

Targeting the Harm: Prostitution and the Law

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"On the dialectical function of money in prostitution. It buys pleasure, and, at the same time, becomes the expression of shame."

[WALTER BENJAMIN, *THE ARCADES PROJECT 492* (Howard Eiland & Kevin McLaughlin trans., 2002)]

"Are you fucking that guy right now"

"Are you"

"Are you"

"Are you"

"Answer me"

"Whore."

[KRISTEN ROUPENIAN, *CAT PERSON*

New Yorker, December 11, 2017]

I. INTRODUCTION

This paper delineates the types of harms that women in prostitution encounter, and in so doing, puts them on the map. As will be elaborated here, there are two types of prostitution-related harms: individual, or subjective harms and an objective harm—coined previously by this Author, the *social infamy tax*.¹

The term, *social infamy*, indicates a particular price-tag of shame levied on women in prostitution. It is a harm that involves degradation, debasement, and humiliation. The term *tax* denotes both the obligatory and inevitable nature of the humiliation.

The term “stigma” is often mentioned regarding the social status of women in prostitution. Quoting Erwin Goffman’s formative definition, stigma is: “an attribute that is deeply discrediting.”² Yet, the notion of stigma is too loose and too general in order to convey the idiosyncratic nature of social dignity loss idiosyncratic to prostitution. Stigma is a wide-range term, which is often applied to entire populations: the LGBTQ community; the mentally disabled; the obese; and those belonging to certain ethnic or national groups. Stigma may also be applied to individuals, and

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¹ See Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER AND L. 711 (2010) (for further elaboration of the term.)

² ERWIN GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (1963).

has an entire spectrum of negative connotations. The term is not potent enough to target and represent the certain reputational harm inherent to prostitution. In order to conceptualize the exact nature of prostitution's harm, a more nuanced concept, reflected by the term *social infamy tax*, is called for.

No woman in prostitution can evade the *social infamy tax*; it is imposed by society, and it stems from the way society constructs prostitution. As is maintained here, against the backdrop of ongoing controversy surrounding the conceptualization of prostitution, awareness of the nature of the *social infamy tax* is crucial in order to trigger necessary legal reforms.

Two main, competing perceptions emerge from contemporary discourse regarding the regulation of prostitution.³ The first of these conceptualizes prostitution as inevitable exploitation.⁴ Prostitution, according to this view, should be forbidden, its clients criminalized, and the women in prostitution

³ For elaboration see: Shulamit Almog, *Jennifer Suchland: Economies of Violence: Transnational Feminism, Postsocialism, and the Politics of Sex Trafficking*, 29 INTERNATIONAL JOURNAL FOR THE SEMIOTICS OF LAW 843, 844-845 (2016). See also: VANESSA E. MUNRO & MARINA DELLA GIUSTA, DEMANDING SEX: CRITICAL REFLECTIONS IN THE REGULATION OF PROSTITUTION 1 (2016).

⁴ For elaboration see: Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER & L. 711 (2010)

treated as victims. The legal regimes of several countries, among them Sweden and France, echo such a perception.⁵ A reflection of this perspective can be found in a non-binding resolution passed by the European Parliament in 2014, stressing that prostitution violates human dignity and human rights, whether forced or voluntary.⁶

A competing perception refers to prostitution as "sex work" and as a legitimate occupation when deriving from free choice. This perception is reflected in the legal status of prostitution in Germany, the state of Nevada, and many other states within the United States.⁷

This view is mirrored in an Amnesty International decision from 2015, calling on countries worldwide to decriminalize sex

⁵ For more on legal approaches toward prostitution, see Rebecca Beegan and Joe Moran, *Prostitution and Sex Work: Situating Ireland's New Law on prostitution in the Radical and Liberal Feminist Paradigms*, 17(1) IRISH JOURNAL OF APPLIED SOCIAL STUDIES 59 (2017).

⁶ Resolution on sexual exploitation and prostitution and its impact on gender equality, European Union 2014 (available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET\(2014\)493040_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf))

⁷ See *US Federal and State Prostitution Laws and Related Punishments*, PROCON.ORG (last updated May 4, 2018), <https://prostitution.procon.org/view.resource.php?resourceID=000119> (discussing more details regarding the relevant laws in each of the states, in addition to federal law); See also Gail M. Deady, *The Girl Next Door: A Comparative Approach to Prostitutions Laws and Sex Trafficking Victim Identification Within the Prostitution Industry*, 17 WASH. & LEE J. C. R. & SOC. JUST. 515, 522-523 (2011) (discussing the American history of prostitution and its legal regulation).

work and protect the human, welfare, and safety rights of sex workers.⁸

As is posited here, only after addressing the primary question of "*what is prostitution?*" can the naturally flowing question, "*what should law do about prostitution?*" be dealt with effectively. The starting point when considering the appropriate legal framework for prostitution should be developing an understanding of the host of harms it invariably brings upon individual women; women in general; and society at large. This paper aims to delineate the scope and nature of such harms, while promoting recognition of the existence, and legal meaning, of the *social infamy tax*.

