

Winter 2019

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### Recommended Citation

Shulamit Almog and Ariel L. Bendor, *Views on Prostitution*, 30 *Hastings Women's L. R.* 3 (2019).

Available at: <https://repository.uchastings.edu/hwlj/vol30/iss1/3>

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## Views on Prostitution

*Shulamit Almog\* and Ariel L. Bendor\*\**

*The Essay argues that both law and art represent deeply-rooted cultural ambivalences and ethical incoherence towards prostitution. The choice of Picasso's *Les Femmes d'Alger* as representative of this tension stems from the sui-generis status of the painting in the history of modern art—as an avant-garde which later became a canon. Of the various views evoked by the painting, four are especially prominent: a moralizing, a normalizing, a victimizing and a patheticizing view. The examination of various Western prostitution laws shows that each of the laws simultaneously expresses different perceptions and ideologies about prostitution, much like the views evoked by the painting. It appears that law is unable to avoid the cultural incongruity linked to prostitution, which is apparent even in countries that allegedly declare unambiguous standing towards it.*

### INTRODUCTION

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We are grateful to Uriel Procaccia, who called our attention to the possible insights relevant to law evoked by *Les Femmes d'Alger*; to Susan Heinzelman, Alan Young, and participants in the Annual Meeting of the Association for the Study of Law, Culture & the Humanities, for helpful suggestions and to Rachel Aharoni, Bar Fargon and Yonatan Yehosef for excellent research assistance.

E. ISRAEL  
F. CANADA  
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## INTRODUCTION

This Essay discusses prostitution in art and in law. We suggest that both art and law mirror unresolved ambivalence and ethical incoherence towards prostitution. These tensions are evident even in legal systems that are perceived as dramatically different from each other in their attitudes towards prostitution. We pursue our contention by a close observation of Pablo Picasso's painting "*Les Femmes d'Alger (O. J.)*" supported by the rich interpretive discourse the work has produced over more than one hundred years.<sup>1</sup>

Of the various views evoked by the painting, four—all of which concern ethical aspects and perceptions of reality surrounding prostitution—are especially prominent: a moralizing, a normalizing, a victimizing and a patheticizing. In this context, we refer to a "view" as the product of a spectator's visual perception of the painting—a spectator that makes sense of what meets his or her eye.<sup>2</sup>

The moralizing view represents a spectator who is mainly concerned with the sexual promiscuousness he or she sees in the painting, and perceives prostitution as a manifestation of such promiscuousness. The normalizing view represents a spectator who perceives sex as a source of joy, pleasure, and vitality; And sees the painting as a depiction of such joyful sex, presented by the presence of the naked women. The victimizing view belongs to a spectator who perceives prostitution mainly as a harm prostitutes endure, and sees in the painting five victims. The patheticizing view is that of a spectator for whom the painting evokes the image of the absent clients, alongside the perception of these clients as wretched and pathetic, since wretchedness is inherent in the status of prostitutes' clients.

Prostitution—which is generally understood to be the exchange of sexual activity for money or other financial compensation<sup>3</sup>—is governed by many legal systems. Certain countries prohibit prostitution. Other countries permit it. There are countries that impose a prohibition on the involvement of certain persons in prostitution, while permitting the activity of other involved persons. Each of these systems is conventionally viewed as

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1. See Shulamit Almog, *Les Femmes d'Alger: Painting Prostitution, Delineating Law*, 36 *CARDOZO ARTS & ENT. L.J.* 63, 65–73 (2018) (describing moralistic, liberal, and feminist approaches that have developed within the exegetical discourse regarding the painting).

2. See DAVID BORDWELL, *MAKING MEANING: INFERENCE AND RHETORIC IN THE INTERPRETATION OF CINEMA* 8 (1989).

3. See Jocelyn Eskow, ed., *Eleventh Annual Review of Gender and Sexuality Law: Criminal Law Chapter: Prostitution and Sex Work*, 11 *GEO. J. GEN. & L.* 163, 165, 167 (2010).

representing a specific, coherent set of ethical values. The differences between the systems represent differences in values, which, in certain cases, also reflect differences in the perception of the reality surrounding prostitution (for example, with regard to the degrees to which women who work in prostitution do so consensually). Thus, it is customary to classify the various legal systems into the following categorizations, each based on one leading ideology: the criminalization of prostitution (absolute or partial), the legitimization (or regulation) of prostitution, and the abolition of prostitution.<sup>4</sup>

Examination of various legal systems, however, show that none of them are fully coherent or consistent in its attitude towards prostitution. Each of the legal systems which were examined represent a plurality of perceptions, and simultaneously express at least two of the four views set forth above, with some expressing all four.

The legal incoherence analyzed here does not represent a balance between conflicting values and interests. When such a balance is reached, it is intended to take various values and interests into account without conferring absolute superiority upon any of them. The lack of coherence also does not stem from the very dramatic differences in the attitude of different liberal legal systems to the same phenomenon. In contrast, each and every one of the different legal systems which were examined reveals not a carefully calculated balance, but rather, expresses the simultaneous existence of different perceptions and ideologies regarding prostitution.

We do not claim that there is one right view or one accurate interpretation of *Les Demoiselles d'Avignon*, nor do we propose in this Essay any normative argumentation with regard to the optimal legal model for addressing prostitution. Furthermore, we do not argue against the very incoherence of the prevalent legal models, nor do we claim that it would be proper to regulate prostitution coherently. There are different approaches to the question of whether law in general must be coherent.<sup>5</sup> Our principal concern is to point out the incoherence in attitude toward prostitution, which seems inherent in two different cultural representations—legal and artistic.

Part I of this Essay offers some introductory remarks on the nature of the emerging law-and-art discourse, and delineates the uniqueness of painting in this regard. In Part II, we describe *Les Demoiselles d'Avignon* and explain the four views on prostitution it evokes. In the third part of this

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4. Eskow, *supra* note 3, at 184; *see also* Janet Halley et al., *From the International to the Local Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GEN. 335, 338–39 (2006). (drawing a similar distinction between four “ideal types” of regulation of prostitution: complete criminalization, abolitionist or partial decriminalization, complete decriminalization and legalization).

5. *See, e.g.*, Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & PHILL. 355 (1984); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Jaap Hage, *Law and Coherence*, 17 RATIO JURIS 87 (2004).

Essay we discuss the legal views towards prostitution in six different countries: the United States (except Nevada), the Netherlands, Sweden, England and Wales, Israel, and Canada, and the ways in which each view represents different concepts which are parallel to the four views evoked by the painting.<sup>6</sup> It appears that different legal systems cannot escape the deeply-rooted incoherence linked to prostitution.

## I. ON LAW AND ART

Law is a culturally embedded practice,<sup>7</sup> and culture is represented and constructed also by aesthetical means. Therefore, it is hardly surprising that areas of affinity between the fields often transpire. Consequently, turning to aesthetic representations in order to investigate legal discourses or to examine law-related themes in artistic articulations is frequent. Law and literature, law and film, law and visual culture, law and image, and law and popular culture have long thrived as academic subgenres. The interdisciplinary research of law and art has also emerged, and already yielded some academic interest.<sup>8</sup> Such interest is based upon the capacity of artistic articulations to cast new light on cultural norms and social practices that influence law.<sup>9</sup> The investigation of the resonance between legal regimes of prostitution and an artistic articulation depicting prostitutes derives from a similar perception. The aesthetic articulation at the center of this Essay is a painting.<sup>10</sup>

The employment of paintings in this context poses a particular challenge. Paintings differ from most other artistic mediums. For example,

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6. The regularizations of prostitution in the various legal systems, which we present in this part are prototypes of similar legal regimes which apply in other countries; *see 100 Countries and Their Prostitution Policies*, PROCON.ORG, <https://prostitution.procon.org/view.resource.php?resourceID=000772> [<https://perma.cc/P6MX-VC62>] (for a detailed list of countries and their legal policies with regard to prostitution).

