madonna-whore was replaced by a new dichotomy of sex worker-trafficked women".<sup>123</sup> She suggests that both are in fact victims of the same exploitative system that should therefore be abolished.

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<sup>123</sup> Leidholdt, *supra* note 45, at 177.

Doezema, an individualist, like Leidholdt, objects to the forced v. voluntary distinction. She also argues that focusing on this distinction conceals human rights violations and deplorable working conditions that sex workers by ‘choice’ endure. Thus, the focus on consent, though not condemning voluntary sex work, leads to its disregard. An unintended by-product of the distinction is the division of sex workers into “innocent”, ‘Madonna’-like, sex workers (those who were coerced into prostitution) and “guilty” ‘whores’ (those who chose prostitution as wage work), and thus to the reinforcement of stereotypical views of women’s sexuality.<sup>124</sup> Doezema therefore concludes that “it is time to reconsider the usefulness of “choice” v. “force” as the model of sex worker’s experience”.<sup>125</sup>

Both Doezema and Leidholdt resent the distinction between trafficking and sex work, and are opposed to anti-trafficking campaigns that use this dichotomy to gain support. Both think that sex work/prostitution and trafficking is a continuum. But while Leidholdt sees it as a continuum of coercion, Doezema sees it as a continuum of limited choices. This similarity in the individualist and structuralist positions is particularly striking mainly because of the failure of this position in international and national human rights discourse. The choice v. voluntary distinction became a winning trope in national and international discussions. Combating sex trafficking is a hot issue in the international agenda while the issue of sex workers' rights violations is practically non-existent. This might prove the difficulty of feminist arguments to impact the legal discourse and to attract global attention when it offers a more nuanced claim that diverges from classical liberal argument-bites about freedom of contract, personal agency, and sexual agency.

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<sup>124</sup> Doezema, *supra* note 36, at 47.

<sup>125</sup> *Id.*

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ii. *The link between the assumptions about sexual agency and proposed legal reforms*

An inevitable causal relationship is assumed between a feminist position - structuralist or individualist - and the law reform promoted as a result of it. In the context of sex work and trafficking, if one is a structuralist she will be an abolitionist. If one is an individualist she will call for the legitimization of sex work through decriminalization and regulation. But are the linkages that emerge in feminist writing indeed inevitable?

It can be claimed that this link is not necessary. For example Radin notes that abolitionism as a reform solution is not necessitated by the structuralist position. 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. 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>126</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. 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

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<sup>126</sup> Radin, *supra* note 18, at 133-134.

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 neither abolitionism of sex work nor extending workers' rights can be helpful to sex workers.<sup>127</sup>

It is surprising to see that although 'hybrids' of the opposing positions are more than plausible there is hardly any trace of these in feminist writings about prostitution and trafficking.<sup>128</sup> Exposing that the link between the substantive position about agency and the legal regime proposed is not inevitable or 'natural' as it is presented in the feminist debate can have two effects: first, it might show that the positions are not *necessarily* mutually antagonist, as the debate might present them to be. Second, it exposes the role of feminist discursive traditions in structuring and positioning law reform proposals.

*iii. The link between the assumptions about sexual agency and the extent of regulation*

The traditional feminist distinction between the individualist approach and the structuralist approach entails some automatic associations between assumptions about women's sexual agency and legal regulation of sexuality. One of these associations links the stance towards the possibility for women's agency and prohibitionist legal regulation. According to this common view the individualist approach is against prohibitionist regulation, believing that state regulation will have negative effects since it will end up not protecting and liberating women but rather controlling women's bodies, and reifying conservative views of women's sexuality; the

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<sup>127</sup> Prabha Kotiswaran, *Agency gone Astray: Sex work, the Sex Workers Movement And The Invitation to Discipline* 29 (on file with writer, forthcoming 2005).

<sup>128</sup> For a rare example of such a position see Debra Satz, *supra* note 112, at 64 ("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 in which I claim that prostitution is wrong").

structuralist approach on the other hand traditionally promotes prohibitionist regulation, believing in the symbolic and material power of legal regulation for the protection of women. These diverging views were evident in the debate around pornography in which structuralists who held an anti-pornography stance called for recognition of the harm caused to women in pornography through legal prohibition, and individualists who feared that such regulation of speech and expression will be excessive. The discussion around prostitution is often characterized as repeating this pattern - while structuralists call for legal protection through an abolitionist approach and criminalization of third party profitters, individualists resent the prohibitionist impulse as moralistic and excessive.

The feminist discourse in the context of sex work proves that such a link, between one's view of women's agency and sexuality and one's view of the usefulness of legal regulation, is not necessary. Both the individualist and structuralist positions in the case of sex work and sex migration are at once pro certain aspects of regulation and against other aspects. Individualists are against regulation in the sense that they resist regulation of women's sexual and occupational options. For example post-modern 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, countervailing, and unpredictable effects on social power imbalances".<sup>129</sup> Yet at the same time they call for the same legal regulation any employment-employee relationship entails.

The individualist approach might de-facto lead to hyper-regulation. As the discussion above suggested, when a contextualized individualist approach to prostitution and sex migration is applied (the presumption of coercion removed) the judge is left to discern whether the case is

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<sup>129</sup> Nathaniel Berman, *Subversive Legacies: Learning From History/Constructing The Future: Round Table Discussion: Subversive Legal Moments?* 12 Tex. J. Women & L. 197, 216 (2003).

one of coerced trafficking or one of free choice, thus having to carefully analyze and consider the consent/coercion situation at every stage of the migratory experience. 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>130</sup>

This scenario of wide discretion in judicial deciphering of moments of consent and coercion in the context of trafficking and 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 regulation does not exist under the structuralist presumption of coercion that leaves the judge with less room for discretion.