II. PROSTITUTION AND HARM

Defining what activities should be considered to constitute prostitution is a hotly contested issue. As Stuart P. Green suggests, the two main elements of the definition of prostitution are: (1) the

⁸ *Decision on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, AMNESTY INTERNATIONAL, (last visited March 29, 2019), <https://www.amnesty.org/en/policy-on-state-obligations-to-respect-protect-and-fulfil-the-human-rights-of-sex-workers/>.

offering of sexual activity; (2) in exchange for money or other benefits.⁹

For the purposes of this paper, it is not necessary to opt for either a wide or narrow definition of ‘sexual activity,’ nor for a wide or narrow interpretation of the element of ‘payment.’ Rather, it will suffice to adopt Green’s two-part definition of prostitution and supplement it with a third element: (3) where by so doing, one incurs the irrevocable harm of social infamy.

Before delving into the issue of harm, it is worthwhile to note that undoubtedly prostitution can be, and often is, conceptualized, described and imagined in various terms. For instance, prostitution can be viewed in terms of labor and the rules of the market economy; it can be analyzed through a human rights prism; or, it can be conceived based on agency, pleasure and choice. However, as this paper asserts, regardless of one’s approach to understanding the nature or impetus for prostitution, a prerequisite for any discussion of an appropriate legal response to prostitution must be careful identification and mapping of the harms inherent to prostitution.

⁹ Stuart P. Green, *What Counts as Prostitution?*, 4(1) BERGEN J. OF CRIM. LAW AND CRIM. JUST. 184 (2016). For a nuanced discussion, which is beyond this scope, of the question what counts or should count as prostitution see: Green, *id.*

Generally speaking, when it comes to harm, the state tends to perceive itself as charged with intervening and taking measures that lead to eradication of the source of the harm, prevent its expansion, or, at the very least, adequately warn against it. However, insofar as the goal of lawmaking is the alleviation of harm: the law must be driven by an understanding of the nuances of that harm, such that it leads to action effectively targeting the particular harm.

In the following paragraphs, I will describe in brief the two main approaches employed with respect to the harms caused by prostitution. The first approach focuses on the correlation between prostitution and trauma (*the trauma approach*). It is based upon first identifying the subjective harms caused to women in prostitution. The second approach concentrates on the link between prostitution and the *social infamy tax* (*the social infamy approach*). The social infamy approach is rooted in viewing prostitution as related to an objective harm - the *social infamy tax* - affecting all women engaged in prostitution.

It should be noted that a third, integrative approach exists, which juxtaposes the two types of harm described above. Such an approach, though rarely employed, holds the potential to pave the way toward acknowledging the responsibility incumbent on society to initiate and enforce a normative regime that will alleviate both types of harms.

This paper does not presume to indicate a particular regulatory approach as the correct one. Rather than recommend a solution, it advocates a process for reaching an appropriate solution by suggesting that any legal path taken should commence with a clear grasp of the range and nature of the harms inherent to prostitution.

I will commence by introducing the subjective harms of prostitution, many of which are related to trauma and post-trauma. The term “trauma,” from the Greek word, *traumatizo* (wound), originally denoted sudden physical injury. Starting in the 19th century its meaning expanded and was used in a variety of scientific disciplines, gaining wide popular use.¹⁰ In the present context the term trauma denotes a severe mental injury: “a shock creating a fragmentation or psychological rupture, a mental injury.”¹¹

Typical traumatic experiences characteristic of such mental injuries include exposure to terrorism or war, or being the victim of sexual or other physical abuse. According to a study conducted in the United States, women in prostitution face the most dangerous

¹⁰ KIM LACY ROGERS, SELMA LEYDESDORFF AND GRAHAM DAWSON, *TRAUMA AND LIFE STORIES: INTERNATIONAL PERSPECTIVES* (London: Routledge, 1999).