7. *See generally* LAWRENCE ROSEN, *LAW AS CULTURE: AN INVITATION* (2006); AUSTIN SARAT ET AL., *LAW IN THE DOMAINS OF CULTURE* (Austin Sarat & Thomas R. Kearns, eds., 1998).

8. *See, e.g.*, COSAS DOUZINAS & LINDA NEAD, EDS., *LAW AND THE IMAGE: THE AUTHORITY OF ART AND THE AESTHETICS OF LAW* (Costas Douzinas & Lynda Nead, eds., 1999) (for an example of interdisciplinary research of law and art).

9. *See also* Richard Sherwin, *Nomos and Cinema*, 48 *UCLA L. REV.* 1519 (2001); Shulamit Almog, *Windows and 'Windows': Reflections on Law and Literature in Digital Age*, 57 *U. TORONTO L.J.* 755 (2007).

10. *See* Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist Schools of Constitutional Interpretation*, 2003-2004 *CATO SUP. CT. REV.* 69. (providing other examples of addressing the links between legal issues and paintings, namely the analysis of constitutional theories through the prism of visual art in schools); *see also* Benjamin A. Templin, *The Marriage Contract in Fine Art*, 30 *N. ILL. U. L. REV.* 45 (2009) (discussing six paintings, which reflect and shape the political discourse of the nature of marriage contract laws from the fifteenth through the eighteenth centuries); *see* URIEL PROCACCIA, *RUSSIAN CULTURE, PROPERTY RIGHTS, AND THE MARKET ECONOMY* (2009) (discussing the links between schools of paintings and contract law in Russia and Europe.).

literary expressions (novels, stories and poems) and performative (especially theatrical) and cinematic expressions are vehicles that enable the delineation of a broad scope. They can easily present multifaceted characters, consciousnesses, and situations. Moreover, they are able to transcend spatial and temporal constraints. Their capacity to introduce simultaneous views and perspectives, as well as different variations of a single occurrence, is almost limitless. A painting, on the other hand, depicts one single situation, static and frozen.<sup>11</sup> The points of view that evolve depend on the spectators. Only the spectators can create multifariousness of perspectives and voices relating to the characters or situations depicted in the painting. As Roland Barthes put it, a picture “exists only in the account given to it . . . in the total organization of the various readings that can be made of it: a picture is never anything but its own plural description.”<sup>12</sup>

Even other plastic-art mediums, such as sculptures or bas-reliefs, which are also static and depict a single moment, differ from paintings since their three dimensions enable some latitude that paintings lack. A painting, then, offers an exceptional experience when one aims to examine the intricacy or ambivalence of a situation or a phenomenon. Given this background, *Les Demoiselles d'Avignon*'s static, frozen depiction of five naked women creates a unique platform for examining unarticulated ambivalences and dissonances underlying the regulation of prostitution.

## II. VIEWS REFLECTED IN PICASSO'S *LES DEMOISELLES D'AVIGNON*

In the first years of the twentieth century Pablo Picasso drew well over 100 sketches for the painting that eventually became *Les Demoiselles d'Avignon*. In 1906 he presented the completed work to the world. *Les Demoiselles d'Avignon* became a representation of “a new path to 20th-century art”<sup>13</sup> and one of the most celebrated works in the history of art. The painting is considered as one of the crowning glories of the collection of the Museum of Modern Art in New York.

Five naked women are set within a dense, packed composition. Four of them look forward. The fifth, the one in the left, is in side-view, facing the other women. The next woman puts one hand under her head. Her other

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11. See MAX BLACK, *How do Pictures Represent*, in ART AND PHILOSOPHY: READINGS IN AESTHETICS 257 (William E. Kennick ed., 1979) (elaborating on the nature of depiction that takes place in paintings).

12. ROLAND BARTHES, *Is Painting a Language?*, in THE RESPONSIBILITY OF FORMS: CRITICAL ESSAYS ON ART, MUSIC, AND REPRESENTATION 150 (Richard Howard trans., 1991); see also ROLAND BARTHES, CAMERA LUCIDA, REFLECTIONS ON PHOTOGRAPHY (Richard Howard trans., 1993) (describing Barthes' observations on the ways in which photographs differ from paintings as representations).

13. *Les Demoiselles D'Avignon: Picasso's Influences in the Creation of a Masterwork*, PRINCETON BLOGS (last visited Aug. 20, 2013, 1:40 PM) [http://blogs.princeton.edu/wri152-3/f05/cargyros/les\\_demoiselles\\_davignon\\_picassos\\_influences\\_in\\_th.html](http://blogs.princeton.edu/wri152-3/f05/cargyros/les_demoiselles_davignon_picassos_influences_in_th.html) [http://archive.li/4c5rN].

hand holds a piece of fabric. The third woman, in the middle, lifts both hands over her head. The other two women are wearing masks. The one in the front is squatting with her legs apart. The hands of the other woman are partly covered by fabric, probably pushing it aside. At the feet of the woman in the middle there is a plate with some fruits—grapes, a round fruit, and a slice of melon or watermelon. At the top left there is a hand that apparently does not belong to any of the women, probably pushing a fabric. The women are entangled in silver and blue draperies. The organs of the women are sharp, geometrical, and with no curves. There are two dominant colors, orange-pink (the women) and silvered-blue (the background). The word “*Avignon*” in the title refers to a street in Barcelona famed for its brothels, and “*Les Demoiselles*” are five prostitutes. And indeed, according to the widespread understanding of the picture, the painting depicts prostitutes in a brothel.<sup>14</sup>

Prostitution is a common theme in art. Many painters, sculptors and photographers, as well as film-directors, playwrights, choreographers, authors and poets have created works of art which focus on prostitution. Germaine Greer said of the art of painting that “prostitution and painting go hand in hand.”<sup>15</sup> Works dealing with prostitution were common in Picasso’s day, and even earlier.<sup>16</sup> However, the sophisticated manner in which Picasso visually puts together both historical and cultural references to prostitution renders *Les Demoiselles* into a representative of cultural incoherence with regard to prostitution. As noted by Carol Duncan, “[i]n the finished work, the women have become stylistically differentiated so that one looks not only at present-day whores but also back down into the ancient and primitive past . . . placed on a single spectrum.”<sup>17</sup>

A considerable part of the writing that was inspired by *Les Demoiselles* has focused on the esthetics of the painting. The content of the painting has also been interpreted in many different ways, or “views.” The immensely rich literature generated by the painting has produced a wealth of

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14. “The painting depicts five naked prostitutes in a brothel; two of them push aside curtains around the space where the other women strike seductive and erotic poses—but their figures are composed of flat, splintered planes rather than rounded volumes, their eyes are lopsided or staring or asymmetrical, and the two women at the right have threatening masks for heads. The space, too, which should recede, comes forward in jagged shards, like broken glass. In the still life at the bottom, a piece of melon slices the air like a scythe.” *MoMA Highlights 64* (originally published 1999, revised 2004), [http://www.moma.org/collec tion/object.php?object\\_id=79766](http://www.moma.org/collec tion/object.php?object_id=79766) [https://perma.cc/3DEJ-9BC5 ]

15. Germaine Greer, *Artists Have Always Glamorized Prostitution. Manet savaged all their Delusions*, THE GUARDIAN (Feb. 6, 2011), <http://www.theguardian.com/artanddesign/2011/feb/06/manet-olympia-prostitution-courtesan> [https://perma.cc/NF J8-NB76]; see also JENNIFER DOYLE, SEX OBJECTS: ART AND THE DIALECTICS OF DESIRE 45–70 (2006) (discussing the centrality of the motif of prostitution in art).

