

Beyond Positive Law

Women's Condition and Role within the Patriarchal Structure

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Abstract: Women's suffering and resistance within the well-known patriarchal structure have existed since time immemorial.

This will be demonstrated by starting from the concept of the victim from a broader perspective, touching on its meaning, the prejudices related to it, and the difficulties encountered by victims within the adversarial justice system, finally concluding with the need to seek help and the related challenges.

An example of a victim is surely the woman within the above-mentioned structure, mainly because of the roles she is forced to perform. It is difficult for her to be coerced into being a virgin, which is a hurtful anatomical myth and a cage. Even more demanding is the role of motherhood, which is a source of joy for some, yet a burden. While maternity might be fulfilling, it still exposes women to significant physical, psychological, and social disadvantages. Enjoyment does not erase the structural costs imposed on women's bodies and lives.

Finally, what most call "sex work" – but is indeed brutal, non-consensual sex, thus rape – will be examined, and the legislative models used to regulate or tackle it will be considered, together with some unpopular critiques of the prostitution debate.

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After analyzing what is already hard for women living “free” yet within a hierarchical and oppressive structure, it will appear even less painful when compared to the lives of incarcerated women.

Cases, acts, and various examples will be provided to prove that the three above-mentioned roles make women’s existence a burden. Nonetheless, solutions, insights, and considerations will be offered so as to give hope for change.

Keywords: Victim; Virginity; Motherhood; Prostitution; Prison System.

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1. *Introduction*

To this day, gender-based violence is still insufficiently addressed both nationally and internationally.

In order to consider this still-present phenomenon, this paper will start from the concept of the “victim”, consequently focusing on the woman as a victim within the patriarchal structure.

First, an overview will be provided, using victimology as the most appropriate field of study to expand on the above-mentioned concept, related prejudices, and the hard step of disclosure. Consequently, the institutions typical of the adversarial justice system, which make life harder for victims, will be briefly outlined.

Subsequently, the paper will shed light on women’s role as victims within the patriarchal structure, then focusing on the three main roles a woman is brought to perform: the virgin, the mother, and the whore.

Hence, the paper will consider the case of virginity testing in countries where either the law (e.g., in the U.K.) or the judiciary (e.g., in India) have dealt with this issue.

As for the second role, namely “the mother”, the paper will take as examples the Irish referendum on Articles 41.2.1° and 41.2.2° of the Constitution, concerning the “duty” of women in the home. Subsequently, another interesting example to reflect on women’s role as mothers, namely the refusal to undergo medical treatment while pregnant, will be provided.

The third role, that is to say the “whore”, will be examined from both a legal and a sociological perspective, giving space to the liberal and radical feminist points of view on prostitution and, respectively, to the regulative and abolitionist models. However, the main argument will be to deconstruct prostitution as society’s tool to oppress mainly disadvantaged women for the sake of men’s pleasure.

Finally, after considering women’s suffering within the patriarchal structure, the lives of women behind bars will be

examined. Thus, light will be shed on the ways that distinctly female nuisances (e.g., the menstrual phase) make life even harder for them in an institution built by men, for men: prison.

In conclusion, by providing cases and examples, this paper aims to give meaning to gender-based violence in a deep and comprehensive way.

Comparing various legal systems will be pivotal to do so, because when a legal system fails or stumbles, there might be an answer in some other country – or perhaps in some other discipline, victimology for one.

2. Victimology as One of the Lenses to Look at Women's Victimization within the Patriarchal Structure

2.1. The Victim: Prejudice v. Reality

Law is fertile soil for other research areas and often intersects with such fields. Among others, victimology is useful to look at contemporary legal issues.

Within a patriarchal framework, the complexity of victimization inevitably deepens, making it essential to reflect on how this label is used. Simplistic narratives may satisfy the media's need for immediacy, yet they ultimately damage critical thought and collective wellbeing.

A deeper analysis of what it means to be a victim – and of how victimization operates in contemporary patriarchal and capitalist societies – helps avoid this reductionist trap. A proper understanding of the label can also benefit the victims themselves, enabling them to navigate legal and psychological support more effectively. It is equally relevant for the offender and their relationship with society, contributing to both prevention and re-education.

After a critical reflection on the notion of "victim," the next step is to provide further argumentation and examples, narrowing the focus to contemporary patriarchal society and one of its direct

outcomes: victim blaming. The analysis of victimization is complicated by the inconsistency of the legal and social definition.

While the first one is easily accessible through the consultation of the law, the second one can be deceptive and leads to the “ideal and non-ideal victim” dichotomy. So, certain characteristics, such as being “weak” and victimized by the stereotypical “big and bad” unknown man, encourage society to acknowledge somebody as a crime victim and react accordingly while less stereotypical behaviors and traits have the opposite effect¹.

Additionally, the response the victim has stresses this fallacy even more, making unacceptable what draws away from the fight or flight duo². Yet even when fitting perfectly into that stereotype, a victim can still look at themselves in the mirror and prefer to stay blind before their shattered self. Sure enough, sexual violence interferes both in the short and long run with their health, holistically considered: from their physical to their mental status, along with their emotions and sexuality. Thus, they may not only experience anger, fear and shame but also develop mental illnesses³.

Considering the victims of sexual violence, scholars underline both how the aftermath of the event is exacerbated by victim blaming pervasively spread by rape culture, and the fact that the act of rape is not about the perpetrator’s sexual pleasure, rather concerns patriarchal power dynamics⁴.

¹ Ciaran McCullagh, *‘Respectable’ Victims and Safe Solutions: The Hidden Politics of Victimology?*, 68 Northern Ireland Legal Quarterly 539 (2017).

² Hillary Hurst, *Women, the Law, and Sexual Assault: Why the Model Penal Code’s Ordinary Resolution Standard Furthers Victim Blaming*, 59 Tulsa Law Review 573 (2024).

³ Sheena Norton, *The Place of Victims in the Criminal Justice System*, 4.1 Irish Probation Journal 63 (2007).

⁴ Jericho Hockett, et al., *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*, 22.2 Violence Against Women 139 (2016); Prachi Bhuptani and Terri Messman, *Role of Blame and Rape-Related Shame in Distress among Rape Victims*, 15.4 Psychological Trauma: Theory, Research, Practice, and Policy 557 (2023).

In this regard, when it comes to the connection between rape acknowledgement and victim's mental health, evidence showed how minimizing sexual violence is a direct consequence of the internalization and acceptance of both gendered roles and the "ideal rape/victim" standard⁵.

Denial might indeed protect the individual in the short term, but it is damaging in the long run, dissuading victims from reaching out for support⁶.

Furthermore, particular attention must be paid to marginalized victims, whose experiences often reveal additional layers of vulnerability and exclusion.

Adolescents, being in a developmental stage, have limited coping skills and resources, finding themselves caged in an even darker hole when considering disclosure⁷.

A recent study also shows that people living with intellectual disabilities often fear both disbelief and the loss of those on whom they depend⁸.

Victims hospitalized in psychiatric institutions face similar biases, as their diagnoses are frequently used against them to dismiss their credibility⁹.

⁵ Laura Wilson, et al., *Examining the Psychological Effect of Rape Acknowledgment: The Interaction of Acknowledgment Status and Ambivalent Sexism*, 73.7 *Journal of Clinical Psychology* 864 (2017).

⁶ Nicole Maiorano, Aine Travers and Frédérique Vallières, *The Relationship between Rape Myths, Revictimization by Law Enforcement, and Well-Being for Victims of Sexual Assault*, 29.14 *Violence Against Women* 2873 (2023).

⁷ Yewande Oshodi, et al., *Immediate and Long-Term Mental Health Outcomes in Adolescent Female Rape Survivors*, 35.1-2 *Journal of Interpersonal Violence* 252 (2020).

⁸ Nechama Sammet Moring, et al., *After Disclosure: A Research Protocol to Respond to Disclosures of Abuse and Sexual Violence in Research with Adults with Intellectual Disabilities*, 16.4 *Journal of Policy and Practice in Intellectual Disabilities* 254 (2019).

⁹ Angela Sweeney, et al., *Out of the Silence: Towards Grassroots and Trauma-Informed Support for People Who Have Experienced Sexual Violence and Abuse*, 28.6 *Epidemiology and Psychiatric Sciences* 598 (2019).

Finally, LGBTQIA+ victims experience a dual stigma at the intersection of sexual or gender identity and victimization¹⁰.

2.2. Challenges Faced by Victims in the Adversarial Justice System

In addition to the challenges previously outlined, notwithstanding national and international legal improvements, within adversarial justice systems, victims are far from playing a dignified role. Certainly, many institutions make life harder for them: “lawyer-led questioning, observation of the demeanor of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination”¹¹.

Moreover, in adversarial systems, the prosecutor represents the State, and the victim – who, as in any criminal proceeding, is not a formal party but merely a witness – does not benefit from the procedural protection granted to formal parties. In the U.K. for example, the Crown Prosecution Service can drop private prosecutions of some or all charges, irrespective of the victim’s interests¹². Hence, it is far from being victim centered: victim’s voice matters as long as it serves the interests of justice.

Consequently, victims’ claims are frequently and abruptly challenged during cross-examination, never mind the risk of secondary victimization, generally defined as the victim’s exposure to situations that evoke the traumatic experience, as long as the

¹⁰ Katie Edwards, et al., *Disclosure of Sexual Assault among Sexual and Gender Minorities: A Systematic Literature Review*, 24.3 Trauma, Violence, & Abuse 1608 (2023); Sarah Koon-Magnin and Corina Schulze, *Providing and Receiving Sexual Assault Disclosures: Findings from a Sexually Diverse Sample of Young Adults*, 34.2 Journal of Interpersonal Violence 416 (2019).

¹¹ Shane Kilcommins and Luke Moffett, *The Inclusion and Juridification of Victims on the Island of Ireland*, in Yvonne Daly et al. (eds), *The Routledge Handbook of Irish Criminology* at 11 (Routledge 2015).

¹² Samantha Fairclough and Imogen Jones, *The Victim in Court*, in Sandra Walklate (eds), *Handbook of Victims and Victimology* (Routledge 2017).

person remains the vessel for facts and truths. Certainly, they cannot opt out of testifying, as the defendant can¹³.

In addition to that, during cross-examination the defendant's lawyer will carry on a tireless struggle to make the witness seem less credible, at the cost of the victim's mental health, neglecting the consequences of secondary victimization. The opposing counsel may object, and the trial judge has the power to intervene but there is no official guidance the lawyer has to respect during this delicate stage. Evidently, the Bar Standards Board Handbook does not mention precise rules against unduly belligerent cross-examination in order to treat the victim sensitively¹⁴.

Still, it should be clarified how most legal systems are not fully adversarial or inquisitorial but present both tendencies, which might compensate the edges of these diverse models¹⁵.

Moreover, the number of special measures is rising, which, undoubtedly, carries a relevant wind of change in victim's wellbeing within adversarial systems. For instance, the Toolkits made by Advocate's Gateway shed light on planning the questions for those with learning disabilities and other kinds of potential difficulties.

Another example in the U.K. is the Youth Justice and Criminal Evidence Act, which allowed to give evidence from behind electronic devices, pre-trial, or with the assistance of professional aid¹⁶.

Also, within the Italian legal system, the criminal procedure code has been amended, incorporating articles dedicated to vulnerable victims, such as people subjected to sexual abuse who are

¹³ Lily Thacker, *Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System*, 1 Kentucky Journal of Undergraduate Scholarship 8 (2017).

¹⁴ Fairclough and Jones, *The Victim in Court* (cited in note 12).

¹⁵ *Ibid.*

¹⁶ Roger Nield, et al., *The Youth Justice and Criminal Evidence Act 1999 and the Interviewing of Vulnerable Groups: A Practitioner's Perspective*, 8.2 Legal and Criminological Psychology 223 (2003).

kept away from the accused and surrounded with professional figures such as psychologists¹⁷.

Further improvement occurred. Among others, the Criminal Justice (Victims of Crime) Act 2017, which gives legislative substance to European Union Directive 2012/29/EU.

Also, the European Court of Human Rights contributed, for instance, through *Doorson v. The Netherlands* interpreting article 6 of the ECHR accordingly to the rights of vulnerable witnesses and victims¹⁸.

Moreover, recognition of victims' needs is supported by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which establishes the right to be referred to support services and to be treated with respect¹⁹.

On a narrower level, new instruments have been adopted: for instance, the Council of Europe's Framework Decision on the Standing of Victims in Criminal Proceedings, which, among others, include the right to access relevant information. Subsequently, in 2004 the Council adopted the Directive on Compensation to Crime Victims. In addition to that, the European Commission's draft addresses the "tripartite dimensions of information, participation and protection"²⁰.

Still, the adversarial system's institutions (e.g., cross-examination) are both the offender's guarantees and source of secondary victimization.

¹⁷ Giovanni Conso and Vittorio Grevi, *Compendio di Procedura Penale* (CEDAM 2003).

¹⁸ Ciaran McCullagh, 'Respectable' Victims and Safe Solutions: *The Hidden Politics of Victimology?*, 68 Northern Ireland Legal Quarterly 539 (2017).

¹⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly Res 40/34 (29 November 1985) UN Doc A/RES/40/34.

²⁰ Kilcommins and Moffett, *The Inclusion and Juridification of Victims on the Island of Ireland* at 381 (cited in note 11).

2.3. *A Hard Step: Disclosing the Victim Status*

After examining the weaknesses of the adversarial justice system, it is appropriate to look beyond legal institutions to find the support offered by other stakeholders and resources (e.g., Victim's Charter, helpline, restorative justice projects...).

In this regard, the victims' decision to give voice to their struggle either formally or informally is handled, among others, by centers like the Dublin Rape Crisis Centre (D.R.C.C.). Worldwide, non-profit organizations, universities, and scholars emphasize the behaviors that ought to be observed when a victim comes forward, as such interactions can be either healing or deeply harmful for both the discloser and the listener. The D.R.C.C. is among the institutions highlighting these principles.

Among other universities, the Canadian Vanier College has been concerned with contrasting the high percentages of sexual violence occurring in colleges, raising awareness and providing support²¹. Three core themes carefully underlined are: to listen, believe and empower²². This means providing a safe and comfortable space, and engaging in active listening by preferring thoughtful affirmations (e.g., "I believe you"), rather than probing questions²³.

