

Stereotyping Sex Workers: *S v. Jordan and others*

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INTRODUCTION

In 2002, the South African Constitutional Court decided by slim majority that s. 20(1)(A) of the Sexual Offences Act, criminalizing selling sex but not buying sex, was not discriminatory toward women so as to be inconsistent with s. 8(2) of the South African Interim Constitution.¹

In so doing, the majority court both defended and relied on sex, sex-role, and sexual stereotypes of women, men, and sex workers that are inconsistent with Articles 2(f), 5(a), and 6 of the Convention to Eliminate All Forms of Discrimination against Women.² The minority judgment, however, is a rich source of analysis that shows how gender and sexual stereotypes are at play in both the conceptualization and the application of the impugned law, and how those stereotypes result in harmful stigma and discrimination against women and sex workers.

This paper contrasts the arguments based on stereotypes used by the majority court with the arguments based on an understanding of substantive gender equality made by the minority court, using and applying frameworks presented by Peter Glick and Susan Fiske,³ Kwame

¹ *S v. Jordan and Others*, 2002 (6) SA 642.

² Convention on the Elimination of All Forms of Discrimination against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force Sept. 3, 1981 (hereafter CEDAW or Women's Convention)

³ Peter Glick and Susan T. Fiske, "Sexism and other 'isms': Interdependence, Status, and the Ambivalent Content of Stereotypes," in W.B. Swann, Jr., L.A. Gilbert and J. Langlois, eds., *Sexism and Stereotypes in Modern Society: The Gender Science of Janet Taylor Spence* (Washington D.C.: American Psychological Association, 1999), 193-217

Anthony Appiah,⁴ Sophia Moreau,⁵ and Bruce Link and Jo Phelan,⁶ and argues that the provision in question violated the Women’s Convention Articles 2(f), 5(a), and 6. The paper proceeds by first, framing the analysis by briefly describing the methodologies presented by the authors above and the relevant articles of the Women’s Convention. Then, the paper juxtaposes the majority and the minority judgments, highlighting the stereotypes operating in the reasoning of the majority and how they discriminate against and harm women and sex workers by using the methodologies described below and the Women’s Convention. The conclusion argues that criminalizing the actions of customers can target the exploitation of prostitution of women without resorting to harmful stereotypes of sex workers.

FRAMING THE ANALYSIS: METHODOLOGY

This section briefly outlines the methodologies that will be used to analyse the ways in which stereotyping of women and sex workers was used and reinforced by the majority judgment of the South African Constitutional Court in *S v. Jordan*.

Glick and Fiske present a conception of the form of stereotypes as either descriptive, which describe or explain how things are, or prescriptive, which prescribe or impose ideas of how things should be.⁷ They also conceptualize the content of stereotypes as either benevolent (such as “women are caring”) or hostile (such as “women are stupid”).⁸ To this framework

⁴ K. Anthony Appiah, “Stereotypes and the Shaping of Identity” (2000) 88 *California Law Review* 41 at 47-52

⁵ Sophia R. Moreau, “The Wrongs of Unequal Treatment” (2004) 54(3) *University of Toronto Law Journal* 291 at 297-302

⁶ Bruce Link and Jo Phelan, “Stigma and its public health implications,” *The Lancet* 2006 Vol 367: 528-529

⁷ Glick and Fiske, *supra*, at 208

⁸ Glick and Fiske, *supra*, at 206-207

Appiah adds the category of false stereotypes, which “burden people for no good reason” because the content of the stereotype is simply incorrect or untrue.⁹

Moreau presents a framework that shows how stereotypes can be understood as harms. First, stereotypes can harm by failing to accurately describe an individual or group’s characteristics, circumstances, and capacities, and so arbitrarily denies a benefit or imposes a burden on that individual or group.¹⁰ Second, stereotypes publicly define an individual or group by descriptors that have not been chosen by that individual or group, which detrimentally affects their autonomy: “it will limit [their] power to define and direct [their lives] in important ways – to shape [their] own identity and to determine for [themselves] which groups [they] belong to and how these groups are to be characterized in public.”¹¹

Link and Phelan outline the process by which individuals and groups become stigmatized, one of the specific ways that stereotyped groups experience the second harm Moreau describes: 1) human differences are identified and labelled; 2) stereotypes are formed by the association of the labelled person or group with undesirable characteristics; 3) the group doing the stereotyping distances themselves from the stereotyped group; 4) the stereotyped group experiences loss of status and discrimination; and 5) the group doing the stereotyping exercises power over the stereotyped group.¹²

The Convention on the Elimination of All Forms of Discrimination against Women has several articles that are relevant to the case of *S v. Jordan*, none of which were explicitly applied by

⁹ Appiah, *supra*, at P 48

¹⁰ Moreau, *supra*, at 298

¹¹ Moreau, *supra*, at 299

¹² Bruce Link and Jo Phelan, “Stigma and its public health implications,” *The Lancet* 2006 Vol 367: 528-529 at p 528

either the majority or minority. Assuming ratification of the Convention, the Constitutional Court of South Africa should have taken seriously the obligations on the government to take measures to eliminate stereotyping, discrimination, stigmatization, and exploitation of sex workers.