16. See e.g. HOLLIS CLAYSON, PAINTED LOVE: PROSTITUTION IN FRENCH ART OF THE IMPRESSIONIST ERA (1991) (studying the representations of prostitution in French paintings from the Impressionist period).

17. Carol Duncan, *The MoMA’s Hot Mamas*, 48 ART J. 171, 176 (n. 11) (1989).

interpretations, although, no clear categories of interpretation exist. Each view represents an equally feasible, credible, and genuine interpretation. Together they produce a multifaceted picture of prostitution.

#### A. A MORALIZING VIEW

The moralizing view emerged shortly after the work was first exhibited, early in the twentieth century.<sup>18</sup> The painting seems “mad or offensive,” retorted André Derain<sup>19</sup> in a comment that echoed the vehement railing within Picasso’s milieu. Georges Braque was also disconcerted by the work. “‘Listen,’ he is reported to have said to Picasso, ‘in spite of your explanations your painting looks as if you wanted to make us eat tow, or drink gasoline and spit fire.’”<sup>20</sup> Such reactions caused Picasso to keep the painting out of sight for several years.<sup>21</sup>

The “shocking incoherence” of the form of the work<sup>22</sup> presumably influenced its reception as a painting of prostitution, and the moralizing view associated to it. The moralizing view sees the painting as immoral due to the promiscuous depiction of sex. It perceives the painting as a representation of moral failure. This view is related to the approach which holds that prostitution is an immoral phenomenon of commercialization, and perhaps even industrialization, of sexual relations. Sexual relations are intended to express intimacy within the framework of a couple relationships. The immorality of prostitution lies in its departure from traditional social values, rooted in marriage and family, with sexuality expressed only within those confines.<sup>23</sup> This is especially true of the defiant, shameless prostitution which is represented in the picture. Even if it is somehow possible to resign oneself to the vice and weakness of human kind—of men overcome by their lusts, and of poor women for whom prostitution is the only possible livelihood—the overt depiction of prostitution in *Les Demoiselles* challenges social appropriateness. The moralizing view is focused on what is perceived to be a vulgar depiction of a brothel scene, presented in most unusual visual proportions.

#### B. A NORMALIZING VIEW

The normalizing view perceives sex as normal, pleasurable and openly sought-after practice, and not as a modest and embarrassed addendum to

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18. See HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* 200–01 (1966) (explaining the mechanism that drives the moralizing view).

19. ANNE GANTEFÜHRER-TRIER, *CUBISM* 26 (2010).

20. Roy Donald McMullen, *Georges Barque*, HISTORY OF ART, [http://www.all-art.org/art\\_20th\\_century/braque1.html](http://www.all-art.org/art_20th_century/braque1.html) [<https://perma.cc/F4HR-FV9Y>].

21. Marilyn McCully, *Pablo Picasso*, ENCYCLOPEDIA BRITANNICA (last updated Nov. 2, 2018), <https://www.britannica.com/biography/Pablo-Picasso> [<https://perma.cc/8SPH-8GA A>].

22. See Pablo Picasso, *Les Demoiselles d'Avignon*, MoMA, [http://www.moma.org/collection/object.php?object\\_id=79766](http://www.moma.org/collection/object.php?object_id=79766) [<https://perma.cc/FKF3-3CSV>].

23. See Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1665 (2010).



family life. Prostitution—which is perceived as a celebration of pure sex, in which the prostitutes and their clients participate—is also deemed normal, and even desirable.<sup>24</sup>

Such a view of *Les Demoiselles*—which apparently most authentically reflects the lifestyle of Picasso himself<sup>25</sup>—was first presented in the early 1970s in an article by the art-critic Leo Steinberg.<sup>26</sup> Steinberg based his article on the study of dozens of preparatory sketches for *Les Demoiselles* and of other works by both Picasso and other artists. According to Steinberg, the power of the painting is established by the observer, whom he denotes the “solicited viewer.”<sup>27</sup> From the standpoint of such an observer, the painting in front of his or her eyes is not the most important representation of Cubism, but a painting of nude women.<sup>28</sup> As Carol Duncan puts it: “[i]n Steinberg’s ground-breaking reading, the act of looking at these female figures visually re-creates the act of sexually penetrating a woman.”<sup>29</sup>

And this is how Steinberg describes what meets the eyes of the solicited viewer who is confronted with “brutal immediacy,” with defiant gazes looking back at him or her:

Of the five figures depicted, one holds back a curtain to make you see; one intrudes from the rear; the remaining three stare you down. The unity of the picture, famous for its internal stylistic disruptions, resides above all in the startled consciousness of a viewer who sees himself seen.<sup>30</sup>

The figures are not connected to each other, Steinberg emphasizes.<sup>31</sup> Each of them communicates directly, and separately, with the viewer. The cumulative impression left by the piercing stares of the five women is one

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24. See MARCUSE, *supra* note 18, at 200–01 (claiming that a perception of this type would be considered normal and normative in Utopia).

25. See Thomas R. Quigly, *Semiotics and Western Painting: An Economy of Signs* (last revised on Mar. 15, 2009) <http://timothyquigley.net/vcs/semiotics-frascina.pdf> [https://perma.cc/CR4T-NBQJ].

26. Leo Steinberg, *The Philosophical Brothel*, 44 OCT. 7 (Spring 1988). The Article was first published in two sections, in 71 (5-6) ART NEWS (September-October 1971) 22–29, 38–47. Steinberg’s Article itself has become a milestone in the history of the study of art, and a series of studies have been written about it; see for example Lisa Florman, *The Difference Experience Makes in “The Philosophical Brothel,”* 85 ART BULLETIN 769 (2003). The title of the Steinberg’s Article refers to the original name of the painting, which refers to MARQUIS DE SADE, PHILOSOPHY IN THE BEDROOM, AND OTHER WRITINGS (1795, Richard Seaver & Austryn Wainhouse trans., 1965); see Donald Kuspit, *A Critical History of 20th-Century Art: Chapter 1, Part 1 & 2 (New Forms For Old Feelings: The First Decade)*, ARTNET MAGAZINE (Jan. 10, 2006), <http://www.artnet.com/magazineus/features/kuspit/kuspit1-10-06.asp> [https://perma.cc/8B8Y-7N7G].

27. Steinberg, *supra* note 26, at 15.

28. *Id.* at 33.