This duality towards the role of regulation 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 proper extent of regulation.

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Taken together, these three elements of the polarized debate problematize the inner logic and inevitability of the structure of the dichotomized discourse. Seeing that both camps resist the choice/coercion dichotomy that each basic position doesn't necessarily lead to the reform proposal associated with it, and that neither approach is inherently linked to a specific view of the proper extent of regulation - leads to questioning the current shape of the debate. One possible, though impossible to prove, theory can be that more than their inherent opposition the camps adhere to traditions of rivalry within feminist legal thought. As the previous discussion

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<sup>130</sup> *Id.*

suggests, following the route of previous feminist battles is costly. It seems to leave too little room for creative, out of the box thinking about regulative solutions. As the discussion of the Swedish and Dutch legal regimes of sex work implies, the proffered solutions are far from perfect. Perhaps exposing these logical leaps can open a space for further innovative approaches to the regulation of sex work. The discussion of the unique legal situation in Israel might be an example of the potential and problems that such dissociation can bring about.

## **VI. THE CASE OF ISRAEL: THE GAP BETWEEN OFFICIAL ABOLITIONISM AND UNOFFICIAL TOLERATION**

Israel presents an interesting hybrid of regimes. On the one hand the Israeli legislature is committed to an abolitionist approach that criminalizes the procurer and the trafficker, and prohibits brothel ownership. On the other hand, prostitution is highly institutionalized and tolerated in Israel. Scrutinized under the light of the ‘law in action’ the abolitionist regime is transformed into what seems to be a non-cognizable regime in the language of the dichotomized discourse. To make sure, 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. Given the inherent tension between the written law and the legal reality, 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 CHRONOLOGY OF TRAFFICKING IN ISRAEL**

Trafficking in women into Israel was first documented by report of Israeli NGOs in 1997, yet it can be dated to the collapse of the Soviet Union. The estimation is that 10,000 women

migrated to work in Israel's sex industry in the early 90's, when transnational crime networks took advantage of the waves of migration of Soviet Jews to Israel, to smuggle mainly non-Jewish sex workers into the country.<sup>131</sup> Trafficked women and migrant sex workers arriving to Israel at the early 90's arrived with false documentation, either as tourists or using falsified documents of Jewish immigrants. Due to tightening regulations, migration routes have changed. Today women are mostly smuggled/trafficked in through the Egyptian border, in the outskirts of the Sinai desert, in harsh conditions. Entering Israel illegally the women are considered "illegal stayers". Therefore, when caught by police, mostly after police raids on brothels, the women are arrested and deported.

The arriving migrant sex workers and trafficked women replaced the existing Jewish local market and expanded it.<sup>132</sup> Hardly any research has been done on prostitution in Israel and therefore there is no definite answer to the question where did the Israeli prostitutes go and how did migration influence the market; but it is clear today that an overwhelmingly high percentage of all sex work in Israel is supplied by migrant sex workers from the former Soviet Union, at least some of whom are victims of trafficking.<sup>133</sup>

## **B. THE POSITIVE LAW: ABOLITIONIST APPROACH AND ANTI-TRAFFICKING LEGISLATION**

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<sup>131</sup> Hughes, *supra* note 58, at 632.

<sup>132</sup> Apparently this is not unique to Israel. See: Sassen, *supra* note 49, at 7. ("According to the International Organization for Migration (IOM) data, the number of migrant women prostitutes in many European Union countries is far higher than that of nationals: 75% in Germany, 80% in the case of Milan in Italy, etc"); and also: *It's a Foreigner's Game*, Economist, April 9, 2004.

<sup>133</sup> One 'systematic' and experienced client, who wrote a highly comprehensive report about prostitution in Israel claims that there are "95% Eastern European girls, practically all Russian or from new independent ex Russian states", at <http://israel.worldsexarchives.com/> (last accessed June 2005). Prof. Amir, an expert of organized crime in Israel, estimates that 70% of the women in prostitution in Tel-Aviv are from the former Soviet republics, see: Israel's women's network, *Trafficking of women to Israel and Forced Prostitution* (1997).

The Israeli legislature adopted an abolitionist approach to sex work, i.e. one that criminalizes pimping but not the act of prostitution itself.<sup>134</sup> Nonetheless the sex industry in Israel is a highly active and prosperous.

In 2000 the Israeli legislator criminalized trafficking in women by amending the Penal Code and adding section 203A-D. The article adopted a structuralist approach - it does not give any weight to the consent of women to migrate for the purpose of sex work, and assumes that all migrant sex workers are a-priori victims of trafficking. The amendment was heavily critiqued by NGOs as being too narrow in its scope - both dealing only with trafficking for purposes of prostitution and looking only at the punishment of the traffickers without addressing the rights of victims.