Article 2(f) lists as an obligation of States Parties to the Convention

[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.¹³

Article 5(a) obliges States Parties to take all appropriate measures

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.¹⁴

Article 6 deals specifically with prostitution:

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.¹⁵

Article 6 requires a few words before moving on. The mandate to “suppress all forms of traffic in women and exploitation of prostitution of women” was written at a time when woman-protective language and measures were the best way to get the international human rights community to recognize women’s problems as human rights problems.¹⁶ Provisions like Article 6 were rooted in Victorian and moralistic ideas about sexuality, and concerns about “white

¹³ CEDAW, *supra*, Article 2(f)

¹⁴ CEDAW, *supra*, Article 5(a)

¹⁵ CEDAW, *supra*, Article 6

¹⁶ Dianne Otto, “Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law” in Anne Oxford, ed., *International Law and its Others* (Cambridge University Press, 2006) 318-356

slavery”: European women trafficked for sex work.¹⁷ The commonly held notion was that white women couldn’t consent to sex work, particularly with foreign men.¹⁸ The purpose of the Article was “not to address the problems of exploitation and abuse that women were likely to face in the unregulated sex industry, but to regulate female sexuality in the guise of protecting women.”¹⁹

The provision itself seems to fall into the same trap the rest of the Convention seeks to eradicate, that of stereotypes of women and women’s sexuality. It manages to construct an image of “women as unable to take care of themselves; as helpless victims needing masculine/state supervision” and paternalistic protection.²⁰ Dianne Otto writes, “This provision does not recognize the rights of women, either as victims of forced prostitution or as workers in the sex industry. Instead, it casts all prostitutes as always already needing protection.”²¹

However, on another reading, the provision looks to eliminate traffic in women, which by international standards now refers to the actual buying and selling of humans,²² rather than

¹⁷ Otto, *supra*, at 324-325

¹⁸ Otto, *supra*, at 324-325

¹⁹ Otto, *supra*, at 325

²⁰ Otto, *supra*, at 325

²¹ Dianne Otto, “Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law” in Anne Oxford, ed., *International Law and its Others* (Cambridge University Press, 2006) 318-356 at 341

²² According to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the United Nations Convention against Transnational Organized Crime, trafficking in persons is defined as follows:

“Trafficking in persons” shall mean 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.

Trafficking invariably involves forcible movement of a person from one place to another and forcible utilization of their services with the intention of inducting them into trade for commercial gains. The

human smuggling, which refers to situations in which people are covertly but consensually moved across national and international borders for purposes of illegal migration.²³ Not all sex work can therefore be classified as trafficking, since sex workers sometimes engage in sex work in order to migrate through either illegal or legal means.²⁴ Furthermore, Article 6 seeks to eliminate the *exploitation* of prostitution of women, not to eliminate prostitution entirely. It is possible to interpret the provision as allowing for women to autonomously choose sex work, and also be entitled to freedom from exploitation. One can imagine many ways this interpretation of the provision could become manifest, from decriminalization of prostitution to ensuring that pimping was illegal; allowing sex workers to register with the state to receive specific benefits such as employment insurance, maternity leave, and pensions, to zoning specific municipal areas for sex work; supporting sex workers organizations and co-operatives by providing funding grants for small businesses to offering free and regular reproductive and sexual health services to sex workers. By focusing on the *exploitation*, this reading avoids the construction of sex workers as “always already” victims, and preserves their autonomy while offering protection from unwanted exploitation if needed.

word 'forcible' signifies that the action is against the person's will or that consensus has been obtained by making deceptive claims and false allurements. In some cases, consensus is obtained because of the victim's social conditioning, where the victim is not even aware that s/he is being exploited.

Accessed online December 14, 2008 at <http://www.ungift.org/ungift/en/humantrafficking/index.html>

²³ Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, Article 3(a) defines human smuggling:

‘Smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident

²⁴ Denise Brennan, “Selling Sex for Visas: Sex Tourism as a Stepping-stone to International Migration” in Barbara Ehrenreich & Arlie Russel Hochschild, eds, *Global Women: Nannies, Maids and Sex Workers in the New Economy* (New York: Metropolitan/Owl Books, 2003) 154-168

These frameworks make up the methodology by which this paper will analyse the use of stereotypes in the argument of the majority judgment in *S v. Jordan*. The next section presents that analysis.

