
PROSTITUTION AS EXPLOITATION: AN ISRAELI PERSPECTIVE

Shulamit Almog*

ABSTRACT

The article presents an alternative approach, which proposes a new legal conceptualization for the prostitution phenomenon. This approach calls for a legislative model which prohibits prostitution and places the onus of punishment and social infamy on the clients. The article applies the Israeli experience to pursue a claim that any attempt to employ the conventional legal doctrines in order to deal with prostitution is doomed to fail.

A. FOREWORD

B. THE EMPLOYMENTS OF VICTORIA MOLDOVNOVA AND OLSIA RARU

C. PROSTITUTION AS A "WILDCAT CONTRACT"

C1. Is the Prostitution Contract Really Like Other Contracts?

C2. Social Infamy Toll

C3. On Consent to Engage in Prostitution

D. NORMATIVE APPROACHES TO THE REGULATION OF PROSTITUTION

E. AFTERWORD

A. FOREWORD

Prostitution is engagement in sexual activity for pay. It usually involves men paying women.¹ From time immemorial

* Associate Professor, Haifa University, Faculty of Law. Member of The Ministry of Justice of Israel Committee regarding National Award for Combating Trafficking in Persons. I am grateful to Osnat Eindor and Lotem Perry for their excellent research assistance.

¹ The core of the problem created by prostitution is the damages to women that engage in it. The article focuses on this core. Although there are men that engage in prostitution, and some of the issues that are dealt with here are relevant to men as well, women that engage in prostitution sustain the vast majority, and the harms they experience are singular. For elaboration on the differences between women and men engaging in prostitution see Carole Pateman, *What's Wrong with Prostitution?*, in PROSTITUTION

the phenomenon of prostitution constitutes an especially tangled strand in the complex fabric of human sexuality. The variety of theoretical constructs, cultural representations and normative choices on the subject of prostitution well reflect the conceptual and emotional confusion surrounding it. Generally, approaches range from the view of prostitution as a perfectly legitimate phenomenon to which the same law applies as to any other occupation in the course of which people buy and sell services, to a view of it as a contemptible phenomenon that must be eradicated.

In light of prostitution's numerous aspects and its association with deep-seated cultural attitudes, it is hard to expect the law to best delineate the way society should deal with it; indeed the diversity of normative approaches that different legal systems have chosen frequently exhibit internal contradictions, fudging, and major questions which the law ignores and leaves dangling without a clear or consistent answer. This appears to be the case also upon examination of the attempt by the labor court system in Israel to treat prostitution as work or employment and those who engage in it as workers or employees.

In what follows, I will start with an analysis of several recent rulings of Israeli labor courts; at the conclusion, I will conclude by suggesting de-legitimizing the phenomenon of prostitution as a worthy goal—in Israel as anywhere else. As I shall show, the labor courts' decisions in matters of prostitution fail in their attempt to sufficiently address the profoundly problematic nature of prostitution from the aspect of the women who engage in it. In the next section I shall try to sketch the basic narrative that arises from the labor courts' decisions in the matter of prostitution. This is a narrative

AND PORNOGRAPHY 50, 53-54 (Jessica Spector ed. 2006); Debra Satz, *Markets in Women's Sexual Labor*, in PROSTITUTION AND PORNOGRAPHY 394, 413 (Jessica Spector ed. 2006); Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, in RETHINKING COMMODIFICATION 248, 257 (Martha M. Ertman & Joan c. Williams eds. 2005); Jody Freeman, *The Feminist Debate Over Prostitution Reform: Prostitutes' Rights Groups, and the (Im)Possibility of Consent*, 5 BERKELEY WOMEN'S L.J. 75, 77 (1989).

which distinguishes between women who choose or agree to engage in it and women who are forced to it. Afterwards I shall address the primary question stemming from the explicit or implicit adoption of such a narrative, namely the nature and essence of the "prostitution contract." I shall attempt to show that prostitution involves a social infamy tax, not included in the contract's terms, but which is in effect imposed on women who sign such a contract. The rest of the section will discuss the practical significance and harsh consequences of this social infamy. In the following section I shall review a number of normative approaches toward prostitution around the world. Finally, I shall single out the model introduced in Sweden—prohibiting prostitution but criminalizing only the clients—as the one that should be emulated.

At this point, I would like to emphasize that the commodification of sex or sexual services in and of itself does not seem to me inherently negative or morally reprehensible. I do not find in sex, in and of itself, any trait that morally proscribes the possibility of trading in it. In a Utopian world, in which sex could be traded from positions of equality and in a fair manner, just as men and women provide other services to men and women, I do not think that moral difficulty would arise with such commerce. It follows that engaging in prostitution does not justify any kind of disgrace or infamy. It is a weighty question, then, why nevertheless engaging in prostitution involves such profound humiliation. This question concerns a broader issue, namely, as Foucault has put it, "why is sexual conduct, why are the activities and pleasures that attach to it, an object of moral solicitude?"² Needless to say, the answers to these questions are complex and multilayered, and should be addressed by historical, sociological, psychological, economic and other tools. This issue, however, interesting and important as it may be, lies beyond the scope of the present discussion. What is of importance here is only the fact that prostitution indubitably

² MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 10 (V.2, Robert Hurley trans., 1978).

entails social infamy, from which stems an obligation to take it into account when dealing with the question which normative approach addresses prostitution in an optimal way.

B. THE EMPLOYMENTS OF VICTORIA MOLDOVNOVA AND OLSIA RARU

Victoria Moldovnova, a native of Moldavia, arrived in Israel in 1999, intending to support herself as a masseuse. She was met at the airport by a man who took her passport and brought her to an apartment in the south of Israel, where she was forced to work as a prostitute. During the next few months she was sold, trafficked from hand to hand, and earned considerable sums of money for her "owners," until the authorities put an end to her employment. In 2003 Victoria Moldovnova filed suit in Beer Sheva District Labor Court to recognize an employment relationship between her and several respondents in the periods when she was employed in escort service parlors, and to award her wage differentials, layoff compensation and other payments due under the Israeli labor laws. In 2005 Judge Glatner-Hoffman ruled that plaintiff was indeed entitled to wages for the periods in which she had been employed in various escort service parlors.³ It was also determined that Victoria had suffered humiliation, that her spirit had been trampled, her body violated, and her basic rights denied. Consequently, the court awarded her relatively high compensation for the mental anguish, pain and suffering caused her due to having been robbed of her dignity, her freewill, and the right to earn her livelihood as she wills and not by coercion.⁴ In 2008 an appeal was rejected and the Israel's National Labor Court affirmed the District Court's decision.⁵

Justice Steve Adler, President of the National Labor court defined the relationship between Victoria and the respondents

³ District Labor Court – Be'er Sheva 4634/03, Moldovanova v. Slasravski (Unpublished 2005).

⁴ *Id.* at 130-131.

⁵ National Labor Court 480/05, Ben Shitrit v. Anonymous (Unpublished 2008).

as unlawful contract; however, he also ruled that, under sections 19 and 31 of the Israeli Law of Contracts (General), 1973, the contract's unlawfulness should not allow respondents to evade fulfilling their obligations under labor laws, in order to prevent a situation in which "the sinner is rewarded."⁶ According to the National Labor Court's decision, although the relationship between Victoria and the respondents cannot be defined as an employer-worker relationship as defined by the labor laws, once Victoria did indeed perform work which was not, in and of itself, illegal, she was entitled to wages.⁷

Having made this ruling, the court had to determine the appropriate wage. Applying the doctrine of purposive interpretation⁸, it decided that plaintiff was entitled to the minimum wage at least, by dint of the purpose of the stipulations of the Minimum Wage Law, 1987⁹, allowing the District Court's decision in this matter to stand.

A primary factor in both decisions, by the National Labor Court and the District Court, was the absence of any consent by the plaintiff to her employment in prostitution, and consequently the absence of free will. Plaintiff, say the decisions, came to Israel in the belief that she would be able to work as a masseuse, but then upon arrival was incarcerated, sold from hand to hand like merchandise, and forced to engage in sexual relations.¹⁰

The absence of consent and lack of choice is in the core of both courts' decisions. The absence of consent, which is mentioned and emphasized several times in the decisions, is the component which ultimately entitles Victoria to significant compensation. Since her autonomy and dignity were so gravely harmed, the court views protecting her as "an exalted social purpose."¹¹ The absence of consent is also the

⁶ *Id.* at 17-21.

⁷ *See also* Moldovanova, *supra* note 3, at 77.

⁸ For elaboration on the purposive interpretation doctrine *see* AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW (Heb.) (2007).

⁹ Ben Shitrit, *supra* note 5, at 24-31.

¹⁰ *Id.* at 3. *See also* Moldovanova, *supra* note 3, at 177.

¹¹ Moldovanova, *supra* note 3, at 99.

reason for awarding her relatively high damages for the mental anguish that was caused her due to the robbing of her dignity, her freewill, and her right to earn her livelihood as she wills and not by coercion.

In a later decision delivered in 2007, the District Labor Court again dealt with a similar issue, but arrived at exactly the opposite decision.¹² In that case plaintiff, Olsia Raru, worked as an "escort girl" (the decision's wording) and the respondent (also a woman) supplied her with clients and rented a room in a hotel for her. The profits were divided between the two. In the wake of a break in their connection, Olsia asked the court to recognize the employment relationship between her and the respondent, and to award her wage differentials, layoff compensation and other payments due under the labor laws.

