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**Regulating Prostitution:
A Comparative Law and Economics Approach***

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DOCUMENTO DE TRABAJO 2007-30

October 2007

* We wish to thank Gianluca Fiorentini, and participants at a Workshop at the University of Bologna for helpful comments and suggestions. All remaining errors are, of course, our own. Fernando Gomez would like to thank the financial support of the Spanish Ministry of Education and Science under grant SEJ2004 –05059/JUR. The three authors would like to thank the financial support of the Spanish Ministry of Education and Science under grant SEJ2005-10041.

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Abstract

Prostitution is a market activity that is now, and has been historically, subject to an extensive, and varied, set of regulations by Law, criminal and other. From an economic perspective, the literature has explored, both theoretically and empirically, the supply and demand decisions in the market for prostitution. In the paper we concentrate instead on the effects on social welfare of the different regulatory alternatives, namely upon the reduction of negative externalities that may arise from prostitution transactions. We look at 4 models of regulating prostitution, currently in use in several countries: prohibition with criminal sanctions on both parties to the transaction; prohibition with sanctions only for the client; full legalization with or without zoning; and a sort of legal limbo, implying that the transaction is not legal, but there are no sanction for the parties involved. We emphasize the differentiated effects of the alternative regulations within such a marked segmented market, due not only to price/quality differentials, but also to the role of intermediaries, the scale of operators, the communication channels, or the contractual safeguards in place. The resulting implications point at a more diversified approach than currently in force in most legal systems with respect to prostitution.

1. Introduction

Prostitution, so far its legal regulation is concerned, has traditionally been studied in a one-dimensional perspective, namely, as a binary choice between two alternatives, to legalize or to prohibit the activity. In this paper we claim that prostitution, in its legal treatment as in other dimensions – leaving the moral issues to a side-, is not a game to be subject to an on/off binary decision. If one prefers, it is not an all black-or-white kind of question, but one in which different shades-of-grey appear. Policy-making, legal rules and thinking on this matter have traditionally presented a global picture on how to deal with prostitution as a social phenomenon. They seem to have failed to notice that prostitution is one term referring to a pretty diverse set of circumstances. We will argue, accordingly, that the specificities of each segment in the fragmented market of prostitution require a separate analysis, and probably also differentiated policy responses to tackle the problems involved in each segment. The typically found uniform scope of the approach to prostitution is likely to be a result of a common liberal conception of legal regulation, based upon the recognition of fundamental rights that require to be uniformly applied to the cases in which those rights are at stake.

According to the particular and prevalent – at least in the western tradition- liberal conception of Law, a rule hardly deserves the name of Law if it does not have a potentially universal scope of application. Or being a little bit more flexible: the more universal the scope of application, the more preferable the legal rule. And, not infrequently, behind a legal rule there is a fundamental right that requires application, detailed delineation, and/or protection. Legal discourse is typically a discourse of rights that clash or conflict, rights which legal thinking and legal decision-making have to adequately balance and, in the end, make substantially prevail the one deserving a higher degree of protection.

This seems to be the case when dealing with the legal treatment of prostitution. Either it is the prostitute's right to freedom, his or her right to enter the job market and freely exercise a chosen job, but also the right to physical integrity, and the right to personal dignity. It may also be a question of the client's right to privacy. Given that fundamental rights have universal character by their very nature, one would then think that the legal rules dealing with their application should also have a universal scope, once one has found the "correct" or desirable way to deal with, or to adequately ensure, the level of protection of the fundamental rights at stake in a given set of social circumstances. Therefore, if we hypothetically take, *e.g.*, the fundamental right of prostitutes to dignity or to physical/psychological health as the fundamental interest involved, and thus providing the leading and governing principle behind the legal rules implementing state regulation of prostitution, the *a priori* proper legal way to

undertake the search for policy responses would be: which is “the best way” to preserve that right? Once legal reasoning has found an answer to such a question, almost axiomatically this kind of approach would suggest that the chosen policy measure is “the best way”, THE way, to uniformly implement the right that carries more weight among the fundamental ones at stake.

Underneath this uniform strategy to legal policy lies the equality principle, which looms large in legal reasoning, and plays a very prominent role here as elsewhere in the Law. The Law should treat every individual equally in order to fulfil the goal of fair and just treatment. This implies, at least *prima facie*, that the lower the differentials in treatment of the same right at stake, the lower the degree of discrimination between rightholders, and the closer we find ourselves from the legal aspiration of justice. This way of looking at a social issue –to be fair, one heavily charged with connotations of moral judgement and social mores- such as prostitution, has led to legal policies that tend to disregard the important differences to be found in the different manifestations of prostitution, as the term is commonly applied in contemporary western countries and legal systems¹. This uniformity in approach does not mean that the policies imposed have not, and do not, continue to vary widely across time and space. But that at a given time, in a given legal system, the legal policy towards prostitution appears to apply uniformly to all transactions falling into a single legal definition of what amounts to prostitution.

When the economic perspective comes into play, differences seem to appear that, we think, deserve differentiated analysis and response. As an economic activity giving rise to consequences of diverse nature, but capable of being analysed using the toolkit of economic reasoning, uniformity of regulation of prostitution starts to look less appealing as a policy strategy. Even at a very simple level, the idea behind this sceptical approach towards a unified policy response seems straightforward. Prostitution is not an economic term, but a moral or legal one. Or, if one prefers, there is not ONE single prostitution market, as there is not a unique type of prostitution as economic activity. Therefore, in search of a desirable legal policy in terms of the resulting social welfare consequences, one should take into account the market differentials on several dimensions: Price and quality, for sure, but also scale of operation,

¹ In this paper, we essentially restrict ourselves to the legal regulation of prostitution in western legal systems. With this self-imposed restriction we do not intend to imply that the analysis in other legal environments is devoid of interest, quite the contrary. It is simply that probably the diversity in moral criteria and social mores on these matters –already large within western systems- is too important to allow an intrinsically abstract analysis as the one we undertake in the paper. Also, we want to point out that we have decided to leave aside “sex tourism”, even acknowledging that it is closely related to prostitution, given that we believe that the policies we will discuss in this paper –essentially “domestic” legal responses- will probably have little or no impact upon that other issue.

presence or absence of intermediaries, externalities caused by the activity, and so on. From this perspective, thus, there doesn't seem to be a single policy answer which could be optimal for all the different prostitution markets, but plausibly there may be as many desirable policies as market segments themselves. In fact, one would think that the more adapted the policy response – including no response at all- to the features of each sub-market, the better the set of policies would be for overall social welfare.

Another very relevant aspect has to do with the intrinsic informational problems associated with the prostitution market. The type of policy chosen to deal with prostitution significantly affects the amount, the quality, and the modes of transmission of the information which may flow and be relevant within that market. For example, it is easy to understand that a policy of strict prohibition would have a negative impact on the exchanged information between prostitutes and potential clients.

On the one hand, if they spread information, this may alert the police, and thus one or the other, or both, may end up being arrested and convicted. Furthermore, the information cannot be directly focused to the target, because in system of strict of prohibition, clients remain also hidden. Thus, a high amount of information is lost despite the high communication efforts investment made by prostitutes and their employers (through very different channels: internet, newspaper advertisements, supposedly sexy or attractive dress in the case of the street walkers, etc.).

On the other hand, this lack of information reduces market competition. In any market, a basic tool for competition lies in the process of transmitting to potential customers all the relevant information on the relevant features and conditions of the good or service. Therefore, the lower the competition in the market, the lower, in turn, the opportunities for the client to choose in an informed manner and, correspondingly, the lower the expected quality of the service and matching of the quality to the preferences of the consumer.

Asymmetric information between sellers and buyers of sex is one of the main characteristics of the prostitution market. Initially, only one side of the transaction, the prostitute, knows the quality of the service. Prohibition seems to deepen this market failure, and legalization seems to contribute to its correction, as long as it allows more transparent and less costly modes of reducing informational asymmetries.