²¹ Valerie Halstead, Jessica Williams and Rosa Gonzalez-Guarda, *Sexual Violence in the College Population: A Systematic Review of Disclosure and Campus Resources and Services*, 26.15-16 *Journal of Clinical Nursing* 2137 (2017).

²² Lindsay Cuncins, *Responding to Disclosures of Sexual Violence* (EDUQ Info Online, 2020), available at <https://eduq.info/xmlui/bitstream/handle/11515/37861/cuncins-VAV-3-1-2020.pdf?sequence=2> (last visited November 8, 2025).

²³ Rachel Caswell, et al., *Providing a Supportive Environment for Disclosure of Sexual Violence and Abuse in a Sexual and Reproductive Healthcare Setting: A Realist Review*, 24.4 *Trauma, Violence, & Abuse* 2661 (2023); Stephanie Lanthier, Janice Du Mont and Robin Mason, *Responding to Delayed Disclosure of Sexual Assault in Health Settings: A Systematic Review*, 19.3 *Trauma, Violence, & Abuse* 251 (2018); Ashley Valanzola, *Student Disclosure: The Aftermath of Teaching about Sexual Violence in the Classroom*, 43.2 *Review of Education, Pedagogy, and Cultural Studies* 185 (2021).

Moreover, in the case of informal disclosure, the epilogue to hope for is a gentle referral to health, social and legal services in order to better address the victim's needs. Other scholars enriched this perspective considering a trauma-informed approach²⁴. The preliminary need to debunk biases and rape myths is particularly stressed, contemplating how, in order to raise awareness, recent feminist movements (e.g., #MeToo) create a mindful environment, facilitating victim's disclosure.

Further studies, on one hand, confirmed the benefits of formal disclosure given the knowledge and abilities of professionals; on the other, shed light on mutual disclosure's benefits, which enabled not only heartfelt responses and validation from attentive listeners but also to expand victims' network²⁵. Nonetheless, other scholars advocated for wider change, needed to corroborate deeper educational programmes designed to change "the social and institutional cultures around sexual violence"²⁶.

Moreover, together with broad considerations on victims' needs during disclosure, the D.R.C.C. (2020) reminds a few immediate safeguards: to stay grounded and assure victim's safety but also not to force them to report, rather informing and not imposing on them what should be considered an anchor (e.g.,

²⁴ Susan Rees, et al., *Believe#MeToo: Sexual Violence and Interpersonal Disclosure Experiences among Women Attending a Sexual Assault Service in Australia: A Mixed-Methods Study*, 9 *BMJ Open* (2019), available at <https://pubmed.ncbi.nlm.nih.gov/31366639/> (last visited November 30, 2025).

²⁵ Eunsuhk Choi, et al., *How Do Victims of Sexual Violence Benefit from Mutual Disclosure? An Exploratory Study of Women in South Korea*, 36.9-10 *Journal of Interpersonal Violence* 4641 (2021).

²⁶ Charlotte Jones, Anne Chappell and Pam Alldred, *Feminist Education for University Staff Responding to Disclosures of Sexual Violence: A Critique of the Dominant Model of Staff Development*, 33.2 *Gender and Education* 121 (2021).

support services, SATU etc)²⁷. This enhances their advocacy and power, which have been violated during the event.

A final core theme when discussing victim's disclosure turns the spotlight from the victim to the listener. Evidently, their account can be shattering, thus, it is both complex and necessary to avoid vicarious traumatization. In this regard, studies clarified how repeated exposure to traumatic narratives might not only damage health holistically considered but even affect the listeners' worldview, piercing through the typical cognitive schemas (i.e., "world as safe and predictable; people as benevolent")²⁸. Moreover, it might lead to misdiagnosis, revictimization of patients and "disengaging from advocacy work"²⁹. For these reasons, both the D.R.C.C. and other stakeholders, stress the importance of self-care after welcoming victims' emotions and worries³⁰.

From a therapist's perspective, a recent study suggested how to look after physical and mental health, especially as professionals, constantly dealing with a patient's trauma. It focused not only on ensuring basic needs (e.g., sleep, nutrition) but also on journaling, engaging in social relationships, mindfulness and counselling³¹. An example of this approach is provided by the regenerative supervision

²⁷ Dublin Rape Crisis Centre (DRCC), *Vicarious Traumatization – DRCC Resource* (October 2020), available at https://www.drcc.ie/assets/files/pdf/_drcc_resource_vicarious_traumatization.pdf (last visited November 8, 2025).

²⁸ Anita Padmanabhanunni and Nondumiso Gqomfa, "The Ugliness of It Seeps into Me": Experiences of Vicarious Trauma among Female Psychologists Treating Survivors of Sexual Assault, 19.7 *International Journal of Environmental Research and Public Health* 3925, 2 (2022), available at <https://pubmed.ncbi.nlm.nih.gov/35409607/> (last visited November 30, 2025).

²⁹ LaDonna Long, *Rape Medical Advocates' Experiences with Vicarious Trauma, Burnout and Self-Care*, 29.4 *Journal of Aggression, Maltreatment & Trauma* 421, 423 (2020).

³⁰ *Ibid.*

³¹ Jaclyn Houston-Kolnik, Charlynn Odahl-Ruan and Megan R. Greeson, *Who Helps the Helpers? Social Support for Rape Crisis Advocates*, 36.1-2 *Journal of interpersonal violence* 406, (2021).

model, which enables the so-called post-traumatic growth³². In a nutshell, through trauma sensitive peer supervision, and thanks to creative activities (e.g., visual or written creative expressions) it is possible to “facilitate counsellor growth, meaning-making, and empowerment”³³. Among others, one aspect emerges: the imperfection of the above-mentioned recommendations when put into practice. Certainly, what scholars call “good soldiering” surfaces, meaning the wish to relieve victims of their suffering even when it means trumping the beholder’s mental health.

In addition to that, despite the hours of training and experience of the individual, a tendency to override victim’s unwillingness to report, might come into play³⁴.

Moreover, the delicate balance between providing support and experiencing harm underscores the intersection of formal and informal disclosure, which can result in personal growth for those who witness or assist victims (so-called post-vicarious growth), though not without emotional cost³⁵. This concept permits drawing ahead an individualistic approach to mental health, staying grounded and resilient enough to support both the victim and ourselves.

In addition to that, a broader meaning of self-care is explored by Audre Lorde when contesting the Reagan administration in xenophobic and capitalistic America. Looking at black, queer and disabled women she affirms “caring for myself is not self-indulgence,

³² Sarah Ullman, *Correlates of Social Reactions to Victims’ Disclosures of Sexual Assault and Intimate Partner Violence: A Systematic Review*, 24.1 *Trauma, Violence, & Abuse* 29, (2023).

³³ Rhonda Neswald-Potter and Robyn Trippany Simmons, *Regenerative supervision: A restorative approach for counsellors impacted by vicarious trauma*, 50.1 *Canadian Journal of Counselling and Psychotherapy* 79, (2016).

³⁴ Long, *Rape Medical Advocates’ Experiences* at 436 (cited in note 29).

³⁵ *Ibid.*

it is self-preservation, and that is an act of political warfare”³⁶. Consequently, she adds how it has to be integrated into one’s life, avoiding making recovery separated from one’s daily existence.

Finally, while capitalism dismisses it as “individual personal time”, self-care means on-going engagement with the self, the other and often entire marginalized categories, for instance, victimized women in the patriarchal system. Hence, “the self for Lorde was never about the individual, bounded body, but about how the self exists in relation to and in support of other bodies”³⁷.

These considerations allow us to imagine a rather diverse society, based on communication, which encourages piercing through trauma, with the appropriate resources and professional help, rather than barricading behind a façade of “capitalistic” self-care.

2.4. A Gendered Concept: Women as Victims within the Patriarchy. Some Generic but Significant Examples

To sum it up using Professor MacKinnon’s wisdom: considering male as the standard, women are not simply different, they are dominated and consequently systematically subjugated³⁸. More precisely, she argues that neither gender neutrality nor gender difference theories fit well within feminist critique of the patriarchal structure. Indeed, in the first case feminine would not be the same as masculine and as close as it gets it would still be inferior. In the second

³⁶ Audre Lorde, *A Burst of Light: and Other Essays* at 130 (Courier Dover Publications 2017).

³⁷ Jina Kim and Sami Schalk, *Reclaiming the Radical Politics of Self-Care: A Crip-of-Color Critique*, 120.2 *South Atlantic Quarterly* 325, at 11 (2021).

³⁸ Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1st ed. 1987).

case, special protection clauses trap women within the “Other” and keep them far from equality³⁹.

Hence, her point is prior to the epilogue of these two theories and considers that, within the patriarchy, difference means systematic dominance.

In order to uproot that, “equality” would still be weighted according to the male standard. Thus, liberation from patriarchal oppression is preferable in order to consider women not as inferior but as fully human⁴⁰.

An example of MacKinnon’s effort into contrasting gender violence goes as follows. After listening to the victimization of porn actresses such as Linda Boreman, and being appointed by Minnesota city council, MacKinnon and the feminist activist Andrea Dworkin drafted antipornography ordinances⁴¹. Albeit the U.S. 7th Circuit Court in *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (1985), struck down the final ordinance, their standing certainty made a difference.

She argued against the argument that the Constitution protects pornography as a form of speech⁴². Moreover, MacKinnon was partly responsible for sexual harassment being considered an offence under U.S. law and she definitely played a prominent role in the women’s antiporn movement in the 1980s⁴³.

³⁹ Simone de Beauvoir, *The Second Sex in Classic and Contemporary Readings in Sociology* (Routledge 2014).

⁴⁰ *Ibid.*

⁴¹ Amanda Cawston, *The feminist case against pornography: A review and re-evaluation*, 62.6 Inquiry 624 (2019);

Péter Szil, *Men, Pornography and Prostitution: The Trap of Pornography as Sexual Education*, paper presented at Second Global Conference on The Erotic, Budapest, Hungary (2005).

⁴² Catharine MacKinnon, *Pornography as Trafficking*, 26 Michigan Journal of International Law 993 (2004).

⁴³ Katharine Bartlett, *MacKinnon’s Feminism: Power on Whose Terms*, 75.4 California Law Review 1559 (1987);

Surely, their contribution to feminist literature inspired the radical feminist movement in pondering over what the liberals put aside: the sexual victimization of women in the heteronormative society.

Another step forward which sustained women's liberation opposing their societal victimization, consists in their increasing presence in the workforce⁴⁴.

As men left to fight at the front, women covered those positions left unfilled, demonstrating their abilities and soon after gaining what for many centuries had been exclusively men's rights (e.g., right to vote).

This went hand in hand with the possibility to control their fertility, thereby avoiding being stuck with offspring either inside them or around them⁴⁵.

Still, the chains which kept women victimized within the patriarchal society were not loose enough. Thus, every one of the four waves of feminism contributed to enhancing their status; each one with their peculiarities: from universal suffrage to the #MeToo era.

Some changes have been remarkable, such as the inclusion of sex as a ground for discrimination within Title VII of the Civil Rights Act (1964); while others have been less so. For instance, the cumbersome path of Italian law toward women's emancipation within the home: while under the civil code reform of 1975 women could, for example, decide not to follow their husband's domicile; only in 1996 rape was considered an offence against the person and not against morality.

Emily Jackson, *Catherine MacKinnon and feminist jurisprudence: A critical appraisal*, 19.2 *Journal of Law and Society* 195 (1992).

⁴⁴ Adrienne Rich, *Of Woman Born: Motherhood As Experience and Institution* (WW Norton & Company, 2021).

⁴⁵ Germaine Greer, *The Female Eunuch* (Harper Collins Publishers, 2006).

2.5. Ever-Present Victim Blaming

It is now appropriate to consider, through the discussion of some cases, the practical outcome of this framework. Although they differ in their historical and factual details, they share a common thread: both exemplify the phenomenon of secondary victimization, showing how victims of sexual violence are subjected to further harm through judicial procedures, societal attitudes, or media scrutiny. This conceptual link underscores a persistent pattern in which the focus shifts from the offender to the survivor.

The Irish system provides a brilliant yet miserable example of female victims' role within the patriarchal structure, with the so-called Cork Rape Trial.

Apart from the incident itself, what sounds alarming are the words pronounced by the defence barrister: O'Connell. Sure enough, during the hard-fought cross-examination O'Connell demanded that the victim's underwear be considered as proof of consent. Her words show how an item of clothing can speak for the victim, not only undermining the very content of consent in general but also a very specific and indisputable characteristic of it: revocability⁴⁶.

Other legal systems were and – woefully – still are not far⁴⁷.

In Italy, in 1979, a young woman endured a gang rape episode and during the trial is subjected to “judicial rape”⁴⁸. Through invasive questions, the defence belittled the event as the linear outcome of women's decision to be anything but the “angel of the hearth”.

⁴⁶ Jennifer O'Connell, *Lawyers concerned over public backlash after underwear comments in rape trial*, (Irish Times Online, November 24, 2018), available at <https://www.irishtimes.com/news/social-affairs/lawyers-concerned-over-public-backlash-after-underwear-comments-in-rape-trial-1.3708111> (last visited November 9, 2025).

⁴⁷ Yvonne Marie Daly, *Knowledge or Belief Concerning Consent in Rape Law: Recommendations for Change in Ireland*, 6 Criminal Law Review 478, (2020).

⁴⁸ Sue Lees, *Judicial rape*, 16 Women's Studies International Forum 11 (1993); Samantha Fairclough and Imogen Jones, *The victim in court*, (Routledge 2nd ed. 2017).

Brilliantly, her lawyer recalled how when it is about rape, on the dock unjustly stands the victim and not the offender.

Close enough, both chronologically and symbolically, stands the Circeo Massacre and especially what came after that: the umpteenth example of secondary victimization. Outside the courtroom, this time, the interviewer asked Donatella Colasanti (the survivor), without fear or hesitation, what had been the main cause of her suffering: physical pain or moral humiliation. The woman answered: "neither", claiming that what really bothered her was the exploitation of the incident and, secondly, the way in which the courtrooms were occupied. To support her, there were only women. Embittered, Colasanti stated that what happened to her went beyond rape and did not only concern women⁴⁹.