In her decision, Judge Varda Samet asserts that after due examination of all the indications attesting to an employer-worker relationship, Olsia cannot be defined as respondent's worker. However, having felt a need to address the more essential question—should plaintiff be defined as a worker because of the need to protect her?—in this case, the Judge clarifies, unlike that of Victoria Moldovnova, Olsia arrived in Israel of her own free will, and knowing clearly in advance that she would be working in Israel as an "escort girl." She did not engage in this occupation out of deceit, compulsion or coercion.¹³ She acted of her own choice, was in control of what occurred, and she was able to decide "whether to work and/or whether to accept a client or not."¹⁴

The court does not discuss the issue of how "free will" should be defined in the context of engaging in prostitution, or how exactly it arrived at the conclusion that Olsia Raru acted indeed of her own free will.¹⁵ Nevertheless, on the

¹² District Labor Court – Tel Aviv 5307/04, Raro v. Cochik (Unpublished 2007).

¹³ *Id.* at 9.

¹⁴ *Id.* at 2.

¹⁵ Indeed, the court usually refrains from looking into the issues of what is free will. Its initial assumption is that free will exists, and very rarely it rules its absence, as it did in the case of Moldovanova. This usual

unequivocal existence of this alleged free will the court bases its determination that Olsia does not deserve the same purposive interpretation of the Israeli labor laws that were used in the Moldovnova case in order to provide redress to Victoria.¹⁶ The decision implies that Olsia Raru, who chose to be a prostitute, does not deserve the redress awarded to Victoria Moldovnova, who found herself prostitution due to compulsion or coercion.

The courts' rhetoric in all three decisions reflects the moral and conceptual confusion characteristic of society as a whole in regard to prostitution. It exposes the murky standards and problematic nature of the legal attempt to properly come to grips with prostitution.

A similar impression arises on examination of the way the District Court handled the issue of appropriate pay, or, more precisely, avoided dealing with it. Victoria submitted calculations to the court according to which she was entitled to wages of total 360,560 NIS (approximately 90,000\$).¹⁷ The court rejected these calculations, ruling that all she was entitled to for the period of her employment was the minimum wage, a total of 25,850 NIS (approximately 7000\$). Beyond the specific problems relating to the factual evidence presented by Victoria, the court ruled that "in this kind of case, concerning employment in prostitution [...] we lack the tools and evidence to determine the customary payment in this sector."¹⁸ Thus, when it came to putting an economic

practice, however, is not applicable to the specific circumstances of women in prostitution, which often indicate lack of consent.

¹⁶ The following quote from the judgment reveals how problematic is the assertion of free will in this case: "I came freely, knowing what job I will have, ... when I arrived to Israel I was brought to someone in Akko, who sold me to Arthur. I worked for Arthur during 3 weeks, and Arthur sold me to Sasha and Sasha let me to the defendant. In the first six months I lived there... and then I escaped." Despite the use of the word "freely", it is hard to perceive the situation described by the plaintiff – being sold and transferred from hand and escaping – as reflecting free will.

¹⁷ The plaintiff presented a table that specified the respondents income, the daily number of clients and the sums they paid. *See* Moldovanova, *supra* note 3, at 111.

¹⁸ *Id.* at 117.

value on rights, the court excused itself from calculating the pay by determining that it did not have the appropriate tools to do so. The brief paragraph accorded to the topic suggests that the court saw it unfit to "dirty its hands" with such a matter. As a result, it awarded the minimum wage. It should be noted that in cases concerning other kinds of employment, the court readily addresses the task of determining the exact sums that an employee is entitled to.

It seems that the court's reluctance to delve deeply into the matter of pay, and its awarding the minimum wage regardless, is related to the social infamy which is inherent to prostitution. The court's reluctance is part of the transparent price, which no-one acknowledges, discusses or confronts, that every woman who engages in prostitution must pay.

It is the infamy inherent to prostitution, then, which lies in the background of the judicial decisions and colors them, even in cases where the courts choose to provide redress to the plaintiffs. What prominently emerges is a basic pattern that has always lurked in the background of the prostitution phenomenon. According to this pattern, prostitution always carries shame, disgrace and humiliation, which I will refer to as **social infamy**. However, the social infamy of those women perceived as choosing to be prostitutes is greater than that of those who are forced to be prostitutes. Most decisions reflect an unceasing search for a sort of dividing line between women who choose to engage in prostitution and those who engage in it not of their own choice.¹⁹ Such boundary has never been delineated in any normative manner, nor can any trace of it be found in the law books. Yet all the above decisions reveal the probing after it, and the assignment of meaning to finding it.

In a decision delivered in 2007²⁰ in the matter of Jane Doe, a similar issue again came up before the Labor Court:

¹⁹ See in this context Balos and Fellows article, which elaborates on such standing: Beverly Balos & Mary Louis Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999).

²⁰ See District Labor Court – Jerusalem 180-3, Ben Ami v. Galintzki (Unpublished 1996).

Jane Doe had been employed for three months as a provider of prostitution services. During that period she stayed at an apartment in Jerusalem, which she was forbidden to leave except when summoned by a client. Payment for her work was made to the respondent. The work was performed under coercion and threats to Jane Doe and her daughter. Jane Doe asked for the payment of both wage differentials and compensation for mental anguish.²¹

This time the court determined that an employer-worker relationship did exist between the sides,²² as opposed to its rejection of that possibility under a coercive regime in the *Moldovnova* case. Judge Eyal Avrahami writes: "An employment relationship can exist between sides even if the intention and consent to perform work is absent and the worker is not really able to retire and conclude her engagement at any time she chooses, as in the case before us."²³ The court rejected the demand for payment of wage differentials, since the sum received by plaintiff during her three months of employment was greater than the minimum wage, and because it had not been presented evidence concerning the proper wages she deserved to receive. Nevertheless, the court accepted the demand for payment of compensation for mental anguish, and awarded her 50,000 NIS in damages.²⁴

Here too, despite recognition of an employer-worker relationship, compensation was awarded only after a coercive relationship had been proven and by dint of it. It appears that the court's decision to award plaintiff relatively high compensation is closely linked to its perception of her as someone who was coerced to engage in prostitution, and is therefore deserving of redress. This decision, too, shows acknowledgment of that intangible but highly significant

²¹ *Id.* at 1-7.

²² As was mentioned, the court previously acknowledged the employee status of women in prostitution. *See* District Labor Court – Ben Ami 4634/03, *Moldovanova v. Slasravski* (Unpublished 2005).

²³ *See* District Labor Court – Jerusalem 2852/05, *Anonymous v. Anonymous* (Unpublished 2007).

²⁴ *Id.* at 17.

boundary that distinguishes between women who allegedly choose to engage in prostitution and those who are forced to.

All the rulings surveyed echo an ancient, partly obscured but fundamental subtext that underlies them, a subtext that distinguishes between those who choose prostitution and those who have it forced upon them. This subtext is embedded and has always resounded in the theoretical, legal and popular discourse that encompasses prostitution; it buttresses normative positions which ostensibly are indifferent to it. What lies at the heart of this subtext is a superficial hunt for signs of consent or its absence. The primary assumption that exists in the background of this subtext is that appropriate consent to engage in prostitution is feasible and acceptable. All that needs be done is distinguish between those cases in which there is such consent and those from which it is absent. When consent is absent, the law will provide the appropriate redress.²⁵

As follows, a considerable share of the problems stemming from prostitution could be resolved by employing a contractual approach. Indeed, pointing to contractual patterns is a primary component in the perception of prostitution as coming within the purview of employment and labor law.

When issues relating to prostitution come up before the Israeli Labor Court, the starting point is usually to examine whether a contract exists. If the court does indeed identify a contract drawn up by consent, ostensibly employment in prostitution can be treated like any other employment. But even in cases where a difficulty regarding the consent that typically characterizes employment relationship is identified, the court may provide redress through other channels, e.g., recognition of "irregular employment patterns," or stipulations of the law that leave room for judicial discretion. As a result, whether or not there is consent, the court applies the tools at its disposal and may provide redress to plaintiffs. The above decisions indicate that the employment and labor laws are equipped to provide an avenue whereby women that engage in prostitution, who are perceived as salaried or quasi-

²⁵ Balos & Fellows, *supra* note 19.

salaried workers, may obtain redress, in such cases that warrant it. This result sidesteps any serious discussion of the basic question concerning the legitimacy of the prostitution phenomenon in our society, and implicitly supports its acceptance as being legitimate in principle.

In effect, the above decisions seem to indicate that the Israeli justice system is prepared to accommodate the prostitution phenomenon with no serious difficulty. In cases of those engaging in prostitution that are perceived as salaried or quasi-salaried workers, the Labor Court may provide the solution. In cases that concern other modes of employment, taking matters out of the Labor Court's jurisdiction, civil courts may provide similar redress.²⁶

In what follows, I shall attempt to go back and, instead of sidestepping the issue, as was done by the courts in the above cases, examine in detail the possibility of accommodating the prostitution phenomenon within the existing judicial framework and applying the customary norms to it. As a first step, I shall examine the application of the contractual approach to prostitution.

C. PROSTITUTION AS A "WILDCAT CONTRACT"

C1. Is the Prostitution Contract Really Like Other Contracts?