29. Duncan, *supra* note 17, at 178 n. 11.

30. Steinberg, *supra* note 26, at 12.

31. *Id.* at 66.

of pure sexuality. As Steinberg argues, the wish to express their sexuality is what motivated Picasso to choose nude women identified as prostitutes as the object of his painting, “[t]hey were to personify sheer sexual energy as the image of a life force.”<sup>32</sup>

Steinberg holds that Picasso, in this painting, was expressing a strong attraction to sexual activity, a song of praise for the power and vitality of sex. *Les Demoiselles*, he sums up, is not a representation of the sins and dangers of sex, or a lament for its price in terms of health. Quite the opposite is true. It is an allegory centered on the joy of sex and the power of the encounter between the observer and sex: “I suggest that the *Demoiselles* project began . . . as an allegory of the . . . confrontation with the indestructible claims of sex.”<sup>33</sup>

According to such view, it is precisely the subject of the painting—and the nudity, together with the defiant stares of the women—that represent the pure joy of sex. *Les Demoiselles* does not merge sex and erotic desire and pleasure with intimacy, coupling or romantic sentiment. It treats sex as a practice free from ties of intimacy or family life. Admittedly, on the continuum between sex as a component of life partnership and family life and sex as an objective in itself, prostitution is closest to the latter, given that the sex which is inherent to prostitution is perceived as detached from family-life, intimacy or romantic sentiment. In the words of Anna C. Chave, Steinberg’s interpretation frames “the experience of viewing the work almost as an act of coitus,”<sup>34</sup> an act of pure sex. According to this view, *Les Demoiselles*, which reveals defiant, naked prostitutes, expresses the joy of sex, innocent of inhibitions caused by societal or romantic conventions. Consequently, it expresses the normalcy and desirability of prostitution.

Implication of the normalizing view is that prostitution is a normal legitimate occupation, which is not substantially different from any other profession. Prostitution is treated as an ordinary business transaction, where the state has the same interest in prostitution as it has in any other contract.<sup>35</sup> According to the normalizing view, just as sexuality in general is normal, prostitution is also a normal part of sexuality. The insights with regard to women’s and men’s sexuality are essentially indifferent to the fact that the women depicted are prostitutes. Furthermore, sex work can be liberatory, an expression of women’s right to sexual self-determination and equality.<sup>36</sup>

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32. Steinberg, *supra* note 26, at 53.

33. *Id.* at 43.

34. Anna C. Chave, *New Encounters with Les Demoiselles d’Avignon: Gender, Race, and the Origins of Cubism*, 76 ART BULLETIN 597, 604 (1994).

35. See Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 L. & INEQ. 19, 31 (2012); see Kuspit, *supra* note 26 (for a variation of a normalizing view that gives little significance to the identification of the women as prostitutes, and perceives the painting as referring to human sexuality in general).

36. See Chuang, *supra* note 23, at 1670.

### C. A VICTIMIZING VIEW

The victimizing view of *Les Demoiselles* sees the five naked, gloomy women, exposed for all to see, as victims. Although four of them are raising their hands, emphasizing their breasts, in a rather seductive pose, and one of them has her legs spread, the victimizing view focuses on the anxious, tense or petrified faces of the unmasked women. Notwithstanding the small space within which they are concentrated, there is no interaction between the women, and certainly no intimacy nor apparent solidarity. Three women are attempting to divide a piece of flimsy fabric among them. The foreground of the painting also shows fruit, which is apparently meant to be on display, together with the women. The fruit is painted in a less Cubist way—that is, as less of an abstract and more of a concrete representation—than the women. The women (like the fruit) are exposed to their viewers by an anonymous person. We see only that person's hand in the painting, gripping a curtain which exposes them to view. These women are identified as victims, subject to prostitution as a social practice of humiliation, oppression, and control. In the words of Thomas R. Quigley, “[t]he representation of naked women as prostitutes, in harems or brothels, etc. belongs to a system of prevalent but largely unspoken and unequal power relations.”<sup>37</sup> The painting can also be viewed as representing women whose occupation are inevitably bound up with social infamy, which, by its very imposition upon them, transforms them into victims, “[t]his specific context makes any woman who has practiced prostitution, even only once, disgraced and inferior to others.”<sup>38</sup>

The women in *Les Demoiselles*, according to this view, are a signifier of a social practice of oppression and control, within which the sexual oppression of women is perceived as a normative commercial transaction and a normal occurrence that reflects a generally accepted practice. In a society with norms which distinguish between women on the basis of their sexual availability, prostitutes are placed at the bottom of the social ladder. Their labeling as prostitutes inevitably transforms them into debased women, devoid of social dignity, and accordingly, into victims of society. The victimizing view sees prostitution as inevitably bonded to low status, within the framework of the existing power relationships between women and men and between sex sellers and their clients, and as a business that causes grave damage—mental, emotional, and physical.<sup>39</sup> Hence there is no distinction between “forced” and “voluntary” prostitution, since choice and consent are not possible because prostitution is an institution of male

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37. Quigley, *supra* note 25.

38. See Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 *GEO. J. GEN. & L.* 711, 723–28 (2010).

39. See Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 *HARV. C.R.-C.L.L. REV.* 271 (2011).

dominance and results from the absence of meaningful choices.<sup>40</sup> The painting, according to the victimizing view, crystallizes this perception.

#### D. A PATHETICIZING VIEW

The patheticizing view of *Les Demoiselles* does not center on the women in the painting, but rather, on their absent clients—men who pay money for sex. While the clients themselves do not appear in the painting, the spectators see what the clients see: miserable, rather unattractive women. Some of them are masked. The others' expression is indifferent, perhaps sad. It certainly reveals no sexual desire or erotic interest whatsoever. Each of the *demoiselles* engages in sexual relations with as many men that are able to pay her. Accordingly, they may all be suspected of harboring contagious venereal diseases. And indeed, some critics have linked the painting to the venereal diseases which Picasso himself allegedly contracted, presumably, from the prostitutes whom he frequented.<sup>41</sup> Against this background, the clients are well aware that the women do not agree to have sex with them because they desire to do so, but rather, because of the money paid to them, which the women have no better way of obtaining. The situation renders clients contemptible, and even more than that—pathetic. In this vein, Chave points out:

[The painting] makes fun of the prostitutes' clients, despoiling their sexual appetites. The boldly squatting figure at the lower right—with her backside turned as if she were 'mooning' the johns, while her mask is swiveled forward to terrify them.<sup>42</sup>

According to the patheticizing view, then, the painting mocks the clients. A man who has no choice but to obtain sex by paying unattractive, perhaps diseased, prostitutes is pathetic. This is especially true in a world in which sexual attractiveness is a significant factor in assessing one's social status.

### III. VIEWS REFLECTED IN PROSTITUTION LAWS

*Les Demoiselles d'Avignon* facilitates a succession of different views on prostitution. A multiplicity of views on prostitution is also characteristic of many legal systems. All the legal systems which we examined—including some in which the legalization of prostitution was adopted only recently, with an aspiration of establishing a reform of the previous laws—cannot be understood as reflecting a single, well-formulated concept. As a parallel to the four different views of *Les Demoiselles d'Avignon*, we may also point out four different views which are expressed by the existing legal models in Western democracies in the context of prostitution. Each of the legal systems simultaneously expresses at least two of these four positions.

40. See Chuang, *supra* note 23, at 1664.

41. See MARY MATHEWS GADO, *PICASSO: ART AS AUTOBIOGRAPHY* 78–80 (1980).

42. Chave, *supra* note 34, at 599.

There is a common, clear-cut categorization that distinguishes between three attitudes toward prostitution: absolute or partial criminalization, legitimization (or regulation), and abolition. This common categorization assumes that each legal system can be characterized by one dominant value (or by a clear balance between values). However, as will be elaborated, such categorization conflicts with the ethical incoherence that is inherent to each of the various legal systems, six of which we examine here, which may serve as prototypes for other legal systems which are close to them by nature.