Legalization, for instance, may also lead also to better information resources for the police. For instance, let us consider a licensing scheme of regulation, in the Dutch style, which allows for periodical control of brothels by

the police. These regular controls are aimed at checking out compliance with the conditions of the license, including the legal status, health conditions, and treatment received by the employees. Thus, the permit and checking system provides the police with valuable information for other socially valuable purposes, *e.g.*, for the detection of trafficking in human beings.

It must be underlined that the available information greatly differs not only due to the different legal policy in force, but also due to the different segment of the market. We identify essentially four sub-markets within the prostitution market: escort services, brothels, house prostitution, and street prostitution. Specific attention devoted to the separate informational problems, and the use of diverse information channels, within each different sub-market in prostitution, constitutes one of the distinguishing features of our paper with respect to previous analyses of prostitution and its legal regulation.

In fact, in contrast with existing treatment of prostitution, even those with an economic bent, we explicitly consider the different sub-markets, and explicitly discuss the likely effects in each of them of the various legal policies that legal systems actually use to deal with prostitution. Not surprisingly, our main conclusion is that no single policy can equally perform well in the different sub-markets, and that the desirable overall policy should be based on an efficiency-inspired mix of some of those policy responses.

The paper will be organized as follows: In section 2, we offer a working definition of prostitution, and present the legal view –whether the prostitution contract should be enforceable or not- and the economic view –prostitution as a potential source of externalities to the parties involved. In section 3 we will review the international experience in regulating prostitution using the different policy options available, that lie between the two extremes of full criminalization, and full legalization, with prostitutes considered as service-providers –albeit of a particular type of service, namely, sex. In section 4 we will examine how to better deal with the relevant externalities, but not to elucidate *in general terms* whether or not to outlaw prostitution, whether or not to regulate the market as a whole, but to determine when, how, and how much, to do or not to do, using legal instruments, *in each particular segment* of such a fragmented market as prostitution is. We will briefly conclude in section 5.

2. The notion of prostitution

Before proceeding further, we need to present at least a working definition of prostitution, and to this task we devoted this second section of our study. We will consider prostitution both from a legal perspective, as a potentially valid contract to exchange sex for money between consenting adults; and from an economic perspective, configuring prostitution as a market interaction which may pose problems of externalities which can be reduced by public sector intervention, one way or another: prohibiting, regulating, or observing a hands-off attitude.

2.1. *The legal approach: prostitution as a contract*

We conceive prostitution as a contract to have sex for money, resulting from an agreement arranged between two consenting adults: the seller of the sexual services, *i.e.* the prostitute, most frequently a female²; and the buyer, nearly always a male. For some feminist positions, this definition of prostitution would not be complete without adding the element of promiscuity, in order to distinguish two markets in which sex is exchanged for money –broadly understood: the prostitution market and the marriage market³. In fact, some economic analysis of prostitution focus on the supply decision by women, who have to choose between both markets to earn –at least to some extent- a living. In any case, we assume –and plausibly so, we think- that whatever the historical affinities between both markets (undoubtedly marriage has been an important mean of earning a living life for women, historically and still so in many countries in the world) and their conceptual closeness for some perspectives, the distinction between prostitution and marriage can be taken currently for granted in the majority of modern societies.

Some comments should be made clear in relation to this definition, namely:

- **First** of all, the validity and enforceability of the contract, as in any other contract, require the voluntary consent of both parties. Here, as elsewhere, one cannot speak of a contract if it is not based upon the consent of the parties

² However, male prostitution is currently increasing. In Spain, for example, 12% of prostitutes are already males (according to the data provided by Antonia García Valls, Deputy of the Spanish Parliament, and Member of the Parliamentary Commission on Women's Rights and Equality of Opportunity, during her intervention in the III International Conference on Local Police, Valencia, June 2005.

³ As noted by Edlund and Korn (2002), it is obvious that promiscuity itself does not turn a person into a prostitute, but it is a relevant feature to distinguish prostitution from marriage.

thereto⁴. We assume prostitutes voluntarily swap sex for money. Thus, we leave apart those cases when the prostitute is somehow compelled or forced to carry out a sexual service. We include among the category of involuntary exchanges the cases of child prostitution, trafficking in women, forced prostitution, and any other form of violence or coercion⁵. We also assume, for prostitution to hypothetically qualify as a contract, that the prostitute, on the basis of general principles of contractual freedom, must also enjoy the right to accept or reject any given contract partner or client. In any way, he or she, as any person or firm in a commercial setting, should have the opportunity to say “no” if, for instance, the potential client does not seem reliable.

However, before assuming that prostitutes voluntarily agree to enter the prostitution market, we must consider whether they have, in fact, alternative opportunities. In other words, the link between poverty and prostitution, and its consequences. This relationship, although by all means present to some extent, does not seem to be presently ubiquitous and absolutely prevalent in developed countries. At least, it does not appear to be relevant in all types of prostitution, and definitely not in the higher segment of the market, as we will argue. Even in the case of street prostitutes –arguably, the segment in which working conditions are harsher, and thus represents the lower segment from the supply side-, who often are immigrants⁶ escaping away from poverty, it would not be accurate to assume they are universally and systematically enslaved or forced into prostitution. Prostitution is not an attractive, pleasant, or rewarding occupation. It is a low-skilled and unpleasant job, but a well-paid one. Girls and boys from Latin America, Asia, Africa and Eastern Europe may –rationally- decide to migrate to Western and Northern Europe, the US and other developed and richer countries, attracted by the potential earnings offered by prostitution compared with other low skilled occupations.

Of course, we should not disregard the constraints that they face when they make the choice of enter prostitution: unemployment, lack of education, sometimes drug addiction, etc. Furthermore, they make a choice between prostitution and other low-skilled –and comparatively badly-paid- alternatives of employment. Of course, these circumstances do influence their freedom of choice, as long as they reduce alternative choices and the ability to assess them. But do those constraints invalidate by themselves the voluntary nature of the exchange? Our position is that we must not mistake scarcity of opportunities

⁴ It is a different claim to assert that contracts require consent of the parties than to embrace a theory of contract which grounds legal enforceability of contracts solely or essentially on the expression of the will of the parties. In fact, we do not share the latter view. On these issues, see Buckley (2005).

⁵ See Trebilcock (1993).

⁶ “For example, of the 500,000 prostitutes estimated to operate in Western Europe, around 250,000 are estimated to be immigrants”, *see* Moffat (2005): 195, about the increasing relationship between migration and prostitution in recent years.

with true coercion. Otherwise, we would be implying that all people employed in hard and unpleasant activities are contracting under duress.

Although prostitution, thus, can be seen as a voluntary interaction even in the lower layers of the prostitution market, it is widely known that organized criminal gangs operate in the prostitution market. There seem to be evidence showing the proliferation of organized criminal groups –mafia, for short-intended to “import” men and women for prostitution from less developed countries⁷. Let us leave now apart the cases in which people are tricked from the beginning. Sometimes, they are recruited, in theory, to work legally e.g. in a factory or some place of the sort, but in reality their true destination is prostitution. In contrast, some empirical evidence suggests that a substantial number of immigrants employed in prostitution come to developed countries with the goal –initially, at least- to work in the prostitution market⁸. They are running away from poverty and expect to make money quickly in a low-skilled and well-paid industry. Fraud typically appears later, when they are demanded to refund an unaffordable debt, allegedly the cost of the trip. Therefore, the link with the mafia cannot be easily severed, and they become trapped in prostitution, maybe for years, without receiving the expected amount of earnings. However, notwithstanding *ex-post* fraud –that we do not condone, of course, and that should be deterred-, the point is that they voluntarily agree to enter the prostitution market initially.

This kind of exploitation, again, differs widely from segment to segment within the prostitution market. We will analyse the extent in which exploitation by criminal organizations is present in each type of prostitution, and also the diverse incidence of poverty and necessity as constraints in the decision to join prostitution in each market segment.

