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## **“I Made a Huge Mistake with My Life” – The Harms of Prostitution as Mis-reflected in Israeli Law**

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**“I MADE A HUGE MISTAKE WITH MY LIFE” –  
THE HARMS OF PROSTITUTION  
AS MIS-REFLECTED IN ISRAELI LAW**

*Shulamit Almog & Gal Amir<sup>1</sup>*

*In memory of Victoria K.*

I. INTRODUCTION

You are wounded inside, hurting inside. You can't really describe it . . . I think that even when I'm seventy I'll remember this time in my life and it will eat me from inside. It hurts so badly. It's a wound; it's traumatic, just like violence. I think it's worse than being beaten up. Prostitution is lethal, it kills you . . . You are ending up slowly, bit by bit, and you hate yourself so much, you hate them. The very fact that I've had to have sex with people that in most cases I wasn't attracted to, sometimes repulsed by. I've had to have sex with people for money. So that I'll have something to eat, be able to pay the rent. I think it's horrible. It's horrible and it still hurts me. I feel bad. I feel as if other people are better than me. I feel that I made a huge mistake with my life.<sup>2</sup>

This is how Mattie, a 44 year old Israeli woman describes her life in prostitution. This description reflects an image of a physically and mentally wounded woman, facing a lifelong struggle with the harms inherent to prostitution. Is such an image that is common to many women in prostitution, present in the legal sphere? Should it generate regulatory consequence? Can one and should one conceptualize Mattie's harms in a way that will be rendered into a meaningful legal outcome?

Israeli case law reveals different images of women in prostitution. Here is, for example, the victim in *Yuri Dorov v. The State of Israel*,<sup>3</sup> who was described by the Israeli Supreme Court as humiliated, deprived of dignity, exploited, commoditized and objectified individual.<sup>4</sup> Yet other Israeli Supreme Court rulings suggest images of women in prostitution as free-willed

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<sup>2</sup> Mattie (Dec. 2, 2016), in Linoy Even-Kesef, "The social infamy of women in prostitution in Israel- Its nature and implications" (2018) (M.A. thesis, Open University of Israel) (on file with the Ingeborg Rennert Library at Open University of Israel).

<sup>3</sup> 49 CA 8523/99 Dorov v. State of Israel 54(4) PD 837, 843 (2000) (Isr.).

<sup>4</sup> See also Cr.A. 1652/07 Yan Normatov et. al. v. State of Israel (2007) (Isr.).

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individuals, engaging in a “transaction between two adults, aware of what lies ahead.”<sup>5</sup> Such transactions are perceived by the Court as legitimate, though somewhat sleazy, as famously described by the late Supreme Court Judge Mishael Cheshin while referring to a defendant who engaged in prostitution — “I will not dine with her at my Sabbath table, but I don’t think she should be imprisoned.”<sup>6</sup> Similar images of prostitution as a basically legitimate occupational choice are present in a controversial 2016 Tel-Aviv Municipal Court judgment, which ruled that although running brothels is illegal according to Israeli penal law, this law will not be enforced if the women that offer the sexual services run themselves the brothel in question.<sup>7</sup>

Who, then, is the Israeli woman in prostitution that faces the courts, and how do the courts conceptualize the meaning of her being a woman in prostitution? Prostitution related issues, such as the conflicting demands to legalize it, to criminalize it, or to criminalize solely the man paying for sex (following the Nordic model) are constantly brought up and debated in court hearings, parliamentary sessions, expert panels, academic forums and the media. Within these debates, women in prostitution are sometimes described as free agents, bearing full responsibility for incurred harms, and sometimes as victims of exploitive social construction.

As we put forward, it is imperative that prostitution will be richly conceptualized in the legal arena. In order to responsibly do that, policy makers are obliged to thoroughly address the issue of harms inherent to prostitution.

Worldwide, courts constantly face the need to conceptualize harms not yet recognized by statutory or case law. Such harms can be a product of technological innovation or a product of social development in the dynamic and globalized 21<sup>st</sup> century societies. Courts legally conceptualize such unrecognized harms in order to achieve socially desired goals as well as legal remedies. When doing so, courts assert that the state, via its legal system, has the responsibility to provide an adequate protection to its citizens from various harms, both in the private and public spheres. Such assertion is no less relevant in regard to the harms of prostitution, which so far, are almost invisible to the legal eye.

At this point, it should be asserted that Israeli courts adamantly confront human trafficking. Yet, they hardly make an effort to confront or even to recognize the full range of prostitution related harms. In this article we shall attempt to uncover what the courts’ gaze may be missing.

## II. THE CONCEPTUALIZATION OF HARM

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<sup>5</sup> CrimA 3520/91 Turjeman v. State of Israel 47(1) PD 441, 459 (1993) (Isr.) (Cheshin, J., dissenting). Cheshin’s dissent is frequently quoted in later rulings and serves as a basis for Israel’s State Attorney’s guidelines for the enforcement of prostitution related offenses.

<sup>6</sup> *Id.* at 466.

<sup>7</sup> MiscO (T.A.) 1424-02-14 State of Israel v. Haddad (2016) (Isr.); Vered Lee, *The Judge Chose to Imagine that in Israel There is Independent Prostitution*, HAARETZ: JUSTICE & CRIMINAL NEW (May 31, 2016) (criticizing the ruling of MiscO (T.A.) 1424-02-14 State of Israel v. Haddad (2016) (Isr.)).

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“There is nothing it is possible to think of anywhere in the world, or indeed anything at all outside it that can be held to be good without limitations, excepting only... a good will.”<sup>8</sup>

In these famed first words of “Groundwork of the Metaphysic of Morals,” Immanuel Kant commenced a deontological theory of ethics, examining the moral virtue of human action rather than its results. The Israeli Supreme Court has been known to quote Kantian ethics as an inspiration for its rulings, endeavoring to establish Israeli society on solid moral ground.<sup>9</sup> But then Kantian ethics — vague and incomprehensible according to Kant himself — cannot supplant mundane judiciary practice.<sup>10</sup> A judge has to examine not merely actions, but their results as well, and particularly the legal meaning of the harms caused by these actions.

In many legal contexts — in criminal, civil and public law — it is the courts’ primary mission to conceptualize harm. Such conceptualization is frequent in torts or contract law, where harms can be clear and tangible. This is most apparent in cases involving physical harms. A case involving a vehicular accident is focused on the plaintiff’s actual damages. The litigants provide evidence of concrete harms, employing, what can be denoted as, metaphorically, a template of “harm poetics” — pain and suffering and loss of amenity, loss of earnings or medical expenses, etc.<sup>11</sup>

But sometimes, in other fields of law, harms are more evasive, and judges develop new tools in order to conceptualize them. In such cases, judges employ theoretical tools to acknowledge the harms and address them legally. A good example are abstract legal concepts such as “reputation” or “privacy.” How can harms to reputation or privacy be enumerated? How can a plaintiff be defended from such harms? Courts have managed to measure these harms and grant, through well-established legal doctrines, efficient protection and compensation to plaintiffs claiming their privacy or reputation was impaired. These doctrines were developed, established, and recognized long before courts had to address the even more abstract harms to privacy or reputation occurring in the new 21<sup>st</sup> century digital spaces.

However, even an established doctrine has a moment of birth; a beginning in which it is not yet an established doctrine but merely a bold innovation. The US Supreme Court provides an illuminating example. In 1928 the Court faced novel legal questions raised by new technologies.

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<sup>8</sup> IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 9 (Allen J. Wood ed. & trans., 2002) (1785).