***S v. JORDAN*: REINFORCING STEREOTYPES OF WOMEN AND SEX WORKERS**

The majority judgment, written by Ngcobo J, structures its reasoning along four main arguments: 1) the impugned provision is not directly discriminatory because it is gender-neutral; 2) the impugned provision is not indirectly discriminatory because there is a “qualitative difference” between sex workers and their customers; 3) any discrimination that results is not unfair because the purpose of the law is so important, and any stigma that attaches to sex workers is due to social attitudes and not the law itself; and 4) any discrimination in the application of the law does not point to a flaw within the law itself. In the course of making these arguments, Ngcobo J relies on and reinforces several gender stereotypes.

The minority judgment, co-written by O’Regan and Sachs JJ, offers a much more contextual analysis on a substantive understanding of gender equality. Many of the points raised in defence of the impugned provision by the majority court were rebutted by the dissenters. This section of the paper is structured as a call and answer between the two judgments, using and building upon the dissenting judgment by application of the methodology described above to illuminate the flaws in the foundation of the majority judgment.

I. No Direct Discrimination

First, the majority writes that the impugned provision does not directly discriminate against women. Ngcobo J writes, “The section penalises ‘any person’ who engages in sex for reward. The section clearly applies to male prostitutes as well as female prostitutes. The section is therefore gender-neutral.”²⁵

This argument, while technically correct, ignores the reality of the context in which the law is operating and the disproportionate effects on women sex workers. The context of the sex industry is that sex workers are primarily uneducated women of low socio-economic status who have few other options to earn a living. In contrast, consumers of sex work are primarily men of relatively higher socio-economic status who create the demand for sex work. The broader social context is that women are more vulnerable to poverty than are men, are less likely to be well-educated so as to have alternative options to earn money through other means, and are more likely to engage in part-time, low-paying forms of work in the informal employment sector due to care-giving obligations within the family. The impugned law operates within this context, and criminalizes only the behaviour of the less powerful, socially and economically vulnerable and oppressed women sex workers, and not that of the (relatively) more powerful and socio-economically privileged male customers. As the minority judgment acknowledges, “The evidence suggests that many women turn to prostitution because of dire financial need and that they use their earnings to support their families and pay for their children’s food and education.”²⁶

²⁵ *S v. Jordan, supra*, at para 9

²⁶ *S v. Jordan, supra*, at para 68

By paying insufficient attention to the context of inequitable gender relations, the majority court fails to recognize the adverse effects the legislation has on women. When primarily women occupy the position of sex worker in society, and only the behaviour of the sex worker is criminalized when the sex act requires at least two parties, women will disproportionately suffer the consequences of being penalized while their customers will suffer less severe penalties or none at all.

II. No Indirect Discrimination

Second, the majority reasons that the impugned provision does not indirectly discriminate against women. This is so for the majority because there is a “qualitative difference between the prostitute who conducts the business of prostitution and is therefore likely to be a repeat offender, on the one hand, and the customer who seeks the service of a prostitute only on occasion and thus may or may not be a repeat offender.”²⁷ It is therefore perfectly legitimate, the majority argues, to target the merchant and not the customer through the criminal law, and in fact this is a common distinction.²⁸ The majority also points out that the customer is liable at common law as an accomplice, and is even liable to the same punishment as the sex worker under section 18 of the *Riotous Assemblies Act* as a co-conspirator, instigator, inciter, or procurer.²⁹

The majority engages in several unspoken stereotypes of sex workers, women, and men in making this argument, which the minority judgment deconstructs and names. The form of the gender stereotypes of sex workers operating in this argument are descriptive sex and sexual

²⁷ *S v. Jordan, supra*, at para 10

²⁸ *S v. Jordan, supra*, at para 10

²⁹ *S v. Jordan, supra*, at para 11, 13, 14

stereotypes. The content of the descriptive sex stereotypes of sex workers are that they are social outcasts, visible, permanently fallen and sullied women who can never redeem themselves: “her existence [is] tainted by her activity.”³⁰ Furthermore, sex workers are stereotyped as morally inferior because they fully autonomously choose to make a mercenary business of exploiting their bodies, sexuality, and the weaknesses of their clients. The content of the descriptive sexual stereotype of sex workers is that they repeatedly allow their bodies and sexuality to be defiled, and are unclean and unhealthy; and they are temptresses so serious and morally dangerous to the community that they must be criminalized.