#### A. THE UNITED STATES (EXCEPT NEVADA)

Each of the states in the United States has its own prostitution regularization.<sup>43</sup> At the same time, prostitution is prohibited in all states except Nevada.<sup>44</sup> Prostitutes, clients, pimps and brothel-owners all bear criminal liability. In forty-three states the penalties imposed upon pimps and brothel-owners are harsher (in most cases, significantly harsher) than those imposed on prostitutes and clients. In most states, prostitutes and clients receive identical and rather lenient sentences, consisting of no more than a few months' imprisonment and a fine. In some states, heavier penalties are imposed upon repeat offenders, prostitutes and clients alike (but generally not upon repeat offenders who are pimps and brothel-owners). In a few states, there is a difference between the penalties imposed upon clients and prostitutes. Clients are more severely sentenced than prostitutes in three states, and prostitutes more severely than clients in two. Nonetheless, irrespective of the differences between the states, in this section we consider the common features of the model: lenient, identical penalties for prostitutes and clients, and heavier penalties for pimps and brothel-owners.

The American regulation reflects the moralizing view by imposing criminal liability on all of the parties involved in prostitution. This implies a perception of prostitution itself as immoral and harmful. The prohibition is not imposed because of the harm caused to prostitutes, but rather, because of the moral harm that prostitution itself causes to society. The sentences of pimps and brothel-owners are heavier in light of the assumption that each of them contributes, much more than individual prostitutes and clients, to the industrialization of the harmful practice of prostitution, and to the widespread propagation of the problem throughout society. Another reason is the particular moral fault of deriving monetary

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43. See US Federal and State Prostitution Laws and Related Punishments, PROCON.ORG, <http://prostitution.procon.org/view.resource.php?resourceID=000119> [<https://perma.cc/5J94-AAWT>]

44. See Gail M. Dedy, *The Girl Next Door: A Comparative Approach to Prostitution Laws and Sex Trafficking Victim Identification Within the Prostitution Industry*, 17 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 515, 522–33 (2011) (describing the American history of prostitution and its legal regulation).

profit from the sex acts of others.

The victimizing and the patheticizing views are reflected in American legislation by the imposition of lenient identical sentences upon prostitutes and clients. Admittedly, society condemns both the prostitutes and their clients for being involved in prostitution and imposes criminal liability upon them. Nonetheless, it also takes into consideration the distress and the weakness, which bring both clients and prostitutes to their shared activity. Prostitutes are typically perceived according to the victimizing view as drawn into prostitution by economic or emotional distress, and clients are typically perceived according to the patheticizing view as men who were unable to resist their sexual urges, and unable to satiate these urges without turning to prostitution. The distress and misery in the situation of both prostitutes and clients are what distinguishes between them and the pimps and the brothel-owners, who exploit this shared distress for the purpose of generating hefty profits. Thus, the exploiters deserve harsher sentences.

Prostitution laws essentially similar to the prostitution laws in most of American states exist in: Croatia, India, Japan, Lithuania, Malta, Romania, Slovenia, and South Africa.<sup>45</sup>

#### B. THE NETHERLANDS

Under Dutch law, the activity of brothels is legal, but there is a criminal prohibition on trafficking in human beings, bringing in illegal workers from other countries in order to employ them in prostitution, and exploitation of minors for purposes of prostitution.<sup>46</sup> The legality of prostitution and of brothels—third parties are also permitted to manage and profit from the brothels—reflect a normalizing view. Municipalities are not allowed to make a moral assessment on prostitution, because the legislature has already done so.<sup>47</sup>

At the same time, legislation in the Netherlands still reflects significant elements of the moralizing view. Prostitution is subject to the strict supervision of local authorities, for example with regard to the location of brothels. Most of local authorities limit the number of brothels, in their overall territory or within each area. There are also local authorities which do not authorize prostitution at all, by ensuring that the terms they set for the granting of a permit cannot be practically met. All these echo a moralizing view, regarding prostitution as basically problematic, which is the reason for the considerable limitations and regulation. Only two percent of the local authorities in the Netherlands allow street prostitution.

A mark of the victimizing view is also apparent in the Netherlands' legislation. Dutch law includes regulation, which is intended to prevent forced prostitution and the involvement of minors in prostitution. Such

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45. See *100 Countries and Their Prostitution Policies*, *supra* note 6.

46. See Halley et al., *supra* note 4, at 398–401 (for the Dutch model).

47. See A. L. DAALDER, *PROSTITUTION IN THE NETHERLANDS SINCE THE LIFTING OF THE BROTHEL BAN 39* (2007).

regulation—which is in no way similar to the regulation governing other professions—reflects an assumption that prostitution is not an ordinary profession and that, by contrast to “normal” professions, special efforts are needed to ascertain that those who engage in it do so of their own free will. Also prominent in this context is the prohibition against receiving sexual services from seventeen-year-old women, whereas sex that does not involve prostitution is permissible even with sixteen-year-olds.<sup>48</sup>

Prostitution laws that are similar to the Dutch prostitution laws exist also in Germany, a few Australian States (for example Victoria), Belgium, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Greece, New Zealand, Switzerland and Turkey.<sup>49</sup>

### C. SWEDEN

The Swedish law, enacted in 1999, imposes criminal liability on the clients of prostitutes, pimps, and all other persons involved in prostitution, but no criminal liability is imposed upon the prostitutes themselves.<sup>50</sup> It is intended to protect prostitutes because they are perceived as victims. The law is part of a section of the Swedish Criminal Code that deals with offenses of violence. Prostitution is perceived as violence against the women who engage in it. Accordingly, criminal liability is imposed upon all of the persons involved in prostitution, except for the women.

Yet, at the same time, the Swedish law also reflects the patheticizing view. Although clients of prostitutes are perceived as criminals, they are treated with relative leniency. Their maximum penalty is up to six months' imprisonment. This penalty is considerably lower than the penalties which can be imposed upon other persons involved in prostitution, such as pimps. The clients' imprisonment is also much shorter than the imprisonment of other violent criminals, and certainly shorter than the potential sentence of rapists and other sex criminals, notwithstanding the fact that the incrimination of clients is based on the assumption that women do not really consent to engage in prostitution and to have sex with them.

Furthermore, according to Swedish law, prostitutes' clients can be sent to an educational-therapeutic program, which is intended to educate them and cure the need which led them to partake in sexual services. This option represents a perception of clients as not really violent and not quite sex offenders, but rather as persons who suffer from a behavioral disorder or who have not internalized the meaning of their actions and who should be urged to seek treatment for their disorders.

Lastly, traces of the moralizing view also appear in Swedish law. The gap between the lenient sentences which are imposed on clients and the

48. Sec. 248b of the Dutch Criminal Code; DAALDER, *supra* note 47 at 40.

49. *100 Countries and Their Prostitution Policies*, *supra* note 6.

50. See Max Waltman, *Prohibiting and Ending Trafficking: The Swedish Prostitution Law*, 33 MICH. J. INT'L L. 133 (2011) (for the Swedish model); Halley et al., *supra* note 4, at 396–98.

heavy sentences which are imposed on others involved in the sex industry is likely to be perceived as embodying the perception of pimps as people who generate profit from sex. Pimping is deemed worthy of extreme condemnation and heavy penalties because of the harm which it inflicts upon the purity of sex and sexuality, which is violated when they are turned into a source of income.