- **Second**, for the purpose of this paper, homosexual and heterosexual prostitution services offered by men are included in the analysis, in contrast with other studies on the subject. Certainly, females vastly outnumber males as sellers of sexual services but, as we already noted, empirical evidence suggests that male prostitution is experiencing an increasing path, mostly oriented to male customers (female clients seem to be practically non-existent)⁹. This may be

⁷ International Labour Organization (2005): Global Report 2005: “A Global Alliance against Forced Labour”.

⁸ “They know exactly what they come to”, as Garcia Valls clearly stated, referring to the Spanish situation, in the III International Conference on Local Police, *cit.*

⁹ Male prostitution is scarce and almost exclusively targeted to men. According with the estimated calculations by some Spanish NGO’s devoted to defending the rights of prostitutes, around 95% of male prostitution focuses on homosexual demand. Women are commonly considered as not being customers of prostitution (See Posner (1992)). It is very hard to find out reliable empirical data about prostitution, but it is impossible to find any figure or even any comment related to women as clients of

seen in contrast to Edlund and Korn's assumption¹⁰ according to which the price of sexual services is mainly determined by the lost opportunities in marriage market associated with prostitution activities. We adopt the vision of sex as an economic resource, not exclusively but most of the times, a female resource. This resource reaches a market price due to a wide range of variables, not a single one. In fact, we doubt that the unique, or even the most relevant factor explaining equilibria in the prostitution market, is the opportunity cost in terms of lost marriage chances. The entry of male suppliers would contradict as well the feminist view of prostitution as another expression of the secular female subjugation to men¹¹. In our view, this is an outmoded and biased approach to prostitution in developed societies, and moreover, one that does not allow to capture the full picture of the relevant issues.

- **Finally**, the contracting parties, prostitute and client, are not the only players in the transaction. The presence of third party intermediaries in this voluntary transaction has been, and still is, widespread. Pimps or madams are some of the traditional names for such parties. They invest resources in, and profit from, facilitating prostitution. Thus, they reduce transaction costs, broadly understood, that is, not only the costs of bringing parties to the agreement, but also the expected costs of the transaction itself, *e.g.*, reducing the risk of violence by the client towards the prostitute, or the risk or robbery to the client by the prostitute or an associate. They may also contribute to reduce another important source of transaction costs, namely information costs, both through direct transmission of relevant information, and through contract safeguards of quality and other relevant contractual variables. We will explain this function in more detail with respect to the various market segments, given that those functions are performed by different parties, and differently, in each of them.

Pimping is legal in some countries and illegal in others, depending on its consideration as pure intermediation, or as an activity of abuse or exploitation of others. Again, we will include the presence of pimping in our definition of prostitution as a voluntary transaction between (or among) adults if, and only if, it does not involve abuse, *i.e.*, when pimping does not imply any kind of

prostitution services. We only found studies about sexual tourism by women. However, specialists point out that even these women can hardly be regarded as demanders of prostitution *strictu sensu*, because they seem to be also moved by emotional concerns: they usually look for a crush, not mere sexual intercourse. Finally, there seems to be a small demand of prostitution services for heterosexual couples, thus we find there some women as clients of prostitution services.

¹⁰ See Edlund and Korn (2002).

¹¹ "That is, with property being concentrated in male hands often to the extent that wives are legally treated as the property of the husband, women are forced to sell their sexuality in order to obtain support" Moffat (2002): 184. This position takes us to the view of marriage as a primary market for sex, and prostitution would be the secondary market (*see* pp. 184-185).

violence or fraud against prostitutes, but it is a mere intermediation or brokerage activity.

It is difficult to quantify the volume of pimping in the prostitution business. Feminist associations point that 80 to 95% of all forms of prostitution are controlled by pimps. In contrast, other organizations state that these figures are widely overestimated (Plamondon, 2002: 10). The point is that there are various types of pimps acting as agents in the prostitution market, whose relevance we cannot ignore: the pimp of a street walker, the owner of a modest brothel, or the sex business magnate. As we will study in more detail later, the *modus operandi*, the social consideration and, of course, the profitability will obviously depend upon the segment of the market in which they operate.

2.2. *The economic view: Prostitution as a source of negative externalities*

As may seem obvious to many –but not all- we think that a Law & Economics analysis of prostitution should not include moral considerations¹² on prostitution as such, that is, as the exchange of sex for money. What consenting adults do privately, in this, as in other matters, is their own business, and, as such, we believe it should not be considered as affecting the welfare of others. Thus, the obvious question which arises is: assuming this starting point, why should we ask ourselves whether we should prohibit or regulate prostitution? Why legal systems have historically, and continue to do so, heavily regulate what appears to be a voluntary interaction among consenting adults? One possible answer is that legal systems do take morality –or at least dominant social conceptions of it, seriously, and try to help its enforcement with the use of legal rules.

We think the most promising avenue to adequately frame the policy and legal response is the idea of reducing negative externalities arising from what can be regarded, *prima facie*, as a voluntary transaction. Our claim is made from a normative point of view, not from the positive perspective of explaining why legal systems have regulated prostitution the way they have. We believe prostitution deserves some thinking in terms of whether and how to legally regulate it, the reason lying in the fact that it is a potential source of negative externalities. The prostitution market, if left entirely unregulated, may generate negative externalities, which should be internalized in order to induce socially efficiency levels of prostitution. We essentially refer to the following externalities: (i) Health effects, basically the spread of HIV/AIDS and other

¹² We share the basic tenet that moral judgements as such should not be the basis of legally enforced rules, and that these rules should be chosen and enforced on other grounds. For different versions and foundations of the same basic stance, see Posner (2002); Kaplow and Shavell (2004). A critique of this view –specially of the Posnerian version- in Dworkin (2006).

STDs; (ii) public disorder, not only referred to public scandal or outrage related to the exhibition of prostitutes marketing their services in the street, but specially to the crimes often associated to prostitution, usually exercised against prostitutes themselves by their clients and others: assault, robbery, rape, and other expressions of abuse and violence; (iii) the potential (and actual) loss of housing value in the areas where prostitution rises; (iv) trafficking in human beings, under age prostitution and, in sum, the rise of black markets involving criminal actions and managed by criminal gangs that promote or surround prostitution. These groups can engage in the above mentioned criminal activities, and moreover they can take advantage from the illegality of the activity as such, independently of the criminal actions individually committed: As long as the activity is hidden, they may get an implicit subsidy, because they do not pay taxes, social security contributions, health insurance for their employees, etc.

We do not include in the analysis the so-called “moral externalities”, *i.e.* the burdens supposedly imposed on others, and eventually on society at large, as a consequence of a behaviour that is considered immoral *per se* by conventional –or other kinds of- morality. As we noted above, we assume a right of self-ownership. What an un-coerced adult does with his/her own body, alone or in company, is his/her own business. And this serves both for the prostitute and for the client. Thus, in the absence of harm, actual or potential, inflicted to third parties, there is no external effect to be internalized by public intervention in that private action¹³.

We think that the notion of “moral externality” is so broad, and so vague, that under it every transaction may potentially impose a cost on a third party, because we would be assuming as –negative- externalities the costs associated to the fact that people have divergent preferences. It seems not to make sense to carry out a cost-benefit analysis which compares, on one side, the increase in prostitutes’ utility derived from the occupation in –immoral- activities, and in the client’s utility, and on the other side, the social cost of their immorality, supposedly imposed to the people who feel offended by their immoral behaviour¹⁴.

¹³ As Stuart Mill stated in his classical Essay on Liberty: “*The sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection*”, See Mill (1859) ch. 1.9.

¹⁴ “*There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings [...] But there is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse and the desire of the right owner to keep it*”, Cf. Mill (1859), Ch. 6.12. See also, very recently, Adler and Posner (2006), Ch. 2, arguing in favour of leaving other-regarding preferences entirely out of social judgements of a cost-benefit nature.

The inclusion of moral externalities in the picture, far from clarifying the debate on the effects of prostitution, would lead to obscure it, probably without remedy. As Trebilcock (1993: 75) has argued, it is more helpful, if we want to, to frame the problem as a matter of rights and autonomy, rather than as a question of morality.