¹¹ SHOSHANA FELMAN, *THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY* 171 (Cambridge, MA: Harvard University Press, 2002).

occupational environment in the United States.¹² Women engaged in prostitution are frequently subjected to: physical and emotional abuse; exposed to sexually transmitted infections; and diseases including HIV/AIDS, and suffer from extreme anxiety, depression, and even suicidal tendencies.¹³ A common side effect for women working in prostitution is a constant (*subjective*) fear. This fear comes from a number of places including but not limited to: a sense of isolation and alienation from the so-called normative society; and a dramatically lowered sense of self-worth and self-esteem.¹⁴ Furthermore, many of the women involved in prostitution reported experiencing some form of emotional pain.

Figures gathered worldwide point to the frequency of cases in which women in prostitution fall victim to various forms of physical and mental harm.¹⁵ A series of medical problems also

¹² John J. Potterat, Devon D. Brewer, Stephen Q. Muth, Richard B. Rothenberg, Donald E. Woodhouse, Johan B. Muth, Hrathar K. Stites and Stuart Brody, *Mortality in a Long-term Open Cohort of Prostitute Women* 159(8) AM. J. EPIDEMIOLOG. 778 (2004).

¹³ Melissa Farley and Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) WOMEN & HEALTH 37.

¹⁴ Laura Agustin, *Migrants in the Mistress's House: Other Voice in the Trafficking Debate*, 12(1) SOC. POLIT. 96, 110 - 111 (2005).

¹⁵ 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); Ameporn Ratinthorn, Afaf

typifies prostitution: sexually transmitted diseases, gynecological problems, dental health issues and more.¹⁶ Existing data also indicates that en trauma and prostitution are linked,¹⁷ and that women who are addicted to drugs or have been victims of sexual abuse and violence as children find their way into prostitution.¹⁸ Research indicates that the post traumatic damages caused to women in street prostitution and women in brothels are similar.¹⁹

Meleis and Siriorn Sindhu, *Trapped in Circle of Threats: Violence Against Sex Workers in Thailand*, 30(3) HEALTH CARE FOR WOMEN INTL. 249 (2009).

¹⁶ Cathy Zimmerman, et al., *The Health of Trafficked Women: Survey of Women Entering Posttrafficking Services in Europe*, 98(1) AM. J. PUB. HEALTH 55 (2008).

¹⁷ 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).

¹⁸ 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).

¹⁹ Melissa Farley, Isin Baral, Merab Kiremire, Ufuk Sezgin, *Prostitution in Five Countries: Violence and Post Traumatic Stress Disorder*, 8(4) FEMINISM AND PSYCHOLOGY 405 (1998); See also a BBC report on the study's results, elaborating that psychological trauma is intrinsic to any act of prostitution: (available at <http://news.bbc.co.uk/2/hi/health/154140.stm>); M. Farley, et al., *Prostitution and Trafficking in Nine Countries*, 2(3-4) JOURNAL OF TRAUMA PRACTICE 33-74 (2004); N. El-Bassel, et al., *Sex trading and psychological distress among women recruited from the streets of Harlem*, 87(1) AM. J. PUB. HEALTH 66-70 (1997).

Yet, notwithstanding the evidence that prostitution is often experienced as traumatic, the appearance and intensity of the traumatic damages depend on the individual circumstances and personality of each woman. Indeed, trauma discourse emphasizes the individual injury as well as the individual capacity to heal. Every victim of trauma has unique characteristics that require personal diagnosis and carefully customized therapeutic care. In other words, traumatic harms are inherently *subjective*.²⁰

Some women in prostitution, due to individual circumstances and personalities, escape traumatic and post-traumatic harms. Thus, the trauma approach seems hardly relevant to their experience of prostitution. Yet, even in such cases, there is an unavoidable *objective* harm that all women in prostitution are affected by, whether or not they undergo the *subjective* individual harms of trauma or post-trauma. This objective harm, *the social infamy tax*, tends to be unacknowledged, dissimulated and practically transparent. The next section of this paper will define that objective harm, and it will suggest that a harm-focused perspective, which integrates the subjective, circumstance-dependent trauma approach, with the objective, unavoidable social infamy approach.

²⁰ SHULAMIT ALMOG, PROSTITUTION: LEGAL AND CULTURAL ASPECTS (Ministry of Defense Press, Tel Aviv 2008) (Heb).

Both approaches must be employed in order to fully grasp the nature of prostitution.