Since 2000 the situation of women who agree to testify as prosecution witnesses has been improved and no longer leads to immediate deportation. Induced by court ruling,<sup>135</sup> in 2000 the police began providing accommodation for witnesses in hostels, instead of in prisons. In 2004 a secured shelter for victims of trafficking was established by the Ministry of Welfare, and provided both health and mental care. In March 2004 the minister of Interior Affairs signed an order providing victims of trafficking who agree to testify against their trafficker visas and working permits until their testimony.<sup>136</sup> In late July 2004 the minister declared his willingness to extend work permits and visas for one more year after the woman gave her testimony.<sup>137</sup>

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<sup>134</sup> See Chapter 10, Section 199, of the Penal Code that deals with prostitution and abomination. Article 199(a) asserts: "A) These are to be sentenced to five years imprisonment: 1. A person whose livelihood – entirely or partly, permanently or for a given period of time – depends on the earning of a prostitute. 2. A person who knowingly accepts what was paid in return for prostitution or part of what was so paid." Other articles in this chapter create a presumption of procuring if one lives with a prostitute or accompanies her to work (section 200), and criminalize living with a prostitute (section 202).

<sup>135</sup> MApp (Tel-Aviv) 91548/00 The State of Israel v. Julia Veriubkin (not published).

<sup>136</sup> Entry into Israel Order (Exemption from Need of Approval to Permits for a Foreign Worker), 2004.

<sup>137</sup> The Minister of Interior Avraham Poraz declared his intention to extend the visas and working permits in a meeting of the Parliamentary commission on Trafficking in women, July 6<sup>th</sup> 2004. The protocol of the meeting is available at <http://www.knesset.gov.il/protocols/data/html/sachar/2004-07-06.html> (last visited June 2005). Until

**C. ZONE OF TOLERATION: THE REALITY OF SEX WORK IN ISRAEL**

Although prostitution in Israel is not legalized it is widely tolerated, and invisibly institutionalized and regulated.<sup>138</sup> The main support to the claim that prostitution is invisibly institutionalized can be found in the Attorney General's directive 2.2 "Investigation and Prosecution Policy in Offences of Prostitution and Trafficking in Persons for the Purpose of Prostitution" as amended in 2002.<sup>139</sup> The directive asserts that when the police receive information about 'regular' prostitution (that does not involve trafficking) it shall not further investigate unless there is suspicion of involvement of minors, or when there are aggravated circumstances such as coercion or violence, or when the place of prostitution is used for other criminal activities.

The institutionalization of prostitution can also be seen in the approach of the courts to prostitution in different contexts. For example, the Israeli Labor Court has asserted 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>140</sup> The court (Judge Adler) carefully justified its decision:

Even a woman who engages in the profession of prostitution deserves the minimal legal protections provided by law, since even a woman who is exploited and is employed as a prostitute is a human being. This ruling does not encourage this profession neither does it make it legal... we are not discussing the contractual

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now the minister did not follow his promise see: Parliamentary commission report, *supra* note 2, at Chapter 5 "The ministry of interior," 7 (2005).

<sup>138</sup> Tehila Sagy, *The Invisible Regulation of Prostitution in Israel*, in *Inquiries in Law, Gender and Feminism* (Dafna Barak Erez et al. eds., forthcoming 2005) (manuscript on file with writer). Sagy holds a structuralist position. She sees the gap between the written law and the law in action as hypocrisy of the Israeli regime of prostitution. She therefore calls for state institutions to adhere to the abolitionist approach adopted by the penal code.

<sup>139</sup> The directives are available at: <http://www.justice.gov.il/MOJHeb/HanchayotSahar/HanchayaSahar.htm> (last visited June 2005).

<sup>140</sup> NLCH 56/180-3 Eli Ben-Ami Mechon Classa v. Rachel Glitzcensky, 31 IsrLC 389 [1998] (hereinafter: Ben-Ami); See also the discussion at Sagy, *supra* note 138, at 12-17.

relationship between the parties or the legality of the contract, we are merely dealing with providing minimal protections set in the relevant employment rules.<sup>141</sup>

Another example to the institutionalization of prostitution exists in the area of tort damages, where Israeli courts compensate men who were physically and/or emotionally harmed in accidents (mainly car accidents), taking into account the expenses of purchasing sex services. In a recent case, when calculating damages a man in his twenties who was involved in a car accident was entitled to, under “impotency care costs”, the judge ordered the insurance company to pay the plaintiff a total sum of 150,000 NIS (approximately \$32,000 U.S.) to cover the expenses of Viagra medication and of buying sex services once a week until the age of 70. The decision is now under appeal.<sup>142</sup>

Other official institutions, presumably following their internal directives, also recognize prostitution and procurement as lines of 'work'. Brothel owners are expected to pay income tax for their brothel activity,<sup>143</sup> and victims of trafficking are considered “workers” by the National Insurance Institute for the purpose of receiving worker’s injury compensation.<sup>144</sup> Another indication of the high level of toleration is the existence of distinct urban areas which are unofficial “red-light” districts that despite random raids, are generally un-intruded.

Looking at the informal wide zone of toleration of prostitution in the formally abolitionist Israeli regime, a mixed regime, un-cognizable by the dichotomized discourse, is revealed. Although the penal code adopted an abolitionist, structuralist approach, various institutions within the state adhere to an individualist approach, not experiencing it as contradictory to the

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<sup>141</sup> Ben-Ami, *id.*, at 393.

<sup>142</sup> A001553/99 (TA) *Yosef Fredo v. Migdal Insurance com.* (not published, Oct. 27<sup>th</sup> 2004).