We cannot end the description of the spill-over effects of prostitution without a mention to the old tolerant position of prostitution, based essentially on some alleged external benefits generated by the practice of prostitution. Though the Church stated clearly that prostitution was morally wrong, it was nonetheless seen as a lesser evil¹⁵. The availability of prostitution protected the integrity of families, and the virtue of decent women from the sexual eagerness of males.

How real and important these alleged externalities are, and how to deal with them? From the morally conservative side, and from feminist positions, it is claimed that prostitution generates such negative effects that prohibition is – even morally- required. This is the argument used to support the prohibition of other markets, such as drugs. *Per contra*, in favour of non-criminalization, from the starting point of the idea of respect to individual freedom and autonomy of the parties involved, one could advocate toleration on analogous terms as awarded to other personal services industries.

We think the externality approach is the more fruitful to cogently and neutrally analyze the regulation of behaviours and markets as contentious as those regarding prostitution. Yet the perspective based on how to deal best with each relevant externality cannot tell us how to elucidate *in general terms* whether or not to outlaw prostitution, whether or not to regulate or to prohibit the entire market as a whole. More modestly, it can help us to think in terms of the more adaptive policy response for the characteristics of the various segments in the prostitution market.

¹⁵ A necessary evil as long as it can prevent major ones, such as rape, sodomy, or masturbation. Indeed, though the Church did not hesitate to denounce prostitution as morally wrong and reprehensible, several of its major figures seem to have adopted a lesser evil theory of prostitution: Saint Augustine explained that "*If you expel prostitution from society, you will unsettle everything on account of lust*". Thomas Aquinas also referred to prostitution in terms of tolerance as a minor evil. The majority of Aquinas's references to prostitution occur in the second part of the *Summa Theologiae*.

3. The international experience: five models of regulating prostitution

During the second half of the 20th century, governments in developed societies have faced increasing social demands of regulation of an activity traditionally hidden or criminalised. The advances in civil rights for women, and gender equality (at least legally), together with the improvement in contraception methods, meant a change in sexual patterns, which obviously had an impact on the social consideration and attitudes in contemporary developed societies towards a related phenomenon, such as prostitution.

Emancipation of women also meant sexual emancipation, and this definitely had an impact on social views about prostitution. Women ceased to be seen essentially as daughters and wives, to be considered as independent individuals. This transcended beyond the frontiers of marriage, implying the recognition of women's full ownership of their body and sexuality. Hence, women started to be viewed as free to decide what to do with their body, including prostitution¹⁶.

From some feminist positions, prostitutes were considered as social workers, deserving the same social rights and protection as the rest of service suppliers. Therefore, during the 1980's and 1990's the trend was against criminalisation and in favour of full legalization.

In contrast, nowadays the tendency seems to have moved quite dramatically towards abolitionism. This trend, to some extent, follows the path marked by Sweden, and it is based on new feminist ideas on the issue, which conceive prostitution as an inherent form of gender exploitation. In general, abolitionist proposals argue that prostitutes should not be legally defined as criminals, and the State and society should adopt serious measures to help prostitutes to give up their occupation. Prostitution cannot be seen as a freely chosen occupation: it is always a form of gender violence. Prostitution itself has to be eliminated through legal prohibitions because it constitutes an affront to women's dignity and it is then irrelevant whether prostitutes apparently consent to perform prostitution services or not. Therefore, prostitutes are always victims to be protected, and protection is admissible in a single way: by abolishing prostitution and sanctioning those who make it possible, namely those organizing supply, and those demanding prostitution services.

Prohibitionism can also try to defend under the umbrella of accepted paternalism, such as the one observed in other areas of forbidden private transactions, such as the sale of human organs. The point would be that, as in the

¹⁶ As we argued before, a different matter is whether the social and economic conditions allow, *de facto*, a relatively free decision to enter the prostitution market. That is a different issue.

case of trafficking in human parts, both the prostitute and the client underestimate the health risks associated to this practise¹⁷.

Another argument for prohibition advanced from feminist positions has to do with the commodification of sexuality, which in turn would lead to a deterioration of its intrinsic value –and men's valuation of women's sexuality-, as long as it has a price and it is exchanged in the market¹⁸. Leaving apart that this pretended feminist argument does consider female sexuality as male property, both in the market and in the private sphere, if this was true, the amount of divorces would be substantially less in countries where prostitution is forbidden, such Sweden. However, data don't confirm this thesis, the rates of divorces for 2004¹⁹ show a higher ratio of divorce for Sweeden (2,2²⁰) than for the Netherlands (1,9) where prostitution is substantially allowed, or Spain (1,4) where legal limbo is the current regime.

In between legalization and prohibition, we can find a range of possibilities which have been implemented in practise, producing diverse results²¹. We identify essentially 5 models of regulating prostitution, currently in use in several countries. In reality, the actual implementation of these five models may bring their actual outcomes closer than they appear in theory, due to the high levels of tolerance and low levels of enforcement in the prohibitionist models; however, this does not invalidate their theoretical differences and, we believe, the main conclusions of our analyses of them.

Some legal systems decidedly opt for prohibiting prostitution. Two main ways of implementation have been used:

A) Prohibition with criminal sanctions on all the parties to the transaction, i.e., prostitutes, clients and also pimps (most US States, Japan; in some countries such as Iran, the exercise of prostitution is not only illegal but punishable by death). Criminal sanctions are the main defining feature of this model, based on the idea of the immorality of prostitution. Not surprisingly, this regulatory model is advocated by moral conservatives of different creeds. The starting

¹⁷ Nevertheless, the health risks associated to prostitution are clearly less than the ones related to the traffic of human organs. Secondly, we observe that the prostitution markets prices health risks, at least to some degree, as can be observed in the different prices for sex with or without condom. This suggests that people do not disregard too much the risks from sexual activity. See Shah and Gertler (2007) for an interesting study of these price differentials using data from Ecuador. Finally, if we assumed health risk underestimating, then the appropriate solution would probably be enhanced information or education, and not necessarily prohibition.

¹⁸ See Anderson (1993) and also Radin (1993 and 1996).

¹⁹ Source of the data, OECD Social Statistics, 2004.

²⁰ The ratio indicates the number of divorces per 1.000 per inhabitants/population for year).

²¹ See Ramseyer (1991); Rao, Gupta, Lokshin, and Jana (2001); Cameron and Collins (2003); Moffatt and Peters (2004); Della Giusta, Tommaso, Shima, and Strom (2006).

point seems to be moral outrage at the practice: as long as morality is compromised when a society allows prostitution, it has to be forbidden. In consequence, the ones who openly engage in immoral behaviour have to be sanctioned. Thus pimps, clients, and prostitutes should be sanctioned as criminals to adequately deter their offensive conduct.

In accordance with this view, the prostitute is deemed a criminal, not a victim of prostitution. Consequently, his or her conduct must be punished or, at least, re-educated by forced periods in a re-education institution.

Prohibition is aimed at deterring both the demand and the supply of prostitution, as a result of the potential sanctions, and the probability of police apprehension and effective prosecution. As a consequence, the number of transactions is expected to diminish, to a variable extent, depending on the expected sanction, and the elasticity of demand and supply with respect to it, compared with a situation without prohibition.

However, prohibiting prostitution does not mean that it disappears, but that it may, to a lower or greater extent, simply hide. The activity keeps going in an informal market for prostitution. Empirical studies (Brewer et al 1997) in the US, where prostitution is forbidden everywhere except in Nevada, claim that the size of the prostitution market is as high as 0.5% of total population.

Furthermore, prohibition often gives advantage to the criminal gangs, and weakens the position of both clients and prostitutes, often seriously endangered. Thus, in such an illegal market, as long as prostitution is considered a crime, prostitutes face increased costs of obtaining effective protection of the Law if they are abused. They are aware of the fact that they will be arrested if they go to the police. Hence, pimps, mafias, and even clients may be more inclined to engage in various kinds of abusive behaviour against the prostitutes.