<sup>9</sup> *E.g.* HCJ 2605/05 Academic Center of Law and Business v. Minister of Finance (2009) (Isr.) (Arbel, J., concurring) (“As the philosopher Immanuel Kant said, a person should not be treated solely as a means of achieving external goals, since this involves a violation of his dignity, or in his words: ‘Accordingly, the practical imperative should be as follows: act in such a way that you treat humanity, whether in yourself or in any other person, always also as an end, and never merely as a means’”), [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf).

<sup>10</sup> “And thus, we indeed do not comprehend the practical unconditioned necessity of the moral imperative, but we do comprehend its incomprehensibility.” IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* 79 (Allen J. Wood ed. & trans., 2002) (1785).

<sup>11</sup> See Shulamit Almog, *Windows and ‘Windows’: Law and Literature in a Digital Age*, 57 U. TORONTO L. J. 756 (2008) (discussing the term “legal poetics”).

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In *Olmstead v. United States*, federal agents<sup>12</sup> uncovered a criminal enterprise led by a person named Roy Olmstead. Olmstead and his partners operated a gang that possessed, transported and sold alcohol — unlawful acts under the Prohibition era Volstead Act. The overwhelming evidence against them was obtained through wiretapping. Olmstead’s lawyers claimed that, although the physical acts that led to obtaining the evidence did not trespass Olmstead’s property, wiretapping had violated Olmstead’s rights under the Fourth Amendment. Therefore, all evidence obtained through the wiretap was found to be impermissibly seized and, accordingly, was ordered suppressed at trial.

The US Supreme Court found itself in a strange, new legal environment. Dealing with the relatively novel technological innovation — the telephone — was not the main problem. The public atmosphere of the Prohibition era, the rise of organized crime in the United States and the founding of federal agencies to fight it, created a situation that required creative thinking from judges and attorneys alike. The physical space of Olmstead’s house constituted a well-defined territory, protected by law. The Court had to figure out the nature of a phone line. Is it an extension of the house, and therefore protected as well? Olmstead’s physical property was not trespassed; his “privacy” was. How far outside his house did his privacy extend? To effectively answer this question, a new way of conceptualizing space was called for. A majority of the Court chose not to conceptualize the new threats to US citizens’ privacy, and ruled that the wiretapping was legal. But Judge Brandeis, who dissented in the case, wrote the following:<sup>13</sup>

The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.

As it turns out, Judge Brandeis had a firmer grasp of the future than his colleagues, and his vision indeed predicted the actuality of the second decade of the 21st century. Four decades later, the United States Supreme Court overturned the Olmstead ruling.<sup>14</sup> Still, technological and social progress continue to challenge the US Supreme Court, as well as other courts worldwide, to re-examine the questions raised by the interplay between newly evolved technologies, social developments, and traditional legal doctrines.<sup>15</sup>

Israeli courts are also sometimes required to review new technological realities and conceptualize yielded harms. An example, in which the conceptualization of the harms was

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<sup>12</sup> The agency in question was the Bureau of Prohibition. Operating between 1920 and 1933, it was commissioned to enforce the prohibition on the use of alcohol. During this period, the Federal Bureau of Investigations, led by J. Edgar Hoover, began to emerge from a powerless and ineffective agency into a powerful and influential one. See CLAIRE BOND POTTER, *WAR ON CRIME: BANDITS, G-MEN, & POLITICS OF MASS CULTURE* (1998).

<sup>13</sup> *Olmstead v. United States*, 277 U.S. 438, 474 (1928).

<sup>14</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>15</sup> In 2015, the United States Supreme Court adjudicated a case with circumstances similar to the Olmstead case. In *United States v. Jones*, FBI agents planted a GPS tracker in the car of a suspected drug dealer. *United States v. Jones*, 565 U.S. 400 (2012).

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extremely complex, is the Israeli Supreme court's recent ruling in the case of *Hashavim H.P.S. Business Information Ltd. v. Court Administration*.<sup>16</sup> The appeal to the High Court of Justice<sup>17</sup> raised the question of when a private company that is commissioned by the Court Administration to construct a database of judicial decisions, to index these decisions, and to make them accessible to search engines, can be held accountable for alleged harms arising from its practices? Outpacing the issue required not only addressing the right to privacy of litigants whose cases were recorded in the database, but also addressing the nature of the public's right to access government data, including data concerning any kind of litigation taking part in any court. The weighty, fundamental nature of these issues steered the Israeli Association for Civil Rights and the Digital Rights Movement to apply for the Court's permission to join the proceedings as *amicus curiae*.

The Court was facing a novel social and technological reality, in which new harms not yet conceptualized had to be addressed. The Court had to balance between various interests —the right to privacy and the freedom to access government data, the right of possessing personal property and the freedom of occupation, the public nature of court proceedings and the right of public access to courts. Reaching an optimal balance required informed knowledge of the ways search engines and legal databases operate and of search engine optimization techniques. The Court had to address technological and legal terms, such as “the right to be forgotten,” that were unheard of only a few years earlier. Indeed, Justice Rubinstein duly remarked that, “Law pursues technological advances, and the problems they present, but can never catch up,”<sup>18</sup> and, “Today's abstract thoughts are tomorrow's reality.”<sup>19</sup>

As a veteran judge, during most of Justice Rubinstein's years on the court, litigants enjoyed, due to the limited distribution of published judgments and the inexistence of digital search engines, almost full anonymity. Yet, during the last decade, a new space was gradually constituted, involving several actors — the private company who owns and operates the search engine of the legal database; the global corporation (whether Bing, Google or any other) that controls the cyber highway; the user that might be harmed if he or she will not be able to access data; the litigant who might be harmed in several ways if his or hers name easily comes up in an internet search, revealing his or her most intimate affairs; and lastly, the state, in whose interest it is to regulate the issue in a way that will optimally balance between the conflicting interests. Each and every actor within this space might be harmed or harm others. And yet, in spite of this complexity, the Court delved into this new space and endeavored to produce intricate balances and new protections against newly conceptualized harms.

The Court ruling allowed for the indexing of judgments while illustrating the potential harms to litigants, many of whom will be constantly exposed to the public eye, as well as ways to prevent harms or reduce them. The text of the decision demonstrates how it is possible to conceptualize,

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<sup>16</sup> HCJ 5870/14 *Hashavim H.P.S. Business Information Ltd. v. Court Administration* (2015) (Isr.).

<sup>17</sup> The Israeli Supreme Court is primarily an appellate instance over all other courts. It also serves as a High Court of Justice — a first instance deciding in matters regarding the legality and constitutionality of decisions of State authorities.

<sup>18</sup> HCJ 5870/14 *Hashavim H.P.S. Business Information Ltd. v. Court Administration* (2015) (Isr.) (Rubinstein, J., concurring).

<sup>19</sup> *Id.*

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in legal language, different harms, relevant to different players, while taking into account a variety of situations in which different agents might be harmed or harm others.

However, as we put forward here, while courts managed to conceptualize technology related harms, other harms deeply rooted in human history, have somehow escaped a scrutinizing legal gaze and judicial conceptualization. For example, consider pornography.

For many years, the legal regulation of pornography echoed moralistic narrative, losing most of its relevance in a liberal era, in which courts typically refrain from favoring one moral over another. Consequently, a call evolved to replace the moralistic narrative with narrative of harm. In her research “The Price We Pay? Pornography and Harm,”<sup>20</sup> Susan Brison describes how the harms of pornography outweigh liberal reasoning in favor of freely producing and distributing porn. Among other things, Brison mentions data elaborating how pornography, which drives many people to take sexual violence lightly, harms the entire society.<sup>21</sup> Along those lines, Andrea Dworkin and Catharine MacKinnon have argued that the harms of pornography require legislation that would limit its distribution.<sup>22</sup> This view led to new secondary legislation (which was later abolished).<sup>23</sup>

Pornography, centering on images of men and women (mostly women) as objects, available for sexual use and allegedly abuse, naturally leads towards the core issue of this paper: pointing out new ways which the law should and employ in order to address the harms of prostitution.