<sup>143</sup> Amir Helmer, *A Brothel Owner Is Accused of Not Reporting Her Income of 2 Million NIS*, Haaretz (Jan. 3<sup>rd</sup> 2005).

<sup>144</sup> 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 institution (Personal communication with her lawyer, Nomi Levenkron, December 2005, on file with writer).

general regime. Thus, the Israeli regime embodies discursive and material ambiguity and resists the polarized discourse. The regime produced is at once both structuralist and individualist and is therefore neither. On the symbolic level the state acknowledges the harms of prostitution and calls for its abolition. On the material level state institutions acknowledge that ‘even sex workers are human beings’ and attempt to protect their right to work, ensure minimum employment law protections, and minimum welfare protections.

From a structuralist standpoint this situation is interpreted as deep hypocrisy - the state failing women by not following its promise to protect them from the violence of prostitution through its abolition. From an individualist standpoint, this regime is problematic since it symbolically marginalizes sex workers, and prevents their full social inclusion.

## **VII. COST BENEFIT ANALYSIS OF THE ISRAELI LEGAL REGIME**

When added up the various “exceptions” and “anomalies” described above transform the abolitionist regime in Israel into a complex hybrid of abolitionist and regulatory approaches. This chapter seeks to list the possible costs and benefits of such a regulative approach. Embarking on such a thought experiment can be quite problematic. A critique of such analysis might be that trafficking in women is an embodiment of pure patriarchal evil, akin to slavery; and if so, even if there are any benefits they should be disregarded as illegitimate and negligible. Further, it can be claimed that it is strategically harmful to even mention the possibility of such benefits. I would like to suggest that such an analysis, far from being harmful, is crucial to vitalizing and to an extent disrupting the dichotomized debate. This exploration aims not to legitimize any benefit produced by women’s exploitation, but rather to open this tightly sealed box and see what is inside, aiming to achieve a better understanding of this phenomenon and its regulation.

Prof. Duncan Kennedy, when conducting a cost/benefit analysis to the sensitive issue of sexual abuse, suggested that there might be an important value in applying a cost/benefit analysis to such a topic, despite the “distancing, objectifying, flattening, alienating” language of such an analysis. He explains:

The virtue of cost/benefit analysis is that it forces us to focus on the aspect of abuse that is denied by the language of horror - that is, on the conflicts of interests between men and women, and among men and women, that are submerged when we are reacting viscerally. These conflicts can't be willed away, and they have a deep effect on social policy, on what various institutions end up doing...<sup>145</sup>

The following analysis does not attempt to be conclusive, or universally accepted - it merely suggests the possibility that migrant sex work might have different costs to different stakeholders, and that, although often denied, it also has benefits for many stakeholders, including sex workers themselves. A realistic, pragmatic view towards legal and social reform should, I propose, be aware of both. If one is a structuralist this exercise can be helpful in finding out what potential benefits you are up against, and what are the potential benefits the abolitionist approach might be denying; if one is an individualist such an exercise might lead to a clearer view of what it is that legalization and regulation will preserve, and what are the costs of the legitimization of sex work.

The chapter will generate the costs and benefits with regard to four groups of stakeholders - men, women who do not engage in sex work, local sex workers, and migrant sex workers.<sup>146</sup>

## A. MEN

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<sup>145</sup>Duncan Kennedy, *Sexy Dressing etc.* 126, 129-130 (1993).

<sup>146</sup> Discussing the interests of these four groups of stakeholders requires crude generalizations, and could be easily nuanced and further dissected. Yet for the purpose of sketching the contours of such an analysis I believe these four main groups of stakeholders will suffice.

A preliminary question that should be raised is whether, putting aside the interest of women, purchasing sex can be seen at all as a benefit for men. The answer to this question heavily depends on one's moral perceptions of non-marital sex and commodified sex. The structuralist answer will clearly be 'no'. Structuralists will suggest that the pleasure of sex is insignificant and questionable when done outside an egalitarian relationship and particularly, when done in a market context. It is especially insignificant in relation to the harm the commodification of sex causes to prostitutes and to women in general. Further, it can be harmful to men since purchasing sex is inherently alienating and de-sensitizing, and will thus have emotional costs. A structuralist will thus claim that first, there is no benefit to men in buying sex, and second, suggesting that there are benefits entails compliance with patriarchal logic since it treats the women's right to be free from the violence of prostitution as less than absolute. Being aware of this powerful structuralist critique, I will continue this discussion under the assumption that men find benefit in purchasing sex, assuming that if this was not the case the phenomenon would have disappeared.

The Israeli legal regime leads both to relative stigmatization of buying sex, and to the accessibility and proliferation of sex work. Different standpoints might see different costs and benefits in this situation. A structuralist standpoint might suggest that while the stigmatization is a benefit for men the proliferation is a cost, while an individualist (post-modern) approach will see stigmatization as a cost for men and proliferation as a benefit. Putting aside the possible arguments that the feminist dichotomized discourse might generate I would like to try and think about the costs and benefits from the point of view of what might be an average man who does or does not buy sex.

From the standpoint of an average ‘consumer’ the formal abolitionist regime might be costly in that the symbolic power of the abolitionist approach stigmatizes (even though it does not criminalize) the purchase of sex. Thus buying sex in Israel has some punishment costs beyond the legal system (e.g. loss of partner, a job, or reputation). Men who buy sex services benefit from the fact that the services are easily accessible with low search and transaction costs, from the fact that there are many opportunities for low risk ‘consumption’ since there is little risk of being caught, and from the fact that there is a vast variety of ‘suppliers’.