Prohibition may also imply that the information exchanged in the market worsens, as intermediaries and market agents themselves face increasing obstacles in the transmission of information, obstacles which negatively influence both the amount and the reliability of information.

B) Prohibition with sanctions only for the client, and eventually the pimp (the Swedish or “emancipatory” model or abolitionist movement²²). This approach seeks to dismantle the sex industry based on the idea that prostitutes are victims of gender violence, thus the measures should be applied essentially on the demand side. It is the buyer of sex who should be punished, not the prostitute.

²² In 1998, prostitution was prohibited in Sweden, by the Violence against Women Government Act, which criminalized the purchase of sex by male customers.

Sanctions on the supply side are ancillary to this goal: Intermediaries are not seen as entrepreneurs or information providers, but as co-operators in female exploitation, and thus punished as well.

Consequently, the main expected effect of abolition is the reduction of the demand of prostitution as a consequence of the prosecution and punishment of clients. A priori, one can think that this scheme can also lead to the rise of the informal market, with all the above mentioned side effects associated with black markets. Besides, the expected sanction increases the cost of the interaction for the clients, who will attempt to transfer it to the prostitute by lowering the prices they are willing to pay for the service.

However, the effectiveness of this policy in reducing observed levels of prostitution has been shown, or at least reported, to be relatively high. In Sweden, where clients are sanctioned with fines from 1000 to 2000 dollars, and/or jail sentences up to 6 months, prostitution has declined substantially since the abolishing legislation entered into force. In this regard, it is claimed that the number of street prostitutes has dropped dramatically, as much as 70% in some areas, and even areas which formerly experienced significant urban degradation due to prostitution are now being reported to have become cool areas, full of restaurants²³.

C) Halfway between prohibition and regulation, there are some countries where simply prostitution and/or pimping are not considered as crimes, but are not regulated either. An informal market prevails, where the legal status of prostitution as an activity, and the transactions involved, is unclear. We can say that prostitution stays in a legal limbo, implying that the transaction is not legal, but there are no sanctions for the parties involved (Spain, France, among others).

Theoretically, this hands-off approach could be an effective and cheap way to deter prostitution, if that is what the lawmaker intends, for reasons of the intrinsic immorality of the interaction, or for some other reason. This goal can be attained by exploiting the incentives for opportunistic behaviour by the parties to the transaction.

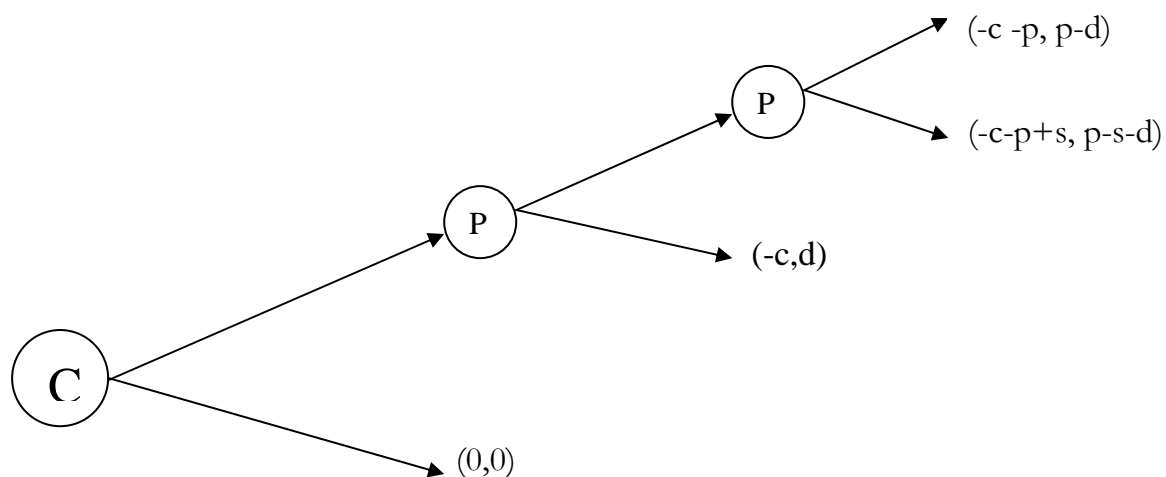
Let us illustrate this statement with a game, in order to clarify how the system would work. In this game, the client can choose between making or not the offer to enter into the immoral transaction. We assume that the immoral conduct is carried on the side of the client, who makes the offer to swap sex for money, but it could be modelled almost identically –just reverting role of offeror

²³ See, Working Group on the Legal Regulation of Sexual Services (2004).

and offeree- if one would prefer to assume the immorality on the side of the prostitute.

If the client makes the offer –entailing a cost c -, the other party, when receiving the offer –which we assume implies a cost d , say in terms of offence to dignity-, can accept or reject it. If the prostitute accepts, she collects the agreed payment, and later, she can decide whether to perform –at a cost s for herself- or refuse to comply with the required service. This is the trick of the hands-off approach. Because the exchange is not deemed to be a legally enforceable contract, the party is not bound to perform, and can opportunistically appropriate the payment from the other side.

The extended version of the game would be as follows:



The immediate conclusion is that, no matter the amount of the offered price, or the cost to the offeror, or the inflicted damage – d - to the offeree, once P receives it, the most convenient option for her is to accept it, collect the money, and later refuse compliance. In this game, P has a dominant strategy, namely non-compliance, because P can retain the price, as long as the agreement is not valid and enforceable²⁴ because of the immorality of the offer. If the client knows this, he will never make the offer in the first place, because if it is accepted he will be worse-off.

Nevertheless, this ingenious mechanism to deter voluntary transactions that the lawmaker sees as undesirable may not work when the interaction

²⁴ We assume under this hands-off approach that alternative –and illegal- forms of enforcement, such as violence or coercion, are not available. If they were, of course, the effects would be, in terms of equilibrium strategies, similar to a setting in which the contract would be legally enforced.

becomes a repeated game, as it is the case of prostitutes, both in brothels, agencies or by they own, because they have a reputation to keep. Then, in such circumstances of repeated interactions, the best option is to appeal to regulation or prohibition.

If $p-s-d > 0$, P would rather prefer to commit to perform the service. In a static interaction, this is not feasible, as we have explained, because P's dominant strategy is to collect the money and later refuse to perform the service. But in a dynamic context, P may probably exploit or benefit from some mechanism to commit and show commitment to other potential transacting party. Let us assume, for instance, that P belongs to a stable organization, e.g. a brothel, where some P's are employed to provide their services. Thus, we can consider the game presented above as simply a single round inside a dynamic game with T periods, where P behaves as a long-term player (P plays in every period, but the clients only play one period). In this setting, a reputation effect leading to the service being performed can arise²⁵. Let us assume a type of P, a prostitute, with weird preferences, in the sense that he/she respects his/her –non legally binding– commitments once receiving the price. The effect of reputation means that, even though the probability to find such a super-honest P tends to zero, and whenever the discount factor is large enough (players are patient enough), P can get the result of a hypothetical perfect commitment of compliance ($p-s-d$ in our example). This is because the existence of the honest P provides to the common Ps (almost all) with the incentives to comply. When P complies, she is sending a signal of honesty to her future clients. In our example, we would also formally need to assume that at least a small group of clients make up their mind to send the offer and pay the price²⁶. Thus, in a more realistic dynamic setting, the hands-off approach is likely not to decrease the level of prostitution and, at the same time, would leave it outside the reach of the regulatory measures that can – at least theoretically- reduce the externalities present in the unfettered version of the prostitution market.

D) We find also a model advocating regulation instead of prohibition, combining legalization with specifically tailored regulatory measures aimed – nominally, at least- at eliminating or curbing the negative effects associated with prostitution. This approach to prostitution is based on the idea that prostitution has to be regulated by public authorities in order to internalize external harms, and this control can only be exercised if the activity is legal. Many of those externalities, or so it is claimed, arise precisely due to be prohibited or ignored nature of the activity by the law. This regulatory mode is expressed through two

²⁵ The effect of reputation in Game Theory was developed by Kreps and Wilson (1982), and Milgrom and Roberts (1982).