The contractual approach to prostitution defines it as a contractual venture, at the core of which a free exchange takes place between a client and a woman who provides sexual services. According to this approach, there are no essential differences between the contract between woman

²⁶ In some cases a civil action is feasible. Such is Jane Doe's 2006 case, which deals with Ukrainian citizen that was brought to Israel during 2001, was told she will be employed as a waitress, but was forced to engage in prostitution. District court Judge Levhar-Sharon ruled that she was used in an "abusive, degrading, harmful and destructive" manner, and granted her with 250,000 NIS (about 70,000\$) compensation. *See* C.C District Court – Tel-Aviv 2191/02, *Anonymous v. Egor* (unpublished 2006). For discussing the option of compensating women in prostitution by means of civil actions *see* Nomi Levenkron, *Money of Their Own*, in *LAW, SOCIETY AND CULTURE* 451 (Heb.) (Mimi Ajzenstadt & Guy Mundlak eds. 2008).

and client and any other employment contract or contract to provide services.²⁷

Those who support the contractual approach frequently resort to human rights contentions, holding that the right to trade in sex is derived from several human rights.²⁸ Thus, freedom of occupation—which is the right to choose any employment subject to the law's restrictions—includes also the freedom to choose to engage in prostitution as one's occupation.²⁹ The meaning of the right to privacy is, among other things, the right to maintain personal autonomy, and the right to choose one way or another without anyone interfering with or preventing it so long as no law is broken. It follows that this right applies both to the women who engage in prostitution and to their clients, giving them all the right to contract to trade in sex. Contractual freedom gives people the

²⁷ For elaboration on the contractual perception of prostitution see Sibyl Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, in PROSTITUTION AND PORNOGRAPHY 209, 211 (Jessica Spector ed. 2006); See also Freeman, *supra* note 1, at 75. It should be noted that the writers oppose the perception of prostitution as a contract.

²⁸ See Pateman, *supra* note 1, at 52-53.

²⁹ For elaboration see *Id.* at 90. Some claim that certain women do not have any better option, and denying them the possibility to engage in prostitution means depriving them of the only way to make a living. Such argument is often heard in regard of "other" women. For instance, some Western "sex-tourists" to Thailand claim that they are sort of beneficiaries to the girls they purchase sex from, because by doing so they save them from hunger and even enable these girls to financially aid their families. See GUY BRUKER, ISRAELI MALE SEX TOURISTS IN THAILAND (Thesis submitted in partial fulfillment of the requirement for the master degree, University of Haifa, Faculty of Sociology and Anthropology, 2007).

Similar argument is sometime made in regard to women from poor countries (such as Moldova or Ukraine) that arrive to Israel. As the argument goes, considering the difficult economic circumstances in their homelands, it will be cruel to deny from these women the opportunity to engage in prostitution in Israel. For elaboration of such arguments see Scott A. Anderson, *Prostitution and Sexual Autonomy: Making Sense of the Prohibition of Prostitution*, in PROSTITUTION AND PORNOGRAPHY 358, 367 (Jessica Spector ed. 2006).

right to make valid contracts by choice, so long as the contractual engagement does not violate the law.³⁰

The contractual approach is customarily seen as reflecting the liberal position in regard to prostitution.³¹ An intricate network of associations links what is perceived as freedom of prostitution with contractual freedom and human rights. The ensuing result is that prohibition of prostitution contracts is perceived as an unthinkable possibility to the liberal mind.

However, even a cursory glance reveals a series of cases that the customary liberal position has exiled from the domain protected by the principle of contractual freedom. In most judicial systems, laws of contract do not protect contracts which do not conform to state laws or are perceived as opposing public good. In Israel, this approach is based on section 30 of the Law of Contracts (General), 1973, which determines: "Any contract, the making, content or purpose of which is unlawful, immoral, or contrary to the public good – is void."³²

The "public good" is a notoriously broad and vague term with flexible limits, which is imbued with content by judicial or social policy. In the words of former Israeli Chief Justice Barak, the public good "is the legal tool by means of which society expresses its credo... it prevents the intrusion of improper normative arrangements into the existing frameworks."³³

Until now, however, courts did not define prostitution contracts as contrary to public good. When judges specify examples of contractual engagements which are contrary to

³⁰ See Freeman, *supra* note 1, at 88.

³¹ To the point of perceiving the contractual approach as part and parcel of a liberal perception *See id.* at 90; Balos & Fellows, *supra* note 19, at 1238; Chwarzenbach, *supra* note 31, at 211-212; NOMI LEVENKRON, THE LEGALIZATION OF PROSTITUTION: MYTH AND REALITY – A COMPARATIVE STUDY OF FOUR COUNTRIES 8 (Heb.) (2007), available at: http://www.hotline.org.il/english/pdf/The_Legalization_Of_Prostitution_English.pdf

³² The Israeli Contract Law (General Part) 1973, § 30.

³³ *See* H.C 693/91, Efrat v. The supervisor of the population registry, 47(1) P.D. 749, 777-778 (1991).

the public good, they mention slavery contracts or contracts to sell organs, but not prostitution contracts.³⁴

Indeed, the position of legal theoreticians who view prostitution as a contractual venture implies that such contractual exchanges are not contrary to the public good. In other words, the ordinary laws of contract apply and should deal with the rights and obligations of the parties to the engagement. Importantly, though, it should be noted that not only legal theoreticians are in favor of the contractual approach, but also some women who have chosen and insist upon their right to engage in this occupation, which gives them – so they say – a handsome income, empowerment, self-esteem and satisfaction.³⁵

The roots of opposition to prostitution, say some proponents of the contractual approach, lie in outdated puritanical and moralizing attitudes and persistent prejudices regarding women's sexuality. Once these have been successfully overcome, as they should, and we cease regarding prostitutes as depraved, women that engage in prostitution will be in the same situation as other workers, male or female, who make contractual engagements.³⁶ Although in this context words such as "legitimacy," "regulation" and "education" are oftentimes heard, they are but rarely accompanied by any real plan of action to change the problematic status of engagement in prostitution, which even proponents of the contractual approach are usually willing to acknowledge.

³⁴ For example, *see* C.C District Court – Haifa 4044/07, *The State of Israel v. Mohamad* (unpublished 2007) that sentenced convicted in selling human organs to long terms of imprisonment.

³⁵ *See* Liad Cantarovitz assertions in a conference that was held in Israel in 2003 on the issue of legalizing prostitution: "Almost all prostitutes regard prostitution as a temporary job and not as a career or as an abuse. ... I vehemently oppose the approach that sees prostitutes as victims that lack the ability to determine their future. Prostitutes are human beings that are capable to decide what is best for them in certain circumstances".

Available at: <http://www.macom.org.il/todaa-conference-31-10-2003-5.asp>

³⁶ *See* Freeman, *supra* note 1, at 76.

Martha Nussbaum, for instance, proposes to place the prostitution worker beside other women who make contractual engagements obliging them to render a service by means of their bodies, like a philosophy professor that receives payment for lecturing before an audience, or a volunteer to undergo innovative treatment for problems of the large intestine. In her view, although the woman who engages in prostitution, unlike these other examples, may be forced to suffer a social stigma, this does not stem from any essential blemish that attaches to her choice, but from a miscellany of mistaken and irrational beliefs.³⁷ To change this state of affairs, contends Nussbaum, the public must be made to understand that there is nothing essentially wrong in commercial engagements which involve payment for use of the body. In parallel, she proposes augmenting the economic autonomy and personal dignity of the women that engage in prostitution and not restricting their options.³⁸ Nussbaum makes no practical attempt to address such issues as how or whether it is at all possible to change the labeling and status of those who engage in prostitution in the framework of a pornographic culture and a patriarchal world. What she calls "augmenting dignity and autonomy" remains a grand but empty slogan, devoid of any real content and without reasonable possibility of realization.

To summarize, some among proponents of the contractual approach note that prostitution is a phenomenon that derives from and is supported by the freedom of contract, although it ought to take place in a social, cultural and economic climate free of prejudice and stigma, a climate that provides full protection and fair recompense to prostitution workers.³⁹ But hardly any assert that prostitution contracts should be prohibited until such a climate has been created, or propose a

³⁷ Martha C. Nussbaum, *Taking Money for Bodily Services*, in RETHINKING COMMODIFICATION 243 (Martha M. Ertman & Joan c. Williams eds. 2005).

³⁸ *Id.* at 246-247.

³⁹ Many liberals will concur with radical feminists that prostitution today is abusive for women, but will refrain from conclusion that bans prostitution. See Anderson, *supra* note 29, at 756-757.

practical plan of action towards fostering a social and cultural climate in which no stigma attaches to prostitution.

Due to this difficulty, in my view, the contractual approach fails in its attempt to serve as a conceptual and practical framework for dealing with prostitution in contemporary society. The attempt to define prostitution as a contractual engagement reflecting the mutual desire of the parties to the contract is mistaken and misleading. It camouflages the true nature of the phenomenon and the harms it is responsible for, and it retards the possibility of dealing with them firmly and in a focused manner by delegitimizing prostitution, which is, to my mind, the appropriate response to the phenomenon. Prostitution, I contend, is an oppressive and exploitative practice, not an occupation or business venture, similar in its contractual origin to any other profession or occupation.⁴⁰

C2. Social Infamy Toll

What makes it wrong to apply ordinary contractual terms to the prostitution phenomenon? There are numerous positions which discredit the contractual approach, for a variety of reasons. In her book *The Sexual Contract*,⁴¹ Carole Pateman suggests looking at the prostitution contract in the prevalent social context, wherein men buy sex from women. Actually, prostitution is the most distinctive example of male supremacy over women.⁴² Prostitution, says Pateman, is the purchase of the right to a woman's body, not another kind of ordinary work for pay. The difference between prostitution

⁴⁰ For elaboration see Jessica Spector, *Introduction: Sex, Money and Philosophy*, in PROSTITUTION AND PORNOGRAPHY 1, 1-5 (Jessica Spector ed. 2006); Christina Stark, *Stripping as a System of Prostitution*, in PROSTITUTION AND PORNOGRAPHY 40 (Jessica Spector ed. 2006); Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69, 81 (1998). See also CATHARINE MACKINNON, LEGAL FEMINISM IN THEORY AND PRACTICE (Dafna Barak-Erez ed. Idit Shorer trans. 2005); Amalia Ziv, *Between Sexual Commodities and Sexual Subjects: The Feminist Pornography Debate*, in THEORY AND CRITICISM 25, 163, 196-171 (2004).