These are hostile stereotypes; using Moreau’s framework, they harm women sex workers by publicly defining them according to descriptions that they did not choose for themselves, thereby diminishing their autonomy.³¹ For example, the stereotypes that sex workers are permanently fallen temptresses may limit their ability to enter or end relationships, and secure reproductive and sexual health care services. Furthermore, the stereotype that they are morally inferior may prevent sex workers from securing work in the formal employment sector, and may prevent them from participating in important aspects of their community life, such as religious services. These stereotypes are also false stereotypes that harm women sex workers by failing to accurately describe individual sex workers’ characteristics, circumstances, and capacities, thus arbitrarily denying them access to benefits and imposing burdens upon them.³² For example, as discussed above, women often have little education and have pressing familial obligations, so options for well-remunerated work are few. Women are vulnerable to

³⁰ *S v. Jordan, supra*, at para 64

³¹ Moreau, *supra*, at 299

³² Moreau, *supra*, at 298

poverty, and sometimes engage in sex work for the purposes of migrating to a country where opportunities might be better to provide for themselves and their families.³³ Often sex workers use the money they make to support their families.³⁴ This image of sex workers troubles the stereotype that sex workers are fully autonomous businesswomen who are morally corrupt and dangerous to the community.

These stereotypes of sex workers exist in relation to prescriptive sex, sex-role, and sexual stereotypes of women who are not sex workers. Contrasted with the stereotypes of sex workers is the content of the prescriptive stereotype of chaste, virginal “good” women, who should never expect or accept reward for sex, whose sexuality should be reserved for marriage and procreation and is so valuable it must always be earned and never bought, and who are too moral to trade their precious sexuality for mere money. These stereotypes are benevolent, and can be false. Using Moreau’s framework once again, these stereotypes are harmful to women because they do not accurately describe the circumstances of many women, and they publicly define women according to descriptors they have not chosen for themselves, thus limiting women’s autonomous self-expression and sexual expression.

The two sets of stereotypes, the descriptive stereotypes of sex workers and the prescriptive stereotypes of respectable women, are the classic Madonna/whore dichotomy brought to life. They essentially constructs only two ways for women to express their sexuality – either as the chaste and faithful wife who engages in sex only for procreation, or the prostitute who preys on men’s sexual weaknesses for profit. Interestingly, neither is constructed in a manner that

³³ Brennan, *supra*

³⁴ Brennan, *supra*, at 157-158

allows much room for women's sexual pleasure – it is either a duty or a business. Elsje Bonthuys describes the reaction to a statement made by Spoelstra J when *S v. Jordan* was heard before the South Africa High Court.³⁵ The judge wrote, “[i]n principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera, or any other form of *quid pro quo*.”³⁶ The public reaction to this statement was one of outrage “at the assertion that ‘respectable women’ trade sex for material reward and the even more disturbing implication that married women may be exchanging sex for maintenance by husbands.”³⁷ Bonthuys notes that it is the trading of sex for money that taints the sex worker and makes her unworthy of respect, and “[t]he association of ‘respectable’ female sexuality with monetary reward is also clearly the cause of the outrage.”³⁸

Contrasted with stereotypes of chaste women and of sex workers are those of men who purchase sexual services. The minority judgment is particularly careful in pointing out these stereotypes.³⁹ These are a blend of descriptive and prescriptive stereotypes that take the form of sex and sex-role stereotypes. The content of these stereotypes is that men who consume sexual services are invisible, faceless, only temporarily fallen and may return to respectability.⁴⁰ Moreover, they only “on occasion” commit morally and criminally culpable

³⁵ Elsje Bonthuys, “Women’s Sexuality in the South African Constitutional Court” (2006) 14 *Feminist Legal Studies* 391, 399-403, p 399

³⁶ *S v. Jordan* 2001 (10) BCLR 1055 (T) at 1058 D-E, quoted in Bonthuys, *supra*, at 399

³⁷ Bonthuys, *supra*, at 399

³⁸ Bonthuys, *supra*, at 401

³⁹ *S v. Jordan*, *supra*, at para 64, 65

⁴⁰ *S v. Jordan*, *supra*, at para 64

acts and when they do, it is because they are weak and cannot control their sexual impulses in the face of such strong temptation from the sex workers who offer themselves up: “he has often been regarded either as having given in to temptation or as having done the sort of thing that men do.”⁴¹ Lastly, these men are constructed as naturally so virile and their sexuality is so uncontrollable that they are too much for one (respectable) woman and must spread their sex around in a way that is to be expected and excused: “[t]hus, a man visiting a prostitute is not considered by many to have acted in a morally reprehensible fashion.”⁴² Overall, “he is at best virile, at worst weak.”⁴³