III. PROSTITUTION AND THE *SOCIAL INFAMY TAX*

Prostitution, as a socially constructed phenomenon, typically revolves around a certain pattern: a woman who has practiced prostitution, even only once, is laden with infamy. The *social infamy tax* indicates a price-tag of shame that is imposed upon women engaged in prostitution. They are the only women allowed by social norms to demand explicit rewards for sex, and the inescapable outcome is that they earn a position at the very lowest and, perhaps, the only point of no return, along a metaphoric scale of humiliation. Outside of cinematic fantasies along the lines of *Pretty Woman*, a woman known to be a prostitute can never move up the scale.²¹

As mentioned, the term, “tax”, is used here as an emblem representation of the mandatory nature of the humiliation exacted

²¹ Many speculations can be made as to the reasons of social infamy that is inherent to prostitution. Presumably it is related to ancient concepts of moral, the way we perceive sex, the relation between sex to power and control, hierarchy between men and women, and other factors. Whatever the reasons are for social infamy, there is no doubt in its existence. Evidence for the existence of the infamy tax can be found in both high and low culture, in books, movies, newspapers, websites and talkbacks. One example is the terms "prostitution" and "prostitute", which are loaded with notoriety and contempt in many languages. Apart from the original meaning, they are also used as a common swear, considered especially rude and offensive. Attaching the word "prostitution" to an activity which is not selling sex is designed to introduce it as despicable and reprehensible.

from all women in prostitution. This tax is payed even from those who managed to avoid physical and emotional abuse or trauma-related harms. While other occupations or conditions may also involve a stigmatic price, and even varying degrees of humiliation, these reputational stains categorically fail to rise to the level of the ultimate infamy inherent and unique to prostitution. This is true cross-culturally regardless of whether the sale of sex is legal or criminal.²²

Even if the laws and regulations bear no evidence of such a tax, it has left innumerable cultural imprints. Unequivocal evidence for the existence of the *social infamy tax* paid by women in prostitution can be found in countless cultural and media products, such as literary works, plays, films, newspapers, websites and comment threads.²³ As will be illustrated below, the term, "whore," is used as a common profanity, considered especially rude and offensive in almost every language. Attaching the word

²² Women who choose to trade their sexual resource openly pay such a high price of infamy that they often go to extreme lengths to conceal their occupation—even in societies in which prostitution is legal. See Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 6:3 GEO. J. GENDER & L. 711 (2010).

²³ See *supra* note 21.

"prostitution" to any activity usually denotes that activity as shameful and contemptible.²⁴

Bearing social infamy means – almost without exception – converting, inexorably, one's individual rich and nuanced identity to the one-dimensional identity of a "prostitute," which engulfs the previous "normative" identity.²⁵ This conversion, which is reflected in the public's gaze, is irreversible. A woman in prostitution, unless she manages to hide any trace of her history, can never shake off her 'prostitute' identity and recover her previous one, untainted by social infamy.²⁶

In the following quote, Anna (pen name of a woman who published a memoir describing a year and a half of her life in prostitution in Israel) comments on the mechanism of the social infamy tax:

²⁴ It is important to emphasize the obvious: women in prostitution do not deserve social infamy, and the fact they are exposed to it is infuriating and deplorable. In some Utopian future commodification of sex will perhaps be transformed into social infamy free phenomena, but currently the presence of the social infamy must be acknowledged and dealt with.

²⁵ *Vivre sa Vie*, Jean-Luc Godard's 1962 film, brilliantly depicts the conversion of identity – from a woman into a prostitute – and the ensuing failure to preserve dignity. See SUSAN SONTAG, *AGAINST INTERPRETATION, AND OTHER ESSAYS* 196 – 207 (New York: Farrar, Straus & Giroux, 1966) (providing an illuminating discussion of the film); Almog, *supra* note 1.

²⁶ Again, one's definition of 'prostitution' is of less consequence here than society's condemnation of the full spectrum of activities that may fall under it. See Green, *supra* note 9, at 220. The social infamy remains the common element attached to all activities within the spectrum.

From the moment I became a prostitute, I was afraid to be scorned. I fretted about the way my life would seem after quitting prostitution, and whether I would still be identified as 'prostitute.' I was afraid that I would find it difficult to live with a partner, because no one would date someone that people whisper 'prostitute' about. When it comes to gossip, 'once' is not relevant. If you were once a prostitute you remain a prostitute for eternity, as the common English construction states, "Once a prostitute, always a prostitute."²⁷

Because the *social infamy tax* is transparent, and there is no formal recognition of it, it is almost impossible to meaningfully address it. The image of a "glass ceiling," denoting hidden barriers operating against women in the labor market, is useful here. Similar to the effect of the glass ceiling, the *social infamy tax* exacts an exorbitant price that directly influences the well-being and dignity of women in prostitution, while at the same time no legal or social institution addresses or even recognizes its existence.