⁴¹ CAROLE PATEMAN, THE SEXUAL CONTRACT 189-218 (1988).

⁴² See Pateman, *supra* note 1.

and any other kind of work in which a woman makes use of her body is that in prostitution a right is granted to use the woman's body not in order to obtain any product or output, real or abstract, from it (as in the case of a seamstress who creates a garment, or a singer who augments vocal delivery with physical movement); here the body itself is central, the sexual use of it the only product or output.⁴³ The unilateral right granted to the client to make direct sexual use of the prostitute's body is what makes prostitution different from any other kind of work for pay. What prostitution actually concerns is not any contractual engagement reflecting the mutual desire of the parties, but a problematic and unacceptable political practice, that enables its existence.⁴⁴

Carole Pateman is right, but it seems to me that her analysis goes around the crux of the problem created by prostitution without pointing to it precisely.

Let me clarify. It is possible to conceive of other cases in which there may be an engagement or a certain practice whereby one person is granted the right to use another's body. Even if the use is sexual, it does not necessarily mean that the practice is exploitative or problematic. Think, for example, about sex between couple in a relationship, in case only one of the partners wants sex. The other partner may consent to the sexual use of his or her body, or to what might be defined as granting sexual services to his or her partner. To most of us, I believe, this practice would appear to be widespread, natural and harmless, and certainly does not cast any disgrace on the partner who provides the sexual service. It follows that the problem regarding prostitution does not lie in the provision of sexual services per se, but in their provision in the distinct and concrete context called "prostitution," i.e., the context in which women are paid for sexual services. This specific context makes any woman who has practiced

⁴³ *Id.* at 66. For further discussions on Pateman's standing see Schwarzenbach, *supra* note 31, at 212; Jessica Spector, *Obscene Division: Feminist Liberal Assessments of Prostitution Versus Feminist Liberal Defenses of Pornography*, in PROSTITUTION AND PORNOGRAPHY 418, 424 (Jessica Spector ed. 2006).

⁴⁴ Spector, *supra* note 40, at 6.

prostitution, even only once, disgraced and inferior to others.⁴⁵ A woman who sold sexual services turns into someone who has done something which requires paying a sort of toll, a **social infamy toll** as I call it.

Social infamy is the toll exacted from every woman who engages in prostitution, and she cannot escape it. Even if by some miracle a woman has managed not to personally experience the physical and emotional abuses prevalent among women who engage in prostitution, she cannot avoid paying the heavy price of social disgrace.

The costs of this disgrace, in terms of social status and image, are immeasurable. It means exchanging one's individual, private, rich and complex identity for the one-dimensional identity of a "prostitute," which overcomes personal identity.⁴⁶ The price such a woman pays is irreversible. She will never be able to discard the "prostitute" identity and return to her previous one, untainted by social infamy, unless she is able somehow to eliminate every trace of her past as prostitute—a task which, even if she succeeds at it, exacts its own heavy price.

One does not have to look far to see the evidence of this social infamy. The reality of our lives is filled with countless reflections of it in the spoken language,⁴⁷ in various cultural and media products,⁴⁸ and in the decisions that various courts

⁴⁵ *Id.*

⁴⁶ *Vivre sa Vie*, Jean-Luc Godard's 1962 film's brilliantly describes the conversion of identity – from a woman into a prostitute, and the failure to preserve dignity and a sense of self that ensues. For an illuminating discussion of the film see SUSAN SONTAG, *AGAINST INTERPRETATION AND OTHER ESSAYS* 196-207 (1967).

⁴⁷ Many languages load the terms "prostitute" and "prostitution" with connotations of shame and infamy that became inherent to their meaning. For example, in English the word "prostitute" and its synonyms (whore, slot, ect.) are used not only to indicate a woman that sells sex, but also as a particularly rude insult. Attaching the word "prostitution" to any activity usually denotes that activity as shameful. For example: "political prostitution" or "artistic prostitution".

⁴⁸ Many literary works, plays, films and others portray the social infamy. For examples and discussion see: SHULAMIT ALMOG, *PROSTITUTION: CULTURAL AND LEGAL ASPECTS* (2008).

hand down. That the disgrace shows up in judicial decision-making makes it clear that the law is not neutral in regard to it. Although this may occur indirectly, or for a good purpose, it plays a part in marking and entrenching the profound distinction between "those who bear the mark of disgrace" and everyone else. The following are a few examples from Israeli judicial inventory.

In a decision by the Israeli Supreme Court, dealing with an appeal by two defendants of their conviction in District Court of raping a prostitution worker, Justice Tova Strassberg-Cohen writes: "The body of a prostitute is not freely to be violated. As a human being, she too has a right not to have sexual acts committed on her person without her consent. She too is entitled to refuse sexual relations."⁴⁹

One has to wonder: why does what is taken for granted bear emphasis? Why do judicial decisions repeatedly emphasize that a woman who engages in prostitution has the right not to be assaulted or raped? Is it not clear that a woman who engages in prostitution is just like anyone else in every conceivable context?⁵⁰ It turns out, however, and this emerges from the decisions of male and female judges alike, that in actual fact this is no matter to be taken for granted; the standing of women that engage in prostitution is so low that some still assert that assaulting or raping them is permissible, and time and again the courts find themselves obliged to refute these contentions, explicitly state that which should be taken for granted, and declare that prostitutes are just like anyone else.

⁴⁹ C.A. 8523/99, Dorov v. The State of Israel, 54(4) P.D 837, 843 (2000). Compare with the following quote from Haifa District Court 2001 ruling: "Women that engage in prostitution are usually forced by the economic reality to be actually (even if not legally) daily raped." See C.C District Court – Haifa 176/01, The State of Israel v. Kovlanko (unpublished 2001). Such poignant words are rare. The Judgmental rhetoric usually tends to accept prostitution as inevitable.

⁵⁰ See Anonymous v. Anonymous, *supra* note 23, at 17, where Judge Avrahami ruled: "A prostitute has a soul and human dignity... Also a prostitute is entitled to human rights".

Another interesting judicial statement in this context can be found in a decision handed down by the Jerusalem District Court in 1996,⁵¹ in the matter of a suit lodged by T' against a number of respondents under the Prohibition against Defamation Law, 1965,⁵² due to the publication of the following advertisement: "Sexy and beautiful; will fulfill adult dreams."⁵³ The ad was accompanied by T's full name, address and telephone number.⁵⁴ The decision, which accepted T's suit against all respondents and awarded her 250,000 NIS (about 60,000\$) in compensation, dealt with several issues, such as the responsibility of *Maariv* daily newspaper and the *Dachaf* advertising agency for the ad's appearance, and how the responsibility should be divided between them and its sponsor. In the present context, especially important is the reference to the gravity of the injury suffered by T' as a result of the ad. Judge Yehudit Tzur describes it as unusually grave. Its gravity, she writes, is "a function of the harsh stigma and prominent mark of moral opprobrium that the publication is liable to cause the affected... There is no doubt that a lifestyle of sex services for pay or the choice of prostitution as profession stamps the engager in it with the harshest stigma, leaving a mark of moral opprobrium which can cause irreversible damage to a person's reputation and honor."⁵⁵

Furthermore, writes Judge Tzur, "There is no doubt that plaintiff's public depiction as someone engaged in prostitution constitutes the *kiss of death* [italics mine] to her positive image in society. [...] The harsh moral image which has stuck

⁵¹ See C.C District Court – Tel-aviv 571/94, Sahar v. Maariv (unpublished 1996).

⁵² The Israeli Libel and Slander Law 1965.

⁵³ See Sahar, *supra* note 51, at 2.

⁵⁴ See *Id.* at 2-3, 10.

⁵⁴ As the ruling elaborates, T' led "normative life", and the ad contained "false information about her, and engaging in prostitution is absolutely out of her way". The ad was initiated by a person that wanted to take revenge on T' that ended the relationship with him after discovering that he was married to another woman.

⁵⁵ *Id.* at 10.

to plaintiff is in part irreversible."⁵⁶ The offensive and demeaning publication will continue to follow her for a long time, and there certainly may be those who will use it against her even in the distant future. All this, says the Judge, explains and justifies plaintiff's sincere reluctance to show her face in public due to her feelings of humiliation, shame and dishonor.⁵⁷ These damaging results led the judge to accept T's suit, in accordance with the Prohibition against Defamation Law, which awards a person compensation for any publication that is liable to cause them humiliation or make them the target of hatred, scorn or ridicule.

My last example concerns S', a student and resident of the town of Beer Sheva, who asked the municipality for a discount on her property tax due to her being a new immigrant from Ukraine. The request was approved and S' got her discount. Later the municipality cancelled the discount, after obtaining a report by a private investigator which suggested that S' is an "escort girl." As set out in the judicial decision, the municipality received the mistaken information from a private investigator who was asked to examine her entitlement to the discount. When the mistake was discovered the municipality apologized to S' and, it may be assumed, restored to her the discount on her property tax. S' was not satisfied with an apology and lodged suit in Beer Sheva Magistrate's Court⁵⁸ on a claim of defamation, contending that the mistake had caused her enormous damages, to both her emotional state and her reputation. She had been deeply wounded, and due to the humiliation and dishonor almost lost her desire to stay in Israel.⁵⁹ In a compromise decision delivered by the court, the municipality was required to pay S' 25,000 NIS (about 6000\$) in compensation for the damages caused her by the non-public

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ C.C Magistrates Court – Be'er Sheva 4053/03, Sizman v. The City of Be'er Sheva (unpublished 2006).

⁵⁹ *Id.* at 3.