Masculinity is so tightly woven with virile sexuality that these stereotypes are both prescriptive in that they tell men how to be men, and descriptive in that they describe how men are. These stereotypes cannot be called benevolent; they could be seen as hostile, and most certainly as false. These stereotypes are false in that sexual impulses can be controlled, and men are not too weak to control themselves. The picture of the man as the ever-aroused and virile sex machine is not true of all men, either. These stereotypes are harmful, following Moreau’s framework, because they do not accurately describe men’s characteristics, circumstances, and capacities, and furthermore, they publicly define men by descriptors not chosen by all men.⁴⁴ Men’s autonomy for sexual self-expression, and other forms of masculine expression, is diminished by these stereotypes. Moreover, these stereotypes are harmful to women as well, since they work to excuse aggressive and even violent sexual behaviour as natural virility, which can harm women’s relationships with men in a multitude of ways. The minority makes

⁴¹ *S v. Jordan, supra*, at para 64

⁴² *S v. Jordan, supra*, at para 64

⁴³ *S v. Jordan, supra*, at para 65

⁴⁴ Moreau, *supra*, at 298-299

clear that the impugned provision works by “track[ing] and reinforc[ing] in a profound way double standards regarding the expression of male and female sexuality.”⁴⁵

Article 5(a) of the Women’s Convention requires States Parties to take all appropriate steps to rectify social and cultural patterns of behaviour and attitudes based on ideas of inferiority or superiority of one sex over the other, or based on stereotyped sex roles that harm women. As illustrated above, this law reflects and reinforces many stereotypes about men and women: that women are morally inferior to men; that women’s sexuality is to only be expressed validly through marriage and procreation and otherwise they must be chaste; that men’s sexuality is naturally mighty and uncontrollable; that sex workers are fallen, their morality permanently damaged; that sex workers are mercenary temptresses/businesswomen whose sexuality is dangerous; and others discussed earlier. The provision violates Article 5(a) of CEDAW by not taking steps to eradicate, and in fact reinforcing, stereotyped beliefs about men and women that cause harm to women.

As mentioned above, the majority defends the law by saying that it is perfectly legitimate to target the merchant in an effort to eradicate commercial sex, and there are other provisions under which clients of sexual services can be charged, as an accessory, co-conspirator, instigator, inciter, or procurer.⁴⁶ However, this approach makes the sex worker the principal or primary offender, with the customer playing a secondary role. That secondary role is either as an accomplice, a helper, a supporting role in the crime committed primarily by the principal, and thus morally and legally less culpable; or as a party to the crime who cajoles or coaxes the

⁴⁵ *S v. Jordan, supra*, at para 67

⁴⁶ *S v. Jordan, supra*, at para 11, 13, 14

principal into committing the crime, but whose moral wrong lies not in committing the actual act, but in convincing the principal in some manner to do it instead – something that would never happen if the principal was a person of stronger moral fibre. This is certainly not assigning equal legal or moral culpability to the client, even when the punishment is equivalent. As the minority points out, “[t]he indirect criminal liability on the client, assuming there is such, flows only from the crime committed by the prostitute who remains the primary offender. The primary crime and the primary stigma lie in offering sexual intercourse for reward, not in purchasing it.”⁴⁷ Furthermore, the minority does not see why it is more legitimate to criminalize the merchant than the customer as more blameworthy. The justices point out that male customers are more likely to come from a position of greater socio-economic stability and power,⁴⁸ and in fact create the demand for sex work in the first place.⁴⁹

Sexual acts involving a monetary transaction require at least two people, both of whom participate in the act. The minority discusses the differences between the sex worker and the client in simple terms:

As partners in sexual intercourse, they both consent to and participate in the action which lies at the heart of the criminal prohibition. There are only three differences between them. The first is that the one pays and the other is paid. The second is that in general the one is female and the other is male. The third is that the one’s actions are rendered criminal by s 20(1)(aA) but the other’s actions are not. Moreover, the effect of making the prostitute the primary offender directly reinforces a pattern of sexual stereotyping, which is itself in conflict with the principle of gender equality.⁵⁰

⁴⁷ *S v. Jordan, supra*, at para 63

⁴⁸ *S v. Jordan, supra*, at para 68

⁴⁹ *S v. Jordan, supra*, at para 65

⁵⁰ *S v. Jordan, supra*, at para 60

On this legal framework, only one of those parties is criminalized by the provision in question, and the other may be liable for a lesser charge at common law or may be liable for a lesser charge that carries the same punishment under statute. Either way, the sex worker is the principal offender, and the client is the secondary offender, and these assignments carry different social stigma. On this view, the law also violates the Women's Convention. Regarding Article 2(f), the mandate to abolish or modify any existing laws that discriminate against women, the law itself was discriminatory, as illustrated by the minority judgment. By criminalizing the behaviour of sex workers, who are largely female, and not their customers, who are largely male, the law has a differential impact of the penalty and stigma of criminality that disproportionately affects women.