This also emerged in another interview conducted by Tommaso Ferrari in which the first piece of information provided to the press was not Colasanti's physical or mental health, the consequences for rapists or in general broader reflections on rape as systematic. Rather, they spoke of "virginity". About that, Colasanti's lawyer, Tina Bassi, underlined a "widespread discourse in the current mentality". She recalled that an event occurred in the previous years in which the victim of a ferocious gang rape episode was awarded a very high sum of money. This was not to compensate for damage to her health and integrity. Bassi expressed bitterness in reporting the sentence's reasoning: since a girl who was raped could not find adequate economic accommodation in marriage, then damage compensation should have given her the possibility to be independent outside marriage⁵⁰.

This keeps women stuck within the archaic condition wherein economic stability is only found in marriage: the husband supports

⁴⁹ *Donatella Colasanti intervistata da Enzo Biagi* (1983), available at <https://www.youtube.com/watch?v=lauqwLfS1wI> (last visited November 30, 2025)

⁵⁰ *Tina Lagostena Bassi intervistata da Enzo Biagi* (1983), available at <https://www.youtube.com/watch?v=nRJytn1HQqc> (last visited November 30, 2025).

the wife and she, in exchange, is obliged to provide offspring and nurturance.

In 2021, another Italian gang-rape case was brought before the ECtHR, considering the interference with article 8 of the Convention. The Court itself contests the invasion of the victim's most intimate self (from her sexual orientation to her career) in order to weaken her claim. Inevitably, the ECtHR denounces the exposure of the woman to "secondary victimization by making guilt-inducing and judgmental comments", demanding that the furtherance of sexist stereotypes in judicial decisions be avoided⁵¹.

As a matter of fact, the Court of Appeal of Florence unfairly perpetrated misogynistic secondary victimization, forgetting about the offender and committing judicial rape.

Some references, heavily criticized by the ECtHR, are worth mentioning.

Clearly, the allusion to "her relationships, her sexual orientation or her clothing choices, and the subject matter of her artistic and cultural activities" was considered irrelevant when evaluating her credibility⁵².

The provided examples are the inevitable handling of victim status within the patriarchal structure and also demonstrate the importance of critical thinking about the inadequate use of the victim label.

To inspire further research about it, some considerations should be provided.

Certainly, acknowledging victim blaming goes hand in hand with debunking the perilous stereotypes recurrent within the rape narrative⁵³. It is not about how the victim appears or takes up space;

⁵¹ *J.L. v. Italy*, ECHR 5671/16 (2021).

⁵² *Id.*

⁵³ Hillary Hurst, *Women, the Law, and Sexual Assault: Why the Model Penal Code's Ordinary Resolution Standard Furthers Victim Blaming*, 59.2-3 *Tulsa Law Review* 573, (2024).

it is about how society educates its rapists, who, for the record, are not “exceptions” (or monstrous) but often fit the “boy next door” stereotype⁵⁴.

An enlightening yet tragic example of this absurdity is the Italian Cecchettin case, in which a young woman was the victim of a femicide by the hand of her ex-boyfriend. He was described by the media as a well-behaved young man and images were shared showing a “cheerful couple” completely neglecting appropriate reflections. Quoting the spot-on words of the victim’s sister, it must be stated that “monsters are healthy sons of the patriarchy”⁵⁵.

Both the education and health systems *ex ante*, and courts and the media *ex post*, can make the difference in how victims are depicted and therefore treated, within a broader necessity to uproot the patriarchal structure⁵⁶. As a matter of fact, one in three women has been subjected to sexual violence. Every day 137 women are killed by a family member as stated by the U.N. Women in 2019. Between 1996 and 2024, among the 267 women who died violently in the Republic of Ireland, 55% were killed by an ex-partner or current partner, of the resolved cases⁵⁷. Among these femicides, 9 out of 10 victims knew the perpetrator⁵⁸. Hence, it is important to frame these issues within gender violence considering how it is deeply systematic⁵⁹.

⁵⁴ Thacker, *Rape Culture* (cited in note 13).

⁵⁵ Sofia Bettiza, *Giulia Cecchettin’s killing sparks Italian reckoning over femicide*, (BBC Online, November 24, 2023), available at [https://www.bbc.com/news/world-europe-67514334/](https://www.bbc.com/news/world-europe-67514334) (last visited November 9, 2025).

⁵⁶ Louisa Pauline Witte and Aleya Flechsenhar, “It’s Your Own Fault”: *Factors Influencing Victim Blaming*, 40.9-10 *Journal of Interpersonal Violence* 2356, (2025).

⁵⁷ Women’s aid, *Femicide Watch* (November 19, 2025), available at <https://www.womensaid.ie/get-informed/campaigns-and-partnerships/femicide-watch/> (last visited November 9, 2025).

⁵⁸ *Ibid.*

⁵⁹ See Andrea Michele Sonnen and Joedeman Brown, *Rape and victim-blaming: A critical examination of the tendency to blame victims and exonerate perpetrators in cases of rape*, *Prized Writing* 75, 84-109 (2012).

However, underreporting is as persistent as gender violence and it can be seen how both female children and adult women, at least most of them, do not report sexual violence to the police⁶⁰. In other common law countries, the data are very much alike.

In the U.S., for example, despite the high prevalence of sex-related crimes, they are the most underreported: less than 5% of such crimes are reported, mainly because of fear of victim blaming⁶¹.

In Australia, the Australian Institute of Health and Welfare affirms that out of 1 in 6 women, who went through sexual violence more than 50% did not report, haunted by the same fear: victim blaming⁶².

In England and Wales, the Independent Office for Police Conduct shed light on recurrent episodes of victim blaming within the Criminal Justice System such as carrying out the investigation only in the cases in which the victim seemed credible enough, and so focusing on a vague and biased criterion⁶³.

This has to stop.

⁶⁰ Central Statistics Office, *Sexual Violence Survey* (2022), available at <https://www.cso.ie/en/statistics/crimeandjustice/sexualviolencesurvey/> (last visited 12/11/2025).

⁶¹ Jodie Murphy-Oikonen et al., *Unfounded sexual assault: Women's experiences of not being believed by the police*, 37(11-12) *Journal of interpersonal violence* (2022).

⁶² Australian Institute of Health and Welfare, *FDSV summary* (July 30, 2025), available at <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>. (last visited November 30, 2025).

⁶³ Independent Office for Police Conduct, *Ending victim blaming in the context of violence against women and girls* (2024), available at <https://www.policeconduct.gov.uk/sites/default/files/documents/IOPC-ending-victim-blaming-guidance-Feb-2024.pdf> (last visited November 12, 2025).

3. *Victim Blaming in Practice. Women as Virgins: the Case of Virginity Testing*

3.1. *Virginity Testing in India*

As already mentioned, victim blaming is a burden for women worldwide.

Among others, the Indian legal system and its tortuous handling of the role of victims within rape trials shed light on a handful of instances.

Since the 1990s nevertheless, gradual but profound criticism has built up both in the legal field and the social conscience, challenging what for centuries has been considered an indisputable truth but is just an anatomical myth: women's virginity⁶⁴.

At this point a short explanation is necessary given that this thin rim of tissue is unknown to most while being legally relevant, as the Indian case will demonstrate.

In *The Wonder Down Under* (2017) Brochmann and Dahl, two passionate physicians, explain how the hymen is a heterogeneous and elastic rim of tissue surrounding the vaginal opening, a leftover from the embryonic existence. Thus, it has many shapes and, rarely, can be absent:

Different configurations of the hymen exist, and include, most commonly: annular (also known as circumferential), crescentic, and fimbriated (with finger-like projections). Less common hymen configurations are: sleeve-like, septate (in which there are two openings with a band of tissue between them), cribriform (with multiple openings), micro-perforate (in which the hymenal orifice

⁶⁴ See generally Nina Brochmann and Ellen Støkken Dahl, *The Wonder Down Under* (Yellow Kite 2017).

is extremely small), and imperforate (in which there is no hymenal opening at all)⁶⁵.

Moreover, when it covers the whole opening, it is handled by surgeons within a few days from birth, otherwise it would cause excruciating pain once the young girl reaches puberty⁶⁶.

The consequence from a legal perspective is that the expert witness, for example, cannot tell if a woman has had sex by examining her genitalia through a so-called virginity test.

This was confirmed by the World Health Organization in 2018 through an Interagency Statement, which aimed to raise awareness about the harmful consequences of virginity testing and to protect women and girls from its dangerous repercussions. The Statement emphasized that virginity testing has no scientific validity, constitutes a form of gender-based violence, and violates human rights. Indeed, it facilitates the dissemination of sexually transmitted infections (STIs), when it is carried out with insanitary tools, and also harms women's mental health, causing post-traumatic stress disorder (PTSD), suicide attempts and eventually honor killings⁶⁷.

⁶⁵ Ranit Mishori et al., *The little tissue that couldn't—dispelling myths about the Hymen's role in determining sexual history and assault*, 16.1 Reproductive health (2019).

⁶⁶ Abbey Berenson, Astrid Heger and Sally Andrews, *Appearance of the hymen in newborns*, 87.4 Pediatrics 458-465 (1991); Carole Jenny, *Congenital absence of the hymen only a rumor?*, 82.4 Pediatrics 679-680 (1988); Amanda M. Jacobs and Elizabeth M. Alderman, *Gynecologic examination of the prepubertal girl*, 35.3 Pediatrics in Review 97 (2014).

⁶⁷ W.H.O., *Eliminating Virginity Testing: An Interagency Statement* (October 16, 2018), available at <https://www.who.int/publications/i/item/WHO-RHR-18.15> (last visited November 12, 2025).

Moreover, virginity testing has not only been used in rape trials but has also been carried out by officials during custody, in jurisdictions where adultery and prostitution are crimes⁶⁸.

Nonetheless, there is no doubt in the scientific community, even more so since the W.H.O. itself clarified its unreliability.

Still, physicians find themselves trapped in a medical dilemma: to hand over a fallacious certificate in order to save, in the short term, a pressured young girl; or to deny it in the name of scientific accuracy, and so to educate the ones who ask for the test in the long term⁶⁹.

Researchers such as Delgross recommend denying the continuation of virginity testing and, at the same time, letting the victim and her parents know about its negative consequences and unscientific basis⁷⁰.

Reverting to the Indian legal system, for centuries, the defence in rape trials relied on the proof of women being “habitual/habituated to sex” to pierce through the victim status. Then, the horrific Nirbhaya case (2012) and its arctic wind of change led to the establishment of the Verma Committee and, consequently, to the approval of the Criminal Law Amendment (2013) and the Health Minister’s guidelines (2014).

Before that, many court decisions emerged and shed light on this pervasive issue.

Back in 2003, in *State Of Punjab vs Ramdev Singh*, the Supreme Court focused on honor, dignity and chastity when considering the rights undermined in rape cases. Still, one year later, in *State of U.P. vs Pappu @ Yunus And Anr*, the Court stepped back from the

⁶⁸ Marcia L. Pearson, *A blemish on the modern face of Turkey: The historical background and social, legal, and international implications of virginity testing in Turkey*, 28 North Carolina Journal of International Law 663 (2002).

⁶⁹ Niklas Juth and Niels Lynøe, *Zero tolerance against patriarchal norms? A cross-sectional study of Swedish physicians’ attitudes towards young females requesting virginity certificates or hymen restoration*, 41.3 Journal of Medical Ethics 215 (2015).

⁷⁰ Savannah Delgross, *The Mythological role of the hymen in virginity testing*, 24.1 Articulãte 4 (2019).

assumption that the victim's sexual history might weaken her claim: "even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question"⁷¹.

Also, in *Sukhdev Anand v. State of Himachal Pradesh* (2005) the Supreme Court highlighted the arbitrary and unscientific nature of this examination calling its outcome hypothetical and based on opinion. In *State of U.P. vs Munshi & Etc.* (2008), the judges reaffirmed the irrelevance of being "habituated to sex" and qualified as "legally unattainable" the outcome of the two-finger test⁷².

In these and similar court cases, the Human Rights Watch highlighted that often the victim's consent was either totally lacking or vitiated by external pressure.

Finally, the Human Rights Watch (H.R.W.) suggested to ban the use of virginity testing given its lack of scientific reliability and the harm it causes.

Together with a legal ban, it was highly recommended strengthening the education of both medical professionals and police officials in order to provide appropriate support to rape victims, thus avoiding useless and detrimental exams⁷³.

In the following years the Court treatment of similar cases improved. For instance, in *Phool Singh vs The State of Madhya Pradesh* (2021), the lower jurisdictions did not use the expression "habituated to sexual intercourse" anymore. Besides, in considering those cases, it was made clear that courts cannot "sit in an ivory tower" losing sight of the above-mentioned pivotal considerations⁷⁴.

⁷¹ *State Of U.P v. Pappu @ Yunus And Anr*, (Supreme Court of India 2004).

⁷² *Sukhdev Anand v. State of Himachal Pradesh* (Himachal Pradesh High Court 2005); *State Of U.P v. Munshi & Etc* (Allahabad High Court 2008).

⁷³ H.R.W., *Dignity on Trial India's Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors* (September 6, 2010), available at <https://www.hrw.org/report/2010/09/06/dignity-trial/indias-need-sound-standards-conducting-and-interpreting-forensic>. (last visited November 12, 2025).

⁷⁴ *Mukesh & Anr v. State for Nct of Delhi & Ors* (Supreme Court of India 2017).

Additionally, in *Vijay v. State of M.P.* (2023), the court recognized the victim as such, rather than implying that they were somehow responsible for or complicit in their own victimization⁷⁵. Moreover, the Court clarified that the absence of physical harm does not deem the accused as innocent, and neither does a delay in the victim's report considering the sense of shame and fear, which is still common among rape victims.

However, between the H.R.W. report and these recent cases, one event in particular shaped Indian handling of rape cases: the Nirbhaya case, which involved a brutal gang rape which eventually led to her death; the victim was still able to report it and narrate the events.

The Court's decision underscores that neither delays in reporting nor the absence of detail in the First Information Report should affect the assessment of the case. Moreover, the judges stressed the importance and sensitivity of the injured witness' declaration, giving proper weight to the mental, physical and emotional status while releasing it. So even though this was not the first gang rape case in India, "this time, the government was compelled to take measures which it had not taken before"⁷⁶.

Sure enough, a committee under the leadership of Justice Verma was created to suggest changes in criminal law, which were soon implemented⁷⁷.

More specifically, the Committee encouraged proper amendments in order to make rape trials more efficient, quicker and to increase punishments in rape cases. Moreover, it clearly recommended avoiding what, back in 2010, the H.R.W. focused on: virginity testing.