The wide zone of toleration creates high availability of prostitution which can be seen as beneficial for men who do not buy sex as well. Such men can benefit from having the imagery of prostitution available to them, either as a sexual fantasy of domination, exoticism, or diversity. For example the economist Cameron suggests that “those who do not consume the products of the sex industry may experience beneficial side effects even if they do not obtain any option value... some may find the *frisson* and excitement and danger that is perceived to reside there beneficial to them.”<sup>147</sup> Yet, the man who does not consume commercial sex might bear the cost of the suspicion that he, like many other men, buys sex. The easy access to paid sex makes any man a suspect. As far as that is a cost, it exists.

Prostitution also posits men in a better bargaining position in their relationship with women.<sup>148</sup> The toleration and availability of sex work positions men in Israel in a situation in which they cannot be deprived of sex.<sup>149</sup> As far as that is a benefit, it exists. Also as long as sex work is unregulated and informal, sex workers are stigmatized and marginalized. The existence

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<sup>147</sup> Samuel Cameron, *Space, Risk and Opportunity: The Evolution of Paid Sex Markets*, 41(9) *Urban Studies* 1643, 1647-1648 (2004).

<sup>148</sup> For a discussion the bargaining dynamics between men and women in every day life see: Kennedy, *supra* note 145, at 145-147.

<sup>149</sup> A more extensive discussion on the bargaining between prostitutes and women who are not prostitutes regarding men’s access to sex will be developed in part B of this chapter.

of this derogatory category that has no male equivalence gives men another strong bargaining chip in their relationship with all women. Since most women fear the prospect of prostitution or even the prospect of being considered a prostitute, men can use these two options as leverage points in their bargaining with women.<sup>150</sup>

In conclusion the hybrid regulatory regime might be better for men than any of the “pure” regimes. The stigmatizing aspect of buying sex is sustained mainly in the symbolic level since the risk of getting caught and shamed is very low, and since high institutionalization levels turns buying sex into a more socially acceptable practice. While buying sex becomes less stigmatized, being a prostitute is still heavily stigmatized, thus harming women’s bargaining position in relation to men. Therefore, men enjoy both being able to buy sex services with low risk and high diversity, and enjoy the disciplinary effect widespread prostitution has on women.

## **B. WOMEN WHO ARE NOT SEX WORKERS**

The legal regulation of sex work does not directly affect women who are not sex workers. Not being part of this ‘sexual transaction’ women are affected by the legal regulation of sex work either through the symbolic power of regulation and through its material effects on men and sex workers.

### *i. Symbolic level*

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<sup>150</sup> It should be noted that this terrorizing effect to women is not necessarily a benefit for men. Duncan Kennedy suggests that although this disciplinary aspect supposedly imposes traditional female identity on women in the interest of men, it is not clear that all men’s interest are necessarily to produce more women who shy away from explicit sexuality in fear of being considered prostitutes, and that in fact for many men this can be seen as a cost. See: Kennedy, *supra* note 145, at 150.

The existence of trafficking, and its legal toleration means that in Israel today women can be bought and sold. The existence of extreme cases in which women (and only women) are treated as chattel, for the sexual gratification of men, might affect the way men perceive women, and decrease women's security and social status. It therefore might be suggested that the mere existence and residual toleration of trafficking, in itself, can be seen as a cost to all women. On the other hand trafficking is not a scenario that threatens most *Israeli* women. The fact that it is not Israeli-born women who are bought and sold, but rather foreign 'Russian' women - an easily identifiable group of 'others' who often look and sound different - means that this adverse effect on Israeli women is limited.<sup>151</sup>

Yet the cost on a symbolic level is not subdued by the foreignness of sex workers and trafficked women. Mary Jo Frug, in a study of the complex relationship between the law and the female body,<sup>152</sup> analyzes a legal regime that criminalizes prostitution. Although the Israeli regime does not criminalize prostitution, but only third party beneficiaries, I believe that many of her insights are applicable to an abolitionist regime, since it also has the effect of illegitimizing, stigmatizing, and marginalizing sex work. Frug suggests that the regulation of sex work and the illegality that surrounds it *sexualizes* the female body. She explains that "[b]y characterizing certain sexual practices as illegal... rules sexualize the female body. They invite a sexual interrogation of every female body: is it for or against prostitution?"<sup>153</sup>

The legal regulation of sex work does more than that, it also terrorizes the female body through allowing a wide range of sex worker's abuse - both physical, by clients and pimps, and

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<sup>151</sup> This subsection focuses on the *symbolic* effects of the current legal regulation on women non-sex workers. Relevant issues such as the cost of being mistaken for a prostitute will be discussed under the disciplinary effects.

<sup>152</sup> Mary Joe Frug, *A Postmodern Legal Manifesto (An Unfinished Draft)*, 105 Harv. L. Rev. 1045, 1049 (1992).