III. No Unfair Discrimination

The majority's third argument in defence of the impugned provision is that any discrimination that may result from the law "can hardly be said to be unfair."⁵¹ The purpose of the law is to outlaw commercial sex, which the majority sees as very important and legitimate.⁵² This claim seems to point to a proportionality-type argument that is not made explicit in the majority reasoning. Nevertheless, the majority argues, if discrimination does occur against sex workers, it is because of social attitudes toward their behaviour, rather than a result of the law itself.⁵³ Prostitutes have made the choice to engage in sex work, even if it is a limited or constrained choice.⁵⁴ Ngcobo J writes:

⁵¹ *S v. Jordan, supra*, at para 15

⁵² *S v. Jordan, supra*, at para 15

⁵³ *S v. Jordan, supra*, at para 16

⁵⁴ *S v. Jordan, supra*, at para 17

If the public sees the recipient of reward [for sexual services] as being 'more to blame' than the 'client' and a conviction carries a greater stigma on the 'prostitute' for that reason, that is a social attitude and not the result of the law. The stigma that attaches to prostitutes attaches to them, not by virtue of their gender, but by virtue of the conduct they engage in. That stigma attaches to female and male prostitutes alike... by engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community, thus undermining their status and becoming vulnerable.⁵⁵

Ngcobo J goes on to deny that the reality of sex work, being that the majority of sex workers are women, is of importance in deciding whether the law is discriminatory on the basis of gender: "I am not persuaded by the argument that gender discrimination exists simply because there are more female prostitutes than male prostitutes. [...] [The provision] cannot be said to be discriminating on the basis of gender simply because the majority of those who violate such a statute happen to be women."⁵⁶

Ngcobo J says that there is no gender discrimination here, just the proper disapproval by the community of morally blameworthy acts, and that there is no evidence of gender discrimination just because most prostitutes are women. However, as discussed at length above, women's sexuality is constructed in a particular way, such that the only "good" or "moral" way for women to be sexual is to protect their sexuality against corruption, to be chaste, virginal, or else become wives and mothers. Sex workers are constructed in opposition to this model, as women who are "bad," who have "fallen," whose sexuality they have not guarded but have allowed to be sullied, spoiled, and corrupted. It is, then, *precisely because* sex workers are primarily women that they experience such stigma. It is because they are women

⁵⁵ *S v. Jordan, supra*, at para 16

⁵⁶ *S v. Jordan, supra*, at para 17-18

who have not lived up to the prescriptive sex, sex-role, and sexual stereotypes of women that sex workers experience discrimination, stigma, marginalization, and all of the vulnerabilities and negative consequences that are their corollaries.

As discussed above, the stereotype of sex workers choosing sex work in a fully autonomous and mercenary way is false and harmful because many women choose sex work in order to alleviate poverty for themselves and their families in circumstances of low educational and/or formal employment opportunities, and this stereotype works to deny benefits and impose burdens arbitrarily. The majority seems to pay lip service to the context of sex work by characterizing these choices as constrained or limited, but ultimately it is clear the majority believes that the women who choose sex work could and should choose some other way to make a living. Moreover, since they do choose sex work, they deserve whatever stigmatization or discrimination that comes their way as a natural consequence of their choice – they bring it upon themselves. This element of choice is something the minority also struggles with: “Their status as social outcasts cannot be blamed on law or society entirely. By engaging in commercial sex work, prostitutes knowingly accept the risk of lowering their standing in the eyes of the community. In using their bodies as commodities in the marketplace, they undermine their status and become vulnerable.”⁵⁷ The minority, however, seems to show more sympathy to the realities of sex workers’ lives and the paucity of options for meaningful employment that are often available to women in the South African context.⁵⁸

⁵⁷ *S v. Jordan, supra*, at para 66

⁵⁸ *S v. Jordan, supra*, at para 66, 68

One of the harms resulting from stereotyping sex workers in the ways discussed in this paper is the harm of stigma. Stigma is a process by which groups become marginalized and oppressed in society. There are five phases to the process of stigmatization: 1) human differences are identified and labelled; 2) stereotypes are formed by the association of the labelled person or group with undesirable characteristics; 3) the group doing the stereotyping distances themselves from the stereotyped group; 4) the stereotyped group experiences loss of status and discrimination; and 5) the group doing the stereotyping exercises power over the stereotyped group.⁵⁹ The harms of stigma can be wide-ranging: “Stigma processes have a dramatic and probably under-recognized effect on the distribution of life chances such as employment opportunities, housing, and access to medical care.”⁶⁰ Stigma can also have serious negative effects on both physical and psychological health and wellness, and is cited as a source of chronic stress,⁶¹ fear,⁶² shame, and guilt.⁶³