(in this case) association of her name with engaging in prostitution.⁶⁰

The law, then, acknowledges that social infamy exists and provides tools by means of which restitution can be made to "respectable" women to whom it has attached. Therefore it is interesting to see how the contractual approach tackles the infamy issue.

To do so, we need ask several questions, such as: How do we quantify or place an economic value on this social infamy, so as to make redress to a woman who engages in prostitution? When a prostitution transaction is made, in what way does it express the social infamy and its huge charge? Does the typical prostitution contract provide a woman who sells sex services fair or appropriate compensation for the social infamy which is the necessary and inevitable result of fulfilling the contract? The answer to all these questions seems clear: the contractual approach ignores the enormous losses entailed by the social infamy attaching to prostitution. It is concerned only with the visible, thin upper shell of the prostitution contract—the sum or economic return for which a woman consents to sell sex—and disregards the underlying, more substantial layers of the transaction. The contractual approach is indifferent to the true cost borne by a woman that sells sex, and by her alone—the loss of social respectability and transition to an inferior, branded, humiliating status.

Because this loss is disregarded, no compensation for it is provided. No mention of it appears in prostitution contracts. It has no economic significance. And therefore there is something mendacious about the contractual approach, which takes no consideration of the true meaning of a sexual engagement. In effect, the view of prostitution as contractual engagement is a means of facilitating exploitation, due to the

⁶⁰ It should be noted that I do not criticize the outcome in the rulings I mentioned. My aim is to demonstrate some representations of social infamy in judicial texts, and to emphasize how the court is compelled to preserve the infamy. It seems that the dilemma that judges face – the need to rule in the context of reality that accepts the social infamy as normal – lacks sufficient answers, and ensue problematic results.

contractual instrument's inability to deal with the social infamy problem.

In our world everyone is constantly buying and selling, and a significant portion of the transactions conducted involve the body. Countless workers, both male and female, sell their working capability, which in practical terms means selling labor performed by their bodies over long periods of time, sometimes for no more than a pittance. There are indeed certain similarities between such situations and the case of women engaged in prostitution, as Martha Nussbaum points out.⁶¹ Indifferent or cynical exploitation of disadvantage and poverty is, of course, a common occurrence. Notwithstanding all that, prostitution remains singular and set apart from other kinds of exploitation and humiliation, due the enormous and unique price paid by the women who engage in it.

C3. On Consent to Engage in Prostitution

The decisions of the Israeli Labor Court applied employment and labor law to the cases discussed, but without according any significant discussion to the plaintiff women's consent to engage in prostitution. As mentioned above, in the Moldovnova decision compensation was awarded through recognition of "irregular employment patterns,"⁶² whereas in the Jane Doe case compensation was awarded for mental anguish⁶³ and not by dint of appropriate pay (even though it was ruled that an employer-worker relationship existed between the sides). The court thus sidestepped going into the question of consent in any depth, or into any deep discussion of how the law should regard prostitution.⁶⁴ In this section, I

⁶¹ See Nussbaum, *supra* note 37.

⁶² See Moldovanova, *supra* note 3, at 93.

⁶³ See Anonymous v. Anonymous, *supra* note 23.

⁶³ See also The Israeli Contract Law (Remedies for Breach of Contract) 1970, § 13, that enables compensating for mental anguish according to the court discretion.

⁶⁴ The Moldovnova ruling shortly surveys the main legal approaches in regard to prostitution, but the court refrains from a comparative discussion and from indicating which approach seems optimal.

shall try to address the more general question concerning what ought to be normative standing towards prostitution.

In my view, the way employment and labor laws deal with the phenomenon should be designed as part of a broader conception, in the framework of which an attempt is made to define law's role in general vis-à-vis prostitution. To establish a valid position in this context, a discussion of the question of consent is called for.

As has been shown, when prostitution is viewed as a contractual engagement the primary difficulty that arises is the disregard of the social infamy, the enormous price paid by women who engage in prostitution in terms of their social status, which finds no mention in the "prostitution contract." Therefore, even unblemished consent—were it possible to obtain any such—would not solve the problem, as I shall now show.

Let us assume, for the sake of the argument, that every woman that decides to engage in prostitution is aware of this price, but is nonetheless willing and even interested in doing so. Compare this with the common situation of men and women who are aware of the cost and exact significance of a medical procedure they are interested in, and choose to undergo it. As is well known, such situations are usually governed by the doctrine of "informed consent."⁶⁵ In Israel this subject is regulated by the Law of Patients' Rights, 1996,⁶⁶ according to which patients must be fully informed of the risks and chances of the treatment and possible alternative therapies, as well as the dangers of rejecting the treatment.

The consent must be free, i.e., given without any external pressure. It must be based on the full and relevant information, after it has been ascertained that the patient fully understands it.⁶⁷ The duty of disclosure lies with the doctor, and its extent is determined by the "reasonable patient" test—the doctor must bring to the patient's attention all information

⁶⁵ See C.A. 506/88, Shefer v. The State of Israel, 48(1) P.D. 87 (1993).

⁶⁶ The Patient's Rights Law 1996.

⁶⁷ *Id.* at section 4.

that a reasonable patient would find important in deciding whether to consent to or reject the treatment.

Receiving medical services is, among other things, a contractual engagement, and the state sees fit to intervene in such engagements and confirm that they are efficient and fair. The doctrine of informed consent ensures that patients will enter into the contractual engagement with sufficient knowledge to determine whether to accept or reject treatment, making the decision-making process authentic and fair. In the present context, it is important to note that the doctrine of informed consent applies not only in cases concerning patients whose decision-making ability may be in question, but to all patients, including those who are of age and able. The law requires that everyone be fully informed before entering into a contractual therapeutic engagement.

It is not my contention that the population of patients requiring or wishing medical treatment and the population of women required or wishing to engage in prostitution are identical. One could imagine, however, that in light of the accumulated knowledge concerning the severe harm suffered by many of the women who engage in prostitution and the risks they face, the state might consider to intervene in cases where women are about to enter prostitution, to ensure that they receive full and comprehensive information regarding the act's cumulative consequences to them. Now, let us assume that the social infamy which threatens anyone who engages in prostitution and its significance have been explained to that woman who is considering whether to engage in prostitution; that it has also been explained to her that the infamy may be intergenerational and attach to her offspring and family, and that any attempt to hide the occupation also carries a proven psychological price: constant fear of disgraceful exposure⁶⁸ and feelings of isolation and alienation from what is considered normative society.

Let us assume also that the woman will be asked to take into consideration the fact that, from the data gathered in

⁶⁸ See Laura Agustin, *Migrants in the Mistress's House: Other Voice in the "Trafficking" Debate*, 12(1) SOC POL. 96, 110-11 (2005).

Israel and elsewhere, women that engage in prostitution are at risk of constant exposure to verbal and physical violence.⁶⁹ A much higher percentage of them fall victim to vilification, defamatory speech, rape, armed robbery and assault, than among women that do not engage in prostitution.⁷⁰ Furthermore, the woman will be informed that psychological studies describe problems of alienation from self, low self-esteem, and a tendency toward numbness of feeling that are very prevalent among prostitutes. They are frequently diagnosed as suffering from post-traumatic stress disorder as well. Many of the women report emotional pain. It is acknowledged that there are no significant differences between the emotional prices paid by different women; women that practice prostitution in the street, in their apartments or in brothels all suffer equal harm.⁷¹

The woman that is considering whether to enter prostitution will also receive information on a series of characteristic physical problems she may face, among them venereal diseases, gynecological problems, palatal health problems. And finally, in trying to imagine the nature and extent of the duty of fair and efficient informing, let us suppose that in order not to suffice with theoretical information, which is sometimes difficult to associate with

⁶⁹ On the perception of prostitution as a violence towards women see Gunilla Ekberg, *The Swedish Law That Prohibits the Purchase of Sexual Service*, 10(10) VIOLENCE AGAINST WOMEN 1187, 1187-89 (2004); Bingham, *supra* note 40, at 81; Freeman, *supra* note 1, at 100; Balos & Fellows, *supra* note 25; Bruker, *supra* note 29, at 75.

⁷⁰ According to a presentation in a conference that was held in January 2008 in New Orleans, women in Chicago "sex industry" suffer a violent attack approximately every month. See *Selling Sex: Economists Let Some Light on the Shady Market for Paid Sex*, THE ECONOMIST (January 17th 2008), available at:

http://www.economist.com/finance/displaystory.cfm?story_id=10533877

This brings to mind Catharine MacKinnon description of prostitution as part of a continuum of violent practices such as rape, pornography and sexual harassment, that gravely harm all women. See CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 138 (1989).

⁷¹ Ekberg, *supra* note 69, at 1192.

the personal, the woman is shown a documentary film, one of those movies made out of the harsh materials of reality which can, perhaps, convey some conception of the reality from which they are taken. The woman thinking over which occupation to choose and considering whether to choose prostitution would be entitled, then, and even required to receive all of the above information before making her decision.

In reality, of course, things are entirely different. Woman's "consent" to engage in prostitution is usually taken for granted. No attempt, not even the most superficial, is made to ascertain the nature of the consent and the circumstances in which it was extracted. Merely receiving payment for sex is considered sufficient and clear-cut evidence of the existence of valid consent. In many cases involving serious irreversible choices we would not accept this kind of consent as valid. In other contexts of life, where we acknowledge the recognized discrepancy in power between the sides to the engagement (e.g., sexual relations between an employer and an employee, or a doctor and patient), we delve into the nature of consent. For the sake of the argument here, however, let us assume that the woman considering whether to enter prostitution has decided to do so even after being exposed to all the relevant information.