²⁷ ANNA, *THE BRIGHT SIDE OF THE MOON: FROM THE WORLD OF A YOUNG WOMAN IN THE CIRCLE OF PROSTITUTION IN ISRAEL* (Tel Aviv: Ressler, 2009) (Isr. Heb). **

**The Willamette Social Justice and Equity Journal adheres to The Bluebook Uniform System of Citation, but with respect to foreign language sources for which the Willamette Social Justice and Equity Journal was not provided an English translation, the editors have relied on the author for the veracity of the statement drawn from such sources.

Numerous speculations can be made as to the attitudes and interests that perpetuate the social infamy associated with prostitution. The links between prostitution and shame likely derive from a range of factors: including obsolete moralistic concepts; sexist patterns that still govern the sexuality domain; and hierarchic power disparities between men and women. Whatever its roots, in today's society there is no longer any valid justification for its ubiquitous presence; nevertheless, it persists.

IV. Harm versus Consent:

The harm-focused conceptualization of prostitution that has been advocated here could be called into question by the notion of consent; that is, the claim that even if prostitution is harmful, women in prostitution exercise their agency and consent to those harms. According to this argument, there is a fundamental dissimilarity between harms caused by prostitution and other situations where harms are identified and addressed. Let us consider sexual harassment, which justly has been recognized in most societies as harmful. Women in many countries around the world are increasingly protected from the harms of sexual harassment due to

the enactment of appropriate laws.²⁸ One of the justifications for legislating such protections is that sexually harassed women did not choose or agree to be sexually harassed. On the other hand, women in prostitution, so long as they are adults, are perceived as having freely chosen to enter the free market of prostitution. The acceptance of payment by a woman in prostitution is usually perceived as an unequivocal signifier of consent and choice.²⁹ Consequently, it would seemingly follow, they have fully consented to the risk of incurring harms.

Yet, the consent model falls short if unaccompanied by a careful and thorough inspection of the circumstances that precipitate consent to prostitution. In many cases, uncovering these layers of circumstances leads to the conclusion that using the terms, ‘consent’ and ‘choice’ is hardly relevant given the circumstances, and even callous. Extensive research indicates a high correlation between entering prostitution and having a history of undergoing: sexual

²⁸ Israeli law, for example, even protects women (and men) from degrading speech referring to their sexuality. According to article 3 (a) (5) of the Prevention of Sexual Harassment Law, 5758-1998, sexual harassment is defined, *inter alia*, as an intimidating or humiliating reference directed towards a person concerning his sex, or his sexuality. Prevention of Sexual Harassment Law, 5758-1998, SH No. 166 (Isr.).

²⁹ SHEILA JEFFRYS, *THE IDEA OF PROSTITUTION* (North Melbourne: Spinifex Press, 1997); Carole Pateman, *What's Wrong with Prostitution*, in *PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY* (Jessica Spector ed., 2006).

abuse; severe poverty; and/or a lack of parental care; lack of education; and social attention.³⁰ Many women in prostitution fled their homes when they were minors and fell prey to pimps due to necessity, drug addiction or simply naïveté.³¹ Taking advantage of these women's traumatic backgrounds, pimps and other actors in prostitution industry use methods of psychological control to push women to prostitution.³² As Chen and Einat explain,³³ referring to studies they conducted in Israel: "The mental difficulty experienced by sexual abuse victims in coping with the trauma, anxiety and depression makes them [...] turn to prostitution, drug trafficking and robbery to fund their drug use and to survive."³⁴ The early trauma that initially lures women into prostitution is frequently augmented by additional traumas encountered by them once in prostitution. For example, U.S. figures show that women in prostitution are exposed

³⁰ Studies reveal that many women in prostitution were sexually exploited during childhood. Some suffered physical abuse and neglect. See Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, in PROSTITUTION AND PORNOGRAPHY: PHILOSOPHICAL DEBATE ABOUT THE SEX INDUSTRY 17, 24 (Jessica Spector ed., Palo Alto, CA: Stanford University Press, 2006); Melissa Farley & Howard Barkan *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27(3) WOMEN AND HEALTH 37 (1998). The latter is a study of women in prostitution in San Francisco. Approximately 57% of the interviewees for this study reported having been victim to sexual assault during childhood, and 49% reported physical assault during childhood.