²⁶ For a detail on the technical argument which leads to this result, see Fudenberg and Levine (1992).

slightly different models. One could be characterized as full legalization –or nearly so- a version currently prevailing in Germany²⁷.

E) Other systems have opted for legalization coupled with specific regulation, but with a special emphasis on the element of special zoning of the legalised activity. This is the current model in the Netherlands, where commercial sex trade was fully legalized in 2000. In this case, the regulatory policy entails the creation of toleration zones, where prostitution can be exercised legally: the so-called red-light districts²⁸.

Both policies based on the idea of legalizing the activity are aimed at controlling the exercise of the prostitution by means of a combination of labour, health, and social regulatory measures. The prostitution industry is seen as an economic activity and prostitutes as sex workers. Recognizing prostitution as an occupation implies the parallel recognition of a series of legal rights, such as the right/obligation to pay Social Security contributions (which, in turn, implies, among others, access to health coverage, unemployment subsidies and benefits, and pensions); the right to create or to belong to unions; the right to be protected from employment hazards and risks, particularly the effectively protected right to receive police protection in case of abuse while exercising prostitution, etc. Regulation, at least in theory, is intended also to diminish the social stigma associated to prostitution²⁹, as a step to ease the social insertion for prostitutes, in an attempt for eliminating marginality.

4. How to deal with a fragmented prostitution market: Different segments, different solutions

Once we have reviewed the different models to regulate prostitution, we now emphasize the differentiated effects of the alternative modes of regulation in the various segments readily present in the prostitution market. This segmentation is marked, due not only to price/quality differentials, but also to the role of intermediaries, the scale of operators (individuals vs. firms), the communication channels, the contractual safeguards in place and, very importantly, to the different external effects they provoke. In other words, we cannot speak properly of a market for prostitution as if it were essentially a single one. There are different sub-markets, even though they may all be

²⁷ In January 2002, prostitution was fully legalized in Germany, after 5 years of legalization with zoning.

²⁸ For a detailed description of creation and evolution of the red district in Amsterdam, *see* Van Somersen, P. and S. Flight. (2004).

²⁹ In practice, however, legalization could lead to increase the stigma, as the prostitute is registered in the Social Security system as a prostitute, thus her occupation becomes “public”.

captured by a common notion of prostitution, such as the one we advanced in section 2 above.

Actually, we can distinguish at least four different market segments with pretty different features, each one requiring a different legal treatment by their own nature, characteristics and associated problematic:

- Escorts and call girls, what we could define as luxury or high-end prostitution;
- Brothels. Within this category, we include prostitution which takes place in brothels, bars, clubs, massage parlours and others.
- House prostitution, meaning sexual services provided at the prostitutes' homes. Especially related to this kind of services, we have to highlight the important –and increasingly so– role played by the internet as a means to link demand and supply, and facilitating such services, although internet is not the sole communication channel available and currently employed.
- Street prostitution. This is, undoubtedly, in the public perception, but also in the one of the potential clientele, the lowest segment of the prostitution market. Walk-ups are included in this class, not in house prostitution, because the determinant feature is the practise of attracting the client in the street, whatever the location of the actual provision of the service (car, house, hotel, etc.).

As one can intuitively anticipate, the effects of the alternative policies towards prostitution are likely to depend heavily on the particular segment within such a fragmented market. We will start our analysis by considering the distinguishing features of each segment, and how they interact with the features of each of the legal policies. We believe that the best way to design legal policy concerning prostitution is to tailor it segment by segment.

4.1. Escorts, call girls and high-standard prostitution

At the top end along both the price and quality dimensions, we find the escort market. Here, young, pretty, well-educated and highly-paid prostitutes lend a package of services in which the sexual component is significant, probably the most significant of the mix. There are acute differentiating factors with other segments of the prostitution market, both in price –very much higher– and in quality –very much higher, too, measured both in terms of beauty and youth, and also in duration of the service, which seems to be one of the most valued quality parameter by the clients (Moffat and Peters (2004): 686).

Nevertheless, as we have already noted before, differentials refer not only to price and quality. A very important difference for purposes of legal policy,

separating this case from the remaining types of prostitution, is that the level of negative externalities –besides, maybe, purely moral externalities- are virtually non-existent. This activity doesn't seem to have an impact on public disorder, for instance in the form of dirty streets, noise or scandal. A likely negative influence on the price of housing in a given neighbourhood is hardly traceable, if at all. It is also hard to find the kind of regularly accompanying criminality which tends to go hand in hand with marginality, as we have described above. We can also safely assume that high prices cover the –increased- risk for the prostitute of suffering violence, which in discounted form would have been taken into account in the decision by the person who lends the service. Moreover, general Criminal law rules against murder, assault, rape and battery would continue to find application in this market segment. Although it is hard to get reliable data on prostitution, it seems clear to us that this type of prostitution is not precisely the riskiest one.

However, we cannot entirely disregard the risk of contracting and spreading STDs, which is unavoidably present given the nature of the services provided. Nevertheless, this risk is clearly lower than the one presented by the lower-quality market segments. It is likely that the high price paid may induce the client to feel entitled to engage in risky practices. But it is also likely that such a high price charged for services, allows the prostitute, or the firm or agency organizing the service, to take adequate preventive measures and controls. Furthermore, agencies who are long-term players, and whose reputation is at stake, have incentives to encourage (and even to impose upon them) prostitutes to pass periodic health tests, given that the health problems will have direct impact on the quality reputation of the agency.

In this market segment it seems to be common to operate by means of intermediaries, namely escort or contact agencies. This way of operation is due to the high price of the service, demanding a high quality level. Thus, agencies guarantee a sort of quality standard. This helps to correct the asymmetry in information existing in the market, by offering quality signals to the potential clients before contracting, signals that are credible due to the agencies' concern for their reputation. Agencies act, therefore, not as mere communication channels linking demand and supply, but also as information-reduction channels for the clients, as a means of product labelling, and as providers of contractual safeguards against breach, opportunistic behaviour and quality-reduction concerns.

Once the main features of this market segment have been sketched, the following step is to identify the likely effects of the different basic policies: prohibition with sanctions for all or some of the players; formal prohibition but practical toleration; and legalization with its consequent regulation.

We do not find convincing arguments to support prohibition of these prostitution activities. In fact, we see very narrow chances for exploitation or other gender-discriminatory behaviours against those who are engaged in the high-end prostitution market. Apparently, they tend to be well-educated and informed persons, often with well-established careers in other sectors, and they practice prostitution as a side occupation. Certainly, one may identify in recent years a proliferation of immigrant prostitutes also in these upper levels of prostitution³⁰. However, in our view, there is little evidence that these immigrants are being exploited, or forced into top-end prostitution. One could even argue that exploitation and coercion would not be sustainable as strategies on the side of suppliers, given the quality requirements on the side of clients.

Summing up, the nature and conditions of this activity do not lead us to advocate for criminalization of suppliers, buyers, or intermediaries. Indeed, their criminalization would imply all the undesirable effects associated with the rise of black markets. Clients would also be worse-off, because prices would be higher if this kind of prostitution is prohibited.

The option for toleration without explicit legalization in a sort of legal limbo would not pose significant advantages either. This regime may well imply some of the above mentioned effects associated with illegality, plus the additional effects associated with the lack of sanctions, assuming that they deter fraud, violence and other misbehaviours against prostitutes. Pimps may well be the ones taking advantage of the legal limbo. In the informal economy, as we would be under this regime, firms do not pay taxes, which would increase their profits, and would add a distortion into the tax system.

Finally, the option of specifically designed regulation does not seem to be very appealing either. The point is that this type of service does not appear to cause significant negative externalities, as we have already argued. Hence, there are no social welfare losses to be neutralized by rules, controls and regulations.