Let us imagine that woman saying: "I well understand the meaning of the social infamy that attaches to prostitution. I have also aware of the physical and emotional health hazards and to other dangers to which I'll be exposed. Nevertheless, I have decided to engage in prostitution."

What are we to say in such a case, where we have no doubt that a woman has chosen prostitution after a procedure of informed consent? In my view, even such consent cannot resolve the deeply problematic nature of prostitution. And ironically, labeling a woman as "consenting" inflicts the initial damage. She who has "consented" turns all at once into a marked, abandoned, disgraced woman, separated by an abyss from all women who have not chosen to be prostitutes, and is therefore "deserving" to bear the high cost of her choice. The problematic nature of the consent is borne out by the data showing that the large majority of women engaged in

prostitution arrive there out of distress; prostitution frequently is just another sad station along the road for women who have undergone sexual abuse in childhood and youth, and who have suffered abject poverty and deficiencies in parental concern, education and social attention. Many of them were drug addicts before they began to engage in prostitution, and many others become addicted in the wake of their occupation.⁷²

It is a distressing question then: why, in light of the numerous testimonies regarding the grave harms caused to women that practice prostitution, many are trapped in the contractual conception, which is suitable to protect sides of equal power operating in the ordinary market, but has failed utterly to protect women that engage in prostitution?⁷³ A prostitution transaction, like any which involves slavery, trafficking in human beings or the sale of human organs, entails such severe injuries that consenting to it becomes meaningless. In other words, prostitution's proven grave harm to women makes their consent to it problematic.

A woman's consent to prostitution is not of the kind that the state or the law should ascribe binding validity to. Some may contend, and rightfully so, that such a stance is paternalistic, patronizing and overbearing.⁷⁴ My own position is that, in this context, there is room for the state to be overbearing or paternalistic. Of course, the law in its entirety can be seen as a paternalistic or overbearing practice in essence, because it makes us all subject to certain norms whether we like them or not.

The overbearing element is necessary, and without it no system of law could exist. Its operation or application changes according to the matter at hand and the

⁷² Research reveals that many women in prostitution were exposed to sex at a very early age, often because they were raped. Most of the women in prostitution were sexually abused during childhood, and suffered from severe neglect. See Vendita Carter & Evelina Giobbe, *Prostitution, Racism and Feminist Discourse*, in PROSTITUTION AND PORNOGRAPHY 17, 24 (Jessica Spector ed. 2006).

⁷³ See Balos & Fellows, *supra* note 19.

⁷⁴ See Freeman, *supra* note 1, at 76.

circumstances. Employment and labor laws are a good example of a field in which the state, for reasons that might be termed "paternalistic," does not respect the consent of workers to engagements because certain kinds of transactions are grasped as damaging to both the personal wellbeing of the workers and the general public good.⁷⁵ Sometimes the law, with unequivocal paternalism, requires us to perform or refrain from certain actions or practices, even if we have chosen them fully of our own freewill. Restrictions on driving without buckling one's seatbelt or riding a bike without a helmet are good examples. If a driver should contend that she is aware of the risks of driving unbuckled, but nevertheless has chosen to drive that way, it holds no water. The same applies to smoking in public spaces. In recent years it has become the normative position that smoking, in circumstances where it may cause harm to others, should be prohibited. The consent of the victims or of some of them is not grasped as relevant in this context, nor the fact that there will always be some who continue to violate the norm. There is no call, then, to avoid paternalism or cite it as reason for forestalling any normative intervention in the case of prostitution.

There remains, however, the matter of the women who engage in prostitution, but apparently suffer no harm. There are women who report that for them prostitution reflects the authentic fulfillment of personal autonomy. Sometimes they are women who truly have a choice, and have chosen prostitution as the option which best serves their interests because it brings them high economic rewards, or because it is empowering and gives them pleasure, or for any other reason.

It is not my contention that the word of those women who report pleasure and empowerment should be doubted. It is important to remember, however, that these women are the

⁷⁵ Such laws are, for example, The Israeli Working and Rest Time Act 1951; The Israeli Statutory Sick Pay Act 1976; The Israeli Minimum Wage Act 1987, which set obligatory rules in regard to terms of employment and wages.

exception. They constitute a minority amongst the women in prostitution, who very often report some kind of injury. More importantly, even those women who report an authentic desire to engage in prostitution cannot escape the social infamy applied to any prostitute, whether she declares herself to be empowered and have chosen it, or reports having been forced into it and humiliated by it. Cutting testimony to this effect is the fact that even women, who declare they have chosen and are satisfied with prostitution, will in the vast majority of cases prefer to remain anonymous and not be exposed, and thus try to escape the social infamy.

However, even if it should be proved that there are certain women who manage to engage in prostitution without being harmed and without paying a heavy emotional and physical price, or that there are women even who manage to draw satisfaction, pleasure and empowerment from prostitution, there would still be no place in our society, I believe, for legitimizing prostitution by means of a contractual conception augmented by arguments claiming consent. An important reason for this is the fact that, beyond the personal injuries caused to the majority of women in prostitution, the phenomenon is significantly harmful to the wellbeing of all women and to the good of society in general.

All women, women as a group, are harmed by the very existence of prostitution in the world. The word "prostitute" and its various synonyms has become a common curse, intended to humiliate. Studies affirm a link between prostitution and violence towards women in general. For instance, victims of domestic violence report that attackers frequently hurl the epithet "prostitute" at them.⁷⁶ Rape victims have reported rapists who threw money on them after the rape.⁷⁷

We are living today in a society in which it is legal, even acceptable, for men to buy the right to the sexual use of a female body. The digital age, which has made the possibilities of buying sex from women more accessible,

⁷⁶ See Balos & Fellows, *supra* note 19, at 1237-1232.

⁷⁷ *Id.*

widespread and simple than ever before, has contributed to the globalization of the social infamy that attaches to prostitution, putting it up on every screen with internet access.⁷⁸ All of us, women and men, live in a society where buying the sexual services of women is taken for granted; it is a society which is signaling that all women are available, that all women can, in principle, be bought. As a result, the goal of gender equality recedes farther from fulfillment, and all of society is harmed. In effect, it is a question of appropriate balances. If we weigh, on one hand, the right of certain women to draw income, satisfaction and pleasure from prostitution, as opposed on the other hand to the grave and irreversible damage caused to many other women, it seems that the harm tips the scales against the interests of those who are not harmed by or even enjoy engaging in prostitution. To this add, of course, the harm caused to all women and to society in general by the very existence of prostitution.

For society and the law to appropriately address the question of prostitution, a necessary first step is to break out of the existing frameworks of thought and discussion, and abandon the barren preoccupation with the issue of consent. Another important step would be to recognize a right not to be branded by social infamy, and developing the tools to make it enforceable.

The contention that an "escort girl," or even an "independent escort girl," is "master of her fate," that appears in one of the judicial decisions this article analyses,⁷⁹ is an embarrassing oxymoron.

⁷⁸ The internet has become the most common platform for selling and buying sex. While optimizing the clients experience by enhancing their privacy and enlarging their options, it deepened the social infamy. In Israel the courts has just started to deal with digital prostitution enterprises. See Ofri Illani, *Virtual Pimps May Pay the Price*, HAARETZ-ONLINE (Heb.) (July 3rd 2007), available at:

<http://www.haaretz.com/hasen/spages/877530.html>. For the Verdict see C.C District Court – Tel-Aviv 1084/03, *The State of Israel v. Zohar* (unpublished 2004).

⁷⁹ See Raro, *supra* note 12.

However, even in the cases where it is possible to identify a free and unblemished choice to enter it, in the existing social reality, a prostitution contract is in effect a wildcat contract, not one which is controlled by both sides to the transaction and designed by them alone. It is a wildcat contract because, uncontrolled by the woman who is a party to it, it extends far beyond the specific transaction and payment for it. The contract is not only between the woman selling sex and the client buying it from her, but between the woman selling sex and the society in which she lives. Society, as it were, is saying: "We will allow you to sell sex, out of respect for your autonomy and your choice. But the price that you will have to pay for this - turning from a woman into a prostitute - does not concern us."

Even society's normative enforcer, the law, ignores the wildcat dimension of the contract. The contractual conception, like the liberal conception from which it derives, is not legitimizing fair engagements based on mutual consent, or protecting the autonomy of the individual and freedom of contracts, but supporting a practice of oppression and exploitation, which cloaks itself in a mantle of legitimacy by means of hypocritical reliance on the laws of contract.⁸⁰

D. NORMATIVE APPROACHES TO THE REGULATION OF PROSTITUTION

I took already note of the diversity and lack of coherence that characterizes legal arrangements in the matter of prostitution, which reflects, so it seems, the conceptual bewilderment that prostitution arouses in most societies in which it exists, and the inability of prevailing arrangements in most societies to suitably address its problematic nature. In what follows, I shall shortly review several existing legal approaches.

⁸⁰ For discussion on the attempt to legitimize prostitution by using contract law doctrine *see* Freeman, *supra* note 1, at 92; Spector, *supra* note 40, at 6; Stark, *supra* note 40; HILA KEREN, CONTRACT LAW FROM A FEMINIST PERSPECTIVE 301-309 (Heb.) (2005); MacKinnon, *supra* note 40.

The first one is the criminalization of prostitution. In its most extreme application, prostitution is prohibited and everyone that participates in it—women who sell sex, pimps and clients—violates the criminal law. This is the approach in most states of the U.S.,⁸¹ where state law regards prostitution as a misdemeanor—a relatively low-grade crime—and procuring as a felony.⁸² The punishments meted out to the clients, usually fines, are lighter than those of the women that engage in prostitution. The latter are also arrested more frequently than the clients.