It seems that the harms inherent to prostitution are even more tangible than the harms attributed to pornography. A diverse body of research shows that women in prostitution are frequently exposed to verbal and physical violence. The percentage of women in prostitution who fall victim to verbal abuse, rape, armed robberies or assaults is much higher than among women who do not engage in prostitution.<sup>24</sup> A series of physical problems characterize prostitution: venereal diseases, gynecological problems, oral health problems, and more. According to various studies, prostitution often leads to emotional pain and distress, traumatic injury, and post-traumatic stress disorder.<sup>25</sup> Research shows that there are no significant differences between the harms caused to different types of women in prostitution: those who engage in prostitution in the street, in apartments or in brothels are similarly harmed.<sup>26</sup>

<sup>20</sup> Susan J. Brison, *The Price We Pay: Pornography and Harm*, in CONTEMPORARY DEBATES IN APPLIED ETHICS 236 (Andrew I. Cohen & Christopher Heath-Welman eds., 2005).

<sup>21</sup> See e.g. THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA & PORNOGRAPHY (Laura J. Lederer & Richard Delgado eds., 1995).

<sup>22</sup> IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS (Catherine A. MacKinnon & Andrea Dworkin eds., 1997).

<sup>23</sup> Rebecca Benson, *Pornography and the First Amendment: American Booksellers v. Hudnut*, 9 HARV. WOMEN'S L. J. 153, 162 (1986).

<sup>24</sup> See Ameporn Ratinthorn, Afaf Meleis & Siriorn Sindhu, *Trapped in Circle of Threats: Violence Against Sex Workers in Thailand*, 30 HEALTH CARE FOR WOMEN INT'L. 249 (2009).

<sup>25</sup> See Cathy Zimmerman et al., *The Health of Trafficked Women: A Survey of Women Entering Posttrafficking Services in Europe*, 98 AM. J. PUB. HEALTH 55, 56-57 (2008).

<sup>26</sup> See BBC ONLINE NETWORK, *Most Prostitutes are Psychologically Shell Shocked* BBC NEWS (Aug. 19, 1998), news.bbc.co.uk/2/hi/health/154140.stm.

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These harms, although relevant to many, if not most, women in prostitution, can be categorized as individual or subjective harms. Their exact nature and intensity depend on the individual circumstances of each woman — her good or bad luck if you will. Alongside recognition of these harms, it is important to draw attention to another type of harm pertaining to prostitution — an objective harm caused not only to some or most of the women in prostitution, but to all of them. This harm is the social infamy “tax.”

The social infamy tax entails converting one’s individual identity into the one-dimensional identity of a “whore” or a “prostitute”, which engrosses all other dimensions of one’s personal self. The term “tax” is meant to emphasize the obligatory aspect of the social infamy harm. This harm is the consequence of social construction. It is not related to a woman’s inner perception of herself, her engagement in prostitution, or her personal experience. The social infamy is cast upon her no matter what she personally experiences. It represents a cold, permanent external gaze. A woman in prostitution will never be able to shake off her identity as a whore and the inherent social infamy and return unharmed to her previous identity, free of social infamy, unless she can cover any trace of her past as a prostitute — a task that is often impossible.<sup>27</sup> The social infamy tax is, in actual fact, a massive, irreversible harm.

And yet, in contrast to the litigant whose case has been made digitally available, women in prostitution’s harms are neither conceptualized nor recognized by law. Their harms remain transparent, and the legal gaze misses them.

Time and again the legal system fails, or perhaps avoids, a comprehensive conceptualization of women in prostitution’s situation and the harms caused to them. Next, we will demonstrate, by presenting a number of recent Israeli cases dealing with women in prostitution, the ways in which the courts avoid, in a variety of ways, investigating the full meaning of prostitution’s harms.

The judgments we will review, dealing with women in prostitution as victims of offenses, or women in prostitution as accused of committing offenses, reflect the ambivalence and the moral and ideological confusion that characterizes how society views prostitution.<sup>28</sup> The stories unveiled in them reveal the awkward nature of legal attempts to deal with the meaning of prostitution, particularly in criminal law.<sup>29</sup>

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<sup>27</sup>Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER & L. 711, 739 (2010).

<sup>28</sup> *Id.* at 717.

<sup>29</sup> In this article, we focus on examples from criminal law in Israeli jurisprudence. However, judicial ambivalence regarding the perception of prostitution exists in almost all branches of the law. For example, Israeli labor courts place a significant emphasis on the free will component as an indicator of the existence of employer-employee relations. However, on the other hand, courts have found it difficult to quantify the proper salary of women in prostitution or the compensation component due to them. *See e.g.*, 2852/05 (Jm.) Anonymous v. Anonymous, (2007) (Isr.); 480/05 N.L.C Ben Shitrit v. Anonymous, (2008) (Isr.); 247/07 (N.L.C) Anonymous v. Kuchic, (2009) (Isr.); *Cf.* CA 11152/04 A v. Migdal Insurance Company Ltd., (2006) (Isr.), [http://elyon1.court.gov.il/files\\_eng/04/520/111/p19/04111520\\_p19.pdf](http://elyon1.court.gov.il/files_eng/04/520/111/p19/04111520_p19.pdf) (overturning an award of tort damages that were supposed to finance prostitution services for victims of



## III. WOMEN IN PROSTITUTION AS CRIMINAL OFFENDERS

One of the harms of prostitution is the often unavoidable trail that frequently leads women in prostitution towards activities defined as criminal.<sup>30</sup> Mary Gilfus describes how, for women in prostitution, the most readily available option to escape physical and sexual violence often leads them to acts defined as criminal.<sup>31</sup> An Israeli ruling by Nazareth's District Court poignantly illustrates this outline.<sup>32</sup>

A., an Argentine-born woman arrived in Israel with her ex-husband and four children after suffering years of familial alienation.<sup>33</sup> In Israel, she found no solace. It was extremely difficult for her to adjust to the new circumstances. Gradually she lost her ability to take care of her children. The welfare agencies intervened, took custody of the children and assigned them into out-of-home settings. Her emotional state deteriorated, and so did her ability to provide for herself. At the age of 54, A. began to engage in prostitution. Six to seven men, some of them minors aged 14 and 13, came to her apartment on a daily basis and had intercourse with her.

A. was convicted of having sexual relations with minors. This is how the facts are described in A.'s sentencing: "Each of the minors entered the defendant's apartment in turn, and stripped off his clothes ... afterwards every minor inserted his penis into the defendant's vagina."<sup>34</sup> Following a plea bargain, A., the Court convicted A., using the same legal framework pertinent to cases of male sex offenders, whose actions are mostly the result of sexual pathology.<sup>35</sup> However, as we maintain, what happened in A.'s apartment reflects a very different pathology, suggesting gang rape, in which the penetrated person is the victim rather than the offender. The minors contacted A. on their own initiative, arriving at her apartment as a group, taking turns to have intercourse with her, one after the other. Minors the age of her children used her body to satisfy their sexual and social needs, perhaps to be able to tell that "they are no longer virgins" and "they have been with a whore."<sup>36</sup> Indeed, the minors were under the age of consent under

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vehicular accidents because such compensation was contrary to public policy); Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER & L. 711, 739 (2010) (providing a discussion of Israeli labor and civil court's ambivalence regarding women in prostitution).