<sup>153</sup> *Id.*, at 1052.

through the exclusion of prostitutes from the social order. This terror affects all women “by encouraging them to do whatever they can to avoid being asked if they are ‘for’ illegal sex.”<sup>154</sup>

The legal regulation of sex work also *maternalizes* the female body since it proposes distinct roles for women - the role of the mother or the role of the whore. This is brought about by the interrelationship between anti-prostitution rules and legal rules that encourage women to bear and rear children.<sup>155</sup> The legal regime de-legitimizes sex *work* yet legitimizes and encourages marital sex, mainly due to its link to reproduction.<sup>156</sup>

Does the informal toleration of sex work decrease the terrorizing, sexualizing and maternalizing effect of the written law? I suspect that it does not. Since Frug’s gaze is fixed on the discursive level, it seems that an informal institutionalization of sex work will not suffice to balance the symbolic costs that Frug pointed out of the abolitionist penal code section. It seems therefore that the complexity of the hybrid regime does not affect the symbolic level, so that the costs of the de-legitimization and marginalization of sex work and sex workers are similar to the ones of a ‘pure’ abolitionist regime.

## *ii. The disciplinary effect*

As far as sex work is stigmatized the wide zone of toleration of sex work and its social prevalence also has a disciplinary aspect in preserving and/or channeling women into certain patterns of traditional feminine behavior.<sup>157</sup> The main disciplinary mechanism seems to be non-sex-worker-women’s fear of being treated as, or mistaken for prostitutes. Frug helps in clarifying

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<sup>154</sup> *Id.*, at 1054.

<sup>155</sup> *Id.*, at 1055.

<sup>156</sup> *Id.*

<sup>157</sup> Here as well I am building on the analysis Duncan Kennedy develops in relation to the cost and benefit of sexual abuse. See Kennedy, *supra* note 145, at 147-162.

the disciplinary outcome resulting from the terrorizing, sexualizing reality and imagery of sex work. She says:

This sexualization of the female body explains an experience many women have: an insistent concern that this outfit, this pose, this gesture may send the wrong signal -- a fear of looking like a whore... This sexualization also explains the shadow many women feel when having sex for unromantic reasons -- to comfort themselves, to avoid a confrontation over some domestic issue, or to secure a favor -- a fear of acting like a whore.<sup>158</sup>

Women's fear of being considered as prostitutes will limit women from walking in certain areas of the city alone at night, and dressing in a more flashy, sexy, 'prostitute like' way. It will also lead women to be monogamous. Violating certain norms of sexual monogamy, dress codes, or trespassing into the informal red light areas without the escort of a man, exposes women to the risk of being treated as a prostitute exposing them to physical and/or reputational harms. Thus women are made to fear the stigmatization through the legal regulation that excludes sex work from the market and marginalizes it. At the same time the wide practice of sex work makes the phenomenon very 'real' in women's lives and further entrenches their fear.

Yet, as mentioned above, in Israel not all women are suspect of being sex workers - it is not only clothing, makeup and location that signifies a woman as a prostitute but also her ethnic origin. The fact that in today's Israel most prostitutes are foreigners who arrived from the former Soviet Union, often look different and sound different, means that most Israeli women might be spared from being considered as prostitutes. This is probably an over-inclusive generalization. There are Israeli sex workers and an Israeli woman, no matter what her origins are, dressed provocatively and alone at certain areas of cities can be mistaken for a sex worker. So there are still some general disciplinary effects, yet non "Russian" looking women are 'safer' in this respect. Russian looking women on the other hand are heavily suspected, even outside the

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<sup>158</sup> Frug, *supra* note 152, at 1053-1054.

‘natural’ context. Jewish immigrants from the republics of the former Soviet Union are probably more often mistaken as prostitutes, to the extent that to say a woman is “Russian” in Israel, is a derogatory word that stands for the word ‘prostitute’. It is therefore these women, I suspect, who will be most fully disciplined by the wide toleration of sex work and its marginalization.

Yet Prostitution, it can be claimed, has more complex, and maybe even contradictory, effects. On the one hand it disciplines women into traditional gender roles, on the other it might be doing just the opposite. While prostitution generates images of erotization, domination, and women’s submission, it also generates images of women as sexually active beings who find great pleasure in sex and in being sexy. This is the aspect of sex work that individualists see as empowering and subversive. Thus prostitution can be emblematic of another horizon - not one of submission but one of sexual liberation.

### *iii. Bargaining position*

It was suggested above that the wide access to sex service coupled with its stigmatization puts women in an inferior bargaining position vis-à-vis men since women cannot deny sex from men and at the same time need their protection from the reality and reputation of prostitution. Hirshman and Larson further explain another bargaining axis, that between wives and sex workers. They say:

The individual advantage [for prostitutes] comes ... at the expense of the collective bargaining power of women in dealing with men who seek female sexual cooperation... prostitutes in fact damage the interests of non-prostitutes, bidding down the price of heterosexual access... prostitution is a standing offer to violate the wedding contract of sexual fidelity, and thus particularly injures the interests of wives. Where prostitution is curtailed wives are better situated to force their husbands to bargain with them for sexual access.<sup>159</sup>

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<sup>159</sup> Linda R. Hirshman & Jane E. Larson, *Hard Bargains: The Politics of Sex* 287 (1998).

According to this analysis laws against prostitution drive up the price of sexual access, thus improving women's bargaining power. This analysis might lead to the conclusion that although the toleration of sex work is costly for women, the abolitionist formal approach is a benefit because it gives women a leverage point when dealing with men who buy sex services.