⁷⁵ *Vijay v. State of M.P.* (Supreme Court of India 2023), last visited November 30, 2025).

⁷⁶ Akshay Bhatnagar, et al., *Sparking the #MeToo revolution in India: The 'Nirbhaya' case in Delhi*, 6 AEI Paper & Studies 1, 9 (2019).

⁷⁷ Ashish Verma, *Test Identification Parade's Purpose And Evidentiary Value Under Indian Law*, 7 Research Ambition: An International Multidisciplinary e-Journal 1, 1-2 (2022).

Consequently, in 2013, a massive change occurred in Indian law: with the Criminal Law Amendment Act, Section 53A was inserted into the Evidence Act, which now specifies: “In a prosecution for [sexual violence and similar offences] (...) evidence of the character of the victim’s previous sexual experience shall not be relevant on the issue of such consent or the quality of consent”⁷⁸.

In the same year the Supreme Court, in *Lillu @ Rajesh & Anr vs State Of Haryana*, declared virginity testing to be unconstitutional. Indeed, the Court held that this examination violates “the ‘right of rape survivors to privacy, physical and mental integrity and dignity’”⁷⁹.

Changes in the medical practice followed: in 2018 one of the main textbooks of medical jurisprudence was revised (*A Textbook of Medical Jurisprudence and Toxicology*), underlining the lack of scientific basis behind the two-finger test⁸⁰.

More recently, the 2013 Court decision was reinforced by a more concrete and precise one (*Supreme Court in the State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*, 2022) which gave practical guidelines in order to translate the declaration of unconstitutionality into practice. Certainly, it reaffirms that “the so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth – a woman’s sexual history is wholly immaterial while adjudicating whether the accused raped her”⁸¹. Hence, it confirms that virginity testing harms more dimensions: privacy, physical and mental integrity and dignity.

⁷⁸ Criminal Law Amendment Act (2013), Section 53A.

⁷⁹ *Lillu @ Rajesh & ANR v. State of Haryana* (2013), <https://indiankanoon.org/>, at 5.

⁸⁰ Sumedha Sen, *The ‘Virtue’Vertigo: Case of the Paradoxical Virginity Test in Rape Cases* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861810 (last visited November 12, 2025).

⁸¹ *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*, para 16 (Supreme Court of India 2022).

The Court replicated not only how this “exam” lacks scientific basis and qualifies as misconduct but also how it “re-traumatizes” the victim, shifting the spotlight on what is defined as wholly immaterial: women’s sexual history.

More specifically, the Court asserts that “the so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. (...) It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active”⁸².

Also, it turns directly to the Government asking to properly apply the Ministry of Health and Family Welfare guidelines, for medical examination and for the protection of victims of sexual violence, approved in 2014 but not fully implemented.

Moreover, close enough to what the W.H.O. recommended in 2018, the Indian Supreme Court shed light on the importance of conducting workshops on the matter.

Finally, it demanded to review curricula in medical schools in order to give proper space not to female anatomy in general but more specifically to the two-finger test, classifying it as a procedure to avoid when taking care of rape victims. About that last point, in 2024 the National Medical Commission revised medical curriculum for undergraduate students, qualifying virginity testing as unscientific and inhumane⁸³.

⁸² *Id.* para18.

⁸³ Megha Chowdhury, *NMC Reintroduces MBBS CBME Curriculum, Talks About Informed Consent & Removes 'Virginity Test'* (The Free Press Journal Online, September 13, 2024), available at <https://www.freepressjournal.in/education/nmc-reintroduces-mbbs-cbme-curriculum-talks-about-informed-consent-removes-virginity-test> (last visited 12/11/2025).

3.2. *Virginity Testing in the U.K.*

Not only India recently handled the umpteenth example of secondary victimization, namely virginity testing. In 2022, the U.K. took comparable action, though through legislative measures rather than a court decision. It is now severely punished in England, Scotland, Wales and Northern Ireland to “carry out, offer or aid and abet virginity testing or hymenoplasty”⁸⁴.

The law meticulously defines each relevant term starting with “virginity testing” and “hymenoplasty”. This procedure aims to manipulate the hymen in order for it to look like a “virginal hymen” whatever that might signify. Clearly, researchers pondered over the validity of this operation considering that, as yet clarified, hymens come in various shapes and such thing as a “virginal” hymen does not exist⁸⁵.

Moreover, the W.H.O. classified it among the four types of female genital mutilation (WHO, 2018); qualification which was adopted by other relevant institutions such as: the Royal College of Obstetricians and Gynecologists, the American College of Obstetricians and Gynaecologists and the International Society for the Study of Vulvovaginal Disease⁸⁶.

⁸⁴ Health and Care Act of 2022 §§ 136 – 148.

⁸⁵ Brian D. Earp, *Hymen ‘restoration’ in cultures of oppression: how can physicians promote individual patient welfare without becoming complicit in the perpetuation of unjust social norms?*, 40.6 *Journal of Medical Ethics* 431 (2014).

⁸⁶ R.C.O.G., *Royal College of Obstetricians and Gynaecologists position statement Virginity testing and hymenoplasty* (August 2021), available at <https://www.rcog.org.uk/media/qlxh3wro/rcog-virginity-testing-hymenoplasty-position-statement-august-2021.pdf> (last visited November 12, 2025); A.C.O.G., *Elective Female Genital Cosmetic Surgery* (January 2020), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/01/elective-female-genital-cosmetic-surgery> (last visited November 12, 2025); Pedro Vieira-Baptista, et al., *International society for the study of vulvovaginal disease recommendations regarding female cosmetic genital surgery*, 22.4 *Journal of lower genital tract disease* 415 (2018).

It has been recommended that physicians refuse to carry out such practices and rather to ponder over the reasons behind the request, establish a safe and enriching dialogue with the patient in order to explain the negative consequences of the procedure, as well as the anatomical myth in question⁸⁷.

In addition to that, it is relevant to underline how the previous set of legal rules was not sufficient to condemn such practices. Therefore, it cannot be considered a battery or an assault, and virginity testing, specifically, does not fall under the definition of female genital mutilation. Consequently the 2022 amendment of the Health Care Act was necessary to contrast these two practices.

Moreover, this legal provision covers the definition, sanctions a wide range of conduct other than “carry out” and it also extends the possibility of punishment beyond national borders.

The *ratio* behind this wide coverage lies in the consistent reference, when a service is prohibited in the Country of origin, to other States. This happens among the so-called procreative tourism but also the horrid scenario of sexual tourism. To avoid this epilogue in the U.K., the legislator preferred to extend its scope of punishment to the point of “following” not so much the accused but the injured party even outside the United Kingdom. Therefore, the will to enhance the universality of the protected fundamental rights does not end in a single country. Rather it remains worthy of protection wherever the person is. Among these rights, there certainly are life, health, psychophysical integrity and sexual freedom.

Thus, the multi-agency guidance clearly states: “there is a risk that women and girls may be taken abroad and subjected to virginity testing and hymenoplasty (as is often seen with so-called ‘honor-

⁸⁷ Bianca R. Van Moorst, et al., *Backgrounds of women applying for hymen reconstruction, the effects of counselling on myths and misunderstandings about virginity, and the results of hymen reconstruction*, 17.2 The European Journal of Contraception & Reproductive Health Care 93 (2012);

Venkatachalam Raveenthiran, *Surgery of the hymen: from myth to modernisation*, 71(4) The Indian journal of surgery 224 (2009).

based' abuse offences, such as female genital mutilation or forced marriage). The offences, therefore, carry extra-territorial jurisdiction"⁸⁸.

4. *If not Virgins, then Mothers*

4.1. *Motherhood, Marriage and Heterosexuality through the Lenses of (Radical) Feminist Constitutionalism*

In her work, Ruth Rubio-Marín deals with the preoccupying relationship between motherhood and the State. Conveniently enough, the capitalistic structure recognizes the value of social reproduction, embedding motherhood, as an institution, within the confining domestic walls. Although particularly harsh in the past, the dichotomy between the private and public spheres, apparently, faded as a result of second wave feminism's efforts⁸⁹.

Still, this massive change was not secluded in the streets, far away from the law: inevitably it influenced the legal field too, corroborating the struggle endured by the above-mentioned movements. Nonetheless, within some 20th-century democratic constitutions, together with equality, maternity clauses emerged. They were considered by those very female voices who, for instance, in Germany contributed to constitution-making. However, if in Europe the accommodationist model recognized gender differences and dealt with them; in the U.S., as stated by Rubio-Marín, gender neutrality thrived within the assimilationist model⁹⁰. The first model

⁸⁸ U.K. Government, *Virginity testing and hymenoplasty: multi-agency guidance* (2022), available at <https://www.gov.uk/government/publications/virginity-testing-and-hymenoplasty-multi-agency-guidance/virginity-testing-and-hymenoplasty-multi-agency-guidance> (last visited November 12, 2025).

⁸⁹ Ruth Rubio-Marín, *The (Dis)Establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, Vol. no. 13 *International Journal of Constitutional Law*, 787 (2015).

⁹⁰ *Ibid.*

acknowledges the biological differences between women and men and supports women without undermining those differences, while the second model treats men as the standard to which women must conform in order to secure their rights.

Both models are intrinsically weak. In the U.S., gender neutrality proved the argument of dominance feminism: within the patriarchal structure, difference means inferiority, while pretending that a male-tailored system can fit women's existence⁹¹.

Through the analysis offered by another noteworthy author, Julie Suk, the fallacies of normative motherhood, for example in Germany, are plain. On the one hand, it is crucial to translate constitutional maternity clauses into ordinary law (e.g., with pregnancy and maternity leave); on the other hand, their gendered basis brings the employer, within the capitalistic system, to prefer men (the "ideal worker") to women⁹².

Hence, Rubio-Marín's proposal to de-gender "maternity" clauses is spot on. In particular, the author encourages both to cherish the importance of social reproduction and to expand its boundaries to a gender-neutral version of those guarantees. By providing parental leave the aforementioned accommodationist model's fallacy can be overcome⁹³.

Nonetheless, a closer look is essential to ponder over a long-term solution.

Among the others, Jennifer Nedelsky's argument comes to the rescue: not only is institutional change much needed (i.e., parental leave, part-time work in the first years of the child's life etc.), but also, a "change in desire" is crucial. That is to say the need to establish pervasive forums within many fields (from education to work

⁹¹ Mackinnon, *Feminism Unmodified* (cited in note 38).

⁹² Julie Suk, *Gender Equality and the Protection of Motherhood in Global Constitutionalism*, 12 *The Law & Ethics of Human Rights* 151 (2018).

⁹³ Rubio-Marín, *The (Dis)Establishment of Gender* at 787 (cited in note 89).

including religious institutions), in order to discuss and challenge the gendered division of labor⁹⁴.

According to Nedelsky, this would nudge men inside the private sphere, reaping major benefits, for example bonding with their children more consistently. At the same time, women would be freed from the never-ending burden of internal and external work.

A further argument to improve Nedelsky's point could be outlined. Evidently, when discussing and addressing a "change in desire," it is essential to examine desire itself. Although far from the pronatalist ideals of the 20th century – which equated the family with a heterosexual, reproductive union – such notions still persist. In these forums, therefore, and with the aim of promoting holistic health, the very wish to become a parent should be carefully considered, allowing individuals to explore their unique identities, whether aligned with a parental project or a childfree life⁹⁵.

At this point it is possible to refer to the normalization of one family ideal: the heteronormative one. The obsession for reproduction is intertwined with the romanticization of a woman's prison: marriage.

Only one union is convenient for the patriarchal and capitalistic system and that is the one which permits new workforce to multiply. (Heterosexual) marriage breeds the achievement of social reproduction, fostering the sex-dichotomy which depicts the man as the breadwinner and the woman as, necessarily, the caring and nurturing mother.

Among other examples, this obsession with marriage becomes vibrant through the words of John Mee, who clarified: "the constitutional right to marry may preclude measures that render it

⁹⁴ Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, *Feminist Constitutionalism: Global Perspectives* at 15 (Cambridge University Press [1st ed. 2012]).

⁹⁵ Amy Blackstone, *Childfree by Choice: The Movement Redefining Family and Creating a New Age of Independence* (Penguin Random House 2019).

unduly difficult to exit a failed civil partnership where one of the partners wishes to marry a person of the opposite sex”⁹⁶.

Accordingly, institutions like motherhood and marriage can be understood as clear examples of how gendered oppression is embedded and maintained within legal and social structures.

In particular, considering marriage, Rubio-Marín states: “constitutionalism was built on the assumption of women’s relegation to, and subordination within, the private sphere”. Consequently, marriage equals “women freely ‘contracting into’ an institution that secured patriarchy and affirmed their obedience to men”⁹⁷.

Bringing this argument to its core makes it inevitable to question the very basis of women’s heterosexual relationships, eventually culminating into marriage, within the patriarchy. Thus, by “placing sexuality in the construction of women’s definition and status, they act as if women can be ‘persons’ by interpretation, as if the concept is not, in every socially real way, defined by and in terms of and reserved for men and as if sexuality is not itself a construct of male power”⁹⁸.

4.2. *A Clear Example: on One Side a Person, on the Other, not One Yet*

The struggle between women-centered necessities and institutionalized patriarchal needs is often brushed off as second-rank tantrums. However, they are definitely not when a pregnant person is carrying a fetus inside them and a pivotal decision has to be made

⁹⁶ Fergus Ryan, *Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family*, 48 Irish Jurist 201 (2012).

⁹⁷ Rubio-Marín, *The (Dis)Establishment of Gender* at 790 (cited in note 89). See also Leslie Francis and Patricia Smith, *Feminist Philosophy of Law* (Stanford Encyclopedia of Philosophy, March 5, 2025), available at <https://plato.stanford.edu/entries/feminism-law/> (last visited November 11, 2025).

⁹⁸ MacKinnon, *Feminism Unmodified* at 344 (cited in note 38).

(e.g., about blood transfusion, HIV or syphilis treatment, Caesarean section, etc.)⁹⁹.

Legally speaking, courts have grounds for ordering forced treatment, when, in the same jurisdiction, next to the right to refuse (in Ireland, for example, before the 2018 Constitutional amendment), the rights of the unborn are guaranteed. Nevertheless, even before 2018, Irish case law proved to be skeptical of coerced treatments for pregnant persons (*Health Service Executive v. B and Anor*)¹⁰⁰.