<sup>30</sup> See SUSAN DEWEY & TONIA ST. GERMAIN, *WOMEN OF THE STREET: HOW THE CRIMINAL JUSTICE - SOCIAL SERVICES ALLIANCE FAILS WOMEN IN PROSTITUTION* (2017) (discussing the problematic interface between the law enforcement system and women in prostitution).

<sup>31</sup> Mary E. Gilfus, *From Victims to Survivors to Offender*, 4 WOMEN & CRIM. JUST. 63 (1993); See GILA CHEN & TOMER EINAV, *WOMEN'S PRISON: THE BACK-DOOR OF THE SOCIETY IN ISRAEL* (2010) (describing a similar state of affairs in Israel).

<sup>32</sup> CrimC (Nz.) 16283-12-14 State of Israel v. Anonymous (2014) (Isr.).

<sup>33</sup> The case law does not mention the woman's name and refers to her as "the defendant". *Id.*

<sup>34</sup> *Id.* at § 9-11.

<sup>35</sup> A. was the subject of a clinical 'dangerousness assessment' required by the Protection of the Public from Sex Offenders Law at art. 6, 2006. *Id.* at § 15-19.

<sup>36</sup> Pamela C. Regan & Carla S. Dreyer, *Lust? Love? Status? Young Adults' Motives for Engaging in Casual Sex*, 11 J. PSYCHOL. & HUM. SEXUALITY 1 (1999); see Laura M. Carpenter, *The Ambiguity of "Having Sex": The Subjective Experience of Virginity Loss in the United States*, 38 J. SEX RESEARCH

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Israeli law, and rightly viewed as victims by the Israeli justice system. But they are not the only victims in A.'s case.

It seems that in this case, the legal system employed the routine "tool box" for sex offenders without considering how suitable it was in A.'s circumstances. Professionals examined A., assessing her empathy toward the minors and the harm caused to them, her understanding of the moral wrongs in her actions, and her refusal to engage in therapy.<sup>37</sup> But the Court did not wonder how A. could be expected, for example, to take part in meetings of a support group for sex offenders and share her difficulties in overcoming her apparent attraction to minors? Indeed, as the circumstances of the case illustrate, A. needs much more than "therapy." She needs help and guidance in the form of economic and psychological support. In the absence of all of these, A. will return to sell her body to anyone willing to pay, and will continue, like most women in prostitution, to be emotionally cut off from the situation. The probation service's position that "there is a significant risk of recurrence of similar cases in the future" is indeed realistic, but nevertheless did not result in a recommendation to grant her the support she needs.<sup>38</sup>

As a sex offender, the system subjected A. to a clinical "dangerousness assessment" required by article 6 of the Protection of the Public from Sex Offenders Law, 5766 – 2006 ("Protection of the Public law"). This assessment established that A. is "manipulative, unreliable, impulsive, viewing herself as a victim, has difficulties in managing anger and setting borders, and blames the complainants for having unprotected sex."<sup>39</sup> In addition, the assessment noted that A. "has a good understanding that her actions are wrong . . . but feels she harmed mostly herself, her reputation . . . . She is taking formal responsibility for her actions, but does not believe that she caused anyone else any harm."<sup>40</sup> This paragraph clearly indicates A.'s harms as a woman in prostitution, the social infamy she is burdened with, and the fear that her time in prostitution will cloud the rest of her life.

Should the Court have taken into account the circumstances of A.'s life, her harms as a woman in prostitution, the social infamy tax she will pay all her life and the fact that she perceived the minors in the same way she perceived any other johns arriving at her apartment? In our opinion, an in-depth examination of the situation cannot take place without taking these factors into account. In view of the circumstances described in detail in the judgment, it is less likely to expect A. to empathize with the minors and the way she harmed them, rather than expect the legal system and society at large to empathize with A., who was caught up in the harmful territory of prostitution.

The Court's ruling indicates some awareness to the full meaning of the circumstances. These are the words of Justice Binyamin Arbel:

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127 (2001) (discussing the positive social value of losing one's virginity for men and the negative social value for women).

<sup>37</sup> CrimC (Nz.) 16283-12-14 State of Israel v. Anonymous, at § 8-19 (2014) (Isr.).

<sup>38</sup> The Service's recommendation is standard and is customary in cases in which the defendants do not take responsibility for their actions to impose harsh, boundary setting punishment. *Id.* at § 14-15.

<sup>39</sup> *Id.* at § 15.

<sup>40</sup> *Id.* at § 16.

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I am of the opinion that when the defendant had sex with her clients, including the minors, she did so on the background of the economic duress she faced following her separation from her spouse, and not because she planned to have sex with minors. ... We have no indication of harm incurred to them, physically or mentally. We have not even heard any arguments that could scientifically teach us what is the harm to male minors, as opposed to female minors, from exposure to acts of the kind that were committed in the case before us. In addition, the material before us does not indicate that the accused used<sup>41</sup> any means of soliciting that caused the minors to fall into her net. On the contrary, the probation report indicates that the defendant was indifferent to the age of her clients. These clients turned to her on their own initiative ... The minors — who cannot statutorily consent — initiated the encounters to satisfy their wants, whether curiosity or sexual desire, while the defendant's wanted financial gains.<sup>42</sup>

As clearly illustrated by this paragraph, A. is also the victim of the complainants, who exploited her weakness to satisfy their sexual needs. Under this background, the court rejected the state's demand that A. be sentenced to at least 18 months in prison, yet sentenced her to six months of community service, while noting that the punishment was necessary in order to deter her from repeating the acts and to express "society's aversion to her actions."<sup>42</sup>

Israeli penal law allows courts to take into account the personal circumstances of the offender at the time of the sentence. The Court indeed took into account A.'s divorce, A.'s low cognitive capacities, the way A. was harmed by the criminal charges against her, and A.'s clean criminal record, but it did not refer to her mere being a woman in prostitution as a mitigating circumstance.

The difference between the rhetoric and the practice of the Court in this particular case is a manifestation of the current inability of the Israeli court system to conceptualize and take into account the harms inherent to women in prostitution. Eventually, the woman whose plight was lamented by the Court, whose unfortunate life was reviewed in detail, is treated no differently than a common sex offender. The Court sentences her for an offense that did not cause harm to anyone but herself, while at the same time expressing aversion to her actions.

Let us now examine another ruling, given by the Israeli Supreme Court in the matter of *Kumashin v. State of Israel*.<sup>43</sup> Two women in prostitution — Anna and Marina, Ukrainian citizens who had been living in Israel for several years — were convicted of premeditated murder. According to the verdict, the two arrived at the victim's apartment, where the three consumed alcohol. The two women put drugs into the deceased's glass. While the three were in bed, Anna and Marina strangled the deceased with a pillow, and caused his death by stabbing him with a knife, wrapping a plastic bag around his neck, and setting his body on fire. They were convicted, and each was sentenced to life imprisonment.

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<sup>41</sup> *Id.* at § 38.

<sup>42</sup> *Id.*

<sup>42</sup> *Id.* at § 44.

<sup>43</sup> CrimA 8512/14 *Kumashin v. State of Israel* (2016) (Isr.).