Building on such an analysis Hirshman and Larson propose a hybrid legal regime in which sex workers will receive the protection of workers' rights and will be considered employees, yet the prostitution contract will still be considered an illegal one. To a large extent their proposal is the informal reality of sex work regulation in Israel. Therefore as far as the bargaining power of non sex-workers is concerned, the Israeli legal regime can be seen as a proxy for the optimal regime proposed by Hirshman and Larson.

Prabha Kotiswaran suggests that the regulative approach promoted by Hirshman and Larson might benefit wives but is harmful to sex workers. She argues that according to their logic an equally useful reform could be "to substantially increase the rights of the weaker worker [sex workers] so the interest of both the stronger worker [wives] and that of the weaker worker are protected".<sup>160</sup>

Although, as Kotiswaran notes, there are several ways to respond to the situation in which sex workers reduce the bargaining position of other women, the Israeli regulative regime, according to Larson and Hirshman, can definitely be seen as one of them. Thus, surprisingly, the unintentional hybrid regime produced in Israel can be seen as beneficial, or even optimal, to women (non sex workers, and mainly wives) - significantly enhancing their bargaining position vis-à-vis men.

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<sup>160</sup> Kotiswaran, *supra* note 39, at 13.

Women's (non sex workers) situation under the hybrid regime is complex. On the symbolic level the abolitionist regime can be seen as costly: sexualizing, terrorizing and maternalizing the female body. On a disciplinary level it seems to have a mixed effect - both channeling women into traditional gender roles and enabling a horizon of sexual liberation. In terms of their bargaining position vis-à-vis men it seems that the hybrid regime is an efficient solution for enhancing women's (particularly wives') bargaining position by making out-of-marriage sex less accessible, yet ensuring sex workers receive some minimum protection.

### **C. ISRAELI SEX WORKERS**

The hybrid legal regime seems to bear benefits for sex workers in relation to a fully abolitionist regime, and maybe even in relation to the decriminalizing regulatory one. The obvious cost of such regime is sex worker's marginalization and de-legitimization. The benefits in relation to the fully abolitionist regimes is that some Israeli sex workers enjoy - at least in theory - workers rights, and some social security benefits. They are also less marginalized since they are legally not criminals themselves, but at the same time their employers, who are officially criminals, are not prosecuted by the police unless they engage in further criminal activities. Thus the industry can operate above ground rendering sex workers less dependent on pimps, and theoretically less vulnerable to exploitation and abuse. It is also evident that the symbolic exclusion of sex workers by the penal code is eroded by general acceptance of sex work as a form of wage work by various governmental institutions. This has the potential of aiding sex workers' social acceptance. In reality though, as will be further discussed below, sex workers rarely demand and receive these rights.

This complex regime can be seen as an improvement to a de-criminalizing regulatory regime since the penal code's criminalization of third party profiteers raises awareness to issues of agency and choice in many situations of prostitution. The penal code provision weakens the liberal myth that sex workers engage in their labor by free choice and potentially increases court's willingness to question liberal assumptions in cases in which sex workers employment rights and human rights are violated.

Although this regime seems potentially able to create space for sex worker activism, the worldwide trend of such organizations did not reach Israel. One hypothesis, in an attempt to explain this lack, can be the fact that Israeli sex workers make up a small percentage of the sex market. The high percentage of migrant sex workers can be seen as an obstacle to the emergence of an Israeli sex workers movement, since the two groups of sex workers - local and migrant - are in conflict of interests. Agustin, discussing the conflict between local and migrant sex workers in Europe explained:

[Migrants] are alleged to lower the value of services by charging less, they are said to be less 'professional' than Europeans and they muddle the claim of sex workers' autonomy by being involved in informal networks and illegal activities or by being 'trafficked'. The interests of migrants who have no right to work and who put their priority on accumulating as much money as possible in a short time are not the same as the interests of Europeans who want to legitimize and professionalize the industry.<sup>161</sup>

The spill-over from the toleration of sex work to the toleration of migrant sex work and trafficking ensures that many sex workers are illegal workers: highly disempowered social actors with weak political consciousness. Thus, although theoretically sex workers benefit from the hybrid regime, especially in relation to a purely abolitionist regime, these benefits are rarely materialized due to the toleration of sex worker migration.

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<sup>161</sup> Agustin, *supra* note 78, at 111.

**D. MIGRANT SEX WORKERS**

It can be said that the phenomenon of trafficking exists and is sustained by the gap opened by the state's informal toleration of prostitution on the one hand, and its official abolitionist intentions on the other. When migrant sex workers are viewed purely as victims, and any benefit of this experience is disregarded, it seems that such a system endorses exploitation and allows their enslavement. If most migrant sex workers are really trafficked and if the sex industry consists of a majority of migrant workers - the state's nonintervention in brothels can be seen as a symbolic act (with very real consequences) of exclusion of victims of trafficking from the social order. Migrant sex workers are doubly excluded - first for being sex workers (marginally protected and stigmatized), and second for being illegal aliens (vulnerable to deportation). This exclusion ends too late, only when the women are 'saved' in police raids, or when they manage to escape from their traffickers and reach the police. At that stage the state becomes active in providing limited assistance to the victims.

When sex worker migration is viewed as possibly resulting from choice, one is led to ask more nuanced questions about the Israeli regulative regime. Individualist researchers suggest that migrant sex workers can reap benefits from this experience "in terms of assets (social, cultural, financial) they acquire as migrants that enables them to affect change through both personal and community empowerment."<sup>162</sup> The question under this assumption is what is the role of the regulative regime in enabling or preventing migrant sex workers from obtaining such benefits.