In conclusion, the appropriate solution for the sub-market of high-class prostitution seems to be full legalization. Legalization will imply that prices would go down in countries where prostitution was previously illegal, with the consequent increase in the market equilibrium quantity. There may still be problems linked to the desire of market participants to evade the eye of the tax collector, a desire that may be helped by the private nature of the transaction. Prostitutes will try to hide their activities, thus escaping taxation. And probably, although the service were fully legal, agencies will hide their true activities under the cover of model agencies or something of the sort, as they do now

³⁰ Traditionally, it was a “domestic market”, in the sense that most of these luxury prostitutes used to be nationals. One could even say this acted as a quality label which increased client demand.

under prohibitive regimes. In sum, we will encounter some of the usual problems of tax avoidance in the services industries, plus the ones derived from the particular characteristics of this market. Legalization would probably not eliminate social reprobation (and family troubles, eventually) to the customer, and social stigma to the sex buyer. But these should not be, as we see them, central concerns of legal policy.

4.2. *Prostitution in brothels*

When prostitution is carried out in brothels, clubs, bars, massage parlours, and so on, the role of the intermediaries becomes extremely important. Brothels reduce transaction costs for both parties: for the prostitute, because inside the brothel she is protected from potentially dangerous clients; and also for the customer, because he can obtain *ex ante* a more accurate estimate of the quality of the service he is going to buy as long as the brothel has some kind of consistent reputation. Thus, brothels perform a role in the market for prostitution similar to that of trade marks in most markets for goods and services³¹: They provide potential clients with a reliable –at least, to some extent- signal of consistent quality, and simultaneously give incentives to the brothel to honour this signal with the necessary investments to keep that level of quality corresponding to the signal. Brothels thus contribute to reduce the asymmetry of information between prostitute and client, and introduce an implicit quality warranty, as long as the brothels are –as they rationally would be expected to be, at least at the local level- interested in living up to their reputation.

The scale of operators, as it is well known, varies widely, ranging from a small and modest road motel to a huge and luxurious brothel, such as the famous Daily Planet, in Melbourne. When they have a certain scale of operation, they can engage in price discrimination. In fact, it seems to be common that brothels charge different prices depending on the prostitute, and also on the time slot.

Concerning the externalities caused by prostitution in brothels, probably the most important one is the risk of human trafficking. We could identify other negative externalities such as the negative impact on housing prices, but this effect, though not trivial, is clearly lower than in the case of street prostitution. Risk of violence and accompanying criminality are highly mitigated when prostitution services are provided in brothels. As regards health and safety hazards, it can be argued that the risk for the client is indeed mitigated, because brothels have a reputation to maintain, which leads it to invest in preventive measures concerning STDs and other health risks. It is true, however, that those risk may be perceived to be remote enough as to not affect local demand, and

³¹ See, W. Landes and R. Posner (2004).

thus incentives to reduce risk would be suboptimal for brothels. Brothels may also have an incentive to care about the health and other hazards affecting their employees, but the intensity of such concerns would heavily depend on the contractual arrangements between brothel and prostitute³², and the –private for the brothel- productivity of investments in health risk reduction.

Given the above mentioned factors, a restrictive legal policy towards prostitution in brothels doesn't seem to bring about relevant gains in terms of the negative side-effects associated with this segment of the prostitution market. An adequate solution for this sub-market may be one based on legalization coupled with some specific regulatory measures tailored to address the remaining negative externalities which may arise in this setting. Consequently, brothels could be subject to opening licences and police controls to avoid exploitation, and to health controls, aimed at curbing the health hazards that the self-interest of the brothel owner would not adequately take care of. A likely effect of legalization will be an increase in the scale of operation of many brothels. In itself, this should not be a source of concern. Quite the opposite, this is a market in which economies of scale can bring efficiency gains to all market participants, and in the end contribute to increase contract surplus.

One possible alternative, in order to reduce even further the risk of exploitation of the prostitutes inside the brothels, could be to include in the specific regulatory regime a rule restricting the available organizational forms of brothels. Specifically, it could be mandatory that brothels are cooperatives, and thus run by the prostitutes themselves. However, this argument assumes that prostitutes know how to run a business, and possess the managerial and other skills to form and operate the brothels as a cooperative, something that probably is not the case in reality. Anyway, if these agreements of cooperatives were more efficient in the provision of the services than the traditional brothels, we would expect them to emerge and develop, regardless of the regulatory requirements.

Depending on the specifics of the local circumstances, zoning may be an interesting addition to the policy mix, particularly when brothels are likely to generate some amount of local negative externalities. And zoning may be particularly innocuous when the area was, prior to legalization, a –more or less tolerated- red light district, or when the designated area is newly planned and built, and there are no surrounding neighbourhoods. One must be attentive, however, at the possibility of some rise in criminality in surrounding areas, if they are densely populated, or residential. Wherever we concentrate prostitutes,

³² See, Ramseyer (1991) for a very detailed and informative account of those arrangements in pre-WWII Japan, a time in which –contrary to the current regime- prostitution was entirely legal in brothels.

there is a chance to awake some of the problems typically associated with zoning: potential congestion of prostitutes, and incentives to avoid zoning requirements in order to better serve the desire of clients to protect their privacy and escape social reproach.

4.3. *House prostitution*

This sub-market is operated by individuals, typically on a kind of small-scale business enterprise, full-time or part-time. There seems to be no significant presence of intermediaries in the average transaction. Hence, the problem of asymmetry of information typically present in the prostitution market is not compensated here through the role of the third-party information provider or pimp, as it happens in the case of brothels. As a consequence, this is a setting of high transaction costs: the prostitute can meet, *e.g.*, a dangerous psycho just at her home door, because of the lack of a safety filter such as that exercised by the doorman at the entrance of a club. On the other side of the relationship, the client does not have any warranty on the quality of the service, as it happens when you buy the services in a brothel, because the latter has a reputation at stake and thus has incentives for quality assurance.

The main recent innovation in this market seems to have been the use of internet as the main communication channel and advertising tool in the last years. Internet mitigates, to some extent, the asymmetry of information, as the prostitute may publish pictorials, which may function, at least, as a basic or rudimentary quality indicator for the client. It allows as well a way to define the prostitute's target market, and the conditions of the transaction. Internet reduces time and cost invested in marketing the service and attracting the potential client.

This allows for the presence of part-timers in this market, which in turn may increase quality, as they are not professional prostitutes (quality in prostitution is not usually measured in terms of experience or even skills; youth, health, and time of service seem to be more relevant dimensions).

Finally, we can point out with Moffat (2005: 226) that the role of internet is positive in terms of abating some externalities derived from other types of prostitution: information on the internet is usually seen only by those who search for it. This implies a benefit for society as long as non-participants in the market are not exposed to it.

The main externalities that house prostitution may generate are essentially of two kinds: health risks for the client, the prostitute, and for society at large, due to further spread of STDs; and the risk of violence and other undesirable hazards for the prostitute. There is, at least in most cases, little room for human

trafficking, and it does not seem to have a significant impact on housing prices of the surrounding areas. We can conclude that these prostitutes are probably less protected than in a brothel against employment hazards –albeit they are also less exposed to coercion and trafficking–, but they work in substantially better conditions than street walkers.

How to deal with this type of prostitution? A policy option seems to clearly dominate the others: Full legalization, given the modest levels of risk of violence and coercion for prostitutes, and the even more modest levels of negative externalities produced in this sub-market. Moreover, the alternatives lack appeal in this setting. On the one hand, regulatory costs would be prohibitive, as it is impossible at the practical level to keep track of every single person announcing in the internet or else: detect and monitor any person swapping sex for money at home. Health risks do not appear to be serious enough to make up for those regulatory costs, even assuming regulation is at all possible in this segment of the prostitution market.

4.4. *Street prostitution*

At the bottom end of the spectrum we find street prostitution. This is widely considered to be the lowest-quality and the cheapest sub-market.