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We would like to focus on one argument raised by Anna and Marina, involving article 300A(c) of the Israeli Penal Law 5737-1977. This article, referred to as the diminished capacity defense, allows the court to reduce the sentence of a person convicted of murder when the defendant was in a state of severe mental distress due to the severe and prolonged abuse inflicted by the victim. Defense counsel argued that Anna and Marina's harsh circumstances, which included abuse by many men — both clients and pimps — should be considered as prolonged abuse, thus rendering their clients' murder into a slaying of their abuser, paving the way to a valid diminished capacity defense and consequently reduced sentence.<sup>44</sup> The Court curtly rejected this argument, stating that there was no evidentiary basis to substantiate the claim that the circumstances of the defendants' harsh life led them to prostitution or that they were in a "state of severe mental distress" when they were with the deceased.<sup>45</sup> It was further determined that, even if defendant's claim were to be accepted, it was undisputed that the deceased never harmed the defendants and had nothing to do with their mental state, and it was unclear from the defendants why their anger, accumulated over the years, erupted against him.<sup>46</sup>

In their appeal to the Supreme Court, Anna and Marina repeated the diminished capacity defense.<sup>47</sup> Justice Fogelman discussed it briefly:

The appellants' argument should be rejected. The appellants did not meet the burden — which lies upon them — to show that they were each in a state of severe mental distress; that they had suffered severe abuse from the deceased; and that there was a causal link between the abuse and their mental state at the time they committed the offenses. I cannot accept the appellants' claim — which they presumed to support by expert opinion — that the deceased should be regarded as the last link in a chain of abusive factors, and therefore should be regarded as the abuser relevant to article 300A(c).<sup>48</sup>

After rejecting the diminished capacity defense, Justice Fogelman added:

At the same time, we emphasize that we do not ignore the personal circumstances of the appellants. Prostitutes are frequently exposed to a harsh, sometimes cruel reality, often involving violence and humiliation. Life experience also indicates that in many cases prostitution is a result of difficult and complex life events. However, none of this is

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<sup>44</sup> To substantiate their position, the defendants provided testimony from Ms. Nomi Levenkron, an expert on trafficking women in prostitution, who reviewed the harms of prostitution and the trauma that women in prostitution suffer. They also presented the testimony of a psychologist, Dr. Yuri Rassovsky, who explained that each of the defendants experienced symptoms of anxiety and depression. Dr. Rassovsky also diagnosed Anna with symptoms of post-traumatic stress disorder. CrimC (Nz.) 52738-01-12 State of Israel v. Kumashin, at § 20 (2014) (per curium) (Isr.).

<sup>45</sup> See THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA & PORNOGRAPHY (Laura J. Lederer & Richard Delgado eds., 1995).

<sup>46</sup> *Id.*

<sup>47</sup> The appellants also claimed an intoxication defense which is recognized by Israeli law. According to Anna and Marina, they were drunk before and during the crime. The appellants claimed that they are addicted to alcohol and use it to numb their senses before having sex with a client. CrimC (Nz.) 52738-01-12 State of Israel v. Kumashin, at § 16 (per curium).

<sup>48</sup> *Id.* at § 26.

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sufficient to attest to the fulfillment of the conditions for the application of article 300A (c) of the Penal Law, which requires a detailed factual basis, focusing on a specific victim. This was not found in our case, as the District Court has determined.<sup>49</sup>

Anna and Marina committed heinous, horrifying crimes. However, the diminished capacity defense is not intended to be applied solely in regard to slight demeanors. It is intended to be applied particularly in regard to serious, even hideous crimes. Yet the Court sufficed with a general reference to the harms of prostitution and general acknowledgment of the appellants' difficult life, and easily dismissed the claim of diminished capacity. No attempt was made to conduct a comprehensive discussion of the diminished capacity defense in the context of women in prostitution that act violently against a client or a potential association between the unique harms of prostitution and violent acts committed by women in prostitution.<sup>50</sup> The Court in this case had evidentiary tools (expert opinions, Anna's and Marina's testimony) that enabled examining the highly complex issue of a victim who may be the last link in a chain of prolonged abuse. Yet instead of an in-depth examination of the applicability of the diminished capacity defense in this case, the Court adhered to a strict interpretation of the language of the law, and stated that the diminished capacity defense must relate to a *particular* victim (the emphasis appears in the ruling).<sup>51</sup> The Court preferred a path that did not require conceptualizing the harms of prostitution rather than one that paved new path and drew guidelines relevant to situations in which victim to a crime can be considered as "a last link in a chain of abuse."

The two cases analyzed in this chapter are polar opposites. The case of *Anonymous* is analyzed by the Court as a victimless crime, while in *Kumashin* the Court is dealing with a horrifying murder. A., the accused in *Anonymous*, engaged in prostitution almost accidentally while Anna and Marina, the *Kumashin* affair offenders, are apparent victims of a life time in which they were exploited. Yet, in both cases, the Courts had the chance to hone criminal law norms to the defendant's special circumstances as women in prostitution while at the same time conceptualizing and taking those harms into legal account. Instead, the Courts chose to avoid a discussion that might lead to such conceptualization.

## IV. WOMEN IN PROSTITUTION AS CRIME VICTIMS

A vast body of data points to the frequency of cases in which women in prostitution fall victim to various forms of physical and mental harm.<sup>52</sup> In light of this, it is not surprising that Israeli courts are often required to deal with cases of crimes committed in women in prostitution. We

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<sup>49</sup> *Id.*

<sup>50</sup> *Monster* is a film based on the true story of Aileen Carol Wuornos: a woman in prostitution who later became a serial killer. Phyllis Chesler, *A Woman's Right to Self-Defense: The Case of Aileen Carol Wuornos*, 66 ST. JOHN'S L. REV. 933, 946 (1993). The film is a well-known representation of a traumatized woman's narrative. *MONSTER* (DEJ Productions, 2003).

<sup>51</sup> CrimA 8512/14 *Kumashin v. State of Israel* § 27 (2016) (Isr.).

<sup>52</sup> See Rochelle L. Dalla, Yan Xia & Heather Kennedy, *You Just Give Them What They Want and Pray They Don't Kill You*, 9 VIOLENCE AGAINST WOMEN 1367, 1370 (2003); Charisse T. Coston & Lee E. Ross, *Criminal Victimization of Prostitutes: Empirical Support for the Lifestyle / Exposure Model*, 21 J. CRIME & JUST. 53 (1998); Stephanie Church, Marion Henderson & Maria Barnard, *Violence by Clients Towards Female Prostitutes in Different Settings: Questionnaire Survey*, 322 BRIT. MED J. 524 (2001).

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shall now examine a number of such cases, focusing on the question of the extent to which courts consider the special vulnerability of women in prostitution.

The first case is *Police Investigation Department v. Al-Huzayl*, in which a woman in prostitution was sexually harassed by a policeman, while he was on active duty.<sup>53</sup> The policeman arrived at the place where the victim was sitting with a client in a vehicle, demanded that she return the money to the client, and threatened to impose a fine on her. When the victim returned the money to the client, the policeman told her that he would refrain from imposing the fine if she gave him sex services at a discount. She made it clear to him that she was not interested, and he repeated his proposal. The policeman brought her to his car, informed that she was detained, and after a short drive and an exchange of insults, returned her to the place from which she was taken.

The policeman agreed to a plea bargain, and admitted he committed offenses of fraud, breach of trust, and abuse of his powers as a police officer. The central, most severe offense — sexual harassment — was removed from the amended indictment<sup>54</sup> was removed from the amended indictment. He was sentenced to six months of public service labor and a suspended prison sentence. Considering even this punishment too severe, he filed an appeal, which was rejected, asking that his conviction be annulled and that his sentence be replaced by community service.<sup>55</sup>

At the hearing of the appeal, the Supreme Court found it appropriate, as is its rhetorical practice in such cases, to point out how seriously the Court perceives crimes directed at weak women living on the margins of society, who are particularly in need of the protection.<sup>56</sup> The Court even repeated a verbal formula that appears almost routinely in rulings dealing with women in prostitution: “Life in prostitution does not make a woman’s body unprotected.”<sup>57</sup>

Against this background, the plea bargain and the lenient punishment are startling. The complainant submitted a letter to the Court in which she stated that mitigation of the appellant’s sentence would undermine her belief that “the law protects me as well.”<sup>58</sup> This sad statement illustrates the sense of lack of protection (both police protection and court protection) that women in prostitution experience. In practice, the Court chose to reach a generous plea bargain with an officer of the law who abused his power in a way that deepened the humiliation of a woman in prostitution.