³¹ See the studies referred to in GILA CHEN AND TOMER EINAT, WOMEN'S PRISON: THE BACKYARD OF ISRAELI SOCIETY 16 (Tel Aviv: Ressler, 2010) (Heb).

³² JUDITH LEWIS, HERMAN, TRAUMA AND RECOVERY 76 - 84 (New York: Basic Books, 1992).

³³ CHEN AND EINAT, *supra* note 31.

³⁴ *Id.* at 25.

to frequent sexual violence and repeated rapes.³⁵ In such cases, the assumption that carefully calculated choice and consent are common precursors to entering prostitution, and continue to be present in every subsequent prostitution transaction, seems dubious at best, if not baseless.³⁶

Nevertheless, the existing norms across legal systems lack a mechanism designed to scrutinize the quality and extent of the consent attributed to women in prostitution. Instead, the norms in many countries define prostitution as an essentially normal legal 'transaction,' and, consequently, women in prostitution are perceived as necessarily having consented to the harms of trauma and social infamy. These paradigms ignore the varied backgrounds of the alleged consenters and view a genuine ability to choose as the default, while it is clearly not so.³⁷

Moreover, it is illuminating to compare the imputed consent in prostitution with the conscientious and meticulous regulatory

³⁵ Michelle J. Anderson, *Prostitution and Trauma in U.S. Rape Law*, 2(3-4) J. TRAUMA PRAC. 75, 77 (2004).

³⁶ The damages caused by prostitution continue years after prostitution. See: Melissa Farley, *Prostitution, Trafficking, and Cultural Amnesia: What We Must Not Know in Order To Keep the Business of Sexual Exploitation Running Smoothly*, 18 YALE J.L. & FEMINISM 109, 126 (2006).

³⁷ It should be noted, in this context, that one can argue that since there is evidence of the absence of valid consent among many women in prostitution, respecting the choice of women who validly consent is problematic and cannot validate a phenomenon that causes such profound harm to so many other women. See Michelle M. Dempsey, *Sex Trafficking and Criminalization: in Defense of Feminist Abolitionism*, 158(6) U. OF PA. L. REV. 1738 (2010).

processes employed by many societies in order to examine and construct the nature of 'consent' by men and women in other transactions in which the risk of harm arises. For instance, consider great lengths to which all fifty states went in devising a consent infrastructure suitable for transactions among adults in the medical arena. Under the so-called 'Informed Consent' doctrine, when one opts for even minor cosmetic surgery, such as a "nose job," her or his consent is rendered valid only after detailed explanations of the possible complications and harms.³⁸ According to regulation in many other countries, physicians are required to provide clients or patients with all of the information that would be considered by a reasonable patient important and relevant in deciding whether or not to accept treatment.³⁹

Another salient example can be found in the financial markets. The state views it clearly within its role to protect

³⁸ In the United States 'Informed Consent' laws cover the legal aspect regarding an individual's right to be informed of and consent to a procedure or treatment suggested by a physician or professional. The ethical concept of Informed Consent is regulated in numerous rules across the United States. Although Informed Consent laws vary from state to state, all 50 states have enacted informed consent laws and regulations. These laws list the types of information that patients must be provided so they can make an informed decision about receiving medical care, diagnostic tests, or treatment. See PAUL S. APPELBAUM, ET AL., CHARLES W. LIDZ, AND ALAN MEISEL, *INFORMED CONSENT: LEGAL THEORY AND ED.* (New York: Oxford University Press, 2001).

³⁹ As we have seen, people tend to explore all of their options before they agree to a medicine treatment, or business proposal. However, when it comes to prostitution, it seems that this is the last option for a prostitute. Indeed, this consent is impossible. See: Catherine A. MacKinnon, *trafficking, Prostitution and Inequality*, 46 HARV. C.R.-C.L.L. REV. 271, 295 (2011).

individuals from a long line of potential harms that may occur while interacting in this hazardous arena. For example, there are over fifty-five regulatory agencies within the U.S. Capital Market, including the Securities Commission in each of the fifty states, and a myriad of rules and regulations regarding fair trade and supervision over transactions in the financial market. The vast majority of securities regulation schemes are aimed at one goal – promoting fair and full disclosure of all relevant information relating to the markets, and to specific securities transactions, including all aspects of market trading.⁴⁰ Such extensive measures are taken by the U.S. in order to protect all individuals and companies trading in the capital market from harms, while ensuring all players in the Capital Market receive all of the relevant information and warnings before making any financial transactions or decisions.