This is confirmed when considering competent patients, even after the High Court President imposed a C-section on a woman affected by a mental health disorder¹⁰¹.

After 2018, in Ireland, neither the Constitution nor other norms provide a decisive answer when considering the courts' intervention against a competent pregnant person's refusal of treatment¹⁰². Consequently, it is appropriate to interpret this vacuum through ethical lenses.

Authors shed light on the different interests at stake: those of the foetus and those of the pregnant person; except, when considering the latter, it is not about interests, it is about rights.

⁹⁹ R.C.O.G., *Blood transfusion, pregnancy and birth* (2015), available at <https://tinyurl.com/3bprprkm> (last visited November 11, 2025).

¹⁰⁰ Mairead Enright and Deirdre Duffy, *Law and childbirth in Ireland after the 8th Amendment: notes on women's legal consciousness*, 49 *Journal of Law and Society* 753 (2022); See also *Health Service Executive v. B*, IEHC 605 (2016).

¹⁰¹ High Court reporters, *High Court approves hospital's plan to carry out elective C-section on woman against her will*, (BN, July 5, 2023) available at <https://www.breakingnews.ie/ireland/high-court-approves-hospitals-plan-to-carry-out-elective-c-section-on-woman-against-her-will-1498242.html> (last visited November 30, 2025).

¹⁰² Maeve Taylor, Alison Spillane and Sabaratnam Arulkumaran, *The Irish Journey: Removing the shackles of abortion restrictions in Ireland*, 62 *Best Practice & Research Clinical Obstetrics & Gynaecology* 36 (2020).

Problems emerge when men and women are considered as entirely distinct individuals with inherently different roles¹⁰³. Nevertheless, it remains clear that no separate spheres truly exist¹⁰⁴.

It must be emphasized that this is a gendered issue, encompassing not only the right to privacy and bodily integrity, but also broader forms of gender discrimination¹⁰⁵. Evidently, it is people with a uterus who, by virtue of their reproductive capacity, are disproportionately subjected to rights violations and treated as “second-class citizens”¹⁰⁶. Within a patriarchal and capitalistic society, the deviation from the male standard of bodily function systematically oppresses these individuals and undermines their rights¹⁰⁷. Far from the “ideal worker”, who can be productive seven days a week, they are second-class citizens: the fact that there is still room for disagreement on their right to choose treatment refusal when pregnant, proves so¹⁰⁸. The “ideal worker” model inherently assumes a male body, unconstrained by pregnancy or reproductive care. By contrast, people with a uterus are systemically positioned as “second-class citizens” precisely because their reproductive capacity is used to justify restrictions on bodily autonomy, including the right to refuse medical treatments during pregnancy. In this sense, the critique of the “ideal worker” is not tangential but directly illustrates how societal and institutional norms intersect with reproductive rights.

¹⁰³ Lawrence J. Nelson, Brian P. Buggy and Carol J. Weil, *Forced medical treatment of pregnant women: Compelling each to live as seems good to the rest*, 37 *Hastings LJ* 703 (1985).

¹⁰⁴ Anne Drapkin Lyster, Margaret Olivia Little and Ruth R. Faden, *A critique of the ‘fetus as patient’*, 8 *The American journal of bioethics* 42 (2008).

¹⁰⁵ Lisa H. Harris, *Rethinking maternal-fetal conflict: gender and equality in perinatal ethics*, 96.5 (Part 1) *Obstetrics & Gynecology* 786 (2000).

¹⁰⁶ Michael Ulrich, *With Child, without Rights: Restoring a Pregnant Woman’s Right to Refuse Medical Treatment through the HIV Lens*, 24 *Yale JL & Feminism* 303 (2012).

¹⁰⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

¹⁰⁸ Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, *Feminist Constitutionalism: Global Perspectives* at 15 (cited in note 94).

Furthermore, the right to life (for those who consider the foetus a separate entity) 'does not entail using another person's body to secure that right'¹⁰⁹.

Thus, rivers of ink on 'when life begins' should be spared. "Life" could start at conception according to one's moral or religious view, but it would not be relevant.

Indeed, Thomson and other authors' point is that if one has a duty to protect the other, and above all that parents have a duty to protect their child, this should not be hypocritically reduced to an abortion ban¹¹⁰. Instead, it should include organ donation. Both have permanent effects and in the case of birth, not only emerges the duty to raise a person but also the damage to physical, sexual and mental health and potentially life¹¹¹.

In response to the argument that another donor could be found, while the foetus is "stuck" within one's body, it can be said that no human being could be forced to donate¹¹². One is an omission while

¹⁰⁹ Devora Shapiro and Jeffrey Pannekoek, *Another Defense of Abortion: What Transplant Ethics Tells Us about the Ethics of Abortion after Dobbs*, 54 Hastings Center Report 34 (2024).

¹¹⁰ Judith Jarvis Thomson, *A defense of abortion*, 1 Philosophy & Public Affairs 47 (2004); See also Emily Carroll and Parker Crutchfield, *The duty to protect, abortion, and organ donation*, 31 Cambridge quarterly of Healthcare Ethics 333 (2022).

¹¹¹ Jessian L. Muñoz, *Physical Changes During Pregnancy* (MSD Manual, September 2024), available at <https://www.msdmanuals.com/home/women-s-health-issues/normal-pregnancy/physical-changes-during-pregnancy> (last visited November 11, 2025); Natalie O. Rosen, et al., *Trajectories of dyspareunia from pregnancy to 24 months postpartum*, 139 Obstetrics & Gynecology 391 (2022); *Supports for postnatal depression*, (Citizen Information Online, February 26, 2025), available at <https://www.citizensinformation.ie/en/birth-family-relationships/after-your-baby-is-born/supports-for-postnatal-depression/> (last visited November 11, 2025); *Maternal Mortality* (National Center For Health Statistics Online, April 20, 2022), available at <https://www.cdc.gov/nchs/maternal-mortality/index.htm> (last visited November 11, 2025).

¹¹² Shapiro and Pannekoek, *Another Defense of Abortion* (cited in note 109).

the other is an action, but the duty of protection can be equally violated by both conduct, forcing to abandon that distinction¹¹³.

Therefore, if one cannot be obliged to undergo such an intrusion, no competent pregnant person can be coerced into unwanted treatment in the light of foetus rights' protection¹¹⁴.

There is further motive to oppose a court order against competent pregnant persons' treatment refusal.

As clarified by the A.C.O.G., person-centered care is the foundation of twenty-first-century health care system and so should be for pregnancy-related treatments¹¹⁵.

Thus, informed consent arises, described as an 'ongoing process' between physicians and patients, within an "open, non-judgmental and continued dialogue"¹¹⁶.

Therefore, the former should, first of all, provide clear and complete information on the available treatments and alternatives, including risks and benefits of each.

Secondly, they should listen without interrupting and empathically understand the potential patient's refusal. This should be addressed in order to avoid negative side effects on the mother and the foetus. Still, any type of coercion (as in *South Western Area*

¹¹³ Elizabeth Latham, *Vulnerability Ethics, Abortion, and Organ Donation*, 33 *Cambridge Quarterly of Healthcare Ethics* 306 (2024); See also Carroll and Crutchfield, *The duty to protect* (cited in note 110).

¹¹⁴ Shapiro and Pannekoek, *Another Defense of Abortion* (cited in note 109).

¹¹⁵ Committee Opinion by the American College of Obstetricians and Gynecologists' Committee on Ethics, *Informed Consent and Shared Decision Making in Obstetrics and Gynecology* (American College of Obstetricians and Gynecologists, February 2021), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology> (last visited November 11, 2025).

¹¹⁶ Committee Opinion was developed by the American College of Obstetricians and Gynecologists' Committee on Ethics, *Refusal of Medically Recommended Treatment During Pregnancy* (American College of Obstetricians and Gynecologists, June 2016), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/06/refusal-of-medically-recommended-treatment-during-pregnancy> (last visited November 11, 2025).

Health Board v. K & Anor (19 July 2002) (HC)) is opposed by the A.C.O.G., who wisely suggests that once dismantled, the person's trust in physicians and the health care system can hardly be restored¹¹⁷.

This is an issue for those very theorists who deeply care about the foetus, because coercion discourages antenatal and post-natal care. Also, it is indicated, in the case of HIV treatment for example, how this poses a threat to public health, too¹¹⁸. Moreover, "in almost one third of cases in which court orders were sought, the medical judgment, in retrospect, was incorrect"¹¹⁹.

Most importantly coercion should be avoided since, according to the A.C.O.G., it can be prevented. This is possible thanks to effective communication skills within a respectful dialogue between patients and physicians, and through an interdisciplinary team which includes nurses, social workers, ethical counsellors, etc.

Other theorists suggest the use of a Personalized Alternative Care and Treatment framework "for documentation and communication with the goal of supporting women"; in order to sustain informed choices and possible refusal¹²⁰.

Thus, "pregnancy is not an exception to the right to refuse", neither legally nor ethically¹²¹.

Clearly, pregnant persons and fetuses are not to be regarded as occupying separate spheres.

¹¹⁷ *Ibid.*

¹¹⁸ Michael Ulrich, *With Child, without Rights: Restoring a Pregnant Woman's Right to Refuse Medical Treatment through the HIV Lens*, 24 Yale JL & Feminism 303, (2012).

¹¹⁹ Veronika Kolder, Janet Gallagher and Michael Parsons, *Court-ordered obstetrical interventions*, 43.1 Obstetrical & Gynecological Survey at 41-43 (New England Medical Journal [1st ed. 1988]).

¹²⁰ Bec Jenkinson, Sue Kruske and Sue Kildea, *Refusal of recommended maternity care: Time to make a pact with women?*, 31 Women and Birth 433, 433-441 (2018).

¹²¹ Committee Opinion by the American College of Obstetrician and Gynecologist, *Refusal of Medically Recommended Treatment* (cited in note 115).

What firmly stands on both legal and ethical grounds is one person, who is entitled to respect of their right to health, life and privacy; so as to balance the benefits and side effects of the proposed treatment.

Most importantly, what is considered, but is not, a conflict between equal beings, can be avoided through person-centered care in which treatment is offered; still, how the pregnant person answers is their choice.

4.3. Another Clear Example: Women in the Home. The Case of the Irish Referendum

Article 41 of the Irish Constitution:

(...)

2 1° In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.

On 8th March 2024 Irish citizens had to vote in what has been called a “confused” referendum, modifying the Irish Constitution by expanding the definition of family to durable relationship and by substituting articles 41.2.1° and 41.2.2° with a genderless provision¹²².

Not only did the government, in the final phrasing of the Family Bill and the Care Bill, neglect what had emerged from the Citizens’ Assembly, but the campaign also confused the citizens failing to make clear the outcome of these amendments.

¹²² Sophie Treacy, *Constitutional Confusion: Ireland’s Failed Referendum on Care and the Family* (Oxford Human Rights Hub Online, April 29, 2024), available at <https://ohrh.law.ox.ac.uk/constitutional-confusion-irelands-failed-referendum-on-care-and-the-family/> (last visited November 30, 2025).

Thus, disinformation viciously spread, undermining every possibility for this necessary change to thrive, with the opposition of respectively 67.69% and 73.93% of Irish citizens.

However, the vague wording made the outcome of the Care Bill plausible¹²³. Indeed, it deteriorated the condition of people with disability, for instance by making State's support optional.

Behind these critiques lies a broader one: the voter turnout sheds light both on the general uncertainty and indifference caused by the government's handling of the issue; and on scarce and uninformative campaigning about the Constitutional amendments¹²⁴.

Nevertheless, in order to assess, from a feminist constitutionalism perspective, whether the referendum was ultimately a failure, a brief account on the variety of feminist perspectives has to be recalled.

A premise is needed: despite differences there surely is common ground, which can be summarized as follows: women are systematically oppressed; thus, it is pivotal to wonder why that is so and how to change it¹²⁵.

However, sameness, difference and dominance feminism underline various perspectives about the status quo¹²⁶.

Evidently, the priorities of the first wave feminists, who focused on the right to vote, are entrenched in and explained by that context.

¹²³ *Irish referendums: Voters reject changes to family and care definition* (BBC Online, March 9, 2024), available at <https://www.bbc.com/news/world-europe-68484651> (last visited November 30, 2025).

¹²⁴ *Id.* at 119.

¹²⁵ Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 *Berkley Journal of Gender, Law and Justice* 1 (1987); Tracy A Thomas, *The Long History of Feminist Legal Theory*, in Deborah L. Brake, Martha Chamallas and Verna L. Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (November 30, 2020), available at <https://ssrn.com/abstract=3740082> or <http://dx.doi.org/10.2139/ssrn.3740082> (last visited November 30, 2025).

¹²⁶ Chris Beasley, *What is feminism? An introduction to feminist theory* (Sage Publications Ltd 1999).

Undoubtedly, faced with absolute carelessness, white and middle-class women settled for formal equality vaguely demanding “admission to all the rights and privileges which belong to them as citizens”¹²⁷.

So-called “sameness feminism” lingered for a while, surfacing through the voices of many movements mainly preoccupied with the right to vote (NWSA, WCTU, NWP, etc.). This was evident in the example of the British suffragettes, whose push for universal suffrage overlapped with the outcome of World War I: women had to substitute for men in their everyday jobs to actually “deserve” rights within the male status quo¹²⁸.

Most scholars acknowledge it as the first wave of feminism; one thing is certain: the right to vote was only one of the first steps; the victimization of the female body and sexuality came right after. In particular, within the patriarchy, how can women be considered citizens, or even fully human, if they do not have control over the first thing that belongs to them, namely their bodies?

Within the ongoing pronatalist demands, the stance of second wave feminists misaligned with the understanding of women as mothers at all costs¹²⁹.

Evidently, these various approaches are vivid in feminist legal literature and so in notorious acts (e.g., E.R.A, Fair Labor Standards Act in the U.S.).

Theory and norms on those issues deserve deeper clarification in order to understand, within the above-mentioned frame, both the roots and the epilogue of the Irish Family and Care Referendums.

¹²⁷ Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage, *The Declaration of Sentiments and Resolutions, A History of Woman Suffrage*, (Rochester, N.Y.: Fowler and Wells 1889).

¹²⁸ Francis and Smith, *Feminist Philosophy of Law* (cited in note 97).

¹²⁹ *Ibid.*

Engaging with feminist legal theory is fundamental to consider activity and inquiry in relation to the legal system. This research area considers the law as both the venom and the antidote¹³⁰.