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<sup>53</sup>CrimC 54377-12-14 *Police Investigation Department v. Al-Huzayl* (2015) (Isr.).

<sup>54</sup>Sexual harassment is defined as the “repeated propositions of a sexual nature, addressed to a person who has demonstrated to the harasser that he is not interested in the said propositions”. Prevention Sexual Harassment Law, art. 3(a)(3), 1998.

<sup>55</sup> In Israeli law, community service is considered a lighter punishment than service labor. Penal Law 5737-1977, art. 71(a) (1997).

<sup>56</sup> CrimA 3721/16 *Al-Huzayl v. State of Israel* (2017) (Isr.).

<sup>57</sup>Israeli Supreme Court has applied a similar formula in cases with victims who are women in prostitution. Cf. CrimA 1641/94 *Asulin v. State of Israel* § 5 (1994) (per curiam) (Isr.) (“A street walker is entitled to the law’s defense of her freedom and dignity, even though she engages in vile practices”); CrimA 9687/11 *Syuri v. State of Israel* (2013) (Isr.) (“A prostitute is entitled, as is any other woman, to have her dignity and her physical and mental integrity protected by law”) (Arbel, J., concurring).

<sup>58</sup> CrimA 3721/16 *Al-Huzayl v. State of Israel* § 10 (2017) (Isr.) (per curiam).

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Another example that illustrates the ambivalence of the Court toward women in prostitution and their harms is the case of *State of Israel v. Abou Guilyon*.<sup>59</sup> The complainant, a woman in prostitution in her 40's who immigrated to Israel on her own at the age of 20, met the defendant on the street and agreed to have sex with him for 200 NIS.<sup>60</sup> The defendant knew at the time that he did not have the money. When they arrived at his apartment, he refused to pay, and an argument erupted. At one point, the defendant threw the complainant on the mattress and began to undress her by force, hitting and bruising her. As a result of his violence, the complainant agreed to perform oral sex on the defendant. Eventually, the defendant ceased his actions, asked for the complainant's forgiveness, and the two got dressed. Later, the defendant ordered the complainant to take off her clothes. The complainant, who was afraid of the defendant, lay down on the bed, and the defendant rubbed his penis against her vagina and then turned her on her stomach and inserted his penis into her anus until he climaxed.

In the District Court, the defendant was convicted, after agreeing to a plea bargain, of committing the offenses of sodomy and indecent acts.<sup>61</sup> In its verdict, the Court indicated the severity of the acts and, as is customary, set out the adamant standing of Israeli courts regarding offenses against women in prostitution. In addition, the Court referred to a report relating to the state of the victim (presented to the Court before sentencing according to Israeli criminal procedure law) indicating that she suffers from depression, sleep disorders, and chronic headaches. It was further asserted that the complainant experienced humiliation and aggravated abuse in the wake of the present event, and that the most significant harm caused to her as a result of the defendant's actions was a mental injury: anxieties and obsessive thoughts that shook her faith in her ability to cope with her life.<sup>62</sup> Against this background, Justice Tamar Naot-Perry writes:

Another circumstance to consider is the harm caused by the offense. In this case, in view of the report regarding the state of the victim, she will suffer from mental damage in the future, accumulating to her fragile emotional state before the events. In this sense she should be considered a "*thin skull*."<sup>63</sup>

Here, Justice Naot-Perry is proposing that Israeli courts will employ the *thin skull* doctrine while dealing with cases of women in prostitution who are victims of an offense. This term is taken from the Israeli law of torts, and means that the tortfeasor meets the injured person as is, and if the victim was unusually sensitive to a certain type of damage, the tortfeasor should have expected it and will not escape liability on the basis of the victim's unique vulnerability.<sup>64</sup> This

<sup>59</sup> CrimC (Hi) 8086-10-14 State of Israel v. Abou Guilyon, (2015) (Isr.).

<sup>60</sup>This is equal to approximately fifty-dollars in the United States.

<sup>61</sup> *Id.* at § 1- 4. Sodomy is defined as "introduction of a bodily organ or an object into a person's anus, or introduction of a sex organ into a person's mouth" and can be punishable with a maximum sentence of 16-20 years imprisonment. Penal Law 5737-1977, 1997 at art. 347(c). Whereas, an indecent act is defined as "an act for sexual arousal, satisfaction or abasement" and punishable with a maximum sentence of 7 years. *Id.* at 348(e).

<sup>62</sup>CrimC (Hi) 8086-10-14 State of Israel v. Abou Guilyon, § 6 (2015) (Isr.).

<sup>63</sup> *Id.* at § 23.

<sup>64</sup>This principle is rooted in the common law. See *Smith v Leech Brain & Co* (1962) QB 405 (UK) (applying the principle in a UK case); see *F.H. 12/63 Leon v. Ringer* 18(4) PD 701 (1964) (Isr.) (applying

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principle is applied in criminal law, where it serves as a substitute for the requirement of subjective expectations of a certain result in cases of a resultant offense.<sup>65</sup> The District Court's opinion thus implies that clients committing crimes against women in prostitution can expect to cause an increased range of harms and injuries, beyond those caused to women who are not in prostitution. In light of all this, the Court sentenced the defendant to 11 years in prison, in addition to requiring him to pay the complainant the sum of 50,000 NIS (about 12,000\$).

The Supreme Court, in its ruling in *Abou-Guilyon's* appeal regarding the severity of the punishment,<sup>66</sup> noted the importance of protecting women in prostitution who are "easy prey" for sexual offenses. However, despite expressing the routine general condemnation of sex crimes against women in prostitution, the Supreme Court reduced the appellant's sentence by two years.<sup>67</sup>

The Court reasoned that the defendant confessed as part of a plea bargain and that the sentence imposed on the appellant was exceptionally harsh in relation to plea bargains under similar circumstances.<sup>68</sup> The Supreme Court did not address the fact that the matter of the admittance had already been addressed in the District Court's ruling. The admittance was part of the plea bargain, and resulted in a mitigated sentence in the District Court. The Supreme Court granted further mitigation, thus forming a gap between the rhetoric used by the Court regarding the need to unwaveringly protect women in prostitution and the leniency in regard to the defendant's punishment.

In the *Abou Guilyon* case, the District Court proposed to see the damage done to women in prostitution through *thin skull* lenses. It should be noted that courts employ this principle not while determining guilt, but in the stage of sentencing.<sup>69</sup>

We propose that the path outlined by the District Court in the *Abou Guilyon* case should be developed in order to impose increased liability on offenders when the victims are women in prostitution. Acknowledging the relevance of the *thin skull* doctrine in such cases may significantly reinforce the victim's status.<sup>70</sup> It will provide greater deterrence on the one hand,

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the principle in an Israeli tort case); CA 8279/02 Golan v. The Estate of Dr. Menachem Albert 62(1) PD 330 (2006) (Isr.) (applying the principle in an Israeli tort case).

<sup>65</sup> See e.g., CA 6294/11 Anonymous v. State of Israel (2014) (Isr.); CA 707/83 Petromilio v. State of Israel, 38(4) PD 821 (1984) (Isr.).

<sup>66</sup> CrimA 1630/15 Abou-Guilyon v. State of Israel (2016) (Isr.).

<sup>67</sup> See CrimA 3011/13 Saaida v. State of Israel (2015) (Isr.) (district court expressed the harms caused to women in prostitution while the Supreme Court mitigated punishment).