This is the less common approach in the world. Besides the U.S., it is employed in the countries of the Persian Gulf; but even in the U.S. there are exceptions, which will be detailed below.⁸³ The striking drawback of the criminalization approach is its disregard of the essential difference between women and all the other players in the prostitution arena—pimps and clients. In its extreme version, the criminalization approach punishes the victims, the women in prostitution. It aggravates not only their exploitation and suffering, but also the social indifference and hostility towards them.

Toned-down variations of the approach which views prostitution as a fundamentally illicit phenomenon have been adopted by many countries in the world. One widespread approach is to regard prostitution itself as permissible, but to define certain activities surrounding it as illegal. This is the approach taken in Israel, where prostitution itself does not violate the law. The Israeli legislature, following the British, adopted the norms of the British Mandate period that ended in 1948, but essentially have remained almost unchanged to this very day. Women who engage in prostitution are committing no crime, nor are the men who buy sexual services from them.

In the 1990s prostitution based on trafficking in women began to flourish in Israel. It was only in 2000 that trafficking in human beings for the purpose of prostitution was made a

⁸¹ See Freeman, *supra* note 1, at 78.

⁸² *Id.*

⁸³ *Id.* at 21.

crime, and the State Attorney instructed the police to assign special attention to the crime of trafficking. The clients remained free of any criminal responsibility. Furthermore, the legal prohibitions of trafficking created a problematic separation between prostitution that results from trafficking, which is dealt with relatively severely today, and prostitution that is not related to trafficking, which remains a legitimate activity grasped as a necessity, and generally requiring police intervention only in case of a public nuisance.

In Israel, then, the woman who engages in prostitution and the man who buys her sexual services are committing no crime. However, the criminal law does prohibit procuring, inciting someone to an act of prostitution, or keeping a property for the purpose of prostitution.⁸⁴

The opposite approach is regulation of prostitution, or its institutionalization or legalization.⁸⁵ This approach views prostitution as permissible, and calls upon the state to supervise its conduct. There are numerous versions of regulation. It is the most common approach in the world, with each country developing its own model for the regimentation and regulation. I shall mention two examples: the legal regimes obtaining in Victoria State in Australia, and in Nevada in the U.S.

In Victoria prostitution has been institutionalized since 2000, and it is regulated by The Prostitution Act. The only restrictions on prostitution are in municipal planning regulations, in reference to the possible location of brothels and to laws that deal with public health.⁸⁶ The tendency is to view prostitution as a business, as part of a legitimate industry.⁸⁷ Victoria is the first state in the world where a brothel has begun to operate openly in the capital market,

⁸⁴ The Israeli Penal Law 1977, § 199, 201, 202.

⁸⁵ See HANNY BEN-ISRAEL & NOMI LEVENKRON, THE MISSING FACTOR – CLIENTS OF TRAFFICKED WOMEN IN ISRAEL'S SEX INDUSTRY 21 (Heb.) (2005).

⁸⁶ Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalization of Prostitution in Australia*, 3 (2005), available at: http://action.web.ca/home/catw/attach/Sullivan_proof_01.pdf

⁸⁷ *Id.* at 5.

raising 9 million Australian dollars in its first public issue. Ironically, Victoria still has a law on the books making it a crime to live off the profits of prostitution, punishable by ten years' imprisonment. The authorities, however, take this law to apply only to pimps, not to businesspeople or stockholders that rake in profits from the sex industry.⁸⁸ A special agency, the Prostitution Licensing Authority, has been established in Victoria.⁸⁹

Since the law's enactment, there has been a growingly opposition to it, demanding that it be changed. The opposition contends that Victoria's legislation has given rise to a culture of prostitution in the state, making the male custom of buying sex from women legitimate and acceptable. The Prostitution Licensing Authority is concerned with public order, making sure that the respectable public is not exposed to noise or other disturbance stemming from prostitution, and that the regulations meant to protect the clients' health are strictly followed. The Authority does not see itself as responsible for the interests of the women that engage in prostitution, and therefore has not designed any program for escaping prostitution, although most of the women are interested in one. The Victoria government, apparently motivated by the profits brought in by the prostitution market, is ignoring the accumulating evidence regarding the sorry situation of women in the "sex industry," the growing violence towards them and the normalization of this violence.⁹⁰

Another variation of legalization is practiced in Nevada where, in contrast to the legal situation obtaining in other states, prostitution is permitted in most of the state's counties.⁹¹ In one study, the writer ascribes the practice in Nevada not to any adoption of contemporary liberal norms,

⁸⁸ *Id.* at 9.

⁸⁹ The Prostitution Licensing Authority publishes a manual with instructions as to deal, among other things, with hygiene and clients complaints. Available at: <http://www.pla.qld.gov.au>

⁹⁰ See Sullivan, *supra* note 85, at 23.

⁹¹ Bingham, *supra* note 40.

but rather to the state's tradition and historic continuity.⁹² In the past, she contends, prostitution served Nevada's mining industry, and today, the state having become a Mecca for gamblers and tourists, sexual services remain as available as they always have been.⁹³

In Nevada, then, prostitution is not illegal. However, that does not mean that any protected legal status is granted to the women that engage in it.⁹⁴ The specific arrangements vary from county to county, but most focus on the strict regimentation and restriction of the lives of the women that engage in prostitution. A woman may do so only if she has a permit issued by the authorized county agency. Applicants are photographed, have their fingerprints taken, and undergo a series of medical examinations. The permit grants the woman the right to engage in prostitution only in licensed brothels, located in prescribed areas.⁹⁵

When a woman receives a permit, it means in effect that she has renounced a significant portion of her human rights. She renounces her right to refuse to undergo invasive medical examinations; ordinances require women to undergo frequent medical examinations that include invasive procedures. She renounces her right to choose freely place of residence and to freely conduct personal life; there are ordinances that prohibit holders of a prostitution permit from renting an apartment downtown or in familial residential areas. Other ordinances restrict the hours these women are permitted to stay outside the brothel, and other aspects of their personal lives.⁹⁶

⁹² "Brothels in operation today in Nevada are not the product of some new-found liberalism, or even libertarianism, but are a throw-back to an earlier time, a tradition that had not died out by the time legalized tolerance took the form of state-wide status and local ordinances. In essence, the state and local laws merely reflect the general tenor of rural Nevada: prostitution has been around for a long time, the business of brothels seems to be fairly well controlled, and the houses serve some sort of social function." *See Id.* at 85.

⁹³ *Id.*

⁹⁴ *See Freeman, supra* note 1, at 78.

⁹⁵ *Id.* at 78-79; BEN-ISRAEL & LEVENKRON, *supra* note 85, at 23-26.

⁹⁶ Bingham, *supra* note 40, at 93-94.

A typical shift in a Nevada brothel runs from twelve to fourteen hours a day, every day, for three weeks.⁹⁷ The woman has almost no control over the number of clients per day, their identity, or her working hours. One woman who has engaged in prostitution in one of these establishments testified that "it was like a prison."⁹⁸ After the permit-holder has paid management for her room and board, laundry expenses and tips to brothel workers, she is left with about fifty percent of her earnings. Such a woman is considered to be an "independent contractor," therefore not entitled to the benefits and protections to which salaried workers are entitled. But, in actuality, she is constrained, exploited and humiliated under the aegis of the state and its laws.⁹⁹

In light of the situation, elsewhere in the U.S. criticism has been leveled against the situation in Nevada, contending that the state has taken on the role of procurer. The normative arrangements in Nevada have not resulted in the empowerment of women that engage in prostitution, or in granting such women an opportunity to take control of their lives; to the contrary, they have given the state an instrument with which to control transactions where men buy sex from women, in the process severely restricting these women's independence and ability to take control of their lives.¹⁰⁰

Another negative outcome is a strengthening of the stigma or social infamy that attaches to women engaging in prostitution. First, merely applying for a permit means to openly and formally choose disgrace and stigmatization.¹⁰¹ Second, the legal situation in Nevada reinforces the conception associating prostitution with shame, contamination, and public health and environmental hazards. The primary aim of most of the regulations is to contain prostitution within well defined and well supervised enclaves,

⁹⁷ See *Id.* at 94; BEN-ISRAEL & LEVENKRON, *supra* note 85, at 24.

⁹⁸ See Bingham, *supra* note 40, at 93.

⁹⁹ See BEN-ISRAEL & LEVENKRON, *supra* note 85, at 24.

¹⁰⁰ See Bingham, *supra* note 40, at 96-98.

¹⁰¹ Many women in prostitution refrain from applying for permit because they fear of the "official stigma". They prefer to engage in prostitution illegally. See *id.* at 93.

so that society's exposure to the unpleasantness that it entails is kept to a minimum.¹⁰²

Nevada's choice is a living illustration of Foucault's description of how society banishes, isolates and polices prostitution, in a manner that best serves the clients and disservices the women that engage in it. Society, writes Foucault, transfers the prostitute, client and pimp to a secluded place, in which "acknowledged with a wink, words and movements are traded at full price"¹⁰³. Seclusion and isolation ensure that this activity will be encompassed by clandestine and encrypted forms of discourse. The heavy price of seclusion and isolation is borne by the women in prostitution, whereas profiting from the services they provide is regulated efficiently and goes on undisturbed.

I have surveyed the approaches adopted in various places in order to demonstrate that not much separates them. What is common to all of them is a disregard of the harm caused to women in prostitution. Some of the above approaches do have regard for the principle of harm, but the harm that is taken into consideration is that grasped as being caused to the public. This conception has been named the "Broken Windows" contention,¹⁰⁴ according to which prostitution should be restricted because it increases the chances of criminal activity in proximity to it. Prostitutes, accordingly, are considered to belong to one of those groups liable to disturb the peace by their very presence, like beggars, drunkards and drug addicts. The presence of all these in the public space has to be policed and restricted in order to reduce the risks of disorderly conduct, great or small, and of criminal activity in general.¹⁰⁵

¹⁰² *See id.* at 94.