Sure enough, law is soaked with patriarchal influence, as well demonstrated by many examples. From the reasonable person (once “man”) standard, to testimony, as well as in marriage, reproduction and the actions against gender violence; together with economic norms.

Among these many examples two are the most relevant: the institution of marriage and reproduction, together with the data on poverty affecting women.

Here the so-called maternal wall comes into play: women will be either uncommitted workers or bad mothers, but will not have time to worry considering the tedious burden of external and domestic work, forever pestering them¹³¹.

Reproduction and marriage, employment and economic rights are clearly intertwined: women are exiled in the private sphere, taking care of re-producing the work force, as their husband’s property, duly belonging to the home (as the Irish Constitution confirms).

They are not equal citizens, nor fully human and will not be until home labor is genderless. On this specific point, Nedelsky states that to cherish substantial equality, other rights have to be guaranteed: education, work, health, etc¹³². Still, those are far from being recognized if women remain utensils within the domestic walls.

Additionally, the difference dilemma and so “how to acknowledge differences without entrenching stereotypes”, becomes

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights* at 15-47 (Cambridge University Press 2012).

vivid and urgent within the bond between equality and motherhood clauses, particularly present in inter-war constitutions.

Two models emerge: the assimilationist (e.g., in the U.S.) and the accommodationist (widely spread in Europe). In the first one, norms could not recognize sexual differences without being declared unconstitutional. Still, this apparent gender neutrality is instead the male standard; and negatively affects women¹³³.

In the second one, measures are provided to facilitate employment (often underpaid and part-time) and unpaid care labor. Here, the above-mentioned framework comes into play: these measures might now be unwanted and fiercely criticized but were advocated by the 1970s movements.

Evidently, in many European Countries, women had to make their way into gender equality also through maternity clauses. For instance, in Germany women who engaged with the constitution-making process, brought “attention to the challenge of social reproduction”, requiring for their “role” – or better burden – to be constitutionally recognized and thus managed¹³⁴.

To be fair, the World Economic Forum’s annual report points out how the presence or absence of maternity clauses or even of gender equality in the Constitution does not say much about the condition of women in a certain jurisdiction. So, the answer lies in the overall condition of women in such countries and in the legal and political system¹³⁵. In Germany, the translation of maternity clauses into legal guarantees has been a crucial step. Yet, by targeting these protections exclusively at women, it has contributed to a significant problem of female unemployment, for instance through the effects of paid maternity leave¹³⁶. Thus, it is fundamental, within the patriarchal and capitalist system, to open those clauses to both genders. Surely,

¹³³ Rubio-Marín, *The (Dis)Establishment of Gender* (cited in note 89).

¹³⁴ Suk, *Gender Equality* at 154 (cited in note 92).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

care and home duties, if gendered, do cause precariousness and poverty at women's expense.

Finally, there is no short answer to the question of whether the epilogue of the Irish referendum specifies what a failure was. Nonetheless, some points can be affirmed.

First of all, the final phrasing was problematic, mainly because it did not take good care of disabled people, both neglecting care outside the home and making State assistance discretionary.

Nevertheless, the need for a substantial change to the article in question must not be put aside. Undoubtedly, it is misogynistic and concretely harms women.

Evidently, by considering care and home labor as gendered, the destiny of women is predetermined and so is their economic condition and mental health. Article 41 of the Irish Constitution does not leave room for choice or debates: home duties are on women's back. Moreover, by making guarantees such as parental leave or the adjustments of the work schedule (e.g., part-time) gendered, unemployment is likely¹³⁷. As Nedelsky reminds us, this does not go without serious consequences¹³⁸.

Indeed, keeping those clauses means stripping women's ambition, along with damaging their economic condition, right to leisure, and health.

5. Neither Virgins nor Mothers, Inevitably Whores. Women Pressured by Capitalism; Men Empowered by Patriarchy. Deconstructing Prostitution

Being subjected to constant rape, beaten to stay, prevented from looking into other options, sustaining the trauma of a war zone or a

¹³⁷ Sandra Fredman, *Care as a Constitutional Value*, 22 International Journal of Constitutional Law 741 (2024).

¹³⁸ Nedelsky, *The Gendered Division of Household Labor* (cited in note 132).

torture chamber, needing drugs to keep doing it – is this what you mean by employment?¹³⁹

5.1. *Prostitution Harms Women: the Solution is to Keep It. Spain, Germany and New Zealand as Three Notorious Examples*

Behind the decriminalization of prostitution lies the liberal feminist legal theory, which conceives women as oppressed within the patriarchal structure, and considers the path toward the liberal feminist's goal, namely equality, to be a sex-positive one¹⁴⁰.

Consequently, the sex industry is not described as a threat to women's rights but rather as an opportunity to exercise their "agency", free from shame and "moralized" views of sexuality¹⁴¹.

Regarding prostitution, liberal feminist legal theory recognizes the current risks and harms that prostitutes face and asserts that these are worsened by the abolitionist approach.

Rather, maintaining prostitution means drawing a line between the direct coercion of women into paid sex, and women who are not forced into this. Finally, liberal feminists assert that the condition of the latter should be safeguarded through legislation¹⁴².

This has been considered by some local governments in Spain.

Evidently, sex trafficking is prohibited under Article 188 of the Criminal Code (LO 11/2003)¹⁴³. Different approaches are adopted

¹³⁹ Catharine A. MacKinnon, *Trafficking, prostitution, and inequality*, 46 Harvard Civil Rights - Civil Liberties Law Review 271 (2009).

¹⁴⁰ Beaslet, *What is feminism?* (cited in note 126); Robert Jensen, *Getting radical: Feminism, patriarchy, and the sexual-exploitation industries*, 6 Dignity: a journal of analysis of exploitation and violence (2021).

¹⁴¹ Beaslet, *id.*; Jane Dodsworth, *What Influences or Displaces Perceptions of Agency?, Realising justice for sex workers: An agenda for change*, at 61 (Bloomsbury Publishing, 2018); Jane Scoular and Sharron FitzGerald, *Why decriminalise prostitution?: Because law and justice aren't always the same*, 10 International Journal for crime, Justice and social democracy 56 (2021).

¹⁴² Chris Beasley, *What is feminism?* (cited in note 126).

¹⁴³ Helena Bonache, et al., *Prostitution policies and attitudes toward prostitutes*, 50 Archives of sexual behavior 1991 (2021).

depending on local governments, with Valencia and Barcelona criminalizing both prostitutes and clients; Seville opposing prostitution (criminalizing only the client); Córdoba and Tenerife neither banning nor regulating it¹⁴⁴. Therefore, the Spanish approach to prostitution is regarded as fragmented, and consequently harmful toward prostitutes, worsening their condition¹⁴⁵.

Much less criticized, but still flawed, is the German approach, which, with the intention to improve prostitutes' socio-economic conditions and combat criminal organizations, regulated prostitution in 2001 (*Prostitutionsgesetz*) and in 2016 (*Prostituiertenschutzgesetz*). This legislative framework outlines the requirements to legitimately engage in prostitution, for example, mandating medical checks (Art. 10), the use of condoms (Art. 32), and anti-violence alarms within every restroom (Art. 18)¹⁴⁶.

Nonetheless, the German model has faced criticism for its registration procedures (Articles 3–6), which verify voluntariness. In practice, this requirement can prevent vulnerable populations – such as economically disadvantaged individuals, or those lacking adequate support networks – who may not be able to demonstrate full autonomy, from engaging in lawful prostitution, forcing them into illegality and undermining their basic rights, including safety and healthcare¹⁴⁷.

Instead, New Zealand is recurrently appreciated in the literature, and its advantages regarding prostitutes' conditions are repeatedly referred to, both as the consequence of the Prostitution

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Carlotta Rigotti, *When the Law Meets Feminisms: The Shortcomings of Contemporary Prostitution Policies across the European Union*, 86 *Women's Studies International Forum* (2021).

¹⁴⁷ *Ibid.*

Reform Act (PRA) 2003 itself, which decriminalised prostitution, and of its enforcement¹⁴⁸.

The PRA protects prostitutes, for instance, by criminalizing “compelling someone to sell sexual services” (section 16), and impeding underage prostitution (sections 20 and 22). Its aim is to care for their health and safety, as stated in section 3¹⁴⁹. This is implemented by sections 8 and 9 which, for example, mandate the use of condoms, provide prostitutes and clients with health information and impose sexually transmitted infection (STIs) preventive measures¹⁵⁰.

However, even New Zealand’s approach to prostitution has been contested. More specifically, it has been reported that little has changed regarding the number of underage sex workers¹⁵¹. Moreover, even though it became easier for prostitutes to deny sex, exploitative employment conditions remained, as well as violence and public stigma¹⁵².

In addition to that, in-house prostitution, meticulously regulated by the PRA, is still regarded as “the lesser of two evils in the sex industry”, confirming the economic pressure behind it rather than “love of the work”¹⁵³.

Furthermore, although street prostitution remained more dangerous, in-house services were still described as “psychologically

¹⁴⁸ Billie Lister, *The Impact of Criminalisation on Indoor Sex Workers in England and Wales and the Need for Legislative Change*, in Sharron Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018).

¹⁴⁹ Holly O’Callaghan, *Sex Work in Ireland*, 17 Centre for Criminal Justice and Human Rights Working Paper (2022).

¹⁵⁰ *Ibid.*

¹⁵¹ Pantea Farvid and Lauren Glass, “It Isn’t Prostitution as You Normally Think of It. It’s Survival Sex”: Media Representations of Adult and Child Prostitution in New Zealand, 28.1 Women’s Studies Journal 47 (2014).

¹⁵² *Ibid.*

¹⁵³ *Id.* at 58.

risky” and “detrimental to [prostitutes’] emotionality and relationships outside of work”¹⁵⁴.

5.2. *Prostitution Harms Women: the Solution is to Ban It. The Nordic Model*

Behind the so-called Nordic Model lies radical feminist legal theory.

Far from sterile paternalism, radical feminism, as the adjective itself indicates, looks at the root of the patriarchal structures and so at its consequences¹⁵⁵. Women are considered one – although diverse – class, oppressed within the aforementioned structure¹⁵⁶.

The institutions built within it are themselves patriarchal and cannot offer women the space they need to thrive and see their fundamental rights respected¹⁵⁷.

The sex industry itself (i.e., prostitution, pornography, lap-dancing, etc.) exploits women in favor of men’s pleasure, not leaving space for agency. “Sex positivity” is influenced by the male gaze, oppressing women who are pushed into the industry because of

¹⁵⁴ *Ibid.*

¹⁵⁵ Victoria Robinson, *Radical Revisionings? The Theorizing of Masculinity and (Radical) Feminist Theory*, 26 *Women’s Studies International Forum* (2003); Breanne Fahs, *The Urgent Need for Radical Feminism Today*, 49 *Signs: Journal of Women in Culture and Society* 479, 497 (2024); Denise Thompson, *Radical Feminism Today* (SAGE Publications Ltd 2001); Dianne Bell and Renata Klein, *Radically Speaking: Feminism Reclaimed* (Zed Books Ltd 1996).

¹⁵⁶ Joan Cassell, *Group Called Women: Sisterhood and Symbolism in the Feminist Movement* (Waveland Press Inc 1989); Voichita Nachescu, *Radical Feminism and the Nation: History and Space in the Political Imagination of Second-Wave Feminism*, 3 *Journal for the Study of Radicalism* 29 (2009); Kate Grosser and Meagan Tyler, *Sexual Harassment, Sexual Violence and CSR: Radical Feminist Theory and a Human Rights Perspective*, 177 *Journal of Business Ethics* 217 (2022).

¹⁵⁷ Denise Thompson, *Radical Feminism Today* (cited in note 152); Bell and Klein, *Radically Speaking* (cited in note 156).

ethnicity, class, and/or their economic condition.¹⁵⁸ Indeed: “The economic class of a prostitute ranges from the stereotypical street prostitute (with or without a pimp) to the most upscale escort or call girl but, unsurprisingly, the vast majority of prostitutes are poor women”¹⁵⁹.

Therefore, radical feminist legal theory does not support the regulation of prostitution, but rather demands that it be banned¹⁶⁰.

However, it is relevant to underline that the Nordic model was not originally inspired by the noble purpose of radical feminism, namely women’s liberation¹⁶¹. Rather, as plainly explained in literature, it was motivated by morality and public safety¹⁶².

In particular it is claimed that when the Swedish legal system criminalised prostitution, it aimed to “cleanse the public space”, respond to the HIV panic and racistly “get rid of” immigration, fearing “foreign people, foreign ideas, and foreign values”¹⁶³.

¹⁵⁸Andrea Dworkin, *Why Women Must Get Out of Men’s Laps*, The Herald Online (2002), available at <https://prostitutionresearch.com/wp-content/uploads/2021/03/Andrea-Dworkin-Lapdancing-2002.pdf> (last visited November 17, 2025); Jensen, *Getting Radical* (cited in note 140); Samantha Majic, *Feminists, Step Back! (Re)centring and Supporting Sex Workers’ Political Projects*, in Sharron A. Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018); Meredith Brooke Beloso, *Sex, Work, and the Feminist Erasure of Class*, 38 Signs: Journal of Women in Culture and Society 47 (2012).

¹⁵⁹ Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 Law & Inequality 19 (2012).

¹⁶⁰ Thompson, *Radical Feminism Today* (cited in note 152); Finn Mackay, *Political Not Generational: Getting Real about Contemporary UK Radical Feminism*, 14 Social Movement Studies 427 (2015).

¹⁶¹ Nachescu, *Radical Feminism and the Nation* (cited in note 156).

¹⁶² Jay Levy, *Racism, Xenophobia and Hegemonic Masculinity: The Nordic Model of Criminalizing the Purchase of Sex*, in Sharron A. Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018).

¹⁶³ *Ibid.*

Still, the Nordic model focuses on demand while regarding the prostitute as the victim, hence criminalizing the buyer and not the seller.

Moreover, it is intended to support the victim by acknowledging and addressing the underlying economic and social conditions through social programmes.¹⁶⁴

Considering its shortcomings, scholars highlight that far from eliminating prostitution it keeps it underground, compromising health and safety, by increasing risky practices and obstructing access to justice, and facilitating authority abuse¹⁶⁵.