<sup>68</sup> CrimA 1630/15 Abou-Guilyon v. State of Israel § 32 (2016) (Isr.).

<sup>69</sup> See e.g., CrimA 149/15 Morah v. State of Israel (2016) (Isr.) (thin skull lenses principle was used to determine guilt when a defendant caused the death of a female prostitute).

<sup>70</sup> For the importance of strengthening the status of the victim within the framework of the criminal proceeding and the purpose of compensating the victim, see CrimA 6452/09 Ali v. State of Israel (2010) (Isr.); CrimA 6237/12 Joulani v. State of Israel, § 32 (2016) (Isr.).



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and a much sought after recognition of the distinctive harm of victimized women in prostitution on the other.<sup>71</sup>

We shall now turn to our last case,<sup>72</sup> in which the Israeli Supreme Court considered the appeal of Marwan Morah, found by the District Court to be guilty for the manslaughter of Victoria K., a woman in prostitution who jumped to her death from the balcony of his home. The question was whether the appellant could have expected that the deceased would jump from the balcony, given the fact that prior to her doing so an apparently violent argument between the two about the matter of payment took place, as well as the fact that she was under the influence of drugs and alcohol. In addition, it was argued that appellant blocked Victoria's way out of his apartment (the appellant revealed this detail in his testimony in the police, but later recanted his testimony), leaving her with no alternative but to jump off the balcony. Another fact that was taken into account was that after Victoria jumped off the balcony, which was located on the second floor, the appellant went out of his house, passed by her, and did not help her, but wandered the streets to cover his tracks.

The District Court ruled that the defendant had caused Victoria's fall from the balcony — whether by pushing her or otherwise — and convicted him of manslaughter and obstruction of justice for trying to destroy evidence of his connection to the case.<sup>73</sup> He appealed to the Supreme Court. The Supreme Court ruled in his favor, determining that the District Court findings were not based on evidence, which it found showed, at the most, that the appellant caused Victoria's death by negligence. To determine negligence, the Court asked whether a reasonable person could have expected, under the circumstances that Victoria would try to leave the apartment by jumping off the balcony.

The Court referred to a number of questions arising from the circumstantial evidence, including the existence of a violent struggle between the two before the deceased leaped from the balcony; what the deceased wore before the jump; the exit route from the house to the balcony; and whether the appellant blocked her way out of the apartment. After examining the entire body of evidence, the two majority judges — Justice Menachem Mazuz and Justice Salim Joubran — determined that the appellant should be acquitted of manslaughter, but affirmed his conviction for obstruction of justice. The minority judge — Justice Noam Solberg — found that the appellant should be acquitted of manslaughter but convicted of negligent manslaughter.

We will not dwell on the legal analysis presented by the Supreme Court and the evidence it relates to, but rather focus on the main point that emerges, in our reading, from the Supreme Court's analysis — the lack of adequate conceptualization of the special harms caused to women in prostitution.

This point is echoed in a number of key points in the judgment. It is clear that the Court did not analyze the situation through the imagined perspective of a traumatic woman in prostitution, but

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<sup>71</sup> See CrimC (Nz.) 5893-06-12 State of Israel v. Saaida, at § 32 (2013) (Isr.) (applying the “thin skull principle”); CrimA 1864/11 Davidov v. State of Israel, at § 8 (2012) (Isr.) (applying the thin skull principle in sentencing when the victim was an elderly person).

<sup>72</sup> CrimA 149/15 Morah v. State of Israel (2016) (Isr.).

<sup>73</sup> CrimC (TA) 20998-08-13 State of Israel v. Morah (2014) (Isr.).

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rather through the perspective of conventional life experience, or a life that is perceived as reasonable. For example, the Court wondered why, if the two did have a violent argument, Victoria did not simply defend herself rather than jump off the balcony, especially because, according to the evidence, she had a violent nature. However, the Court ignored the fact that the evidence presented did not indicate that Victoria was inherently violent, but that she had acquired certain survival skills in order to cope with the violent world in which she lived. The Court also ignored the testimony of Victoria's friends that in the last years of her life she developed a drug addiction, which caused her to lose her assertive nature. Her close friend used the phrase "she was like a rag". Could a woman who was so seriously harmed act with determination and force when violence is used against her? In our opinion, a full conceptualization of the harms inherent to prostitution leads towards a negative answer.

The Court analyzed Victoria's jump from the balcony as a suicidal act rather than an attempted escape from the apartment. The court brought up an analogy to the *Yaakovov* case,<sup>74</sup> in which a man was accused of causing the death of his wife, who jumped to her death after years of physical abuse, stating that, "In the present case, the deceased was not in a state of special or exceptional distress, or deep despair, which justified or might have caused an expectation of such an extreme action."<sup>75</sup>

This statement reflects the distance between the Court and the realities of women in prostitution lives. Women in prostitution constitute a specific subgroup of women who are exposed to chronic and ongoing abuse. Recognition of the significant potential of harm caused by prostitution, especially the perception of prostitution as a continuous traumatic experience, is essential for determining the attitude of law towards prostitution. Existing data indicates that there are direct links between trauma and prostitution<sup>76</sup>, in that most women who are addicted to drugs or engage in prostitution have been victims of incest or sexual abuse have fled from their homes, and/or are easy prey to pimps who led them to drugs and prostitution.<sup>77</sup> Against this background, it is difficult to accept the Court's decision that Victoria was not in a state of special distress.

The Court also discussed whether a reasonable person would have predicted that a person would jump to his or her death in the course of a specific dispute.<sup>78</sup> However, in this case, the appellant was not a reasonable man, but rather a man who paid for sex; and it was not an ordinary person who jumped to her death due to a specific conflict — it was a woman in prostitution, who died in

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<sup>74</sup> CFA 983/02 *Yaakovov v. State of Israel* 56(4) PD 385 (2002) (Isr.).

<sup>75</sup> CrimA 149/15 *Morah v. State of Israel* (2016) (Isr.) § 39 (per curium).

<sup>76</sup> See Monica O'Connor, *Choice, Agency Consent and Coercion: Complex Issues in the Lives of Prostituted and Trafficked Women*, WOMEN'S STUDIES INT'L FORUM 62 (2017).

<sup>77</sup> Research indicates that the first sexual experience for women in prostitution is often at a very early age and often caused by rape. Most adult women in prostitution were sexually abused during their childhood by a stepfather or father and were victims of abuse and neglect within their families. See Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L. R. 37 (1999); Melissa Farley & Howard Barkan, *Prostitution, Violence and Post-Traumatic Stress Disorder*, 27 WOMEN'S HEALTH 37 (1998).

<sup>78</sup> CrimA 149/15 *Morah v. State of Israel* (2016) (Isr.) (J. Jubran, concurring).

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her attempt to escape from the client's apartment. It is clear that the judges placed themselves in the same situation, and wondered whether they would have done so in similar circumstances.

It seems that the Court envisions a normal situation — an ordinary woman or man who engages in an argument with someone about something, and in the middle of the argument suddenly decides to jump off the balcony. In such a case, it is clear that the deceased is solely responsible for his or her own death, his or her response being extreme, irrational, and disproportionate.<sup>79</sup> But this is not the case here. In fact, the Court's approach here reflects the basic approach of Israeli law, which treats prostitution as a species of contract law — a woman in prostitution and a man buying sex are perceived as parties to a legitimate contractual deal. The contractual approach to prostitution defines the phenomenon as an activity that is primarily a transaction centered on free trade between a client and a woman providing sexual services, and is not fundamentally different from any contract of employment or provision of other services.<sup>80</sup> As we shall see below, this approach is detached from the harsh realities of the world of prostitution.