¹⁰³ MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 10 (V.1, Robert Hurley trans. 1978).

¹⁰⁴ For discussion of the "Broken Windows" argument *see* James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY 29 (1982).

¹⁰⁵ For elaboration *see* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90(1) CRIMINAL LAW & CRIMINOLOGY 109, 150 (1999).

Furthermore, none of the above approaches has contributed to reducing the public infamy. In systems practicing full criminalization, including of the women that engage in prostitution, the latter are not only targets of infamy, but branded as criminals, which constitutes a huge obstacle to perceiving them as victims and undermines any possibility of their escaping the occupation. In those systems that have legalized prostitution, the social infamy has not disappeared, nor even been moderated. The social infamy, it turns out, has its own independent existence, apart from the question whether prostitution is considered legal or not in the given society. From that aspect, an ironic equality of rights subsists between "legal" and "illegal" prostitutes.

Ultimately, neither the criminalization schemes nor the approaches which practice legalization of one kind or another provide an appropriate answer to the exploitation, humiliation and harm prostitution entails. There is, however, an alternative that does provide a response. Some call it the abolition approach; I shall dub it the "Swedish model," after the first country to have adopted it. In my view, it represents the appropriate way in which the prostitution phenomenon should be regarded and dealt with.

In Sweden prostitution is prohibited, and all those involved in it except the women bear criminal responsibility.¹⁰⁶ The law, which went into effect on 1 January 1999, assesses a fine or up to six months' imprisonment on anyone who buys sexual relations.¹⁰⁷ The law applies to all types of sexual services, whether bought in the street, in brothels, in clubs, or anywhere else.¹⁰⁸

¹⁰⁶ Robert Reidberg, the Swedish Ambassador in Israel, described the law in these words: "...since about four years that also according to Swedish law it is a crime to go to a prostitute – that is prostitution has been criminalized from the point of view of the client. The client has been criminalized." Available at: <http://www.macom.org.il/todaa-conference-31-10-2003-5.asp>.

¹⁰⁷ Ekberg, *supra* note 69, at 1191.

¹⁰⁸ See the statement of the Swedish labor office in regard of the law: "By Prohibiting the purchase of sexual services, prostitution and its damaging effects can be counteracted more effectively than hitherto... The

According to the Swedish conception, prostitution is an act of violence, and the law criminalizing the clients is indeed part of "The Law regarding Violence towards Women."¹⁰⁹ The Swedish model places prostitution on the same continuum with other violent behaviors toward women.

It is a revolutionary law. The aim of the Swedish model is to transfer the onus of social opprobrium from the women in prostitution to the clients, who are perceived as criminals and exposed to public criticism and condemnation. The model renders moot, in a single fell swoop, a large part of the discourse that has surrounded prostitution until now with regard to the main issue—the harm caused to the women that engage in prostitution, to women in general, and to all of society.

It is useless, according to the model, to continue discussing the question of consent. Women's consent to violence directed against them by means of the purchase of prostitution services from them is grasped as irrelevant; the main thing is to recognize and prevent the harm. Commonplace contentions, such as "That is the way of the world," or "Prohibiting prostitution is too harsh for the public to endure,"¹¹⁰ are confronted by the resolute forcefulness of the Swedish model and its success in practice. According to current data, the number of women in prostitution has fallen by two-thirds.¹¹¹ This means that most of the women who engaged in prostitution before the law went into effect have succeeded in escaping it, mainly due to support mechanisms

government considers, however, that it is not reasonable to punish the person who sells a sexual service. In the majority of cases at least, this person is a weaker partner who is exploited by those who want only to satisfy their sexual drives." *See Id.* at 1188.

¹⁰⁹ The Law regarding Violence towards Women was enacted following the conclusions of two committees that investigated the issues of violence towards women and prostitution. *See Id.* at 1191.

¹¹⁰ See Schwarzenbach, *supra* note 31, at 211. *See also* C.A 2885/93, Tomer v. The State of Israel, 48(1) P.D 635, 638 (1994), where the former President of the Supreme Court, Meir Shamgar wrote: "We will note that prostitution is an ancient profession, anybody in his right mind will think that it can be rooted out".

¹¹¹ *See* Ekberg, *supra* note 69, at 1193-1194.

for those perceived as the victims, developed by the state. The law also curtails the entry of new women into prostitution. There has also been a significant decline in the number of women smuggled into Sweden in order to engage in prostitution. The phenomenon has been greatly reduced, and is shrinking even more with every passing year.¹¹²

During the years since the law went into effect, there have not been many arrests. It is important to remember, however, that the law's primary aim is to establish and inculcate a norm mandating that Swedish society refuse to accommodate prostitution. The data, as mentioned above, point to success in the accomplishment of this aim.¹¹³ In Sweden the law enjoys broad support from over 80 percent of the public, and the question preoccupying the public is not whether the law is desirable, which is not cast in doubt, but how determinedly it is enforced and the need to increase the number of arrests.¹¹⁴

Prostitution has not been entirely eradicated in Sweden. Some contend that part of the sex industry may have gone underground, or that more Swedish men have become sex tourists. Even if these assertions are correct, it does not follow that the law has failed to accomplish its goals. To the contrary, the situation in Sweden attests that profound cultural change can be achieved in a relatively short time, and prostitution and its ills significantly reduced. If more and more countries adopt the Swedish model, such phenomena as sex tourism and global trafficking in women and sex will also decline.¹¹⁵

Adoption of the Swedish model by other countries is not an unrealistic vision. Several countries have begun to examine its applicability. In England, for instance, there is a growing public demand to prosecute men who buy sex services,¹¹⁶ and Bulgaria has recently begun examining the

¹¹² *Id.*

¹¹³ *Id.* at 1201.

¹¹⁴ *Id.* at 1204-1205.

¹¹⁵ *Id.* at 1209.

¹¹⁶ Tania Branigan, *Men Who Buy Sex Could Face Prosecution*, THE GUARDIAN (September 10th 2007), available at:

possibility of criminalizing the clients.¹¹⁷ In Norway, the legislative process has begun to pass a law prohibiting the purchase of sex services by assessing fines or imprisonment on clients (but not on the women that engage in prostitution), and which will also make it possible to prosecute Norwegians who buy sex services outside the country.¹¹⁸ In Israel, the Knesset subcommittee for the fight against trafficking in women has begun to examine the relevant materials and data in order to draw up a proposed law that will follow the Swedish model. If the proposal should become law, it will constitute a revolutionary change in the legal system's tolerant regard for men who buy sex from women.

Adopting the Swedish model is the right thing to do, in Israel as everywhere else in the world where prostitution exists. The primary reason why prostitution ought to be prohibited, the clients criminalized, is the certain, multidimensional and irreversible harm that engaging in it causes to women.

E. AFTERWORD

A practical question which may arise with the adoption of the Swedish model is what happens to the rights of women that are driven to prostitution despite the legal prohibition of it. If prostitution is prohibited, does that mean that such women will have no recourse to the Labor Court when an employer can be detected, or to any other judicial avenue, depending on the circumstances?

I believe that a model criminalizing the clients should not limit the range of protections and compensations accessible for women in prostitution.

<http://www.guardian.co.uk/politics/2007/sep/10/ukcrime.prisonsandprobat ion>.

¹¹⁷ Nicholas Kulish, Bulgaria moves away from legalizing prostitution, INTERNATIONAL HERALD TRIBUNE (October 5th 2007), <http://www.iht.com/articles/2007/10/05/america/bulgaria.php?page=2>.

¹¹⁸ Nina Berglund, "Buying Sex Can Yield Jail Term", AFTENPOSTEN.NO (July 4th 2007), <http://www.aftenposten.no/english/local/article1870915.ece>.

Side by side with the battle against the existence of prostitution, the full rights of women that engage in it must be protected. Adopting a model criminalizing clients, in acknowledgment of the harms caused by prostitution, should not forestall granting assistance in the appropriate cases to women entitled to it. To the contrary: inflicting significant costs on the clients, procurers, employers and any other element which promotes the existence of prostitution will only help to eat away at the profits of those who exploit the plight of prostitutes, and render prostitution less worthwhile from their aspect.

In this context, the pragmatic approach demonstrated by the Israeli National Labor Court in the Moldovnova case could serve as an inspiring model. There, as detailed above, the court did indeed decide that due to the absence of freewill and consent on the part of the plaintiff no valid contractual engagement had been struck between her and her employers. This, however, did not deprive her of the rights she claimed by dint of her engagement in prostitution, and the court helped her exercise them.

Legal tools making it possible in the appropriate circumstances to compensate a woman driven to engage in prostitution and accord full protection of her rights should be developed, alongside prohibiting prostitution and applying sanctions to clients. Neither the contractual conception nor the claim of consent can serve as a basis for legitimizing prostitution in present-day society. Maximum protection for women will not be achieved by granting any sort of legitimacy, but by prohibiting prostitution and placing the onus of punishment and social infamy on the clients.

As can be learned from the Israeli perspective, employment and labor law cannot provide the solution, although the Israeli Labor Court should be commended merely for its willingness to grant assistance from Labor law realm to women in prostitution. However, the way employment and labor laws tackle prostitution should be designed as part of a broader conception, in the framework of which an attempt is made to determine the role of law in general vis-à-vis the prostitution phenomenon. Only profound social change accompanied by bold and decisive legislative

reform can lead to a transformation, and such change should be vigorously sought everywhere that prostitution exists.