Laws which are similar to the Swedish law apply also in Norway, France, North Ireland, and Iceland.<sup>51</sup>

#### D. ENGLAND AND WALES

In England and Wales prostitution *per se* is not prohibited. At the same time, pursuant to the Policing and Crime Act of 2009, the client of a prostitute is committing an offense, the penalty for which is a fine, if the prostitute is subjected to “exploitative conduct,” which is defined as including “force, threats . . . or any other form of coercion or deception.”<sup>52</sup> A Home Office Circular<sup>53</sup> includes broad definitions for these terms. It is irrelevant whether the client was aware, or should have been aware, that the prostitute was subjected to exploitative conduct.<sup>54</sup> The activities of pimps and brothel-owners also constitute offenses, but these are ordinary offenses of *mens rea*, which bear severe penalties of years of imprisonment.

The victimizing view is reflected in the Home Office Circular, which describes the damage which prostitution entails and states that “agencies involved in the Criminal Justice System (CJS) will only be able to deal with prostitution effectively if they understand its causes and consequences and adopt a ‘victim centred’ approach to those who are sexually exploited.” The definitions of “exploitative conduct” are remarkably broad, and include, *inter alia*, “situations that involve dominating or unequal relationships where the pimp (or a ‘friend’ of the woman) uses his or her influence over the woman, or purposely exploits her vulnerabilities to incite or encourage her to provide sexual services.” Receiving sexual services for money is an offense even if the client was not aware and should not have been aware of the fact that the prostitute was subjected to exploitative conduct. In light of the fact that most of the prostitutes in England and

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51. *100 Countries and Their Prostitution Policies*, *supra* note 6; see also European Parliament, *Resolution on Sexual Exploitation and Prostitution and its Impact on Gender Equality* (adopted 26 Feb. 2014), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM\\_ET\(2014\)493040\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf). [<https://perma.cc/S4LS-SEV9>] (describing the resolution of the European Parliament which endorses the Swedish Model).

52. Policing and Crime Act 2009, Sec. 14.

53. Home Office Circular 006/2010 – Provisions in the Policing and Crime Act 2009 that relate to prostitution (Sec. 14 to 21), <https://webarchive.nationalarchives.gov.uk/20100408125321/http://www.homeoffice.gov.uk/about-us/publications/home-office-circulars/circulars-2010/006-20101/index.html> [<https://perma.cc/B9AT-L22A>].

54. See Anna Carline, *Constructing the Subject of Prostitution: A Butlerian Reading of the Regulation of Sex Work*, 24 INT’L J. SEMIOT. & L. 61 (2011) (for a critical discussion of the law).



Wales, as may be seen from the data set forth in the Home Office Circular, engage in prostitution after having been subjected to exploitative conduct, the imposition of strict liability involves an element of deterrence, which apparently entails the assumption that prostitutes are victims.

The normalizing view is also reflected in the prostitution laws of England and Wales. English law distinguishes between the acquisition of sex services from prostitutes who engage in prostitution of their own free will and the acquisition of sex services from prostitutes who have been subjected to exploitative conduct. This implies that prostitution *per se* is normal and normative. Such conclusion also appears to arise from a statement by Home Secretary Jacqui Smith, to the effect that the British Government “had considered a ban” on paying for sex “but had ruled it out as there was no public support for such a move.”<sup>55</sup>

A manifestation of the moralizing view can also be identified. The key objectives of the Act, as described in the Home Office Circular, are to “challenge the view that street prostitution is inevitable and here to stay; achieve an overall reduction in street prostitution; improve the safety and quality of life of communities affected by prostitution, including those directly involved in street sex markets; and reduce all forms of commercial sexual exploitation.”<sup>56</sup> This indicates a general reservation with regard to the phenomenon of prostitution, and especially street prostitution—a reservation which is difficult to reconcile with the concept of prostitution as normal or as expressing the joy of sex. The Circular emphasizes the need to reduce street prostitution—that is, visible prostitution—in order to “improve the safety and quality of life of communities affected by prostitution.” It barely alludes to the distress of the women who engage in prostitution, and does not embody a concept which considers prostitution, in and of itself, to be an ethically and morally reprehensible practice.

Lastly, traces of the patheticizing view are also to be found. The sentence that is imposed upon clients of prostitutes who have been subjected to exploitative conduct is no more than a fine. There is no appropriate proportion between the presentation of the clients’ acts as essentially similar to rape and the modest penalty which is imposed upon them, along with the definition of the offense as one of strict liability. Offenses of strict liability are typically minor offenses, and *prima facie* defining the offenses of clients as bearing strict liability conveys a message of letting the clients off lightly.

#### E. ISRAEL

Israeli law does not prohibit prostitution, neither from the standpoint of the women engaged in it nor from the standpoint of their clients, but others

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55. Dominic Casciani, *Q&A: UK Prostitution Laws*, BBC NEWS, [http://news.bbc.co.uk/2/hi/uk\\_news/7736436.stm](http://news.bbc.co.uk/2/hi/uk_news/7736436.stm) [<https://perma.cc/AAD8-FH4X>].

56. Home Office Circular, *supra* note 53.

involved with the sex-industry are considered criminal offenders.<sup>57</sup>

The moralizing view in Israeli law is immediately reflected in the title of the Article which deals with offenses related to prostitution: “Prostitution and [what is rather Biblically referred to as] Abomination.”<sup>58</sup> This Article also includes offenses dealing with the publication of obscenity, which is referred to as “abomination.” Thus, the section includes a prohibition against the publication or advertising billboards of “a picture of partial exposure of the body of a man or a woman, which involves harm to the moral feelings of the public . . . or the undermining of public morality, or which involves harm to minors or detriment to their education.”<sup>59</sup> Prostitution manifests a contravention of public morality, in the same way as the publication of abomination contravenes morality. Offenses which concern prostitution are therefore not perceived as sex offenses, and are not included in the section of the Penal Code which deals with sex offenses.

Additionally, some of the sections which specify the offenses of prostitution and the penalties imposed also reveal a moralizing view. One such section, for example, reads as follows: “[w]hoever allows a minor between the age of two and seventeen years, who is in his custody or under his supervision, to live in a brothel or to visit a brothel on frequent occasions, shall be subject to three years’ imprisonment.”<sup>60</sup>

The prohibition against renting out a place while being aware that it is used or will be used as a place where a person commits acts of prostitution, and even the imposition of criminal liability upon a person who has not terminated renting out of a place to another after finding out that the place is being used for this purpose, although having the right to terminate the rental and demand the other person’s eviction for that reason, also appear, to a great degree, to reflect a moralizing view.

The applicability of most of the offenses concerning prostitution to both female and male prostitution is difficult to explain in terms of the victimizing view, which emphasizes the harm to women in prostitution, whereas it suggests the moralizing view, which is linked to reservations with regard to prostitution at large. Yet, an allusion to the gender-related aspects of prostitution is reflected in the statement that:

Any man who lives with a prostitute or is customarily seen with her on a permanent basis, or who uses his supervision of her or his influence on her in such a way as to assist or force her to practice prostitution, shall be presumed to live on her earnings, unless otherwise proved.<sup>61</sup>

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57. See Almog, *supra* note 38 (for the Israeli model); see also Halley et al., *supra* note 4, at 401–05.