## V. CONCLUSION: HARM IS HARM IS HARM.

Like many other court rulings, the last ruling we discussed tells a story. It is about Victoria K., a prostitute who, during a business argument, and while under the influence of drugs and alcohol, tragically fell to her death off a second floor balcony. These are the circumstances that led to Victoria's death, according to the Supreme Court's majority ruling:<sup>81</sup>

1. The deceased came to the appellant's apartment in order to have sex with him, in exchange for money.
2. At some stage an argument broke between the two. According to one of the appellant's versions, a version he later renounced in his testimony, he blocked her way out from leaving the apartment. Up to this point, there is no evidence of violence.
3. The deceased was under the combined influence of high doses of alcohol and drugs that influenced her state of mind and made her feel excited, very self-confident, and elated.
4. The deceased, partly dressed and with her bag on her arm, went out to the terrace, and jumped to her death.

We believe that Victoria K. deserves a richer story, story that will attempt to imagine her past and her life, to see the situation through her eyes. If such story would have been created, the

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<sup>79</sup> However, it is interesting to see the Court envisions a similar situation, in which the appellant is the one who flees. In *Morah v. State of Israel*, the Court blames Victoria for her own death by consuming alcohol and drugs which led her to behave unexpectedly and jump off the balcony. *CrimA 149/15 Morah v. State of Israel* § 39-38 (2016) (Isr.) (“... his demand from the deceased to stay in the apartment despite her request to leave, and possibly blocking her way out, apparently contributed, in addition to the lethal mix of drugs and alcohol, to the deceased deeds that led to her tragic death, and the appellant instead of calling the authorities and calling for help, threw away any objects related to the deceased from his house, fled from his apartment and at first refrained from cooperating in his interrogation.”) (per curium).

<sup>80</sup> See Sybil Schwarzenbach, *Contractarians and Feminists Debate Prostitution*, in *PROSTITUTION & PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY* 209, 211 (Jessica Spector ed., 2006).

<sup>81</sup> *CrimA 149/15 Morah v. State of Israel* § 26 (2016) (per curium) (Isr.).

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court would not have been able, for example, to write the next paragraph, which appeared in the judgment:

Objectively, in contrast to the circumstances surrounding *Yaakobov*, the deceased in our case was not in a situation of special or exceptional distress, or deep despair, which justified or might have been enabled one to expect such an extreme reaction. This was a dispute with a client about additional payment for sexual services rendered, of the type that was presumably not alien to the deceased (who, according to the testimony, often resorted to violence against her clients)...<sup>82</sup>

According to our contention, it should clearly be stated that being in prostitution causes, in many cases, special or unusual distress. A common situation in the lives of many women in prostitution is deep despair. And even more so when a woman in prostitution is addicted to drugs, as Victoria was. What seems to the judge as extreme and unobservable behavior is sometimes the only way of escape, and thus what can reasonably be expected from a woman who has one purpose: to survive.

It is not blindness that prevents the courts from conceptualizing the harms of women in prostitution while at the same time coming up with innovative ways to conceptualize the plethora of varied types of harms that exist elsewhere in human lives. Multilayered and complex social mechanisms are at work here, mechanisms that preserve the existing patriarchal structure and normalize it in a way that makes it very difficult to see reality differently than the way it is seen by the courts. It is difficult to expect judges to break through the system's invisible constructs. Perhaps it is especially difficult when dealing with prostitution. The social infamy around prostitution stifles the ability to imagine prostitution first and foremost as harm. However, a judge can be expected to use emotion and empathy when discussing a case in which a woman in prostitution is involved, whether as a victim or as an offender. This will enable the courts to use the innovation and imagination that they use in any other context that requires harms to be conceptualized.

The facts of Victoria's case were determined by the Supreme Court. We do not presume to question these facts. But we will draw an additional narrative, delineating a path the Court did not take. This is our story, which is told from the imagined point of view of Victoria, giving her a voice that she was not given in the rulings of both instances.

It is an unbearably hot and humid Israeli summer night. She stands at her usual corner in a dark street at the south of Tel-Aviv. Her thoughts ramble between missing her daughter, whom she has not met even once during the last three years, and wandering where she might spend the night. It is the hour when men go out for prostitutes. She is waiting for one, whoever he will be.

She feels merely distress, not fear. She knows johns well. Those that refuse to pay, those that argue, those that seem fine but turn into abusers the minute you are alone with them. A few years earlier everything seemed different. She was stronger then, and more assertive, able to reserve some dignity. All her friends know she can take care of herself.

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<sup>82</sup> CrimA 149/15 Morah v. State of Israel § 39 (2016) (per curium) (Isr.).

## ALMOG &amp; AMIR: THE HARMS OF PROSTITUTION AS MIS-REFLECTED IN ISRAELI LAW

They all knew about the criminal offenses she collected just by refusing to remain silent and passive... that time where she stabbed someone who insulted her. Yes, once she was able to deal with violent men. But during the last few years she has turned into a wreck. The booze and the drugs and the years passing by — next year she will be 50 — have claimed their heavy toll. The estrangement from her daughter, who chose to get as far away as she could from her “temperamental”, drug addicted mother, deprived her of her last scraps of energy. But today she has managed to soldier up and go out to the street. Maybe thanks to the last remains of the cocaine and the alcohol in her veins, or maybe due to some other inexplicable reason, today she feels a little stronger, as if she can handle whatever the street will come up with. She is a woman that dies hard. She can manage.

A man’s voice. “How much?” he asks. They talk for a minute and agree upon a price. Actually he looks all right. They go up to his small apartment on the second floor. But then she withdraws. The deal suddenly looks problematic. At that moment, she recalls that she dropped a note of money on the way up. Without it she will not be able to buy drugs even after she is paid by this man. She goes out to find it. He pursues her. He wants her to do what they agreed upon. He promises a larger payment. He shows her a money bill. She decides to return.

But at the apartment things again go awry. He wants more than she is willing to give. He says that for the money he is paying he is entitled to get more. She says that this not what they agreed upon. She wants to get out. To stop. Right away. She cannot take it any longer. She is willing to give up the payment. She puts on her panties and her shirt. She reaches for her bag. But he insists she must give him what he wants. She feels trapped. She knows she must get out now. She is thinking about her friends’ stories about johns that locked them in. She recalls what happened to her some years ago with a violent client that smashed her for hours before she could escape his apartment. She feels the walls are suffocating her, and she cannot stay there, with this man, even for a minute longer. She is terrified. She gives up her money, and rushes towards the terrace. She bends over the rail and plans the way down. She knows she can make it. She survived tougher situations. “Only two floors,” she tells herself. “You can do it.” But her bare feet lose their grip. And her solitary death finds her there, on the pavement in the south of Tel Aviv.

*A rose is a rose is a rose*, wrote Gertrude Stein<sup>83</sup>. Paraphrasing this puzzling adage, we say *harm is harm is harm*. As we put forward, the saying represents a double-phased associative move. According to the first phase, some occurrences must be brought forward and adamantly presented, particularly because they are transparent. The second phase of the move is associated with the enigmatic repetitive nature that turned Stein’s words into a cultural icon. According to our reading, the uncommon reiterating sheds light on the reiterated word, and forces the audience to contemplate upon it. The announcement *harm is harm is harm* places the hidden and denied harms of prostitution to forefront. It tags it as *harm* clearly and adamantly. It enhances the meaning of the harm and the consequences it entails. It makes it harder to dismiss.

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<sup>83</sup> Gertrude Stein, *Sacred Emily*, in *GEOGRAPHY & PLAYS* 178-188 (1922).