When treating sex work migration as part of the wider phenomenon of worker migration, the Israeli legal regime might seem relatively beneficial for migrant sex workers. While migrant sex workers are vulnerable to deportation since they are illegal stayers, due to weak enforcement the

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<sup>162</sup> *Id.*

actual risk of deportation is relatively low. The women are not eligible for health insurance, since they are not residents, but can receive social security benefits in case of an accident, since that entitlement does not depend on a person's residential status. Migrant sex workers are also theoretically protected by existing workers rights due to their universal application.<sup>163</sup>

Since the penal code does not view consent as a factor in the anti-trafficking provision, when at the hands of police, a migrant sex worker is presumed to be a victim. As a victim of trafficking a woman is eligible for shelter, counseling, health insurance and a small allowance. When women do not agree to testify their situation more strongly resembles that of other 'illegal' migrants, yet it is still somewhat improved due to the a-priori assumption of victimhood, the relatively wide awareness to possible exploitation, and an improved institutional solution for their situation.

Yet migrant sex workers are still a highly disempowered group. As illegal migrants, working in a stigmatized industry they often have a very low sense of entitlement, and very few resources to mobilize as a group. The situation of migrant sex workers is often transitory or perceived as such by them. Thus, they lack a group identity that might enable mobilization.<sup>164</sup> Further, any attempt organize sex workers will most likely exclude 'illegal' migrants since their illegal status hampers most governmental entitlements and weakens any claim for institutional recognition as anything other than victims. As the case of the Netherlands proves when the sex industry is regulated the situation of migrant workers generally worsens.

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<sup>163</sup> DM 1040/01 (labor district court - Beer Sheva) Eric Tomsanga v. Ambassador Hotel, par 46 (not published, Sept. 13<sup>th</sup> 2001); See also worker's rights pamphlet distributed by Kav Laoved, as Israeli NGO that provides legal aid to migrant workers, at: <http://www.kavlaoved.org.il/word/zchuton060904.html> (last visited June 2005).

<sup>164</sup> Agustin, *supra* note 78, at 110.

Agustin notes that neither calling migrant sex workers victims nor normalizing sex work can overcome migrant sex workers' basic illegal status.<sup>165</sup> Given that a purely abolitionist regime, like the Swedish one, drives sex work underground and renders sex workers, particularly migrant sex workers, more vulnerable, and that the decriminalizing/regulatory regime tends to further exclude migrant sex workers, the Israeli regime seems to be an improvement to both. Migrant sex workers are entitled to limited worker and social rights, the sex industry is partially institutionalized and thus the industry is run 'above-ground' and therefore less dangerous, their chances of being deported are relatively low, and there is an institutional mechanism to aid them in case of exploitation. Although the wide zone of toleration is problematic in that it tolerates high levels of abuse, violence, and exploitation, given that migrant sex workers are a particularly vulnerable group it seems that in a non-trafficking situation, it still might have relative benefits in relation to the implemented paradigmatic feminist regimes in Sweden and the Netherlands.

### VIII. CONCLUSION

Each position within the dichotomized feminist discourse around sex work and trafficking explains the regulative solution it promotes as a direct and inevitable consequence of the particular assumption it holds regarding women's sexual agency, and as the most beneficial regulative solution for all women - sex workers and others. But investigating the complex set of effects of the feminist legal regimes adopted in the Netherlands and Sweden - the 'purest'

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<sup>165</sup> *Id.*, at 112.

implementation of the opposing feminist views to date - proves that the legal regimes promoted are not *necessarily* beneficial for women, and definitely not for *all* women.

The hybrid legal regime that evolved in Israel - unintentionally - presents an occasion to break a way from the dichotomized discourse and explore other forms of possible regulation of sex work and trafficking. Some Israeli feminists criticize it as incoherent, not living up to the promise to protect women from the harms of prostitution. But are women and women sex workers really worse off due to this 'incoherence'? The Israeli regime seems to be able to encompass a supposed contradiction - both acknowledging the violence and inequality embedded in prostitution as it is often practiced today, and at the same time being attentive to the needs of sex workers to be protected as workers, and respected as such. The cost benefit analysis suggests that this hybrid regime, although constructed inadvertently and with little feminist input, might be as beneficial (or more beneficial) to most women than the two pure feminist regimes are.

This is not to say that the Israeli regime is perfect. Far from it - it is highly problematic: it generated uncertainty, tolerates violence, abuse, and exploitation of women, and induces stigmatization of sex work. Yet it also enables moments of humane treatment of prostitutes while not 'buying in' to the liberal discourse of free choice.

Given the inherent vulnerability of all undocumented migrant workers - which are the majority of sex workers in Israel - it seems clear that neither the feminist strategies for the empowerment of sex workers, nor their identification as victims are helpful in preventing the exploitation of migrant sex workers. While the realities of sex work are changing - sex worker migration and trafficking becoming prevalent aspects of the industry - the feminist discourse does not seem to catch up. Replicating the traditional feminist split around women's sexual agency and the ability to consent to prostitution fails to take into account the unique situation of

the 'illegal' migrant, whose identity, practices, and life plans often differ from the one's of the local sex worker. In this volatile situation, it seems important for feminists and policy makers to re-consider their approaches, reevaluate their 'enemies', and reshape their goals to be better equipped to deal with the complex realities of sex work.