58. Israeli Penal Code 5737, Chapter VIII, Article X (1977).

59. *Id.* §. 214A(b)(3).

60. *Id.* § 208.

61. *Id.* § 200.

The normalizing view is reflected in Israeli law by the legality of the conduct of both prostitutes and their clients. Furthermore, in practice, sex offenses that are enforced under ordinary circumstances, which are not linked to prostitution, are usually not enforced if they occur in context of prostitution. Thus, for example, one of the alternatives in the definition of the offense of rape is having intercourse with a woman "while exploiting the fact that the woman is in a state of unconsciousness or in another situation which prevents her from giving her free consent."<sup>62</sup> Accordingly, in many cases, men who had sexual relations with a woman while she was drunk or drugged have been convicted of rape.<sup>63</sup> On the other hand, even though many prostitutes are drug-addicts and have sex with clients while they are under the influence of drugs, it is not customary to bring men to trial in Israel solely for having had sexual intercourse with a drugged prostitute.

The victimizing view is reflected in Israeli law in the series of criminal offenses based on the prohibition against exploiting prostitutes. Thus, criminal liability is imposed upon "anyone whose livelihood, in whole or in part, on a permanent basis or for any period of time, comes from the earnings of a person who is engaged in prostitution,"<sup>64</sup> and upon "anyone who intentionally receives what has been given in exchange for an act of prostitution by a human being, or part of what has been given as set forth above."<sup>65</sup> The penalty for these offenses is increased if they were committed by a person "against his spouse, his child or his stepchild, or who committed the offense through the exploitation of a relationship of authority, dependence, education or supervision."<sup>66</sup> Bringing a person to commit an act of prostitution—including a one-time act—with another person is an offense for which the maximum penalty is five years' imprisonment.<sup>67</sup> The penalty for bringing a person to engage in prostitution on a permanent basis is seven years' imprisonment.<sup>68</sup> None of these prohibitions is limited only to situations in which the engagement in prostitution is forced and not of free will.

These prohibitions reflect a concept which views the prostitute as a victim. There is no prohibition against brokerage or employment in the context of other professions. Pimps and other persons who receive part of the earnings which are paid by clients for services of prostitution are not perceived as legitimate businesspersons, but rather, as exploiters and victimizers.

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62. Israeli Penal Code 5737, Chapter VIII, Article X, § 345(a)(4) (1997).

63. *See, e.g.*, SCF (Severe Criminal File) 1024/07 (Tel-Aviv District Court) State of Israel v. Solomonovich (2008).

64. Israeli Penal Code, 1977, Chapter VIII, Article X, § 199(a)(1).

65. *Id.* § 199(a)(2).

66. *Id.* § 199(b).

67. *Id.* § 201.

68. *Id.* § 202.

In a 2011 amendment to the Israeli Penal Code the prohibitions against the advertising of sexual services and the penalties for such advertising were increased.<sup>69</sup> The explanatory statement which accompanied the draft law emphasized that its purpose was to protect the women who engage in prostitution, as the advertisements diminish their dignity, liberty and privacy, and enable “their increased exploitation by clients.”<sup>70</sup> This law views prostitution as harmful and exploitive of women, and is meant to contribute to reducing it.

The patheticizing view is also expressed in Israeli law. Notwithstanding the distress of the prostitutes—which the law recognizes by imposing heavy sanctions on pimps and other persons who live off their earnings—there is no prohibition against being the client of a prostitute. The law takes the clients’ needs into account and does not impose liability upon them. One decision of the Supreme Court even mentions an “innocent client.”<sup>71</sup>

Prostitution laws that are essentially similar to the Israeli prostitution laws also exist in: Argentina, Armenia, Austria, Chile, the Czech Republic, Denmark, the Dominican Republic, Finland, Hungary, Italy, Poland and Portugal.<sup>72</sup>

On October 22, 2018, the Israeli parliament (the Knesset) approved in the first reading a government bill, according to which consumption of prostitution from adults will constitute an administrative offense, punishable by a fine.<sup>73</sup> The proposal includes the use of an alternative means to rehabilitate prostitution consumers: a therapeutic-educational workshop as part of the social change that the new offense is intended to promote.<sup>74</sup> It seems that the memorandum simultaneously expresses some of the views of prostitution discussed in this Essay.

#### F. CANADA

Until recently, under the Canadian Criminal Code 1985, it was not a crime to sell and buy sex for money, but it was a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution.<sup>75</sup> These Canadian rules reflected the moralizing, normalizing, victimizing and patheticizing views.

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69. Israeli Penal Code (Amendment num. 109), 2011.

70. Bill of Israeli Penal Code, (Amendment num. 109), 2011, explanatory statement.

71. CA (Criminal Appeal) 2589/05 Macievsky v. State of Israel (2008).

72. See *100 Countries and Their Prostitution Policies*, *supra* note 6.

73. Prohibition of Consumption of Prostitution (Temporary Law) Bill, 2018.

74. See Tamar Pileggy, *Justice Minister Presents Legislation to Fine Johns Who Hire Prostitutes*, THE TIMES OF ISRAEL (June 13, 2018), <https://www.timesofisrael.com/justice-minister-presents-legislation-to-fine-johns-who-hire-prostitutes/> [https://perma.cc/4449-GVV6].

75. See, e.g., Tesla Carrasquillo, *Understanding Prostitution and the Need for Reform*, 30 TOURO L. REV. 697, 720–21 (2014) (describing the prostitution law that was in effect in Canada until 2013).

In its decision from December 20, 2013, in the case of *Canada (Attorney General) v. Bedford*,<sup>76</sup> the Canadian Supreme Court declared unconstitutional three sections of the Canadian Criminal Code. These sections were Section 210, which makes it an offense to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house; Section 212(1), which prohibited living on the avails of another's prostitution; and Section 213(1), which prohibited either stopping or attempt to stop, or communicating or attempting to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute. According to the Court's decision, those sections prevented prostitutes—"people engaged in a risky—but legal—activity from taking steps to protect themselves from the risks."<sup>77</sup> However, due to the Court's assessment that "it [was] clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians,"<sup>78</sup> they decided to suspend the declaration of invalidity for one year.

The Court's reasons for the invalidation of the three sections clearly reflected the victimizing view. Prostitution is called by the Court "risky,"<sup>79</sup> and the three sections are declared to be unconstitutional because they are "making a prostitute more vulnerable to . . . violence"<sup>80</sup> of "pimps and johns."<sup>81</sup>

At the same time the decision reflects also a normalizing view, since it presumes that part of the prostitutes engage in prostitution of their own free will: "some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution."<sup>82</sup> And indeed, in its decision the Canadian Supreme Court granted the application of three women respondents, all of them current or former prostitutes, which was based on their right to practice prostitution in safety. The Court was also of the opinion that the right of prostitutes is violated also by preventing them "from having a regular clientele."<sup>83</sup>

The decision expresses also a moralizing view. The Court did not

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76. *Can. v. Bedford*, [2013] 3 S.C.R. 1101, 1101 (Can.); see Lauren Sampson, "The Obscenities of this Country": *Canada v. Bedford and the Reform of Canadian Prostitution Laws*, 22 DUKE J. GENDER L. & POL'Y 137 (2014) (for the *Bedford* decision); Max Waltman, *Assessing Evidence, Arguments, and Inequality in Bedford v. Canada*, 37 HARV. J.L. & GENDER 459 (2014).