Nonetheless the Nordic model is widely spread. For instance, it has been adopted in the Republic of Ireland, France, and in general it is at the basis of a neo-abolitionist shift within the European Union¹⁶⁶.

The Republic of Ireland criminalised prostitution throughout the 20th century, mainly driven by religious morality, often condemning not only prostitution but sex outside marriage in general, preferring harmful institutions such as the Magdalene laundries and the Mother and Baby Homes, over sex education, contraception and women's rights.

¹⁶⁴ Karni Kissil and Maureen Davey, *The Prostitution Debate in Feminism: Current Trends, Policy and Clinical Issues Facing an Invisible Population*, 22 *Journal of Feminist Family Therapy* 1 (2010).

¹⁶⁵ Sarah Kingston and Terry Thomas, *No Model in Practice: A 'Nordic Model' to Respond to Prostitution?*, 71 *Crime, Law and Social Change* 423 (2019).

¹⁶⁶ Carlotta Rigotti, *When the Law Meets Feminisms* (cited in note 146); Lucrecia Rubio Grundell, *The EU's Approach to Prostitution: Explaining the "Why" and "How" of the EP's Neo-Abolitionist Turn*, 28.4 *European Journal of Women's Studies* 425 (2021); Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences of Working in the Republic of Ireland*, 18 *Sexuality Research and Social Policy* 869 (2021); Holly O'Callaghan, *Sex Work in Ireland* (cited in note 149); Órla Ryan, "Much-Needed" Review of Sex-Work Laws Stalled for Five Years (The Irish Times Online, March 24, 2025), available at <https://www.irishtimes.com/crime-law/2025/03/24/much-needed-review-of-sex-work-laws-stalled-for-five-years/> (last visited November 17, 2025).

In 1935, the Criminal Law Amendment Act (1885) was amended to criminalise brothels and increase sanctions for engaging in prostitution. At the end of the 20th century, the Criminal Law (Sexual Offences) Act (1993) challenged both the organization of prostitution and “loitering for the intention of supplying sexual services”¹⁶⁷. Ultimately, in 2017 together with the criminalisation of the acquisition of sexual services, sentences for brothel keeping were toughened¹⁶⁸.

Scholars recognize that many in Ireland engage in prostitution because of poverty and inequality, and the 2009 report of the Immigrant Council of Ireland considers ethnicity to be another relevant cause of discrimination¹⁶⁹. Other scholars have confirmed “how sex industries are built on racism and histories of colonialism”¹⁷⁰.

The Irish Medical Organization also stated that prostitution in Ireland is a consequence of socioeconomic inequalities¹⁷¹.

Nonetheless, scholars denounce that the current legal framework perpetuates marginalization and impedes access to support for migrants, who face eviction and deportation instead¹⁷².

Again, the Nordic model has led to difficulties in accessing healthcare, safety and justice¹⁷³. Furthermore, O’Callaghan has denounced the incompatibility of the Irish approach to prostitution with international human rights law, specifically the right to health (Art. 12 ICESCR), safety (9 ICESCR, 11(1)(e) and 11(2)(b) CEDAW),

¹⁶⁷ Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences* at 870 (cited in note 163).

¹⁶⁸ *Ibid.*

¹⁶⁹ Holly O’Callaghan, *Sex Work in Ireland* (cited in note 149).

¹⁷⁰ Maddy Coy, Cherry Smiley and Meagan Tyler, *Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research*, 48 *Archives of Sexual Behavior* 1931 (2019).

¹⁷¹ Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences* (cited in note 163).

¹⁷² *Id.*; Holly O’Callaghan, *Sex Work in Ireland* (cited in note 149).

¹⁷³ O’Callaghan, *id.*

and adequate working conditions (Art. 6(1) ICESCR; 7 ICESCR, 11(1)(a) and (f) CEDAW)¹⁷⁴.

Turning now to the French legal system, it criminalised the purchase of sex with Loi no. 2016-444, which is based on two pillars. The first enhances forms of support to exit prostitution, and the second tackles exploitation by criminalizing the buyer and not the seller. It provides individuals who commit to leaving prostitution with welfare benefits, accommodations, etc., and also aims to re-educate perpetrators through mandatory re-education sessions¹⁷⁵.

Nonetheless, scholars have criticized this legal system by highlighting that it exacerbates stigmatization and precariousness. In addition, the aforementioned programmes are not as inclusive and beneficial as they seem: to access, prostitutes need particular language levels, their birth certificate and no deportation order. Furthermore, as in other systems that adopt the Nordic model, criminalizing the buyer means increased competition among prostitutes and the pressure to accept riskier practices¹⁷⁶.

Also, criminalizing “aiding or abetting prostitution” means isolating the victims, preventing them from prostituting in brothels which, as questionable as they are, are safer than street prostitution¹⁷⁷.

5.3. *Beyond Sex Wars: Frequent Flawed Arguments and Concepts in Literature*

When depicting the two sides of the coin in the prostitution debate some flawed arguments recur.

¹⁷⁴ *Ibid.*

¹⁷⁵ Rigotti, *When the law meets feminisms* (cited in note 146).

¹⁷⁶ *Id*; Niklas Jakobsson, Andreas Kotsadam, *The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation*, 35 *European journal of law and economics* 87 (2013).

¹⁷⁷ Rigotti, *When the law meets feminisms*: (cited in note 146).

First, the focus on dignity and morality. Prostitution is not about morality nor dignity, which are abstract and arbitrary concepts. Women's health and discrimination are very much real problems instead. Hence, prostitution is a political issue and should be regarded and addressed as such¹⁷⁸.

Second, it is an issue, not a right, and it is gendered among other things.

Certainly, gender, ethnicity, together with the social and economic conditions, play a fundamental role which cannot be minimized¹⁷⁹. Most prostitutes have one or more characteristics which, in today's patriarchal society, cause vulnerability. As the lecturer Meagan Tyler confirms: "the vast majority of people in prostitution are women and girls, with an over-representation of marginalized groups within this, including Indigenous women, migrant women, women from ethnic minorities, women in poverty, women experiencing domestic abuse, homeless women and drug-addicted women"¹⁸⁰.

Consequently, "sex positivity" should be set aside, and so should the concept of "empowerment", given that those who hold power and control, and the only ones who consent and truly choose it are clients, mostly men¹⁸¹. They hold their centrality, satisfying their pleasure and are even more empowered, while taking advantage of economic hardship and power asymmetries¹⁸².

Indeed, the intersection of prostitutes' gender and social position, their need to earn money to provide for themselves and their

¹⁷⁸ Bonache, et al., *Prostitution policies* (cited in note 143).

¹⁷⁹ Meredith Brooke Beloso, *Sex, work, and the feminist erasure of class*, 38.1 Signs: Journal of Women in Culture and Society 47 (2012).

¹⁸⁰ Coy, Smiley and Tyler, *Challenging the "prostitution problem"* (cited in note 170).

¹⁸¹ *Id.*

¹⁸² MacKinnon, *Trafficking, prostitution, and inequality* at 293 (cited in note 139) ("So far as is known, their johns remain almost exclusively men. (...) Their free choice to buy women to use sexually produces immense profit for the traffickers and pimps who provide the supply").

children, and the capitalist drive for higher earnings, can significantly weaken consent. As a result, economic pressure often makes true consent effectively impossible. Thus, sex without consent is not to be “regulated”; it is to be tackled¹⁸³.

Third, to call it work is to forget about and minimize the pain – mental, emotional, physical – suffered by prostitutes regardless of the legal system they live in¹⁸⁴.

Some systems make it less risky for them, but prostitutes are still exposed to high rates of sexual violence, STIs, mental health issues (e.g., PTSD, suicidality, personality and mood disorders, anxiety)¹⁸⁵.

The point is not the “commodification of the body”, but rather a much more concrete one.

The aforementioned negative consequences derive from having sexual intercourse under pressure due to economic needs, with strangers, multiple times a day: their body cannot take it, and neither can their mind. It is not work; it is sex, and it is not consensual. Repeated exposure to such conditions causes severe physical strain and psychological trauma, highlighting how economic coercion

¹⁸³ Dworkin, *Why Women Must Get Out of Men's Laps* (cited in note 158).

¹⁸⁴ Meagan Tyler, *All roads lead to abolition? Debates about prostitution and sex work through the lens of unacceptable work*, 31 *Labor & Industry: a journal of the social and economic relations of work* 66, 75 (2021) (“There is substantial evidence of the high levels of psychological and physical harms that women and girls experience in systems of prostitution [which] are high enough for some to question whether or not it is possible to regulate out this abuse, or if there is something more fundamental about the inequalities of imperialist white-supremacist capitalist patriarchy that demands the inequalities and abuses of prostitution”).

¹⁸⁵ Kissil and Davey, *The prostitution debate in feminism* at 164 (cited in note 164). See also Andrea Dworkin, *Prostitution and male supremacy*, 1 *Michigan Journal of Gender & Law* 1 (1993); Catharine A. MacKinnon, *Prostitution and civil rights*, 1 *Michigan Journal of Gender & Law* 13 (1993); Tyler, *All roads lead to abolition?*, *id*; Georgia Zara, Delphine Theobald, Sara Veggi, Franco Freilone, Eleonora Biondi, Grazia Mattutino, Sarah Gino, *Violence against prostitutes and non-prostitutes: an analysis of frequency, variety and severity*, 37 *Journal of interpersonal violence* 15 (2022).

undermines bodily autonomy. Moreover, this situation is embedded in broader patriarchal and capitalist structures, which normalize the exploitation of bodies for profit. By framing these encounters as “work,” society ignores the absence of consent and the profound harm inflicted on these individuals¹⁸⁶.

Fourth, the stigmatization of prostitution undoubtedly exacerbates victims’ suffering, but the preferable path is not to normalize non-consensual paid sex, rather to elaborate ways to tackle it. Harm minimization is often referred to as realistic, but before women’s rights violations what is “realistic” is only a short-term “solution” which still damages women; what counts is combating and ultimately dismantling gender violence¹⁸⁷.

5.4. *Beyond Sex Wars: Women and Men in the Patriarchal Structure; Who Offers Prostitution and Who Demands It*

In order to move toward an argument which builds on the existing literature outlined in the previous sections, it is necessary to recall a relevant concept.

Prostitution does not exist in a vacuum. It is the umpteenth consequence of the patriarchal structure, and more specifically of the status and power men hold within it and the disadvantages women endure¹⁸⁸.

As previously noted, man is the standard; society itself is shaped around his needs, while women have to adjust to a system that is not tailored to them, remaining “the other” – inferior, not just different¹⁸⁹. Patriarchy is at the basis of capitalism, colonialism,

¹⁸⁶ MacKinnon, *Trafficking, prostitution, and inequality* at 281 (cited in note 139) (“Sex is supposed to be chosen and wanted; presumably this is the reason prostitution’s supporters defend it in these terms. When you are having sex with someone you want to be having sex with, you aren’t generally paying each other”). See also Dworkin, *Why Women Must Get Out of Men’s Laps* (cited in note 158).

¹⁸⁷ MacKinnon, *ibid*.

¹⁸⁸ *Ibid*; MacKinnon, *Prostitution and civil rights* (cited in note 185).

¹⁸⁹ MacKinnon, *Feminism Unmodified* (cited in note 38).

imperialism and it conceives women as different from men, hence inferior, ultimately oppressed¹⁹⁰.

One of the many dimensions in which women suffer the consequences of this imbalance is their body and sexuality. Many are the examples that demonstrate their oppression, their role as virgins and mothers, aimed at generating men's offspring, looking after them in the private sphere, cherishing a warm, subservient and subjugated position¹⁹¹.

They are the private, the moral. Men are the public, the political¹⁹².

In this picture, to control their sexuality is fundamental but not on their terms, rather on men's.

Indeed, contraception has been mostly a female burden, and obstructed while chaining them to their husbands, giving up their surname, economic independence and career prospects¹⁹³. Not only marriage and maternity have restrained women, but other elements have also contributed to it.

For example, the already examined anatomical myth of virginity has determined women's value, forgetting what science

¹⁹⁰ *Id.* at 36 ("Men's physiology defines most sports, their health needs define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other their wars and rulership defines history, their image defines god, and their genitals define sex").

¹⁹¹ Rich, *Of Woman Born* (cited in note 44); Caroline Pateman, *The Sexual Contract* (Stanford University Press 1988); Shulamith Firestone, *The Dialectic of Sex: the Case for Feminist Revolution* (William Morrow and Company 1970); Francis and Smith, *Feminist Philosophy of Law* (cited in note 97).

¹⁹² MacKinnon, *Feminism Unmodified* at 36 (cited in note 38).

¹⁹³ Kelsey Davies, "The Female Condition":(Re) thinking Marriage, Prostitution, and Feminist Theories of Abolition, 50 *Signs: Journal of Women in Culture and Society* 71 (2024).

clearly states, namely that the hymen comes in many forms and is an elastic membrane. Instead, it has been deceitfully considered a seal which contributes to the depiction of women as objects that have to arrive intact to their future husband's hands¹⁹⁴.

Women's pleasure is not in the picture. This is clearly demonstrated by horrific practices such as female genital mutilation¹⁹⁵. Their body has to look a certain way to honor the male gaze and an image of perverse fragility. Consequently, those many Western countries which condemn female genital mutilation still permit genital surgery (e.g., labiaplasty, hymenoplasty, etc.)¹⁹⁶.

Moreover, when neither "virgin" nor mothers, they are still useful to men in other ways, such as by satisfying their pleasure.

Hence, when patriarchy meets capitalism, sex is being paid for and men's sacred and indispensable desires are fulfilled¹⁹⁷.

Furthermore, the misconception of sex as an impulse surely contributes to the consideration of sexual pleasure as untouchable. However, this further myth should be dispelled, given that impulses exist to fulfil primary necessities such as hunger or thirst, needed to make the individual survive¹⁹⁸. Sex instead does not make the

¹⁹⁴ W.H.O., *Eliminating Virginity Testing* (cited in note 67); Brochmann and Støkken Dahl, *The Wonder Down Under* (cited in note 64); Ranit Mishori, et al., *The little tissue that couldn't—dispelling myths about the Hymen's role in determining sexual history and assault*, 16 *Reproductive health* 74, 3 (2019); Rose McKeon Olson and Claudia García-Moreno, *Virginity testing: a systematic review*, 14 *Reproductive health* 61 (2017).