In stark comparison, when it comes to the consent of a woman to prostitution, it seems that society has little genuine interest in the nature and quality of her alleged consent. Despite the overwhelming evidence indicating, as elaborated above, that the consent attributed to women in prostitution is often problematic or flawed, society is predominantly indifferent to the nuances of

⁴⁰ See LOUIS LOS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* (New York: Wolters Kluwer Law & Business, 2011) (elaborating on U.S. Capital Market Regulations).

consent in this specific realm. Thus, framing prostitution in terms of consent leads to a twisted perspective that overlooks the fact that the alleged consenters are exposed to a plethora of harms, precisely because of their supposed consent. As this Author previously remarked:

[I]ronically, 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 therefore ‘deserves’ to bear the high cost of her choice.⁴¹

To summarize, the juxtaposition of harms – the subjective harms, such as personal traumas and post-traumas experienced by *many* women in prostitution, with the objective harm and the social infamy tax paid by *all* women in prostitution. This demonstrates that addressing prostitution’s harms is an important public interest that has been ignored by most societies.

Prostitution has been socially constructed as a highly dangerous space. The metaphor of a toxic zone is elucidating here; entering Chernobyl after the nuclear disaster could serve as standard of comparison. Following the destructive explosion, from the

⁴¹ Shulamit Almog, *Prostitution as Exploitation: An Israeli Perspective*, 11 GEO. J. GENDER & L. 711 (2010).

moment the area was determined to be toxic, the first step taken by the authorities was the evacuation of the residents of Chernobyl and its surroundings in an attempt to minimize harm to them.⁴² Later on, entering or returning to the area was banned for the same reason. Acknowledgment of both the immediate and the long-term harms led the Ukrainian government to take the only rationally conceivable path – addressing these harms by creating norms that overcome personal choice. Likewise, a harm-focused analysis of prostitution leads to a similar tack—prevention of possible victims from inevitable harms incurred from entering into a toxic, highly precarious zone. Yet, in the case of prostitution, not only does society fail to prevent its members from entering the precarious zone, but it in fact enables and facilitates its continued existence.

V. Conclusion: The Social Infamy Tax and "Non-Whores"

The quotation at the beginning of this paper (“Are you fucking that guy right now?”/“Are you?”/“Are you?”/“Are you?”/“Answer me”/“Whore.”) is the ending of the story, “Cat Person,” which went viral immediately upon being published in the *New Yorker* in late 2017.⁴³ Robert, who articulates this closing line,

⁴² FOR ELABORATION SEE: DAVID R. MARPLES, *THE SOCIAL IMPACT OF THE CHERNOBYL DISASTER* 28 (1988).

⁴³ Kristen Roupenian, *Cat Person*, *THE NEW YORKER*, (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/cat-person>.)

reflecting his frustration and anger via text messages toward a woman that broke up with him, echoes the way in which the social infamy tax inherent to prostitution is present, to a certain extent, in the life of each and every woman. Hurling “whore” at Margot, the woman who chose to opt out of the relationship, is a strikingly intense manifestation of the tax. It is jaw-dropping because of the major insult that is utterly unexpected on one hand, and so infuriately common on the other hand. Margot is a “non-whore” who is forced to experience social infamy, and the experience is tantalizing.

All women, as a group, are harmed by the very existence of prostitution. Feminist legal scholar Michelle Dempsey explains how the harms of prostitution are projected on women as a group as follows:

[...] My point is that these harms are not *best* understood from an individualistic point of view: they are best, or at least better, understood from a *feminist* point of view—one that takes into account the tendency of these harms to sustain and perpetuate patriarchal structural inequality, which subordinates women as a group.⁴⁴

⁴⁴ Michelle Dempsey, *Sex Trafficking and Criminalization in Defense of Feminist Abolitionism*, *University of Pennsylvania Law Review* Vol. 158: 1729 at 1738-1739.

Studies affirm a link between prostitution and violence toward women in general. For instance, victims of domestic violence report that attackers frequently fling the words "prostitute" or "whore" at them. Rape victims have reported rapists who tossed money on them after the rape.⁴⁵

Art scholar Anna Chave describes how prostitution seeped into her daily life as a woman who is not in prostitution herself:

Although my privileged background has insulated me from the desperate straits that have long driven women to toil in the sex industry, like other independent women I nonetheless have an inkling of what it means to be treated as a prostitute. When I traverse the city streets alone I am subject to pestering by strange men who lewdly congratulate me on aspects of my anatomy while ordering me to smile. If I am not mistaken for a prostitute, given my reserved dress and behavior, I remain prey to that pervasive suspicion that a trace of whore lurks in every woman-just as an "honest" woman supposedly lurks in every whore.⁴⁶

⁴⁵ BEVERLY BALOS & MARY LOUISE, FELLOWS, *LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION 1232 - 1237* (Durham, NC: Carolina Academic Press, 1994).