77. [2013] 3 S.C.R. 1101, at 1134.

78. *Id.* at 1165.

79. *Id.* at 1134.

80. *Id.* at 1142.

81. *Id.*

82. *Id.* at 1141.

83. *Id.* at 1135.

dispute the legitimacy of the moral-based, some may say moralistic, objectives of the sections whose constitutionality was examined, which included “target[ing] pimps and the parasitic, exploitative conduct in which they engage,”<sup>84</sup> and “taking solicitation for the purposes of prostitution off the streets and out of public view.”<sup>85</sup> The Court invalidated the sections not because their purposes, but because of the disproportionate ratio between goals and means.<sup>86</sup>

It seems that the avoidance of the Court to declare immediate invalidity of the three unconstitutional sections and its preference to allow Parliament to enact a new law reflects the Court’s awareness of the public and value complexity which an immediate invalidation would cause. However, this complexity was not a unique result of an immediate invalidation of the three sections that the Canadian Supreme Court declared to be unconstitutional, but it is a general characteristic of prostitution laws in many countries, including Canada before the decision of the Supreme Court.

Following the *Bedford* decision, the Canadian Parliament amended the Criminal Code, and enacted the Protection of Communities and Protection of Communities and Exploited Persons Act 2014, which came into force on December 6, 2014. In a “Technical Paper” published by the Canadian Department of Justice<sup>87</sup> it was explained that the new law “reflects a significant paradigm shift away from the treatment of prostitution as ‘nuisance’, as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls.”<sup>88</sup> The Paper further notes that the new law:

[R]ecognizes that prostitution’s victims are manifold; individuals who sell their own sexual services are prostitution’s primary victims, but communities, in particular children who are exposed to prostitution, are also victims, as well as society itself. . . . [The new law] also recognizes that those who create the demand for prostitution, i.e., purchasers of sexual services, and those who capitalize on that demand, i.e., third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution’s harms.<sup>89</sup>

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84. [2013] 3. S.C.R 1101, at 1156.

85. *Id.* at 1159.

86. *Id.* at 1164–65.

87. *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act*, DEP’T OF JUSTICE, CANADA, (Mar. 8, 2017), <http://www.justice.gc.ca/Eng/Rp-Pr/Other-Autre/Protect/P1.Html> [<https://perma.cc/UDG5-FHXR>] [hereinafter CANADIAN DEP’T OF JUSTICE].

88. CANADIAN DEP’T OF JUSTICE, *supra* note 87.

89. *Id.*

The new Act criminalizes “obtaining sexual services for consideration.”<sup>90</sup> The fines for obtaining sexual services are doubled for a subsequent offense or when the offense is committed in a public place that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where minors can reasonably be expected to be present.<sup>91</sup> The new law, like the former one, states that:

[E]veryone is guilty of an offense punishable on summary conviction who communicates with any person—for the purpose of offering or providing sexual services for consideration—in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.<sup>92</sup>

The law imposes criminal liability on clients of prostitution and other people involved in prostitution but in general not on the prostitutes themselves. In doing so, the law takes into account the personal security of prostitutes and the need to protect them, and as such, reflects the victimizing view. However, the law also criminalizes communication for the purpose of offering or providing sexual services in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare center,<sup>93</sup> and doubles the fines when the offense is committed in a public place that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where minors can reasonably be expected to be present,<sup>94</sup> and hence reflects also the moralizing view.

## CONCLUSION

Michel de Montaigne described the power of paintings to evoke meanings that did not occur to their creators.<sup>95</sup> Perhaps Picasso knowingly planted in his work intricate levels of meanings. At any rate, the painting manifests a unique cultural code. It ratifies from a new vintage point the immanent ambivalence of prostitution in our culture, ambivalence that law systematically overlooks or exploits.

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90. R.S.C., 1985, c. C-46 § 213(1) (relevant Canadian criminal code statute).

91. Lyne Casavant & Dominique Valiquet, *Legislative Summary of Bill C-36: An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford And to Make Consequential Amendments to Other Acts* PARLIAMENT OF CANADA, (July 14, 2014), <https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-e.pdf> [<https://perma.cc/NG2Y-Y2WV>].

92. R.S.C., 1985, c. C-46 at § 213(1.1).

93. *Id.*

94. *See id.* at § 286.1(1)(a)(i).

95. MICHEL DE MONTAIGNE, *Essay n.24* in *ESSAYS OF MICHEL DE MONTAIGNE*, (William Carew Hazlitt, ed. Charles Cotton trans., 1877), <http://www.gutenberg.org/files/3600/3600-h/3600-h.htm#2HCH0023> [<https://perma.cc/2K2W-YBMT>].

Art and paintings are part of a set of keys that may be used in order to predict future societal trends and developments, *inter alia* legal codes.<sup>96</sup> In the case of *Les Demoiselles d'Avignon*, the painting that was created in the first decade of the previous century did indeed brilliantly predict the full scope of contradictions, ambivalence and discrepancies that are probably present in each and every Western legal effort to regulate prostitution more than hundred years afterward. *Les Demoiselles* may serve as an opposite exemplifier of the correlation Benjamin alludes to, and to the miraculous ability of a work of art to prophecy what is culturally and legally coming. In another part of his *Arcades Project* Benjamin refers to “the dialectical function of money in prostitution,”<sup>97</sup> and notes that “[i]t buys pleasure and, at the same time, becomes the expression of shame.”<sup>98</sup>

And indeed, the perception of prostitution is often characterized by deep dialectics—or rather, “*quatrolectics*.”<sup>99</sup> It seems that the century that elapsed since *Les Demoiselles* was painted reinforced and enhanced the dialectics Benjamin describes, and law’s failure to resolve it, since it is unable to evade the contradictions and discrepancies linked to prostitution, even in legal regimes that assert a clear-cut perception of it. According to our suggestion, this deep dialectic that so pronouncedly characterizes the contemporary state of prostitution is reflected in the 111-year-old work of art.

In the first part of the Essay we presented four different views on prostitution evoked by *Les Demoiselles d'Avignon*. In the second part we presented how corresponding to the views suggested by the painting, four different views are simultaneously reflected in prostitution laws in various current legal systems.

This incoherence in central representations of culture—art and law—is hardly surprising. It reflects the ongoing ambivalence, which prevails with regard to prostitution. It appears that law is unable to avoid the deeply-rooted incongruity linked to prostitution, which stays apparent even in countries that allegedly declare unambiguous standing towards it. The basis for seriously dealing with prostitution is full realization of the range of the discrepancies that still surround it. We believe that the perspective suggested here—setting legal rules alongside a seminal work of art and the interpretive discourse attached to it—augments the ability to gauge the profundity of ambivalence surrounding prostitution.

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96. Cf. WALTER BENJAMIN, *THE ARCADES PROJECT* 63–64 (Howard Eiland & Kevin McLaughlin trans., 1999) (“It is well known that art will often—for example, in pictures—precede the perceptible reality by years . . . each season brings in . . . various secret signals of things to come. Whoever understands how to read these semaphores would know in advance not only about new currents in the arts but also about new legal codes . . .”).

97. *Id.* at 492.

98. *Id.*

99. See Jane Scoular, *The “Subject” of Prostitution*, 2004 *FEMINIST THEORY* 343 (contending that feminist theory manifests ambivalence and discrepancies regarding prostitution).



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