The law is recognized as a powerful means by which stigma can be created, prevented, and remedied.⁶⁴ The criminal law, following the five steps outlined above, does work to stigmatize those who are charged with offences. The criminal law identifies human differences and labels them as criminal or not criminal; it associates criminals with undesirable characteristics such as untrustworthiness, dangerousness, volatility, unpredictability, dishonesty, laziness, stupidity, and sometimes even with evil; it literally removes criminals from the rest of society through

⁵⁹ Bruce Link and Jo Phelan, “Stigma and its public health implications,” *The Lancet* 2006 Vol 367: 528-529 at 528

⁶⁰ Link and Phelan, *supra*, at 528

⁶¹ Link and Phelan, *supra*, at 528

⁶² Gerald Keusch et al, “Stigma and global health: developing a research agenda,” *The Lancet* 2006 Vol 367: 525-527 at 525

⁶³ Scott Burris, “Stigma and the law,” *The Lancet* 2006 Vol 367: 529-531 at 530

⁶⁴ Burris, *supra*, at 529

the penal system; criminals experience a loss of status within their communities and are often forgotten or disowned; and it exercises power over criminals by imposing penalties on them that isolate them, such as prison, parole requirements, permanent classification as criminals, or house arrest. The stigma associated with criminality is often one that citizens and other community members can accept in exchange for a peaceful, safe, and orderly society.

Sex work is a hotly contested issue, and religious approaches to community organizing have had a large impact on regulating sexuality and stigmatizing sex workers. Sex workers would likely experience stigma within their communities whether or not sex work was criminalized. However, the law does not live in a separate sphere from the rest of society: it is formulated in response to social realities, and in turn has an impact on forming new social realities – in fact, that is its purpose in many ways. Law is both responsive and transformative. The social reality is that, for many structural reasons, women make up the vast majority of sex workers, and due to stereotypes regarding women's and men's sexuality, experience harms that demean their dignity and autonomy, including stigmatization and discrimination. This law works to reinforce that stigmatization by allowing male clients to be excused while female sex workers bear the full weight of the stigma of criminality for an act that required the participation of them both. Even in cases where the customer is charged under the common law offence of accessory or the *Riotous Assemblies Act*, the stigma is not as severe because the customer is not the primary offender.

The added stigma of criminality, experienced only by the sex worker, who is most likely female, is a thorny and complex burden, as it reduces the ability to access social services such

as health care and welfare, and makes it more difficult to gain legitimate employment and community support. The stigma of criminality makes sex workers isolated from their communities, and thus more vulnerable to violence, crime, and exploitation, and less likely to be able to get justice for violence or other crimes committed against them.⁶⁵

Article 6 of the Women's Convention, requiring States Parties to take steps to eradicate the exploitation of prostitution of women, is violated by this law. When customers' actions are not criminalized, the possibility for exploitation of prostitution is increased, since the existing social power arrangements are preserved by the sex worker taking all the risk of criminal liability and the resulting social stigma that makes her more vulnerable. If the customer's actions were criminalized, the possibility of criminal sanction would work to disrupt the existing power relations that favour the male client over the female sex worker, providing less opportunity for exploitation of the sex worker to occur.

It is disingenuous for the majority court to claim that the social stigma experienced by sex workers is completely unrelated to the criminal law, particularly in light of the provision in question, that criminalizes the behaviour of sex workers but not their customers. The minority acknowledges this: "It is no answer then to a constitutional complaint to say that the constitutional problem lies not in the law but in social values when the law serves to foster those values."⁶⁶

⁶⁵ In 2007, a Philadelphia municipal judge dismissed rape charges against a man who forced a woman sex worker to engage in sexual activity with him and three of his friends at gunpoint, finding instead that the appropriate charge was theft of services. See "Philly Bar Condemns Dismissal of Rape Charges in Prostitution Case," *ABA Journal*, October 31, 2007. Accessed online December 13, 2008 at http://abajournal.com/news/philly_bar_condemns_dismissal_of_rape_charges_in_prostitute_case/

⁶⁶ *S v. Jordan, supra*, at para 72

IV. Unfair Application is Not a Flaw

Lastly, the majority claims that any unfair discrimination in the application of the law is not due to any inherent flaw within the law, but rather is the choice of those tasked with applying the law. "What happens in practice may therefore point to a flaw in the application of the law but it does not establish a constitutional flaw in the law."⁶⁷