¹⁹⁵ W.H.O., *Female Genital Mutilation* (2025), available at <https://www.who.int/health-topics/female-genital-mutilation> (last visited November 11, 2025).

¹⁹⁶ Dina Bader, et al., *Rethinking the anti-FGM zero-tolerance policy: from intellectual concerns to empirical challenges*, 12 *Current Sexual Health Reports* 266 (2020).

¹⁹⁷ Kendra Ballard, *On the Morality of Prostitution Under Hierarchical Social Structures: A Radical Feminist Analysis*, 8.1 *Quest* 1 (2024); Amia Srinivasan, *The Right to Sex* (Bloomsbury Publishing 2021).

¹⁹⁸ Emily Nagoski, *Come As You Are: Revised and Updated: The Surprising New Science That Will Transform Your Sex Life* (Simon & Schuster 2015).

individual survive; thus, it is not an impulse but a response and should be regarded as such¹⁹⁹.

Every one of these many roles played by women in the patriarchal structure – the mother, the virgin, the prostitute – does not empower them, does not exist in a vacuum, rather, it exists in favor of men, strengthening their privilege while damaging women.

5.5. *Beyond Sex Wars: How to Face Prostitution Bearing in Mind Women's Rights. A Proposal De Iure Condendo*

After considering the characteristics and shortcomings of the existing legal approaches to prostitution, and explaining the context in which it exists, a final perspective should be outlined.

It is true that both decriminalization and abolitionism are flawed; however, there is common ground that should be considered. Indeed, prostitutes face a wide range of risks and harms, making regulation not an option²⁰⁰.

Consequently, the Nordic model *per se* should not be abandoned in the short term; evidently, the possibility to ban what is a source of exploitation, violence and damage while not punishing the victim is a significant starting point.²⁰¹ However, in order to combat it, it is relevant to work on demand and to do so means deconstructing men's power and women's role within the patriarchal and capitalist society, highlighting its negative outcomes²⁰².

¹⁹⁹ *Ibid.*

²⁰⁰ Andrea Dworkin, *Prostitution and male supremacy* (cited in note 185); MacKinnon, *Prostitution and civil rights* (cited in note 185); Tyler, *All roads lead to abolition?* (cited in note 184).

²⁰¹ Beran, *Revisiting the Prostitution Debate* (cited in note 159); Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 Berkeley Women's LJ 75 (1989); Davies, *The Female Condition* (cited in note 193)

²⁰² Beran, *Revisiting the Prostitution Debate* (cited in note 159); Freeman, *The Feminist*, *id.*

Raising awareness of prostitution, understanding the gendered consequences of patriarchy and deconstructing it, should be pursued in as many institutions and occasions as possible: from school and universities to workplaces, public conferences, and other social institutions. Men's demand for paid sexual access to women is socially constructed. The evidence base reveals that motivations for buying sex rely on notions of masculinity and sexual behavior"²⁰³.

Secondly, politics is pivotal in tackling economic and social disadvantage, for instance by enforcing equal pay legislation, working on current work structures and institutional childcare²⁰⁴. So, when demand is addressed, former prostitutes and future generations do not have to resort to traumatizing and damaging activities to sustain themselves and their children; ultimately and equally designing their preferred path toward self-fulfillment, taking care of their physical and mental health along the way²⁰⁵.

6. Where the Struggles Intensify. Prison as the Quintessential Patriarchal Oppression and Its Gendered Nature

Nowadays the capitalistic and patriarchal system blindly clings to the disputable practice of locking those who breached the social contract away from society, hiding its weaknesses behind humanitarian and criminal law principles²⁰⁶.

Built by men for men, prison is then the umpteenth patriarchal institution, which still preserves a crumb of male privilege, while discriminating against not just women but many others (e.g., LGBTQIA+ community, older people ...). Being the system tailored

²⁰³ Coy, Smiley and Tyler, *Challenging the "Prostitution Problem"* at 1933 (cited in note 170).

²⁰⁴ Ballard, *On the Morality of Prostitution* (cited in note 197).

²⁰⁵ Beran, *Revisiting the Prostitution Debate* (cited in note 159); Freeman, *The Feminist Debate* (cited in note 201).

²⁰⁶ Ulya Said and Elizabeth Kristi Poerwandani, *The Narrative of Women in Prison: The Parenting Practices and the Concepts of Mother in Incarcerated Women*, 15 *Sawwa: Jurnal Studi Gender* 75 (2020).

on the sane, Caucasian, straight man, what differs from the standard is less, becomes oppressed and succumbs within this violent and hierarchical structure²⁰⁷.

First of all, it is pivotal to recognize how Sykes' focus on the pains of imprisonment in *The Society of Captives*, holds some truth in it; yet, for the above-mentioned types of prisoners, reality is far more complicated and might even contradict his wisdom.

Certainly, there is more than physical pain and surely inmates endure the deprivations pointed out in his work: from liberty to goods and services, together with heterosexual relations, autonomy and personal security²⁰⁸.

Nevertheless, other scholars pay more attention to the gendered pain of imprisonment considering the grief over the lack of power, autonomy and control; as well of trust, privacy and intimacy; together with exacerbated physical and mental suffering, as it will be further clarified²⁰⁹.

Still, what should be further highlighted, after Sykes shifted the spotlight from the corporeal to other kinds of torture, is how for women prisons still hold a strong physical dimension. This argument will be clarified from a gendered perspective, specifically by considering how menstruation, pregnancy, and menopause influence women's woe in prison.

One of the under-researched gendered pains of imprisonment is the menstrual phase²¹⁰. Myths, shame and ignorance about

²⁰⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

²⁰⁸ Gresham Sykes, *The Society of Captives* (Princeton University Press 1958).

²⁰⁹ Ben Crewe, Susie Hulley and Serena Wright, *The Gendered Pains of Life Imprisonment*, 57 *British Journal of Criminology* 1359 (2017); Jennifer Ferguson and Maggie Leese, *Women, the Pains of Imprisonment and Public Health Interventions*, in *The Routledge Handbook of Women's Experiences of Criminal Justice* (Routledge 2022).

²¹⁰ Colin A. Finn, *Menstruation: A Nonadaptive Consequence of Uterine Evolution*, 73 *The Quarterly Review of Biology* 163 (1998).

women's bodies are widespread outside prisons²¹¹. Yet, within them, physical and sociological pains intensify²¹².

As well explained by some scholars: lack of resources and minimization of conditions such as premenstrual syndrome make it harder for women to recover²¹³. Thus, improvements start with education of both women and officers, the providence of medication and care.

Furthermore, another common source of discrimination and agony for women, which in prison intensifies, comes into question: pregnancy.

Between 5 and 10 % of female inmates are in fact pregnant and 90% of them give birth while still being incarcerated²¹⁴.

Concerningly, nourishment, rest, medication, and safety are far from being accomplished.

Moreover, after a certain time span allowed for breastfeeding, child custody comes into question, as do the economic and personal resources available to the mother²¹⁵.

Other gendered pains which afflict mothers have to be considered: the loss of control over their bodies due to the current dependency upon the prison staff and the forced decisions they consequently make (e.g., asking for a C-section to be sure to give birth within hospital's safe walls)²¹⁶.

²¹¹ Brochmann and Støkken Dahl, *The Wonder Down Under* (cited in note 64).

²¹² Kate Smith, *A Period in Custody: Menstruation and the Imprisoned Body*, Internet Journal of Criminology 1 (2009).

²¹³ Malaka M. Shwaikh, *Prison Periods: Bodily Resistance to Gendered Control*, 20 Journal of Feminist Scholarship 33 (2022).

²¹⁴ Adele Baldwin, Agnieszka Sobolewska and Tanya Capper, *Pregnant in Prison: An Integrative Literature Review*, 33 Women and Birth 41 (2020).

²¹⁵ Somayeh Alirezaei and Robab Latifnejad Roudsari, *Promoting Health Care for Pregnant Women in Prison: A Review of International Guidelines*, 25 Iranian Journal of Nursing and Midwifery Research 91 (2020).

²¹⁶ Laura Abbott, et al., *Pregnancy and Childbirth in English Prisons: Institutional Ignominy and the Pains of Imprisonment*, 42 Sociology of Health & Illness 660 (2020).

In addition to that, the fear of being hurt is more vivid and leads to a deep sense of fear, which, together with pressuring ideals of motherhood, proves deleterious for women's mental health²¹⁷.

On the path to women-centered care within penal institutions, basic needs are advocated: from healthy and sufficient nourishment to the right to access sanitary products, and also consistent visits, fresh air, therapy, family and midwifery support; and eventually the opportunity to detoxify and acquire parenting skills²¹⁸.

With the increase of the average age of female prison inmates, which is now over thirty years of age, menopause became a further source of gendered concern²¹⁹.

Under-researched and minimized, its symptoms (e.g., recurrent migraine, insomnia, fatigue, etc.) cause much discomfort for women, possibly requiring hormone replacement therapy, psychological support and further medication²²⁰. Once again, it is hard outside the prison system and much tougher inside. Therefore, scholars encourage providing, through the appropriate guidelines, both human and material resources. More specifically, they shed light on the need for initial assessment, educating women and officials, and hiring specialists (e.g., gynaecologists)²²¹.

A final distinction, which must be taken into account, sheds light on the substantial trauma rates.

Indeed, approximately 90% of women are pestered by past traumas before ending up in prison²²². Hence, when tracing the

²¹⁷ Saida and Poerwandani, *The Narrative of Women in Prison* (cited in note 206).

²¹⁸ Laura Abbott et al., *Pregnancy and Childbirth in English Prisons* (cited in note 216).

²¹⁹ Rifat Latif and Asifa Shahzadi, *Knowledge, Attitude, and Experience of Menopause of Female Prisoners*, 13 *Journal of University Medical & Dental College* 412 (2022).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Holly M. Harner and Suzanne Riley, *The Impact of Incarceration on Women's Mental Health: Responses from Women in a Maximum-Security Prison*, 23 *Qualitative Health Research* 26 (2013).

distinction between male and female prisoners a tragic factor surfaces: most female prisoners are actually victims mainly of physical, sexual and/or domestic violence²²³. Some of them come from the streets, usually use substances to remain vigilant and have met poverty, abuse and violence from a young age²²⁴.

Consequently, prisons do not seem the appropriate place for them to be, given that they lack a chance to thrive and so to heal from past trauma. Prisons are ill-suited to support rehabilitation or recovery from past trauma, as they offer limited opportunities for personal growth or healing. This does not question the necessity of serving a sentence but highlights how current prison conditions often fail to address the specific needs of women.

Still, research which considered closed Canadian penal institutions left room for hope. The women interviewed qualified prisons as shelters, underlining security, nourishment, rest, health care and the time to plan their future, get an education and remain protected from external risks²²⁵. The cutting-edge Limerick female prison offers a similar instance; yet, should be regarded as a brilliant, but not relatable, exception²²⁶.

Female inmates have to be considered moving beyond “male as the standard”. In a patriarchal system, as highlighted in the introduction, difference is dominance²²⁷, hence the key to understand

²²³ Tony Harcup and Deirdre O’Neill, *What Is News? News Values Revisited (Again)*, 18 *Journalism Studies* 1470 (2016); Baldwin, Sobolewska and Capper, *Pregnant in Prison* (cited in note 214).

²²⁴ Sandra Bucerius, Kevin D. Haggerty and David T. Dunford, *Prison as Temporary Refuge: Amplifying the Voices of Women Detained in Prison*, 61 *British Journal of Criminology* 519 (2021).

²²⁵ *Ibid.*

²²⁶ Yvonne Jewkes, *Limerick Women’s Prison: An Architecture of Hope* (The Architects’ Journal Online, July 14, 2022), available at <https://www.architectsjournal.co.uk/news/limerick-womens-prison-an-architecture-of-hope> (last visited November 17, 2025).

²²⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

and improve female inmates' condition is to move beyond standards tailored on men.

Menstruation, pregnancy and menopause are three practical examples of the peculiarity of their suffering and add concreteness to Crewe's work. Still, it must not be forgotten how, as clarified by the statistics above, before being inmates, most women are victims and so should be treated.

Finally, an intertwined and multidisciplinary approach involving prison, court and health services is worth implementing²²⁸. However, this approach is still not enough if considered as a final accomplishment²²⁹; rather, it should be regarded as a temporary way out of prison's bloodshed, on the path to abolition.

To ponder over prevention rather than *ex post* strategies, and so implementing existing institutions (e.g., education, health services), is a much wiser approach. Ultimately still, the above-analyzed short-term strategies should not be underestimated given that it is clear how the long-term hope of this paper is far from being considered and even more so reached.

7. Conclusion

The main point of this paper, namely women's victimization within the patriarchal structure, has been proven not only through feminist legal theory and victimology as disciplines that go hand in hand with positive law.

Various examples have been provided. Although apparently far from each other, these many ways through which women are victimized intertwine.

²²⁸ World Health Organization, *Prison and Health* (2014), available at <https://iris.who.int/handle/10665/128603> (last visited November 17, 2025).

²²⁹ David Scott, *Sympathy for the Devil: Human Rights and Empathetic Construction of Suffering*, 88 *Criminal Justice Matters* 8 (2012).

Women have to be either virgins, mothers, or whores in order to fit patriarchal stereotypes.

To be a virgin means to have one's sexuality inspected and credibility evaluated by believing in an anatomical myth. Thankfully, some jurisdictions – as shown by India and the U.K. – have made some steps forward.

To be a mother means to have one's body potentially exploited against one's will (as explained with the case of coerced treatment during pregnancy and abortion bans).

It also means having "home duties", as shown by Article 41 of the Irish Constitution. This necessarily occurs within a heterosexual marriage, which renders the home a cage.

To be forced into prostitution means to be used for acts that should be wilful and not done in order to survive and therefore paid for.

Evidently, prostitution ultimately harms women's mental, sexual, and physical health; thus, it should be tackled by moving beyond the shortcomings of the Nordic model and working at the roots by dismantling the pillars that sustain the patriarchal structure.

The first step to proceed in this direction is to question its foundations and institutions, outlining women's condition within it.

The second is to advocate for structural change, ultimately to address socio-economic disadvantages.

Finally, as considered above, women's victimization within prisons reaches its peak, given that they struggle more because of women's specific needs: pregnancy, menstruation, and menopausal care.

In conclusion, it can be stated that the high victimization rate of female prisoners sheds light on their condition outside prison, proving that the above-mentioned examples are valid.