⁴⁶ Anna C. Chave, *New Encounters with Les Demoiselles D'Avignon: Gender, Race, and the Origins of Cubism*, 76(4) *THE ART BULLETIN* 597 (1994).

Chave felt exposed to the harms of prostitution by merely walking the streets of New York. Her description aptly illuminates how the shame of prostitution becomes a ‘private shame’ for every woman.⁴⁷

To conclude, let me return to the following words of Israeli woman, Anna, who powerfully cries out the harm characterizing her life as a woman in prostitution: "I felt terrible embarrassment to walk around in public places. ... I was afraid of being ridiculed, of how my life would be when I got out of prostitution and would be recognized as a 'whore.'"⁴⁸

Anna reacts to the assumption that the contractual nature of prostitution means that she is solely responsible for the harms that follow: "This 'deal' empowers the client and his ego, but humiliates the prostitute, as it places her at a lower status, exposing her to health risks and robbing her of her freedom over her body and her dignity in society."⁴⁹ This last quote captures the gist of the argument posited here: prostitution happens within a precarious zone, and should be, first and foremost, treated as such. Going back to the opposing

⁴⁷ The Israeli poet Leah Goldberg coined the term "private shame" in regard to prostitution in her *Letters from an Imaginary Journey*, where she wrote about her experience as a 19-year-old girl wandering the streets of Berlin at night: "When I learned that every shoe color is a sign of a certain 'kind' of prostitute. The black ones- sadists, yellow ones- masochists, the red ones-'nothing.' This classification haunted me as my private shamefulness. There was so much I could not forgive men." LEAH GOLDBERG, *LETTERS FROM AN IMAGINARY JOURNEY* 16 (1937)(Heb).

⁴⁸ ANNA, *supra* note 27, at 32.

⁴⁹ *Id.* at 72.

conceptualizations of prostitution in the contemporary discourse presented in the introduction of this Article, it seems that the "sex work" approach fails to identify the particular nature of prostitution mainly because the social infamy tax falls under its radar and remains unseen and unacknowledged.

An alternative, harm-centered conceptualization is sensitive to prostitution's idiosyncratically precarious nature. In order for it to lead to an appropriate legal solution, such a conceptualization must carefully and responsibly map the exact nature of the harms associated with prostitution. As is asserted here, this approach is to be anticipated from a society that sees it as its business to address severe harms inflicted upon its members. However, even in the face of the long and painful history of prostitution, such mapping is still absent from society today, and despite its heavy toll, the social infamy tax remains mostly unnoticed and hidden from the law's eye. The polemic around prostitution primarily encompasses other harms (referred to here as subjective harms), or the question of choice and consent, and overlooks the existence of the social infamy tax.

The law in many countries, including the United States, is based on an implied differentiations: there are 'prostitutes,' who pay an enormous social price of shame over the mere fact that they are prostitutes, coupled by a prevailing attitude that they 'deserve it' because they are 'whores;' and there are all of the other, normative women, who are presumed to be protected from the social infamy linked to prostitution.

However, as exemplified so well in the story, “Cat Person,” one cannot truly differentiate between women in prostitution and the rest of womankind. It is true that women in prostitution are those who pay the highest price of debasement; the social infamy tax laden on them is of the highest severity. However, ricochets from prostitution’s social infamy tax necessarily target all women at all times. In a world with prostitution, every woman is perceived as a potential prostitute. An ex-partner, any woman on the street, a “feminist”—any woman can be tagged a “whore” at any second with little effort on the part of the ‘tagger’ and triggering a host of potential harms to the tagged.

In conclusion, in light of the analysis offered here, when asking “what is prostitution,” a harm-focused answer is called for. The harm-focused approach is essential because prostitution is harmful to women in prostitution, to all women and to society at large. This paper does not intend to advocate a specific legal approach, but rather to emphasize the position that a deep and thorough acknowledgment of the plethora of harms inherent to prostitution – including the social infamy – is an unavoidable precondition to achieving an appropriate legal solution.