As addressed above, the structure of the law, being that the sex worker is made the primary offender and the customer is not charged at all under this law (although he could be charged under other provisions), makes it more likely that only one party will be charged: the principal. This is, after all, the *Sexual Offences Act*. It is less likely that customers will be charged on accessory or conspiracy than that the sex worker will be charged for prostitution under a law that is structured so that selling sex but not buying sex is made illegal. By making the sex worker the primary offender, it makes it more likely that she will be charged and the client will not, all the while reinforcing the operative stereotypes discussed above. The minority takes note of this, "[t]he differential impact [of the law on women] is accordingly not accidental, just as the failure of the authorities to prosecute male customers as accomplices is entirely unsurprising. They both stem from the same defect in our justice system which hold women to one standard of conduct and men to another."⁶⁸

⁶⁷ *S v. Jordan, supra*, at para 19

⁶⁸ *S v. Jordan, supra*, at para 67

CONCLUSION: TOWARDS EQUALITY

The majority of the South African Constitutional Court did not find⁶⁹ that section 20(1)(aA) of the Sexual Offences Act violated section 8 of the Interim Constitution on grounds of gender discrimination. The minority did make such a finding, and the remedy they recommended was to suspend the finding of unconstitutionality of the provision – which would declare the provision inoperable – for a period of 30 months so the legislature could conduct a thorough study on sex work and devise a comprehensive system of regulation of the sex industry that adhered to principles of gender equality.⁷⁰ The minority felt that simply declaring the provision unconstitutional and striking it down would create a void in the legal framework that would have left sex workers vulnerable and open to exploitation.⁷¹

Bearing in mind the principles of gender equality in the Women’s Convention, and the mandate to eliminate the exploitation of prostitution of women as well as social attitudes based on stereotypes of men and women and laws that discriminate against women, the recommendation of the minority is measured and reasoned. While the minority made no explicit statement that any new regulatory scheme must include criminal sanctions for the purchase of sexual services, it made clear throughout its judgment that only criminalizing the actions of the sex worker would not pass constitutional muster. In particular, the argument that “male customers will generally come from a class that is more economically powerful”⁷² and that the current law “turn[s] the real-life sociological situation upside-down”⁷³ is very

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⁷⁰ *S v. Jordan, supra*, at para 126-129

⁷¹ *S v. Jordan, supra*, at para 125

⁷² *S v. Jordan, supra*, at para 68

⁷³ *S v. Jordan, supra*, at para 68

persuasive. The majority ignored the social realities of the context of sex work, but the minority took these realities very seriously. The fact that the male customer, who is typically more socio-economically powerful than the female sex worker, “creates the demand”⁷⁴ for sex work helps to shatter the stereotype of the sex worker as a businesswoman making money hand over fist by exploiting the uncontrollable sexual desires of their male clients.

A fulsome discussion of the merits and faults of regulation, decriminalization, and legalization of the sex industry is beyond the scope of this paper. However, it is submitted that this analysis has demonstrated that a system where only the sex worker, and not the customer, is liable to criminal sanction is one that reinforces harmful stereotypes and creates stigma that prevent sex workers from participating fully in their communities, makes them vulnerable to abuse and exploitation, suppresses their ability to access social benefits, and limits sexual self-expression of men and women. The legal environment described here is hostile to the values of gender equality.

Criminalizing the purchase of sex by customers, regardless of whether selling sex is also criminalized, would help to disrupt the stereotypes that contribute to the harms suffered by sex workers. Customers of prostitution would be made visible and public, and identified for their part in creating the demand for sex work. It would also disrupt the imbalance of power in the sex worker-client relationship, by putting equal or more risk of criminal liability on the client. By spreading criminal liability more diffusely over both or all parties to the illegal act, the prostitute is not made more vulnerable than the client to the particular harms associated

⁷⁴ *S v. Jordan, supra*, at para 65

with the stigma of criminality. Because of this disruption, imposing criminal sanctions on customers better adheres to the mandates of CEDAW, particularly the mandate to eradicate exploitation of prostitution of women.

This paper has argued that the majority judgment in *S v. Jordan* relied on and reinforced harmful stereotypes of women, men, and sex workers, thereby violating Articles 2(f), 5(a), and 6 of the women's Convention. The specific forms, content, and harms of those stereotypes were outlined, and it was argued that criminalizing the actions of male customers could help to disrupt these stereotypes and would better adhere to the Women's Convention. Exploitation of prostitution of women will not end without specifically targeting the sex, sex-role, and sexual stereotypes associated with men, women, and sex workers.