Street prostitutes are exposed to occupational hazards that can be classified between the public and the private manifestations of risks (Sanders (2004): 1705). In public, they use to suffer abuse and violence from clients and pimps, and –under a regime of prohibition– arrest from the police, with possibility of imprisonment, given that it the more visible prostitution sub-market. This, in turn, makes apprehension easier, and social and political pressures on law-enforcement authorities to toughen enforcement harder to resist. In private, they suffer marginalization and stigmatization, much more, and more often, than the rest of prostitutes. Street walkers used to be the poorest, unhealthiest and oldest among the prostitutes, just because this is the segment where prostitution is carried out in the harshest conditions³³.

In terms of market structure, street prostitutes appear to predominantly work as individual providers, competing among one another. They use to operate as sole traders, and their only capital input is commonly their own body. Their own bodies as well, together with their attitude and demeanour are their only marketing weapons (Cameron (2002): 193). There seems to be, however, a non-insignificant level of intervention by third-parties, in this case not as information providers, or contractual safeguards of quality, but as sources of

³³ However, the arrival of immigrants into Western Europe seems to have substantially increased the average quality of street prostitution.

undesirable behaviours. Street prostitutes are more likely than those working at home to have a pimp, although a significant minority do not have one (May *et al.* (2000): 50). In this segment, pimps, when present, tend to take advantage rather than protect the prostitute³⁴. The risk of violence from pimps and dealers is obviously higher for street walkers than it is for those who work indoors³⁵. Opportunities for exploitation are high in this sub-market, mafias proliferate, and the link between poverty and lack of outside opportunities, and street prostitution is easily ascertainable in this segment.

Street prostitution generates a substantial amount of negative external effects: first, health risks, such as STDs –HIV/AIDS and other infections, because the service is usually lent in a car or even on the street, in a setting in which hygienic conditions are entirely absent; in addition, local negative externalities: nocturnal noise, extra traffic, trash –including dangerous waste in terms of public health; unsafe streets due to increasing drug-related crime and street assaults and robberies. All these circumstances imply that the streets where prostitutes are located are seen by the vast majority of the population as unfit for children and families, even during the day, with the consequent reduction in housing prices.

In countries where prostitution is illegal –albeit non-criminal- but nevertheless tolerated, it is common to implement police measures to hide the effects of the local externalities provoked by street prostitution, instead of combating it or legalizing it. One of these tactics consists in “spreading” the negative effects in order to diminish the social conflict associated to prostitution. Police implement traffic controls, and place uniformed patrols near prostitution areas, aimed at discouraging the presence of both prostitutes and clients. This displaces demand and supply to other areas, and from those to others, and so forth routinely. This strategy attains some level of sharing of the social costs of street prostitution, so that the negative impact does not fall upon the same neighbourhood for a long period (Larsen, 1996: 48).

We think there is no clear optimal legal policy with respect to street prostitution. One could cautiously recommend, in general terms, prohibition with sanctions only on the demand side as one alternative to deal with the negative externalities raised by street prostitution. Law-enforcement resources from the prosecution of other types of prostitution would then be freed to be employed instead on police enforcement policies directed against clients and pimps in order to deter street prostitution. As noted before, this model has been

³⁴ As noted before, the harm in pimping lies not in the fact of benefiting materially from sex work, but in manipulating or forcing the prostitute to engage in prostitution, or in exercising violence against her.

³⁵ For a comprehensive study on the role of pimps in walking prostitution, see May *et al.*, 2000.

implemented, apparently with some degree of success, in Sweden –as an overall legal strategy against all kinds of prostitution, however-, and it could be adopted, more narrowly, only for street prostitution. Street prostitutes are likely to become victims of severe cases of human trafficking, violence and abuse. These risks, together with the magnitude of the negative externalities, may give support to a policy of one-sided prohibition with criminal sanctions. It is true that such a policy would be somewhat more complex to implement than the pure Swedish model, thus decreasing somewhat the deterrent effect of sanctions. But the goals would be easier to accomplish, because the social goal would not be the entire eradication of prostitution as an activity, but merely to discourage street prostitution and its negative side-effects, may be channelling a portion – even a significant portion- to other segments of the prostitution market (such as house prostitution or a brothel) where they can carry out their occupation in more decent conditions, and where those effects are mostly absent. It is true that this solution could imply the loss of a fraction of the surplus currently generated in this sub-market, but this decrease in the surplus from the exchange could be compensated with the reduction in the level of the negative externalities.

It is true, nevertheless, that this policy is costly in terms of law-enforcement resources, and the risk of sanctions imposed upon potential clients, together with the remaining usual costs associated with criminal Law.

Both legalization with regulation directed to eliminate the negative externalities (health controls, limits on advertising and public exposure) and legalization with zoning, though plausible alternatives as they may appear, face some important unintended effects. Such regulations would impose costs on the service providers, including pimps, even in the form of taxes and social security contributions. Given the size of those costs, and the small scale of the activity, the likelihood of moving into the informal sector, and thus avoiding regulatory costs, are substantial. In fact, the Dutch case provides a good illustration of how legalization with regulation does not unearth a big chunk of the street prostitution business³⁶. On top of this, zoning may create additional problems, particularly when the location of the area of legalized prostitution is not obvious under the circumstances.

All in all, probably it is hard to make an all-or-nothing choice of legal policy with respect to street prostitution. Both abolition and legalization with regulation have their own shortcomings. Probably, specific local factors may

³⁶ In 2003, three years after the law which regulated prostitution in Netherlands entered into force, aimed at the eradication of clandestine prostitution, only 921 prostitutes were registered as sexual workers, whilst the actual figure was estimated to be close to 30,000. For further detail, see Working Group on the Legal Regulation of Sexual Services (2004).

weigh in favour of one or the other, and it may be sensible to leave substantial discretion to local decision makers on the most appropriate policy.

Prohibition with criminalization of prostitutes is probably not a good deal either. As Cameron (2002: 193) argues, the deterrence effect of fines imposed on prostitutes may be moot, or even counter-productive, because many of them may lack alternative job opportunities and have no assets to pay the fines. Street prostitutes often ask for a moratorium to pay the imposed fine, in order to have time to make some money, but they earn it precisely by providing prostitution services, how else. Besides, implementation costs of police enforcement measures targeted to prostitutes are high, and those resources may be better employed in deterring the behaviour of trafficking mafias, and also the remainder of the accompanying criminality.

5. Concluding remarks

Legal systems across time and space have had specific ways to deal with prostitution, understood as the voluntary –for both sides- exchange of sex for money. Very seldom do we find that prostitution is considered as an ordinary contract, under the general provisions of Contract Law. From an economic perspective, there may be good reasons for this, given that voluntariness of the interaction, and negative externalities arising from the transaction, may well be more serious than in other market transactions.

In economic terms, however, a specific legal policy may be justified, but not necessarily a uniform one for the different sub-markets that are easily ascertainable within the prostitution market. We argue that there are four functionally different segments in such a market: escort services, brothels, house prostitution, and street prostitution. Each of them poses different challenges to the efficient use of the alternative legal policies that Western legal systems currently adopt to address the market for prostitution. Contrary to what is commonly argued, even from an economic perspective, our claim is that a more desirable legal policy towards prostitution can be achieved through a differentiated strategy that adapts the legal response to the features of each sub-market. There is no single best Law and Economics response for the problems posed by prostitution. Escort services and house prostitution can safely be left out of the scope of legal rules towards prostitution, given that most negative effects are likely to be internalized by market forces. Moreover, legal intervention in these sub-markets is likely to be specially costly and futile at the same time. Brothels, we believe, should also be essentially legalized, although some tailored regulations to avoid some remaining externalities may well be advisable. Street prostitution constitutes, with little doubt, the most problematic

sub-market, and the one in which issues of violence and coercion towards prostitutes, and significant negative externalities are likely to arise. We have no clear-cut solution to those problems, albeit we conjecture that, depending on local conditions, a policy of sanctioning concentrated on the demand side of the market and on organizers of street prostitution, or a policy of zoning, will probably furnish the best practicable and socially acceptable legal response to this low-end of the spectrum in the market for prostitution.

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